

BRING TO MEETING

REAL PROPERTY, PROBATE & TRUST LAW SECTION
www.rpptl.org



Executive Council Meeting

AGENDA

ANNUAL CONVENTION
Don Cesar a Loews Hotel

Saturday, June 2, 2012
9:00 a.m.

BRING THIS AGENDA TO THE MEETING

Real Property, Probate and Trust Law Section
Executive Council Meeting
June 2, 2012
Don Cesar – St. Pete Beach, FL

AGENDA

- I. [Presiding](#) — *George J. Meyer, Chair*
- II. [Attendance](#) — *Michael J. Gelfand, Secretary*
- III. [Minutes of Previous Meeting](#) — *Michael J. Gelfand, Secretary*
Motion to Approve the March 3, 2012 Executive Council Minutes **pp. 1**
- IV. [Chair's Report](#) — *George J. Meyer*
- V. [Chair-Elect's Report](#) — *Wm. Fletcher Belcher*
2012 – 2013 RPPTL Executive Council Schedule **pp. 54**
- VI. [Liaison with Board of Governors Report](#) — *Clay A. Schnitker*
- VII. [Treasurer's Report](#) — *Andrew A. O'Malley*
2011-12 Monthly (April) Report Summary **pp. 55**
- VIII. [At Large Members Report](#) — *Debra L. Boje, Director*
- IX. [Real Property Division](#) — *Margaret A. Rolando, Real Property Division Director*

Action Items:

- 1. Real Property Problems Study Committee -- *S. Katherine Frazier, Chair*

Motion of the Real Property Problem Study Committee to adopt as a proposed legislative position support of legislation to revise Section 689.02(2), F.S. to delete the requirement that warranty deeds include a blank space for the social security numbers of the grantees. **pp 57, 58, 60**
- 2. Title Issues and Standards Committee – *Patricia P. Jones, Chair*

Motion of the Title Issues and Standards Committee to approve revised Chapter 14 of the Uniform Title Standards – Servicemembers Civil Relief Act. **pp 61, 64**

Information Item:

1. Condominium and Planned Development Committee – *Steven H. Mezer, Chair*

In response to the Section's request for a Formal Advisory Opinion regarding certain activities performed by community association managers constitute the unlicensed practice of law, The Florida Bar's Standing Committee on Unlicensed Practice of Law will hold a public hearing on June 22, 2012 at the Gaylord Palms Resort & Convention Center, 6000 W. Osceola Pkwy., Kissimmee 34746, at 9:30 a.m., at which time testimony will be taken on the subject. A full copy of the Section's letter is attached. **pp. 67**

X. Probate and Trust Law Division – *Michael A. Dribin, Probate and Trust Law Division Director*

Action Items:

1. Ad Hoc Committee on Estate Planning Attorney Conflict of Interest, *William T. Hennessey III, Chair*

To adopt as proposed a legislative position supporting the creation of new F.S. §732.806, "Gifts to Attorneys and Other Disqualified Persons", to make a gift to a lawyer, or certain people related to, or affiliated with, the lawyer, void if the lawyer prepares the instrument making the gift, or solicits the gift, unless the lawyer or recipient of the gift is related to the client. **pp. 75**

2. Probate Law and Procedure Committee, *Tae Kelley Bronner, Chair*

To adopt as proposed a legislative position supporting amendment to F.S. §731.110, "Caveat; Proceedings", clarifying that a caveator need not serve formal notice of its own petition for administration on itself. **pp. 86**

3. Probate Law and Procedure Committee, *Tae Kelley Bronner, Chair*

To adopt as proposed a legislative position supporting revisions to F.S. §732.901, "Production of Wills", to provide: that all wills filed or deposited with the Clerk of the Circuit Court are considered to have been deposited for safekeeping and any such wills must be retained for a period of not less than 20 years in their original form; that the Clerk may not convert the original will into an electronic media and then destroy the original; that, after the estate is closed, the original will must be returned to the archives in its original form for the remainder of the 20 years for safekeeping; and limiting the personal information of the decedent with the deposit of the will which must be filed with the court, in order to comply with the confidentiality rules. **pp. 91**

4. Trust Law Committee, *Shane Kelley, Chair*

To adopt as proposed a legislative position supporting a revision to F.S. §717.112, "Property Held by Agents and Fiduciaries", and enactment of new F.S. §717.1125 and F.S. §717.101, to shorten the time for a trustee under a trust instrument to hold unclaimed property in trust from the current five years to two years and to provide that, at the end of the two year period, the trustee would deliver the unclaimed property to the Florida Department of Financial Services in the same manner as is done currently. **pp. 98**

Information Item:

1. Report on the status of the application filed on behalf of the Section with the Supreme Court of Florida for determination of whether Administrative Order No. 2011-02 by the Chief Judge of the Ninth Judicial Circuit of Florida is a court rule or a local rule, rather than an administrative order.

XI. General Standing Committees – Wm. Fletcher Belcher, Chair-Elect

Action Items:

1. Budget Committee – *Andrew M. O'Malley, Chair*

Motion to amend motion previously adopted on March 3, 2012, concerning (i) the refund of past sponsorship fees of \$32,345.00 to The Florida Bar Foundation; and (ii) amending the 2011-12 budget for that purpose. The motion to amend (i) substitutes \$50,470.00 for the amount of the refund, inclusive of past sponsorship and exhibitors fees; and (ii) amends the 2011-12 budget by such amount.
2. Legislation Committee – *Barry F. Spivey, Chair*

Motion to renew recommended Section legislative positions previously adopted. The Legislation Committee recommends the renewal of all positions that are not marked "DELETE" on the attached list. **pp. 104.**

Information Item:

1. Report creation of new General Standing Committee named "Ad Hoc Trust Account Committee" chaired by Roland D. "Chip" Waller.

XII. General Standing Committee Reports – Wm. Fletcher Belcher, Director and Chair-Elect

1. **ActionLine** – J. Richard Caskey, Chair; Scott P. Pence, Vice Chair (Real Property); Shari Ben Moussa, Vice Chair (Probate & Trust)
2. **Ad Hoc LLC Monitoring** – Lauren Y. Detzel and Ed Burt Bruton, Co-Chairs
3. **Ad Hoc Trust Account** – Roland D. "Chip" Waller, Chair
4. **Alternative Dispute Resolution (ADR)** – Deborah Bovarnick Mastin and David R. Carlisle, Co-Chairs
5. **Amicus Coordination** – Robert W. Goldman, John W. Little, III, Kenneth B. Bell and Judge Gerald B. Cope, Jr., Co-Chairs. RPPTL Amicus Motion in North Carillon case **pp. 114**; Sup. Ct. Order granting RPPTL Motion **pp.120**; RPPTL Amicus Brief **pp. 121**.

6. **Budget** – Andrew O'Malley, Chair; Pamela O. Price and Daniel L. DeCubellis, Co-Vice Chairs
7. **CLE Seminar Coordination** – Deborah P. Goodall, Chair; Sancha B. Whynot, Laura Sundberg and Sylvia B. Rojas, Co-Vice Chairs **pp 140**
8. **Convention Coordination (2012)** – S. Katherine Frazier and Phillip A. Baumann, Co-Chairs
9. **Florida Bar Journal** – Kristen M. Lynch, Co-Chair (Probate & Trust); William P. Sklar, Co-Chair (Real Property)
10. **Florida Electronic Filing & Service** – Patricia P. Jones, Rohan Kelley and Laird A. Lile, Co-Chairs
11. **Homestead Issues Study** – Shane Kelley, Co-Chair (Probate & Trust); Wilhelmina F. Kightlinger, Co-Chair (Real Property); Deborah Boyd, Vice Chair
12. **Legislation** – Barry F. Spivey, Chair; Robert S. Freedman, Vice Chair (Real Property); William T. Hennessey, III, Vice Chair (Probate & Trust); Susan K. Spurgeon and Michael A. Bedke, Legislative Reporters. Final Post-Session Report for 2012 Legislative Session **pp. 141.**
13. **Legislative Update (2012)** – Robert S. Swaine, Chair; Stuart H. Altman, Charles I. Nash, R. James Robbins, and Sharaine Sibblies, Co-Vice Chairs
14. **Liaison with:**
 - A. **American Bar Association (ABA)** – Edward F. Koren and Julius J. Zschau
 - B. **Board of Legal Specialization and Education (BLSE)** – Michael C. Sasso, W. Theodore Conner, David M. Silberstein and Deborah L. Russell
 - C. **Clerks of Circuit Court** – Laird A. Lile
 - D. **FLEA / FLSSI** – David C. Brennan, John Arthur Jones and Roland D. "Chip" Waller
 - E. **Florida Bankers Association** – Stewart Andrew Marshall, III, and Mark T. Middlebrook
 - F. **Judiciary** – Judge Jack St. Arnold, Judge Melvin B. Grossman, Judge Hugh D. Hayes, Judge Claudia Rickert Isom, Judge Maria M. Korvick, Judge Lauren Laughlin, Judge Celeste H. Muir, Judge Robert Pleus, Judge Lawrence Allen Schwartz, Judge Richard Suarez, Judge Morris Silberman, Judge Patricia V. Thomas and Judge Walter L. Schafer, Jr.
 - G. **Law Schools** – Frederick R. Dudley and Stacy O. Kalmanson. Law Schools Update **pp. 146.**
 - H. **Out of State Members** – Michael P. Stafford, John E. Fitzgerald, Jr., and Gerard J. Flood
 - I. **TFB Board of Governors** – Clay A. Schnitker
 - J. **TFB Business Law Section** – Marsha G. Rydberg
 - K. **TFB CLE Committee** – Deborah P. Goodall
 - L. **TFB Council of Sections** – George J. Meyer and Wm. Fletcher Belcher
15. **Long-Range Planning** – Wm. Fletcher Belcher, Chair

16. **Meetings Planning** – John B. Neukamm, Chair
17. **Member Communications and Information Technology** – Nicole C. Kibert, Chair; S. Dresden Brunner and William Parady, Co-Vice Chairs
18. **Membership and Diversity** – Michael A. Bedke and Lynwood T. Arnold, Jr., Co-Chairs; Marsha G. Madorsky, Vice Chair (Fellowship); Phillip A. Baumann, Vice Chair (Member Services); Tasha K. Pepper-Dickinson, Vice Chair (Diversity); and Guy S. Emerich, Vice Chair (Mentoring)
19. **Model and Uniform Acts** – Bruce M. Stone and S. Katherine Frazier, Co-Chairs
20. **Pro Bono** – Gwynne A. Young and Adele I. Stone, Co-Chairs; Tasha K. Pepper-Dickinson, Vice Chair
21. **Professionalism and Ethics** – Lee A. Weintraub, Chair; Paul E. Roman and Lawrence J. Miller, Co-Vice Chairs
22. **Sponsor Coordination** – Kristen M. Lynch, Chair; Wilhelmina Kightlinger, Jon Scuderi, J. Michael Swaine, Adele I. Stone, Marilyn M. Polson, and W. Cary Wright, Co-Vice Chairs
23. **Strategic Planning** – Wm. Fletcher Belcher, Chair

XIII. Probate and Trust Law Division Committee Reports – *Michael A. Dribin - Director*

1. **Ad Hoc Study Committee on Creditors' Rights to Non-Exempt, Non-Probate Assets** – Angela M. Adams, Chair
2. **Ad Hoc Committee on Jurisdiction and Service of Process** – Barry F. Spivey, Chair; Sean W. Kelley, Vice Chair
3. **Ad Hoc Study Committee on Estate Planning Conflict of Interest** – William T. Hennessey III, Chair
4. **Asset Preservation** – Brian C. Sparks, Chair; Marsha G. Madorsky, Vice-Chair
5. **Attorney/Trust Officer Liaison Conference** – Robin J. King, Chair; Jack A. Falk, Jr., Vice Chair; Mary Biggs Knauer, Corporate Fiduciary Chair
6. **Estate and Trust Tax Planning** – Elaine M. Bucher, Chair; Harris L. Bonnette, Jr., and David Akins, Co-Vice Chairs
7. **Guardianship and Advance Directives** – Sean W. Kelley, Chair; Seth A. Marmor and Tattiana Brenes-Stahl, Co-Vice Chairs
8. **IRA, Insurance and Employee Benefits** – Linda Suzanne Griffin and L. Howard Payne, Co-Chairs; Anne Buzby-Walt, Vice Chair

9. **Liaisons with Elder Law Section** – Charles F. Robinson and Marjorie Wolasky
10. **Liaisons with Tax Section** – Lauren Y. Detzel, William R. Lane, Jr., David Pratt, Brian C. Sparks and Donald R. Tescher
11. **Power of Attorney** – Tami F. Conetta, Chair; William R. Lane, Jr., Vice Chair
12. **Principal and Income** – Edward F. Koren, Chair
13. **Probate and Trust Litigation** – Thomas M. Karr, Chair; Jon Scuderi and J. Richard Caskey, Co-Vice Chairs
14. **Probate Law and Procedure** – Tae Kelley Bronner, Chair; S. Dresden Brunner, Jeffrey S. Goethe and John C. Moran, Co-Vice Chairs
15. **Trust Law** – Shane Kelley, Chair; Angela M. Adams, Laura P. Stephenson and Jerry B. Wells, Co-Vice Chairs
16. **Wills, Trusts and Estates Certification Review Course** – Deborah L. Russell, Chair; Richard R. Gans, Vice Chair

XIV. Real Property Division Committee Reports - Margaret A. Rolando, Director

1. **Ad Hoc Foreclosure Reform** – Jerry Aron, Chair; Alan Fields, Burt Bruton and Mark Brown, Vice Chairs
2. **Condominium and Planned Development** – Steven H. Mezer, Chair; Jane Cornett and Nicole Kibert, Co-Vice-Chairs
3. **Construction Law** – Arnold D. Tritt, Chair; Hardy Roberts and Lisa Colon Heron, Co Vice-Chairs
4. **Construction Law Certification Review Course** – Kim Ashby, Chair; Bruce Alexander and Melinda Gentile, Co Vice-Chairs
5. **Construction Law Institute** – Wm. Cary Wright, Chair; Michelle Reddin and Reese Henderson, Co-Vice Chairs
6. **Governmental Regulation** – Anne Pollack, Chair; Arlene Udick and Frank L. Hearne, Co-Vice Chairs
7. **Landlord and Tenant** – Neil Shoter, Chair; Scott Frank and Lloyd Granet, Co-Vice Chairs
8. **Legal Opinions** – David R. Brittain, Chair; Roger A. Larson and Kip Thorton, Co-Vice Chairs
9. **Liaisons with FLTA** – Norwood Gay and Alan McCall, Co-Chairs; Barry Scholnik, John S. Elzeer, Joe Reinhardt, James C. Russick and Alan Fields, Co-Vice Chairs

10. **Mortgages and Other Encumbrances** – Salome Zikakis, Chair; Robert Swaine and Robert Stern, Co-Vice Chairs
11. **Property & Liability Insurance/Suretyship** – Wm. Cary Wright and Andrea Northrop, Co-Chairs
12. **Real Estate Certification Review Course** – Ted Conner, Chair; Jennifer Tobin and Raul Ballaga, Co-Vice Chairs
13. **Real Estate Entities and Land Trusts** – Wilhelmina Kightlinger, Chair; Burt Bruton and Dan DeCubellis, Co-Vice Chairs
14. **Real Property Forms** – Homer Duval, III, Chair; Jeffrey T. Sauer and Arthur J. Menor, Co-Vice Chairs
15. **Real Property Litigation** – Mark A. Brown, Chair; Susan Spurgeon and Martin Awerbach, Co-Vice Chairs
16. **Real Property Problems Study** – S. Katherine Frazier, Chair; Patricia J. Hancock and Alan Fields, Co-Vice Chairs
17. **Residential Real Estate and Industry Liaison** – Frederick Jones, Chair; William J. Haley and Denise Hutson, Co-Vice Chairs
18. **Title Insurance and Title Insurance Liaison** – Kristopher Fernandez, Chair; Homer Duvall and Raul Ballaga, Co-Vice Chairs
19. **Title Issues and Standards** – Patricia P. Jones, Chair; Robert M. Graham, Karla Gray, Jeanne Mott (also archivist) and Christopher W. Smart, Co-Vice Chairs

XV. [Adjourn](#)



**The Florida Bar
Real Property, Probate & Trust Law Section**

Special Thanks to the

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Probate Law & Procedure Committee

Management Planning, Inc.
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Sabal Trust Company
Estate & Trust Tax Planning Committee

Business Valuation Analysts
&
Northern Trust, N.A.
Trust Law Committee

Coral Gables Trust
Probate and Trust Litigation Committee

**MINUTES
OF THE
THE FLORIDA BAR'S
REAL PROPERTY, PROBATE AND TRUST LAW SECTION
EXECUTIVE COUNCIL MEETING¹**

**Saturday March 3, 2012
Sawgrass Marriott, Ponte Vedra Beach, Florida**

I. Call to Order – *George J. Meyer, Chair.*

Mr. George J. Meyer called the meeting to order at 8:00 a.m.

II. Attendance – *Michael J. Gelfand, Secretary.*

Mr. Michael J. Gelfand reminded members that the attendance roster was circulating to be initialed by Council members in attendance at the meeting. [*Secretary's Note: The roster showing members in attendance is attached as Addendum A.*]

III. Minutes of Previous Meeting – *Michael J. Gelfand, Secretary.*

Mr. Gelfand moved:

To approve the Minutes of the Marco Island Meeting occurring on December 3, 2012.

The Motion was approved without opposition.

IV. Chair's Report – *George J. Meyer, Chair.*

Mr. Meyer welcomed the membership. He reviewed the events planned for the convention, noting the low room rate and many family activities. Section members are invited to attend the Roundtables after the morning CLE and the Annual Meeting lunch. This means that there will be no committee meetings on Friday, committee meetings occurring only on Thursday. Friday evening will include a dance band and a casino, and will be black tie optional. The Saturday reception will be at the magnificent Salvador Dali Museum, the collection including early Dali pieces. There may also be an architectural tour.

¹ References in these minutes to Agenda pages are to the Executive Council Meeting Agenda, dated February 23, 2012, posted at www.RPPTL.org

The meeting schedule was reviewed. Changes were explained. Members' feedback was solicited concerning the schedule, particularly the Roundtables on Friday afternoon and the meeting first thing on Saturday.

Ms. Stacy O. Kalmanson was introduced as a Law Schools liaison. Ms. Kalamnson noted attendance of students from law schools and introduced those in attendance.

Mr. Meyer recalled the Section's tradition of introducing those Section members who volunteer to run for, and serve on Board of Governors. He introduced two Section volunteers attending the meeting, Past Section Chairs Mr. Pat Christianson of the 9th Circuit, and Mr. Laird Lile of the 20th Circuit.

Sponsors were recognized and thanked for their support. A special thank you was provided to the Section's General Sponsors:

Attorney's Title Fund Services, LLC;
Fidelity National Title Group;
First American Title Insurance Company;
Harris Private Bank; HFBE Inc.;
JP Morgan / Chase; Management Planning, Inc.;
Old Republic National Title Insurance;
Regions Private Wealth Management;
SunTrust Bank; Wells Fargo Private Bank; and,
U.S. Trust.

Special mention was made of the new category of supporters, Friends of the Section: Business Valuation Analysts, LLC; Guardian Trust; PCE; reQuire; Sheldrick, McGehee and Kohler, LLC; and, Wright Private Asset Management. Meeting sponsors were also recognized: BNY Mellon Wealth Management; First American Title Insurance Company; Wealth Management; Management Planning, Inc.; Sabal Trust Company; Business Valuation Analysts; Northern Trust, N.A.; and, Coral Gables Trust.

Great thanks were extended to Ms. Kristen Lynch. Anticipating income issues because of the economy, Ms. Lynch anticipated and adapted, doing a great job. Last night there was a special reception recognizing the continuing support of our sponsors. The Council Breakfast and Meeting's sponsor was introduced: Mr. Mark Middlebrook of US Trust.

Ms. Lynch noted that matters were doing well. Only the Saturday night reception dinner and the Chair's Suite sponsorships are available. There are a few other committee sponsor slots. If members have any ideas, Ms. Lynch encouraged feedback to her.

V. Chair-Elect's Report – William Fletcher Belcher, Chair-Elect.

Mr. William Fletcher Belcher reported the Executive Council meetings for the following year are listed in the Agenda, page 59. He reminded us that the Tallahassee meeting dates were

changed to February 7-10, 2012, moving back one week, to accommodate a Board of Governors' meeting.

VI. Liaison with Board of Governors Report – *Clay A. Schnitker, Bank of Governors Liaison.*

Mr. Clay A. Schnitker reported on a change concerning trust accounts. Clarifying responsibility for trust accounts for multi-member law firms, written policies are required so that everyone knows who is responsible. Also, trust account checks must be signed by lawyers, and prohibiting checks signing in blank. There is also a rule concerning electronic transfer.

The Board will be considering whether assistants can use their attorney's bar number to file e-pleadings which is now prohibited.

He noted that members should not expect significant changes in court funding. Clerks are still having funding issues to be resolved. Legislation is pending to affect JNC's, but only Governor appointments, to allow the Governor to change the five governor appointment seats when the Governor is elected.

Bar member benefits changes were reported: Associated Benefits International, addresses on line marketing and reputation; US Legal Forms, provides about 7000 forms online by subscriptions; and, AtHomeNet which provides website support services.

George attended the Board of Governors December meeting. He provided an excellent presentation. The Section enjoys such high esteem because of the abilities of our chairs.

VII. Treasurer's Report – *Andrew O'Malley, Treasurer.*

Mr. Andrew O'Malley noted that the Treasurer's report through January 31, 2012, is set forth in the Agenda, starting at page 60-61. There is a slight surplus which is not projected to remain through the end of the year. He suggested that each member thank the Section sponsors for their contributions to the Section, and thank Sponsorship Committee chair Kristen Lynch for her efforts. All budget categories are in line.

VIII. At Large Members' Report - *Debra Boje, At Large Members' Director.*

Ms. Debra Boje reported great strides in the transition from Circuit Reps to At Large Members'. The Convention will involve members of local circuits to seek their involvement, including in committees. ALMs of the 9th Circuit will welcome Certification seminar attendees and for Section members, host a meet and greet.

Lead ALM's in each Circuit will be providing updates to Section members, including distributing Council and Roundtable minutes. These efforts result in a great response from Section members. The ALM's will be distributing legislation reports concerning the Section's efforts so members know what the Section is doing.

On the RPPTL website, in addition to the each Circuits' Foreclosure administrative orders, there are links to each Circuits' Probate and Guardianship administrative orders. If you have suggestions for ALM, and if you need input from the Circuits, then please advise.

IX. Real Property Law Division – Margaret “Peggy” Rolando, Real Property Law Division

Ms. Rolando introduced the following:

Action Items.

1. Condominiums. Condominium and Planned Development Committee – Steven Mezer, Chair (Pages 62-72).

Mr. Steven Mezer explained the background justifying a determination of unauthorized practice of law. Four substantive changes to the letter, to change from non-lawyers to the more specific reference of licensed community association managers, removed a reference to the pre-lien letter, and notice to owner for mechanics liens. On behalf of the Condominium and Planned Development Committee, Mr. Mezer moved, incorporating these changes:

To approve a letter to The Florida Bar's Standing Committee on the Unauthorized Practice of Law requesting that the Committee determine whether certain activities constitute the unauthorized practice of law when performed by a non-lawyer as set forth in the proposed request letter, including the following activities: (a) preparing a pre-lien letter to a delinquent community association owner; (b) drafting pre-arbitration demand letters required by Section 718.1255; (c) preparing a certificate of assessments due the association by a delinquent owner at the time the account is turned over to the association's lawyer for collection and thereafter; (d) drafting amendments to declarations of covenants, bylaws and articles of incorporation for the association; (e) determining the vote needed to pass a proposition or amendment to the governing documents; and (f) any activity that requires an analysis of statutory or case law to reach a legal conclusion, and finding that the matter is within the purview of the Section.

[*Sec. Note:* The revised letter is attached as Addendum “B”] The motion was approved unanimously.

2. Legal Opinions. Legal Opinions Committee - *David R. Brittain, Chair* (Pages 73 - 75).

Mr. Brittain introduced the publication of *Report on Third-Party Legal Opinion Customary Practice in Florida*. He moved on behalf of the Legal Opinions Committee:

To amend the budget adding an expenditure of \$23,200.00, and to authorize an expenditure of that amount to match the funds expended by the Business Law

Section, dollar-for-dollar, to print, ship, mail, and pay other expenses incident to distribution of the Report on Third-Party Legal Opinion Customary Practice in Florida (“Report”) to all RPPTL Section members who elect to receive a copy after e-notice, free of charge mailed as a member service by RPPTL.

Mr. Brittain explained that 15,000 copies will be printed, 5,000 to be allocated to the Section. The e-copy will remain on the Section website. The remainder will be offered for sale at \$10.00 per copy. He noted that he is still receiving requests for the 1991 publication.

There was discussion concerning electronic distribution verses printed distribution, and expenses. The motion was approved.

Information Item.

The Section received a letter from Mr. Robert Sorgini seeking the Section to request the Board of Governors to reconsider the rule that trust account checks begin signed by an attorney (Pages 76 – 77). The Residential Real Estate Committee and Title Insurance and R Committee had extensive discussions. The Committee chairs, Mr. Fred Jones and Mr. Kris Fernandez, reviewed their Committees’ discussions, including perceived problem of solo practitioners being out of office, but they reported adapting to the circumstances. Mr. Jones noted that the proposed Rule misses many of the important points, including the differentiation between available and collected funds, and need for education of staff. Mr. Waller requested Board of Governors to consider how attorneys who want to be title agents can do so without forcing them to create separate title companies, and whether the solution is to require a bond for non-lawyer signatories.

X. Probate and Trust Law Division – Michael A. Dribin, Probate and Trust Law Division Director.

Mr. Michael A. Dribin reported that the Agenda’s first item is being withdrawn by the Probate Law And Procedure Committee as it needed more work, and thanked them for their recognition of the issues. He proceeded as follows:

Action Item.

Estate and Gift Tax Planning Committee - *Elaine M. Bucher, Chair*

Mr. Dribin noted that the Agenda Supplement contained amended materials. [Sec. Note: See Addendum “C”] Ms. Elaine Bucher explained Treasury Department comment process. She moved on behalf of the Estate and Gift Planning Committee:

To approve comments to be submitted to the Internal Revenue Service on the proposed trust “decanting” regulations, dealing with the transfer of assets from

one irrevocable trust to another and to authorize the Executive Committee and Section Chair to submit the comments on behalf of the Section.

Ms. Bucher reviewed the terms of the comments, noting that state law usually governs distribution. The motion carried unanimously.

Mr. Dribin congratulated the Committee and also thanked Ms. Bucher, noting that she is the new Florida chair of the American College of Trust and Estate Counsel

Information Items.

1. Ad Hoc Study Committee on Estate Planning Conflict of Interest - *William T. Hennessey III, Chair* (Pages 101 – 108).

Mr. William T. Hennessey reported on a study concerning conflicts and a resulting proposed statute which would void *inter vivos* or testamentary transfers by clients to estate planning attorneys or members of their families and providing certain exceptions. The problem is that lawyers can undertake a cost-benefit analysis, resulting in great cost to estates which can be avoided by simply asking client to seek other drafting counsel. He reviewed applicable decisions, including an opinion from the Fourth District Court of Appeal inviting the legislature to address this issue. The proposed materials address non-related client gifts. The Committee will be reviewing the draft published in the materials, and comments are solicited.

Mr. Dribin thanked the Committee for its hard work, and its approach to a serious issue, noting that this is an example of how an issue percolates through the Section, resulting in an *ad hoc* committee. The materials are of interest to entire section.

2. Guardianship and Advance Directives Committee, *Sean W. Kelley, Chair* (pages 109 – 133)

Mr. Kelley reported on the status of the Petition filed by the Section with the Supreme Court of Florida, challenging an Administrative Order of the Chief Judge of the Ninth Judicial Circuit.

Mr. Kelley proceeded with his Committee report. The Committee is working on Faulkner opinion and how to determine guardianship fees after dismissal. The Committee is also reviewing a Judge's ability to award attorney's fees without expert testimony. Mr. Dribin commended Mr. Kelley, Ms. Sancha Whynot-Brennan, and Mr. Robert Goldman for preparing materials of such high quality and especially on such short notice.

XI. General Standing Committee Items – *William Fletcher Belcher, Director and Chair-Elect.*

Action Items.

1. Budget Committee – *Andrew M. O'Malley, Chair.*

Mr. O'Malley presented two matters seeking amendments to the budget. He moved on behalf of the Budget Committee:

To amend the Section's 2011-2012 Budget by adding an expenditure in the amount of \$746.98 to fund the purchase of equipment (printer and scanner) for the use of the Section's Program Administrator, and authorizing the disbursement of those funds to The Florida Bar for that purpose.

The Motion was approved unanimously.

Mr. O'Malley then moved on behalf of the Budget Committee:

To amend the Section's 2011-2012 Budget by adding an expenditure in the amount of \$3,500.00 to fund the purchase of lapel pins for distribution at the Annual Meeting of The Florida Bar, and authorizing the disbursement of those funds to The Florida Bar or its vendor for that purpose.

The motion was approved unanimously.

2. Pro Bono Committee – *Gwynne A Young and Adele Stone, Co-Chairs, and Tasha K. Pepper-Dickinson, Vice Chair.*

A. Gift to Foundation.

Ms. Adele Stone moved on behalf of the Pro Bono Committee as follows:

To amend the Section's 2011-2012 Budget by adding an expenditure in the amount of \$75,000.00 to fund a charitable gift to The Florida Bar Foundation to fund a full-time legal aid attorney and support staff person to provide legal services to children under the Foundation's Children's Legal Services Grant Program, but not to be used for advocacy efforts.

She reported that the drop in interest income has been drastic, reserves have been depleted, and critical programs will have to be significantly cut back. She explained this was a one time request. There was discussion as to members donating personally, whether dues are properly expended for gifts, and whether a loan is more appropriate.

Mr. John Neukamm moved:

To amend, to provide a substitute, to refund \$32,345.00 of sponsorship fees to The Florida Bar Foundation.

The motion to amend was declined by the maker of the main motion. The motion was withdrawn.

There were extensive discussions as to whether the motion was within the Committee's purpose and appropriate, each speaker noting the importance of the Foundation.

Mr. Jerry Aron, noting the importance of the issue, and great significance, and need to consider, moved to table. Ms. Stone noted a budgeting deadline. The motion to table failed.

There was further discussion regarding purview and whether the dues should simply be reduced to allow members to donate directly.

The motion failed.

B. Sponsorship Fees Refund to Foundation.

Mr. Waller moved:

To refund \$32,345.00 to Foundation of past sponsorship fees and amending the 2011-12 budget for that purpose.

The motion was approved unanimously.

C. Sponsorship Fees Waiver to Foundation.

Ms. Stone moved on behalf of the Pro Bono Committee.

To waive the Section's sponsorship fees for The Florida Bar Foundation for 2011-2012 and 2012-2013 fiscal years, and to provide The Florida Bar Foundation exhibitor space without charge at the Section Annual Conventions and Legislative Update programs for 2012 and 2013 on a space-available basis.

Mr. Waller moved

To amend to lend the Foundation \$42,655.00, until such time as the Foundation's revenues exceed \$12,000,000.00.

Upon the Chair's suggestion that the motion may not be in order at this time, but would be later, Mr. Waller withdrew his motion to amend.

Ms. Stacey L. Cole moved:

To amend to require a payment of a nominal fee of \$10.00 per year for the two fiscal years.

Ms. Cole explained the purpose was to reinforce the value of the effort. Ms. Stone appreciated the sentiment, but did not accept the motion. The motion to amend failed.

Upon the question being called, the main motion without amendment carried unanimously.

D. Loan to Foundation.

Mr. DeCubalis and Mr. Waller then moved:

To loan \$42,655.00 to the Foundation with interest to accrue at the minimum IRS rate, and interest and principal payable when Foundation revenues reaches \$12,000,00.00 per year.

Interest rates were discussed. Bylaws purview provisions and the concept of a loan were reviewed.

Mr. Aron motioned to amend:

To provide that the loan term is for five years, not dependent on revenue.

Ms. Stone accepted the amendment.

Upon a vote on the main motion as amended, the motion failed.

E. Challenge to Raise Funds.

Upon a point of order, Mr. Lile challenged Section members to donate the difference of \$42,655.00, by pledging a donation of \$5,000.00 to raise funds, and urged members not to delay.

3. Amicus Coordination Committee – *Robert W. Goldman*, Co-Chair.

Mr. Belcher noted that materials concerning this matter are in the supplemental agenda. Mr. Goldman moved on behalf of the Amicus Coordination Committee.

Motion to authorize the Amicus Coordination Committee to file a motion for leave to appear and amicus curiae brief in the Florida Supreme Court, taking the position described below on behalf of the Section in *North Carillon, LLC v. CRC 603, LLC, et al.*, Case No. SC12-75, if the Court accepts jurisdiction to

review the opinion of the Third District Court of Appeal in *CRC 603, LLC, and CRC 1103, LLC, vs. North Carillon, LLC, and First American Title Insurance Company*, _ SO.3d _ (Fla. 3rd DCA, WL 3916151 , September 7, 2011), the *amicus* position to be taken is that the passage of time between a legislative enactment and a subsequent clarifying legislative enactment does not limit or preclude retroactive application of the clarifying enactment.

It was noted that chair stepped from dais and that he and attorneys from the firms handling the matter are abstaining. Mr. Goldman noted that the underlying substantive issues will not be addressed, but that the retroactive issue is the Section's focus.

Mr. Mezer reported that Condominium and Planned Development Committee unanimously voted in favor of this matter.

The motion was approved unanimously. It was then moved:

To determine that the matter is within the purview of the Section.

The motion was approved unanimously. It was then moved:

To expend Section funds for reasonable expenses for the matter.

The motion was approved unanimously.

XI. General Standing Committee Reports – William Fletcher Belcher, Director and Chair-Elect.

1. **Actionline** – J. Richard Caskey, Chair; Scott P. Pence and Rose M. LaFemina, Co-Vice Chairs.

Mr. Pence reported for Mr. Caskey that the Winter issue is under preparation. The Committee continues to solicit articles for Actionline.

2. **Ad Hoc LLC Monitoring** – Lauren Y. Detzel and Ed Burt Bruton, Co-Chairs.

Ms. Detzel noted the re-write effort is proceeding, and when a better draft is available it will be distributed.

2. **Alternate Dispute Resolution (ADR)** -- Debra Bovarnick Mastin and David R. Carlisle, Co-Chairs.

Ms. Mastin noted an upcoming CLE seminar and solicited involvement in the Committee.

3. **Amicus Coordination** –Robert W. Goldman, John W. Little, III, Kenneth B. Bell and Judge Gerald B. Cope, Jr., Co-Chairs.

4. **Budget** – Andrew O’Malley, Chair; Pamela O. Price and Daniel L. DeCubellis, Co-Vice Chairs.

5. **CLE Seminar Coordination** – Deborah P. Goodall, Chair; Sancha B. Whynot, Laura Sundberg and Sylvia B. Rojas, Co-Vice Chairs.

Ms. Sundberg requested committee chairs to pay close attention to calendar when scheduling because of hotel commitments.

6. **2011 Convention Coordinator** – S. Katherine Frazier and Phillip A. Baumann, Co Chairs.

Mr. Baumann suggested that the room rate and schedule will make this the largest attended convention, and encouraged members to immediately make hotel reservations.

7. **Florida Bar Journal** – Kristen M. Lynch, Chair Probate Division; William P. Sklar, Chair Real Property Division.

Mr. Lynch requested articles.

8. **Florida Electronic Filing & Service** – Patricia P. Jones, Rohan Kelley and Laird A. Lile, Co-Chairs.

Mr. Lile reported on the Committee meeting and issue of non-lawyer assistance access to facilitate filing which will proceed to the Bar.

9. **Homestead Issues Study** – Shane Kelley, Co-Chair (Probate & Trust); Wilhelmina F. Kightlinger, Co-Chair (Real Property); and, Deborah Boyd, Vice Chair.

Mr. Shane Kelley reported progress, tentatively approving the first statute, and moving forward, soliciting issues.

10. **Legislation** – Barry F. Spivey, Chair; Robert S. Freedman, Vice Chair (Real Property); William T. Hennessey, III, Vice Chair (Probate & Trust); Susan K. Spurgeon and Michael A. Bedke, Legislative Reporters.

Mr. Barry Spivey reported ups and downs of the year, and the able efforts of lobbyists, and especially the efforts of vice-chairs Rob Freedman and Bill Hennesey. Thanks also to the Council members who respond swiftly to legislators’ requests. Mr. Pete Dunbar, noting that there are about twenty-five section bills provided an interim report on the status of bills, awaiting next week, and that so far the Probate and UCC bills have been adopted.

11. **Legislative Update 2011** – Robert S. Swaine, Chair; Stuart H. Altman, Charles I. Nash, James Robbins, and Sharaine Sibbles, Co-Vice Chairs.

The 2012 Update is scheduled for Friday, July 27, at the Breakers. Florida ACTEC will hold meetings in conjunction, the Wednesday of that week.

12. **Liaison with:**

- A. **American Bar Association (ABA)** – Edward F. Koren and Julius J. Zschau.
- B. **Board of Legal Specialization and Education (BLSE)** – Michael C. Sasso, W. Theodore Conner, David M. Silberstein and Deborah L. Russell.

Mr. Silberstein reported on the continuing review of examination requirements to provide consistency across practice areas. There were over 500 applications, and over 6000 requests for CLE. A new certification is being considered in the area of children's law.

C. **Clerks of Circuit Court** – Laird A. Lile.

D. **FLEA / FLSSI** – David C. Brennan, John Arthur Jones and Roland Chip Waller.

Mr. Brennan reported new forms, including guardianship, and soliciting new forms and ideas.

E. **Florida Bankers Association** – Stewart Andrew Marshall, III, and Mark T. Middlebrook.

F. **Judiciary** – Judge Jack St. Arnold, Judge Melvin B. Grossman, Judge Hugh D. Hayes, Judge Claudia Rickert Isom, Judge Maria M. Korvick, Judge Lauren Laughlin, Judge Celeste H. Muir, Judge Robert Pleus, Judge Lawrence Allen Schwartz, Judge Richard Suarez, Judge Morris Silberman, Judge Patricia V., Thomas and Judge Walter L. Schafer, Jr.

G. **Law Schools** - Frederick R. Dudley and Stacy O. Kalmanson.

H. **Out of State Members** – Michael P. Stafford, John E. Fitzgerald, Jr., and Gerard J. Flood.

I. **TFB Board of Governors** – Clay A. Schnitker.

[*Sec. Note:* See above "Liaison with Board of Governors" for report.]

J. **TFB Business Law Section** – Marsha G. Rydberg.

J. **TFB CLE Committee** – Deborah P. Goodall.

[*Sec. Note:* See above "CLE Seminar Coordination" for report.]

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K. **TFB Council of Sections** – George J. Meyer and Wm. Fletcher Belcher.

13. **Long-Range Planning** – Wm. Fletcher Belcher, Chair.

Mr. Belcher noted that the Committee met in January and nominated for the next year Section officers as follows:

Secretary: Deborah Goodall;
Treasurer: Andrew O'Malley;
ALM's Director: Debra Boje;
Probate Director, Michael Dribin;
Real Property Director: Michael Gelfand; and,
Chair-Elect: Peggy Rolando.

He thanked the Committee and congratulated the nominees.

14. **Meetings Planning** – John B. Neukamm, Chair.

Mr. Neukamm noted the goal of using the knowledge of past chairs. The first year the Committee assisted Fletch, has assisted Peggy, and is starting with Michael Dribin. The Committee met Friday with Marriott's world-wide representative and addressed negotiation strategies. Suggested venues for future meetings are solicited.

15. **Member Communications and Information Technology** – Nicole C. Kibert, Chair; S. Dresden Brunner and William Parady, Co-Vice Chairs.

Ms. Kibert thanked Committee chairs updating webpages and providing content. The Committee is perfecting apps to download agendas, and is looking at website redesign.

16. **Membership and Diversity** – Michael A. Bedke and Lynwood T. Arnold, Jr., Co-Chairs; Marsha G. Madorsky, Vice Chair (Fellowship); Phillip A. Baumann, Vice Chair (Member Services); Tasha K. Pepper-Dickinson, Vice Chair (Diversity); and Guy S. Emerich, Vice Chair (Mentoring).

Mr. Arnold reported that the committee met with a representing the Bar's Diversity Office. He noted the different committees folded into this committee. A video is being worked on. April 1 is the Fellowship application deadline and members are encouraged to suggest applications, and the program appears to work. Speakers programs with local bars are proceeding, and expanding to Orlando.

Our message is to increase membership and diversify. When traveling, seek to encourage Executive Council participation. Please go out of your way to introduce and welcome visitors and newcomers. ALM's are utilized to encourage involvement. A Committee goal is for Section membership to reach 10,000.

17. **Model and Uniform Acts** – Bruce M. Stone and S. Katherine Frazier, Co-Chairs.

18. **Pro Bono** – Gwynne A. Young and Adele I. Stone, Co-Chairs; Tasha K. Pepper-Dickinson, Vice Chair.

Ms. Stone noted that many checks are being received in response to Mr. Lile's challenge. Donations can be made on the Foundation's website, but need to be made by Monday to facilitate funding.

19. **Professionalism and Ethics** – Lee A. Weintraub, Chair; Paul E. Roman, Vice Chair and Lawrence J. Miller, Vice Chair.

Mr. Lee Weintraub reported that an on-line data base of ethics opinions should replace the call-in line.

Mr. Paul Roman, Mr. Robert Swain and Ms. Robin King provided a skit involving ethics issues.

Mr. Homer Duval noted that after six years he is cycling off the Bar's Ethics Committee and a Section member should be on the Committee. Mr. Lynwood Arnold remarked that he has volunteered.

20. **Sponsor Coordination** – Kristen M. Lynch, Chair; Wilhelmina Kightlinger, Jon Scuderi, J. Michael Swaine, Adele I. Stone, Marilyn M. Polson, and W. Cary Wright, Co-Vice Chairs.

[*Sec. Note:* See Chair's Report above for the Committee's report.]

21. **Strategic Planning** – Wm. Fletcher Belcher, Chair.

XIII. Probate and Trust Law Division Committee Reports– *Michael A. Dribin – Director*

1. **Ad Hoc Committee on Jurisdiction and Service of Process** – Barry F. Spivey, Chair; Sean W. Kelley, Vice Chair.
2. **Ad Hoc Study Committee on Creditors' Rights to Non-Exempt, Non-Probate Assets** – Angela M. Adams, Chair.
3. **Ad Hoc Study Committee on Estate Planning Conflict of Interest** - William T. Hennessey III, Chair.
4. **Asset Preservation** – Brian C. Sparks, Chair; Marsha G. Madorsky, Vice-Chair.
5. **Attorney/Trust Officer Liaison Conference** – Robin J. King, Chair; Jack A. Falk, Jr., Vice Chair; Mary Biggs Knauer, Corporate Fiduciary Chair.
6. **Estate and Trust Tax Planning** – Elaine M. Bucher, Chair; Harris L. Bonnette, Jr., and David Akins, Co-Vice Chairs.
7. **Florida Electronic Court Filing** – Rohan Kelley, Chair; Laird A. Lile, Vice Chair.
8. **Guardianship and Advance Directives** – Sean W. Kelley, Chair; Seth A. Marmor and Tattiana Brenes-Stahl, Co-Vice Chairs.
9. **IRA, Insurance and Employee Benefits** – Linda Suzanne Griffin and L. Howard Payne, Co-Chairs; Anne Buzby-Walt, Vice Chair.
10. **Liaisons with Elder Law Section** – Charles F. Robinson and Marjorie Wolasky.

11. **Liaisons with Tax Section** – Lauren Y. Detzel, William R. Lane, Jr., David Pratt, Brian C. Sparks and Donald R. Tescher.
12. **Power of Attorney** – Tami F. Conetta, Chair; William R. Lane, Jr., Vice Chair.
13. **Principal and Income** – Edward F. Koren, Chair.
14. **Probate and Trust Litigation** – Thomas M. Karr, Chair; Jon Scuderi and J. Richard Caskey, Co-Vice Chairs.
15. **Probate Law and Procedure** – Tae Kelley Bronner, Chair; S. Dresden Brunner, Jeffrey S. Goethe and John C. Moran, Co-Vice Chairs.
16. **Trust Law** – Shane Kelley, Chair; Angela M. Adams, Laura P. Stephenson and Jerry B. Wells, Co-Vice Chairs.
17. **Wills, Trusts and Estates Certification Review Course** – Deborah L. Russell, Chair; Richard R. Gans, Vice Chair.

XIV. Real Property Division Committee Reports - Margaret A. Rolando, Director.

1. **Condominium and Planned Development** – Steven H. Mezer, Chair; Jane Cornett and Nicole Kibert, Co-Vice-Chairs.
2. **Construction Law** – Arnold D. Tritt, Chair; Hardy Roberts and Lisa Colon Heron, Co-Vice-Chairs.
3. **Construction Law Certification Review Course** – Kim Ashby, Chair; Bruce Alexander and Melinda Gentile, Co Vice-Chairs.
4. **Construction Law Institute** – Wm. Cary Wright, Chair; Michelle Reddin and Reese Henderson, Co-Vice Chairs.
5. **Governmental Regulation** – Anne Pollack, Chair; Arlene Udick and Frank L. Hearne, Co-Vice Chairs.
6. **Landlord and Tenant** – Neil Shoter, Chair; Scott Frank and Lloyd Granet, Co-Vice Chairs.
7. **Legal Opinions** – David R. Brittain, Chair; Roger A. Larson and Kip Thorton, Co-Vice Chairs.
8. **Liaisons with FLTA** – Norwood Gay and Alan McCall, Co-Chairs; Barry Scholnik, John S. Elzeer, Joe Reinhardt, James C. Russick and Alan Fields, Co-Vice Chairs.
9. **Mortgages and Other Encumbrances** – Salome Zikakis, Chair; Robert Swaine and Robert Stern, Co-Vice Chairs.
10. **Property & Liability Insurance/Suretyship** – Wm. Cary Wright and Andrea Northrop, Co-Chairs.
11. **Real Estate Certification Review Course** – Ted Conner, Chair; Jennifer Tobin and Raul Ballaga, Co-Vice Chairs.
12. **Real Estate Entities and Land Trusts** – Wilhelmina Kightlinger, Chair; Burt Bruton and Dan DeCubellis, Co-Vice Chairs.
13. **Real Property Forms** – Homer Duval, III, Chair; Jeffrey T. Sauer and Arthur J. Menor, Co-Vice Chairs.
14. **Real Property Litigation** – Mark A. Brown, Chair; Susan Spurgeon and Martin Awerbach, Co-Vice Chairs.
15. **Real Property Problems Study** – S. Katherine Frazier, Chair; Patricia J. Hancock and Alan Fields, Co-Vice Chairs.

16. **Residential Real Estate and Industry Liaison** – Frederick Jones, Chair; William J. Haley and Denise Hutson, Co-Vice Chairs.

17. **Title Insurance and Title Insurance Liaison** – Kristopher Fernandez, Chair; Homer Duvall and Raul Ballaga, Co-Vice Chairs.

XV. Announcements

Mr. Meyer reviewed the day's calendar. The Executive Committee is meeting on March 16, 2012 to plan for appointments, and those interested in serving should contact those on the dais. Environmentally, drop lanyards and badges where designated as you leave.

XV. Adjournment -- There being no further business to come before the Executive Council, the meeting was unanimously adjourned at 10:47 a.m.

Respectfully submitted,

Michael J. Gelfand, Secretary

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ADDENDIUM A

ATTENDANCE ROSTER **MARCH 3, 2011**

ATTENDANCE ROSTER
REAL PROPERTY PROBATE & TRUST LAW SECTION
EXECUTIVE COUNCIL MEETINGS
2011-2012

Executive Committee	Aug. 6 Palm Beach	Sept. 24 Prague	Dec. 3 Marco Island	March 3 Ponte Verdra	June 2 St. Petersburg
Meyer, George F., Chair	X	X	X	X	
Belcher, William F., Chair-Elect	X		X	X	
Rolando, Margaret A., Real Property Law Div. Director	X	X	X	X	
Dribin, Michael A., Probate and Trust Law Div. Director	X		X	X	
Gelfand, Michael J., Secretary	X	X	X	X	
O'Malley, Andrew M., Treasurer	X		X	X	
Spivey, Barry F., Legislation Chair	X		X	X	
Goodall, Deborah P., Seminar Coordinator	X		X		
Boje, Debra L., Director of At-Large Members	X		X	X	
Felcoski, Brian J., Immediate Past Chair	X		X	X	

Executive Council Members	Aug. 6 Palm Beach	Sept. 24 Prague	Dec. 3 Marco Island	March 3 Ponte Vedra	June 2 St. Petersburg
Adams, Angela M.	X		X	X	
Adcock, Jr., Louie N., Past Chair					
Akins, David J.	X	X	X	X	
Alexander, Bruce G.					
Altman, Robert N.	X				
Altman, Stuart H.	X		X		
Arnold, Jr., Lynwood F.	X			X	

Executive Council Members	Aug. 6 Palm Beach	Sept. 24 Prague	Dec. 3 Marco Island	March 3 Ponte Vedra	June 2 St. Petersburg
Aron Jerry E. Past Chair	X		X	X	
Ashby, Kimberly A.					
Awerbach, Martin S.	X		X	X	
Bald, Kimberly A.		X	X	X	
Ballaga, Raul P.	X			X	
Banister, John R.	X		X	X	
Battle, Carlos A.	X		X	X	
Baumann, Phillip A.	X	X	X	X	
Beales, III, Walter R. Past Chair					
Bedke, Michael A.	X		X		
Bell, Honorable Kenneth B.					
Ben Moussa, Shari D.	X		X		
Bonnette, Jr., Harris L.	X			X	
Boone, Jr., Sam W.	X			X	
Boyd, Deborah	X		X	X	
Brenes-Stahl, Tattiana P.	X		X	X	
Brennan, David C. Past Chair	X			X	
Brittain, David R.			X	X	
Bronner, Tae K.	X			X	
Brown, Mark A.	X		X		
Brunner, S.D.	X		X	X	
Bruton, Jr., Ed B.			X	X	

Executive Council Members	Aug. 6 Palm Beach	Sept. 24 Prague	Dec. 3 Marco Island	March 3 Ponte Vedra	June 2 St. Petersburg
Bucher, Elaine M.	X		X	X	
Butters, Sarah S.	X		X		
Buzby-Walt, Anne	X			X	
Cardillo, John T.			X		
Carlisle, David R.	X				
Caskey, John R.	X		X		
Christiansen, Patrick T. Past Chair	X	X		X	
Cole, Stacey L.			X		
Colon Heron, Lisa	X		X	X	
Conetta, Tami F.	X		X		
Conner, William T.	X		X	X	
Cope, Jr., Gerald B.	X	X	X	X	
Cornett, Jane L.	X		X	X	
DeCubellis, Daniel L.	X	X		X	
Detzel, Lauren Y.	X	X	X	X	
Diamond, Sandra F. Past Chair	X	X	X		
Dollinger, Jeffrey	X			X	
Dudley, Frederick R.	X				
Duval, III, Homer	X		X	X	
Elzeer, John S.					
Emerich, Guy S.	X		X	X	
Ezell, Brenda B.	X			X	

Executive Council Members	Aug. 6 Palm Beach	Sept. 24 Prague	Dec. 3 Marco Island	March 3 Ponte Vedra	June 2 St. Petersburg
Falk, Jr., Jack A.	X		X	X	
Fernandez, Kristopher E.	X		X	X	
Fields, Alan B.	X		X	X	
Fitzgerald, Jr., John E.	X			X	
Fleece, III, Joseph W.	X	X	X	X	
Fleece, Jr., Joseph W. Past Chair					
Flood, Gerard J.	X		X		
Foreman, Michael L.	X		X	X	
Frazier, S.K.	X		X		
Freedman, Robert S.	X	X	X	X	
Gans, Richard R.	X		X	X	
Garber, Julie A.	X		X		
Gay, III, Robert N.	X		X	X	
Gentile, Melinda S.					
Godelia, Vinette D.	X				
Goethe, Jeffrey S.	X		X	X	
Goldman, Robert W. Past Chair	X		X	X	
Gonzalez, Aniella	X			X	
Graham, Robert M.	X		X	X	
Granet, Lloyd	X		X	X	
Greer, Honorable George W.					
Griffin, Linda S.	X		X		

Executive Council Members	Aug. 6 Palm Beach	Sept. 24 Prague	Dec. 3 Marco Island	March 3 Ponte Vedra	June 2 St. Petersburg
Grimsley, John G. Past Chair		X		X	
Grossman, Honorable Melvin B.		X	X		
Guttmann, III, Louis B. Past Chair	X	X	X	X	
Haley, William J.			X	X	
Hamrick, Alexander H.	X		X	X	
Hancock, Patricia J.	X		X	X	
Hart, W.C.			X	X	
Hayes, Honorable Hugh D.					
Hayes, Michael T.	X			X	
Hearn, Steven L. Past Chair	X	X			
Hearne, Frank L.	X			X	
Henderson, Jr., Reese J.				X	
Henderson, III, Thomas N.	X		X		
Hennessey, III, William T.	X		X	X	
Heuston, Stephen P.	X			X	
Huszagh, Victor L.					
Hutson, Denise L.	X				
Isom, Honorable Claudia R.					
Isphording, Roger O. Past Chair	X	X	X	X	
Johnson, Amber Jade F.	X			X	
Jones, Frederick W.	X		X	X	
Jones, Jennifer W.			X	X	

Executive Council Members	Aug. 6 Palm Beach	Sept. 24 Prague	Dec. 3 Marco Island	March 3 Ponte Vedra	June 2 St. Petersburg
Jones, John Arthur Past Chair					
Jones, Patricia P.H.	X		X	X	
Judd, Robert B.					
Kalmanson, Stacy O.	X			X	
Karr, Mary	X				
Karr, Thomas M.	X		X	X	
Kayser, Joan B. Past Chair			X	X	
Kelley, Rohan Past Chair	X	X	X	X	
Kelley, Sean W.	X		X	X	
Kelley, Shane	X		X	X	
Kendron, John J.					
Kibert, Nicole C.	X	X	X	X	
Kightlinger, Wilhelmina F.	X				
King, Robin J.	X		X	X	
Kinsolving, Ruth Barnes Past Chair				X	
Koren, Edward F. Past Chair	X				
Korvick, Honorable Maria M.	X	X	X		
Kotler, Alan S.	X		X	X	
Krier, Honorable Elizabeth V.					
Kromash, Keith S.	X		X	X	
LaFemina, Rose	X			X	
Lane, Jr., William R.					

Executive Council Members	Aug. 6 Palm Beach	Sept. 24 Prague	Dec. 3 Marco Island	March 3 Ponte Vedra	June 2 St. Petersburg
Lange, George	X	X	X	X	
Lannon, Patrick J.					
Larson, Roger A.		X	X	X	
Laughlin, Honorable Lauren C.					
Leebrick, Brian D.	X			X	
Lile, Laird A. Past Chair	X	X	X	X	
Little, III, John W.	X				
Lyn, Denise A.D.				X	
Lynch, Kristen M.	X		X	X	
Madorsky, Marsha G.	X	X	X		
Marger, Bruce Past Chair	X		X		
Marmor, Seth A.	X		X	X	
Marshall, III, Stewart A.			X	X	
Mastin, Deborah Bovarnick	X		X	X	
McCall, Alan K.	X			X	
McElroy, IV, Robert L.	X		X	X	
Mednick, Glenn M.	X				
Menor, Arthur J.	X		X	X	
Mezer, Steven H.	X		X	X	
Middlebrook, Mark T.	X		X	X	
Miller, Lawrence J.	X		X		
Moran, John C.	X		X	X	

Executive Council Members	Aug. 6 Palm Beach	Sept. 24 Prague	Dec. 3 Marco Island	March 3 Ponte Vedra	June 2 St. Petersburg
Mott, Jeanne A.					
Moule, Jr., Rex E.			X	X	
Muir, Honorable Celeste H.	X	X	X	X	
Mundy, Craig A.					
Murphy, Melissa J. Past Chair	X			X	
Mussman, Jay D.			X		
Nash, Charles I.	X	X	X	X	
Neukamm, John B. Past Chair	X	X		X	
Nguyen, Hung V.	X				
Norris, John E.	X				
Northrup, Andrea J.C.	X				
O’Ryan, Christian F.	X				
Parady, William A.	X	X	X		
Payne, L.H.	X		X	X	
Pence, Scott P.	X		X	X	
Pepper-Dickinson, Tasha K.	X		X		
Platt, William R.	X			X	
Pleus, Jr., Honorable Robert J.					
Pollack, Anne Q.			X	X	
Polson, Marilyn M.	X		X		
Pratt, David				X	
Price, Pamela O.	X		X	X	

Executive Council Members	Aug. 6 Palm Beach	Sept. 24 Prague	Dec. 3 Marco Island	March 3 Ponte Vedra	June 2 St. Petersburg
Prince-Troutman, Stacey A.					
Pyle, Michael A.	X	X	X	X	
Raines, Alan L.					
Randolph, Jr., John W.					
Reddin, Michelle A.			X		
Reinhardt, III, Joe A.					
Reynolds, Stephen H.		X	X	X	
Rieman, Alexandra V.			X		
Robbins, Jr., R.J.	X			X	
Roberts, III, Hardy L.	X	X	X		
Robinson, Charles F.	X			X	
Rojas, Silvia B.	X	X	X	X	
Roman, Paul E.	X	X	X	X	
Roscow, IV, John F.					
Russell, Deborah L.	X		X	X	
Russick, James C.	X	X	X	X	
Rydberg, Marsha G.	X	X	X	X	
Sachs, Colleen C.	X			X	
Sasso, Michael C.					
Sauer, Jeffrey T.	X			X	
Schafer, Jr., Honorable Walter L.					
Schnitker, Clay A.	X	X		X	

Executive Council Members	Aug. 6 Palm Beach	Sept. 24 Prague	Dec. 3 Marco Island	March 3 Ponte Vedra	June 2 St. Petersburg
Schofield, Percy A.			X	X	
Scholnik, Barry A.	X				
Schwartz, Lawrence A.					
Schwartz, Robert M.	X		X	X	
Scuderi, Jon	X		X	X	
Sheets, Sandra G.	X				
Shoter, Neil B.	X		X		
Shuey, Eugene E.					
Sibblies, Sharaine A.	X		X	X	
Silberman, Honorable Morris					
Silberstein, David M.	X		X	X	
Sklar, William P.					
Smart, Christopher W.	X			X	
Smith, G. Thomas Past Chair	X	X	X		
Smith, Wilson Past Chair					
Sobien, Wayne J.		X			
Sparks, Brian C.	X		X	X	
Spurgeon, Susan K.	X	X	X	X	
St. Arnold, Honorable Jack R.					
Stafford, Michael P.		X	X	X	
Staker, Karla J.	X		X	X	
Stephenson, Laura P.			X		

Executive Council Members	Aug. 6 Palm Beach	Sept. 24 Prague	Dec. 3 Marco Island	March 3 Ponte Vedra	June 2 St. Petersburg
Stern, Robert G.	X		X		
Stone, Adele I.	X	X	X	X	
Stone, Bruce M. Past Chair					
Suarez, Honorable Richard J.					
Sundberg, Laura K.	X		X	X	
Swaine, Jack Michael Past Chair	X			X	
Swaine, Robert S.	X			X	
Taft, Eleanor W.	X	X	X		
Taylor, Jr., Richard W.	X			X	
Tescher, Donald R.	X	X			
Thomas, Honorable Patricia V.	X		X	X	
Thornton, Kenneth E.	X		X		
Tobin, Jennifer S.	X			X	
Tritt, Jr., Arnold D.	X		X	X	
Udick, Arlene C.	X			X	
Umsted, Hugh C.					
Waller, Roland D. Past Chair	X		X	X	
Weintraub, Lee A.	X			X	
Wells, Jerry B.	X		X	X	
White, Jr., Richard M.	X		X	X	
Whynot, Sancha B.	X		X	X	
Wilder, Charles D.	X	X		X	

Executive Council Members	Aug. 6 Palm Beach	Sept. 24 Prague	Dec. 3 Marco Island	March 3 Ponte Vedra	June 2 St. Petersburg
Williams, Jr., Richard C.	X		X		
Williamson, Julie Ann S. Past Chair	X				
Wohlust, Gary C.	X		X	X	
Wolasky, Marjorie E.	X		X	X	
Wolf, Brian A.			X		
Wolf, Jerome L.	X		X		
Wright, William C.	X	X	X	X	
Young, Gwynne A.					
Zikakis, Salome J.	X	X	X	X	
Zschau, Julius J. Past Chair			X		

RPPTL Fellows	Aug. 6 Palm Beach	Sept. 24 Prague	Dec. 3 Marco Island	March 3 Ponte Vedra	June 2 St. Petersburg
Bush, Benjamin	X			X	
Kypreos, Theo	X		X	X	
Lucchi, Elisa F.	X		X	X	
Pasem, Navin	X		X	X	

Legislative Consultants	Aug. 6 Palm Beach	Sept. 24 Prague	Dec. 3 Marco Island	March 3 Ponte Vedra	June 2 St. Petersburg
Adams, Howard Eugene	X		X		
Aubuchon, Joshua D.	X		X		
Dunbar, Peter M.	X	X	X	X	
Edenfield, Martha	X	X	X	X	

ADDENDUM B

CONDOMINIUM & PLANNED DEVELOPMENT COMMITTEE LETTER TO UPL COMMITTEE

(Text Only, Not Formatted)

[LETTERHEAD]

Standing Committee on the Unauthorized Practice of Law do The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300

**Re: Unauthorized Practice of Law Concerns for the Benefit of Florida's Citizenry
& Activities that Should Constitute the Practice of Law Submitted Pursuant
to Rule 10-9.1 of the Rules Regulating The Florida Bar**

Dear Members of the Standing Committee on the Unauthorized Practice of Law:

We, the Florida Bar's Real Property, Probate and Trust Section, along with the support of the Condominium And Planned Unit Development Sub-Committee request an advisory opinion from the Florida Bar's Standing Committee on the Unauthorized Practice of Law (the "UPL Standing Committee") to determine whether certain activities constitute the unauthorized practice of law when performed by Community Association Managers. The primary concern in addressing these issues is the protection of the public.

We identify certain activities herein occasioned by changes to Florida law that this Committee has not previously considered and ask for your guidance on those activities. In addition, some of the activities discussed are activities that the UPL Standing Committee and the Florida Supreme Court have previously considered, and we ask for confirmation that these actions continue to constitute the unlicensed practice of law.

We believe that clarification of these issues will serve to protect the public interest, will reduce harm to the public, and will supply needed clarification to board members, managers and attorneys involved in the area of community association law.

The last time some of these issues were fully reviewed by this Committee or by the Florida Supreme Court was in 1996 when the Court affirmed the proposed opinion of the Committee in The Florida Bar re: Advisory Opinion-Activities of Community Association Managers, 681 So.2d 1189 (Fla. 1996). Since that time there have been numerous revisions, year after year, to the chapters of Florida Statutes relevant to the operation of community associations and the licensing and conduct of community association management including, but not limited to, Chapters 718, 719, 720, 723, 617, and 468, Florida Statutes.

The Court's 1996 opinion determined that the following constituted the practice of law: i) drafting a claim lien; drafting a satisfaction of lien; ii) preparing a notice of commencement; iii) determining the timing, method and form of giving notices of meetings; iv) determining the votes necessary for certain actions by community associations; v) addressing questions asking for the application of a statute or rule; and vi) advising community associations whether a course of action is authorized by statute or rule. The Court further identified a "grey area" which involved activities that may or may not constitute the practice of law depending upon the relevant facts.

EXISTING ACTIVITY THAT CONSTITUTES THE UNLICENSED PRACTICE OF LAW INCLUDES OF PREPARATION OF CLAIM OF LIEN (AS SHOULD ALL SIMILAR ACTIVITY).

The Supreme Court has already determined that the preparation of a claim of lien for unpaid assessments is the practice of law. *The Florida Bar Re: Advisory Opinion-Activities of Community Association Managers*, 681 So.2d 1119 (Fla. 1996). Preparation of a claim of lien for unpaid association assessments is not merely a ministerial or secretarial act. If a non-lawyer prepares an association assessment lien, then the non-lawyer is engaged in the practice of law.

Yet, most collection activities are resolved long prior to the lien stage and no one is ensuring such charges are being tabulated in accordance with Florida law. Although there is no comprehensive definition of what constitutes the unlicensed practice of law, the courts consistently cite State ex rel. Florida Bar v. Sperry, 140 So.2d 587 (Fla. 1962) for guidance. See also The Florida Bar v. Neiman, 816 So.2d 587, 596 (Fla. 2002); The Florida Bar Re: Advisory Opinion Activities of Community Association Managers, 681 So.2d 1119 (Fla. 1996); The Florida Bar RE: Advisory Opinion-Non lawyer Preparation of Notice to Owner and Notice to Contractor, 544 So.2d 1013, 1016 (Fla. 1989); The Florida Bar v. Moses, 380 So.2d 412, 414 (Fla. 1980); The Florida Bar v. Brumbaugh, 355 So.2d 1186, 1191 (Fla. 1978).

"It is generally understood that the performance of services in representing another before the courts is the practice of law. But the practice of law also ***includes the giving of legal advice and counsel to others as to their rights and obligations under the law and the preparation of legal instruments***, including contracts, ***by which legal rights are*** either obtained, secured or ***given away***, although such matters may not then or ever be the subject of proceedings in a court." *Sperry*, 140 So.2d at 591 (emphasis added).

The reason for prohibiting the practice of law by those who have not been examined and found qualified is "to protect the public from being advised and represented in legal matters by unqualified persons over whom the judicial department can exercise little, if any, control in the matter of infractions of the code of conduct which, in the public interest, lawyers are bound to observe." Brumbaugh at 1189 (citing Sperry at 595).

The Supreme Court held that community association managers ("CAMs") who draft documents requiring the legal description of property or establishing rights of community associations, draft documents requiring interpretations of statutes and various rules, or give advice as to legal consequences of taking certain courses of action engage in the unlicensed practice of law. See Advisory Opinion-Activities of Community Association Managers.

As the Court noted, CAMs are licensed through the Department of Business and Professional Regulation's Bureau of Condominiums and require substantial specialized knowledge of condominium law and fulfill continuing education requirements. *Id.* at 1122. Additionally, the Court recognized that "CAM's are specially trained in the field of community association management." *Id.* at 1124. Notwithstanding CAMs' licensure and specialized training, the Court held that drafting a claim of lien must be completed with the assistance of a licensed attorney. *Id.* at 1123.

"Drafting both a claim of lien and satisfaction of claim of lien requires a legal description of the property; it establishes rights of the community association with respect to the lien, its duration, renewal information, and action to be taken on it. The claim of lien acts as an encumbrance on the property until it is satisfied. ***Because of the substantial rights which are determined by these documents, the drafting of them must be completed with the assistance of a licensed attorney.***" *Id.* at 1123 (Emphasis added).

Similarly, applying the Court's logic to other community association activities, requires that only lawyers perform certain tasks.

By way of example, and often overlooked, to properly prepare a claim of lien, one must perform the following activity:

Interpret Section 718.116, Florida Stats. (or Section 720.3085, as appropriate);
Review the Declaration of Condominium (or Declaration of Restrictions, as appropriate);
Determine the relative rights of the association and owners regarding interest rates;
Determine if the association has the authority to charge late fees;
Determine the application of payments received per 718.116 or 720.3085, as applicable;
Determine any obligation to take payments;
Identify the record title holders;
Consider the application of Bankruptcy law and Fair Debt Collections Practices Act;
Interpret the delivery requirements and notice requirements for pre-lien letters;
Determine if fines, estoppel charges and other charges are both collectable and lienable;
Analyze the legal sufficiency of legal defenses and counterclaims of owners; and

Additionally, if one is collecting from a bank that is taking title, one must review the Declaration for Kaufman language (see Kaufman v. Shere, 347 So. 2d 627 (Fla. 3d DCA 1977), analyze lien priority issues, interpret Florida case law regarding joint and several liability issues, analyze unconstitutional impairment of contract rights issues under the recently-decided cases Coral Lakes v. Busey Bank, N.A., 30 So. 2d 579 (Fla. 2d DCA 2010) and Cohn v. The Grand Condominium Association, Inc., -- So. 3d (No. SCIO-430, March 31, 2011), as well as conduct a third party taking title analysis under Bay Holdings, Inc. v. 2000 Island Boulevard Condo. Assn., 895 So. 2d 1197 (Fla. 4th DCA 2005).

The Drafting Of The Pre-Arbitration Demand Letter Required By s. 718.1255.

The drafting of pre-arbitration letters should be considered the practice of law as it involves the interpretation of various statutes, and the application of those statutes to specific facts. The drafting of statutorily required pre-arbitration letters is complicated, even for lawyers. Section 718.1255, Florida Statutes, describes the "Mandatory Nonbinding Arbitration Program" administered by the Division of Florida Condominiums, Time Shares and Mobile Homes (the "Division"). Under section 718.1255(4)(b), Florida Statutes, prior to filing a petition for arbitration with the Division, the petitioner is required to serve a pre-arbitration demand letter on the respondent, providing advance written notice of the nature of the dispute, making a demand for specific relief, allowing the respondent a reasonable opportunity to comply, and stating an intent to file a petition for arbitration or other legal action if the demand is not met with compliance.

This particular issue is quite germane to the instant matter. By way of background, and not too long ago, a Division arbitrator held that because the law did not specifically provide an activity was the practice of law, such activity was not required to be performed by a lawyer. In Dania Chateau De Ville Condo Association v. Zalcberg, Arb. Case No. 2009-04-0877 (Whitsitt/Final Order of Dismissal/August 17, 2009), the Division arbitrator held, in relevant part, that

"a pre-arbitration demand notice which demanded attorney's fees for the act of writing the demand letter was ineffective under the statute. There is no requirement that an attorney prepare the letter and the statute does not authorize its inclusion into the demand letter."

A summary of the Division's arbitration decisions that evidence the legal complications surrounding all aspects of the statutorily required pre-arbitration letters all but demand such activities must be carried out by lawyers. A brief summary of several such cases follows:

Pre-arbitration demand letter which demands immediate removal of dog did not provide the unit owner with a reasonable opportunity to comply with the demand, and was insufficient statutory notice. Petition dismissed. Brickell Place Condominium Association v. Sanz, Arb. Case No. 2010-06-1240 (Campbell/ Final Order of Dismissal/ December 15, 2010).

Pre-arbitration demand requiring removal of trash on the outside patio within 7 days provides a reasonable opportunity for compliance. However, where letter simply provided that the failure to remove the trash would result in maintenance personnel moving it, letter did not put the owner on notice of impending legal action. Belmont at Park Central Condominium Association v. Levy, Arb. Case No. 2011-00-6468 (Lang/ Order Requiring Proof of Pre-Arbitration Notice/ February 11, 2011).

Where pre-arbitration demand letter in case where a tenant kept a prohibited dog provided that the failure to correct the problem would result in eviction along with all legal fees, or other legal action, since eviction is not available in arbitration, the letter failed to advise that arbitration would be pursued and the notice was inadequate under the statute. It was unclear in the letter whether the tenant or the dog would be evicted. Case dismissed. Biscayne Lake Gardens v. Enituxia Group, Arb. Case No. 2010-02-8314 (Lang/ Final Order of Dismissal/ July 1, 2010).

It is improper and contrary to the statute for the pre-arbitration demand notice to incorporate a demand for the payment of attorney's fees. Bixler v. Gardens of Sabel Palm Condo, Arb. Case No. 2010-03-1915 (Chavis/ Order to Amend Petition/ July 1, 2010).

Where the governing documents prohibited any dogs, pre-arbitration demand letter which offered to permit the owner to keep one illegal dog while removing other dog claimed to be a service animal and requiring a payment of \$9,812 in attorney's fees to the association does not provide the unit owner with a reasonable opportunity to comply with the documents and was not a valid pre-arbitration demand letter. Boca View Condo Association v. Kowaleski, Arb. Case No. 2010-02-2907 (Chavis/ Order to Show Cause/ May 7, 2010).

Pre-arbitration demand notice which demanded \$300 did not comply with the statute. Coach Houses of Town Place Condominium Association v. Koll, Arb. Case No. 2011-01-0234 (Lang/ Order to Show Cause/ March 9, 2011).

Pre-arbitration demand letter requirement is not a mere perfunctory step taken before a petition for arbitration is filed. Demand letter sent the same day as the mailing of the petition for arbitration did not afford respondents a reasonable opportunity to comply by providing the relief requested. Collonade Condominium Association v. Shore, Arb. Case No. 2010-01-1460 (Slaton/ Order to Show Cause/ October 15, 2010).

Posting a demand notice by attaching a copy of it to an unspecified place on the condominium property will not be considered adequate delivery of the notice. Decoplage Condo Association v. Abraham, Arb. Case No. 2009-041016.

Pre-arbitration demand notice that contained fair debt disclosure gives the impression that the letter was a debt collection effort instead of an enforcement effort. Case dismissed for lack of pre-arbitration notice. Eagles Point Condominium Association, Inc. v. Debelle, Arb. Case No. 2011-028477 (Jones/ Order to Show Cause/ June 16, 2011).

Where association did not name a co-owner of the unit as a respondent and did not evidently serve pre-arbitration notice on the co-owner, association ordered to show cause why the petition should not be dismissed. Fiore at the Gardens Condo Association v. Anderson, Arb. Case No. 2010-00-6650 (Slaton/ Order to Show Cause/ February 16, 2010).

Petition dismissed for failure to join co-owner notwithstanding argument that the co-owner had failed to notify the association upon his acquisition of an interest in the unit in violation of the documents. Fiore at the Gardens Condo Association v. Anderson, Arb. Case No. 2010-00-6650 (Slaton/ Final Order Dismissing Petition/ March 5, 2010).

Where association had knowledge that Jake the golden retriever had been "conveyed" to two individuals, "as joint owners, with right of survivorship," the failure to join both individuals and to provide pre-arbitration notice to each putative owner

rendered the petition for arbitration, defective. Grove Island Association, Inc. v. Frumkes, Arb. Case No. 2011-01-1343 (Jones/ Final Order of Dismissal/ May 4, 2011).

Where pre-arbitration notice was addressed to "Terrain Gulf Drive" instead of the correct address Terrain de Golf Drive and where there was no proof that the pre-arbitration notice was actually received, the case was dismissed. Heatherwood Condominium Association of East Lake, Inc. v. Carollo, Arb. Case No. 2011-01-1495 (Lang/ Final Order of Dismissal/ June 20, 2011).

While this list of relevant decisions clearly evidences the need to ensure the pre-arbitration letters are drafted by lawyers, there are at least twenty more cases decided in the past two years that can be cited to illustrate this point. The need for clarification is *particularly important* because, as previously explained, the Division has specifically held in a final order that the statute does not require an attorney to draft this very important letter. As a result, non-lawyers have accepted the Division's invitation and have begun producing these letters. It is very likely the public will be harmed because the letters will be rejected, and the petition for arbitration will be dismissed, resulting in a delay in the enforcement of the community documents and ultimately leads to increased legal expense by those who can afford it the least.

Other Activity That Should Constitute The Practice of Law.

There are other activities that go far beyond mere ministerial acts and are illustrative as the performance of services that can only be described as the practice of law. Determining "rights" under Florida statutes is most definitely the practice of law. Further, many of these activities generate fees, presumably, collected from unit owners or the association. Under what legal authority is the non-lawyer charging and collecting from condominium unit owners or homeowners' association parcel owners more than assessments, interest, late charges, costs and attorneys fees?

The following activities should be clarified as an activity not to be performed by Community Association Managers for Community Associations:

Preparation of a Certificate of assessments due once the delinquent account is turned over to the association's lawyer.

Preparation of a Certificate of assessments due once a foreclosure against the unit has commenced.

Preparation of Certificate of assessments due once a member disputes in writing to the association the amount alleged as owed.

Drafting of amendments (and certificates of amendment that are recorded in the official records) to declaration of covenants, bylaws, and articles of incorporation when such documents are to be voted upon by the members.

Determination of number of days to be provided for statutory notice.

Modification of limited proxy forms promulgated by the State.

Preparation of documents concerning the right of the association to approve new prospective owners.

Determination of affirmative votes needed to pass a proposition or amendment to recorded documents.

Determination of owners' votes needed to establish quorum.

Drafting of pre-arbitration demands (seeabove).

Preparation of construction lien documents (e.g. notice of commencement, and lien waivers, etc.)

Preparation, review, drafting and/or substantial involvement in the preparation/execution of contracts, including construction contracts, management contracts, cable television contracts, etc.

Identifying, through review of title instruments, the owners to receive pre-lien letters.

Any activity that requires statutory or case law analysis to reach a legal conclusion.

With the aforementioned in mind and pursuant to Rule 10-9.1 of the Rules Regulating The Florida Bar, the Standing Committee on Unlicensed Practice of Law may issue proposed formal advisory opinions concerning activities which may constitute the unlicensed practice of law. We kindly request that the UPL Standing Committee do so in accordance herewith.

Final Considerations.

Simply put, many attorneys find that they are devoting more and more resources to such issues that would not have occurred, but for the rendering of what appears as the continued rendering of legal advice by non-lawyers.

With few exceptions, there remains great uncertainty as to which specific activities, when performed by Community Association Managers, constitute the unlicensed practice of law. To provide greater clarity and protection of the public, we believe it is incumbent upon the UPL Committee of the Florida Bar to bring these issues to the Florida Supreme Court for their consideration.

Very Truly Yours,

George J. Meyer, Chair
The Florida Bar Real Property, Probate
and Trust Section

ADDENDUM C

ESTATE AND GIFT TAX PLANNING COMMITTEE COMMENT LETTER TO IRS

May 17, 2012

Via E-Mail: notice.comments@irs.counsel.treas.gov

CC:PA:LPD:PR (Notice 2011-101)

Room 5203

Internal Revenue Service

P.O. Box 7604

Ben Franklin Station

Washington, DC 20044

Re: *IRS Notice 2011-101*
Guidance on Decanting to Another Irrevocable Trust

To Whom It May Concern:

The Treasury Department recently issued IRS Notice 2011-101, requesting comments on various tax issues and consequences arising from transfers by a trustee of all or part of the principal of a "distributing" irrevocable trust to a "receiving" irrevocable trust that change beneficial interests (i.e., "decanting"). We are pleased to submit these comments on behalf of the Tax Section and the Real Property Probate and Trust Law Section of The Florida Bar.

Although the members of The Florida Bar Tax Section and Real Property Probate and Trust Law Section who participated in preparing these comments may have clients who would be affected by the guidance ultimately issued by the Treasury Department and/or Internal Revenue Service (the "Service"), no such member has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of the specific subject matter of these comments.

Principal responsibility for these comments was exercised by George D. Karibjanian, Esq. and David M. Silberstein, Esq. These comments were reviewed by David Pratt, Esq., Elaine M. Bucher, Esq., Charles Ian Nash, Esq., Lindsay A. Roshkind, Esq., Pamela Price, Esq., Andrew M. Jackson, Esq. and Leonard J. Adler, J.D. Contact information is as follows:

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If you have questions regarding these comments, please contact either Mr. Karibjanian or Mr. Silberstein.

The Florida Bar is the third largest organized state bar association in the United States. The Tax Section is comprised of more than 2,000 members and the Real Property Probate and Trust Law Section is comprised of more than 9,300 members. These materials were prepared by the Comment Projects Subcommittees of the Tax Section and the Real Property, Probate and Trust Law Section.

As always, we will be pleased to provide additional commentary as requested. If you have any questions, please do not hesitate to contact us.

THE TAX SECTION OF
THE FLORIDA BAR

THE REAL PROPERTY, PROBATE
AND TRUST LAW SECTION OF THE
FLORIDA BAR

By: _____
Dominick R. Lioce

By: _____
George J. Meyer

Enclosure

THE FLORIDA BAR
TAX SECTION
AND
REAL PROPERTY, PROBATE, AND TRUST LAW SECTION

COMMENTS TO IRS NOTICE 2011-101,
GUIDANCE ON DECANTING TO ANOTHER IRREVOCABLE TRUST

To Whom It May Concern:

These comments are written on behalf of the Tax Section and the Real Property Probate and Trust Law Section of The Florida Bar, and are being submitted in response to the request of the Internal Revenue Service and Treasury Department (collectively referred to herein as “Treasury”) in IRS Notice 2011-101 (the “Notice”) for comments on various tax issues and consequences arising from transfers by a trustee of all or part of principal of a distributing irrevocable trust (“Distributing Trust”) to a receiving irrevocable trust (“Receiving Trust”) that change beneficial interests (i.e., “decanting”).

We would like to acknowledge and thank the American College of Trusts and Estates Counsel (“ACTEC”) for its generosity in sharing a draft of its comments with us. We do not intend to repeat ACTEC’s positions and comments, but would like to acknowledge its thoroughness and request that the Treasury give thoughtful consideration to its positions and comments.

The Notice requested comments on the following facts and circumstances listed below and the identification of other factors that may affect the tax consequences:

1. A beneficiary's right to or interest in trust principal or income is changed (including the right or interest of a charitable beneficiary);
2. Trust principal and/or income may be used to benefit new (additional) beneficiaries;
3. A beneficial interest (including any power to appoint income or corpus, whether general or limited, or other power) is added, deleted, or changed;
4. The transfer takes place from a trust treated as partially or wholly owned by a person under §§ 671 through 678 of the Internal Revenue Code of 1986, as amended (a “grantor trust”) to one which is not a grantor trust, or vice versa;
5. The situs or governing law of the Receiving Trust differs from that of the Distributing Trust, resulting in a termination date of the Receiving Trust that is subsequent to the termination date of the Distributing Trust;
6. A court order and/or approval of the state Attorney General is required for the transfer by the terms of the Distributing Trust and/or applicable law;
7. The beneficiaries are required to consent to the transfer by the terms of the Distributing Trust and/or applicable local law;
8. The beneficiaries are not required to consent to the transfer by the terms of the Distributing Trust and/or applicable local law;
9. Consent of the beneficiaries and/or a court order (or approval of the state Attorney General) is not required but is obtained;
10. The effect of state law or the silence of state law on any of the above scenarios;
11. A change in the identity of a donor or transferor for gift and/or GST tax purposes;

12. The Distributing Trust is exempt from GST tax under § 26.2601-1, has an inclusion ratio of zero under § 2632, or is exempt from GST under § 2663; and
13. None of the changes described above are made, but a future power to make any such changes is created.

The Treasury also encouraged the public to suggest a definition for the type of transfer (“decanting”) that the guidance is intended to address, as well as the tax consequences of such transfers in the context of domestic trusts, the domestication of foreign trusts, transfers to foreign trusts, and on any other relevant facts or combination of facts not included in the above list.

We do not intend to address each of the foregoing issues, which we believe that ACTEC and other organizations have addressed or will address thoroughly and at length in their respective comments. The Florida Supreme Court issued the first opinion from a state's highest court on the issue of decanting; therefore, given Florida's unique position as a state of origin for modern decanting, we will accordingly address issues from a state and common law perspective as to the origins of decanting and the concepts involved in decanting as they pertain to some, but not all, of the enumerated issues.

* * * * *

1. *Discussion of the Phipps Opinion.*

While the first state statute authorizing decanting was enacted in New York in 1992,² decanting has been part of Florida case law since 1940 with the landmark decision *Phipps v. Palm Beach Trust Co.*³ It should be noted that the decision reached by the Florida Supreme Court was not specific as to a particular Florida law. It has been argued that the Florida Supreme Court simply acknowledged the presence of a common law power of trustees with broad discretionary powers of distribution that is applicable regardless of whether a state has enacted decanting laws.⁴ Moreover, practitioners continue to rely on *Phipps* when state law has not statutorily authorized decanting.

a. *Introduction and Facts.*

The *Phipps* case involved an action in equity by the corporate co-trustee of an irrevocable inter vivos trust seeking clarifications of the actions of the individual co-trustee. In *Phipps*, Mrs. Margarita C. Phipps created a trust for the benefit of her four children, naming her husband, John S. Phipps (“JSP”), and Palm Beach Trust Company (“PBTC”) as the trustees. Section Six of the trust provided, in part, that

At any time within the duration of this trust, as hereinafter provided, upon the written direction of the then Individual Trustee, the Trustees shall pay over and transfer all or any part of the rest, residue, and remainder of the trust estate, both principal and income, which may at such time remain and be in the hands of the Trustees to the said John H. Phipps, Hubert B. Phipps, Margaret Douglas and Michael G. Phipps and to the descendants of any of them, in such shares and proportions as the said Individual Trustee, in his or her sole and absolute discretion, shall determine and fix even to the extent of directing the payment of the entire trust estate

² NEW YORK EST. POWERS & TRUSTS § 10-6.6(a) (referred to as the New York “EPTL”).

³ 142 Fla. 782, 196 So. 299 (1940).

⁴ See generally, Halpern and Wandler, Decanting Discretionary Trusts: State Law and Tax Considerations, 29 Tax Mgmt. Est. Gifts & Tr. J. 219 at Footnote 42, citing Restatement (Second) of Property, Donative Transfers § 19.3 (2003) and *In re Hart's Will*, 262 A.D. 190 (N.Y. Sup. Ct. 1941).

to one of said parties. The written direction of the said John S. Phipps may be contained in his last will and testament, anything herein to the contrary notwithstanding.⁵

On July 25, 1939, JSP, pursuant to Section Six of the trust, executed and delivered to the corporate co-trustee written directions to transfer the trust estate (referred to as the "Existing Trust") to JSP and PBTC in trust for the benefit of Mrs. Phipps's descendents (the "New Trust"). The provisions of the New Trust were nearly identical to those of the Existing Trust with one exception – the New Trust provided John H. Phipps ("JHP," who was a son of JSP and Mrs. Phipps) with a testamentary power of appointment to provide that income from the New Trust could be paid to his wife. JHP's wife was not a beneficiary of the Existing Trust.

b. Court Holds that Trustee's Absolute Power Includes Power to Create "Less Than Fee" Interests.

In allowing the distribution of property from the Existing Trust to the New Trust, the Florida Supreme Court held that, "[t]he general rule gleaned from ... cases of similar import is that the power vested in a trustee to create an estate in fee includes the power to create or appoint any estate less than a fee unless the donor clearly indicates a contrary intent (emphasis added)."⁶ The Court rejected the argument of PBTC that the reverse was true, i.e., that the power to create a second trust estate is present under a special power of appointment only where such authority is specifically granted.⁷ The Court concluded that, so long as the beneficiaries of the second trust are limited to the class of beneficiaries under the first trust, the power in the trustees to appoint in further trust, much like a power of appointment, is absolute, and to hold otherwise would limit the power of the individual trustee to administer the trust estate in a way not contemplated by the donor of the original trust.⁸

c. Treatises Acknowledge That Decanting Authority Exists within the Common Law.

A conclusion from *Phipps* is that an absolute power in the trustee to distribute property to a beneficiary may be exercised in any manner at least equal to the interest that the beneficiary would receive had the property been distributed outright to the beneficiary. So long as the trust does not prohibit the granting of a lesser interest, this power could include the power to distribute in trust for the benefit of the beneficiary. Further, if the trustee has the absolute power to distribute trust property to any one or more of a class of beneficiaries, absent a restriction in the trust agreement, there is no prohibition against distributing property to a trust for some, but not all, of the beneficiaries. Both the Restatement (Third) of Property (Wills & Donative Transfers) (the "Third Restatement") in § 19.14 and the Restatement (Second) of Trusts in §17 support this conclusion.

d. Common Law Theory on Decanting.

⁵ *Id.* at 784, 300.

⁶ *Id.* at 786, 301.

⁷ *Id.*; see also BOGERT'S TRUSTS AND TRUSTEES (THROUGH 2011 UPDATE), Chapter 39, § 812, under the discussion of the express (and unlimited by an ascertainable standard) power in the Trustees to distribute principal.

⁸ *Id.* at 787, 301. Note that the opinion did not discuss the inclusion of JHP's wife as a permissible recipient under a power of appointment; presumably, this is because she was not a current beneficiary of the New Trust and could only receive an interest upon JHP's death. The granting of a testamentary power of appointment naming persons who were not beneficiaries under the original trust would appear to be viewed as if the Trustee appointed the property outright to the beneficiary who could then devise the property to whomever he or she desired.

The common law decision of *Phipps* supports the conclusion that trustees with broad discretionary powers of distribution may distribute property in further trust for the benefit of a beneficiary or beneficiaries regardless of whether a state has enacted decanting laws.⁹

The argument is based on two principles: first, a trustee with absolute power to invade principal, as a matter of property law, is the equivalent of a donee of a special power of appointment, and second, absent a contrary provision in the governing document, a donee of a power of appointment may exercise such power in a manner which is less extensive than authorized by the instrument creating the power. Under this latter principle, if there is authority to distribute outright, there is authority to distribute in further trust.¹⁰ The argument could be made that even if distribution authority is subject to an ascertainable standard, so long as there is authority to distribute property outright, there is authority to distribute in further trust.

e. New York Expands Statutory Decanting Authority.

Relying on this principle, the State of New York recently amended EPTL § 10-6.6 to allow decanting of a trust where the trustee's distribution authority is limited to an ascertainable standard.¹¹ Accordingly, based on these changes, in New York, it is not necessary for a trustee to have absolute discretion with respect to distributions in order to effect a decant. In the Memorandum to Assembly Bill A08297 (2011), the New York State Assembly stated as follows:

"To enhance flexibility, the ability to invade principal for any purpose, rather than the ability to invade principal only if the trustee has absolute discretion, should trigger the ability of the trustee to pay from one trust to another. So long as the trustee has the ability to distribute principal for some purpose, for example, if the trustee may make principal distributions for a beneficiary's health, education, maintenance, and support, but may not otherwise invade principal, the trustee should have the ability to pay the trust funds to a new trust for the same purpose. This opportunity should exist regardless of whether a beneficiary has the current need for funds."¹²

2. *Applying Phipps, Common Law and Statutory Law to Decanting.*

a. A Valid State Law Decanting Should Not Result in the Imposition of Income, Estate or Gift Taxes.

(1) Conclusion.

The trustee's decanting authority is analogous to a special power of appointment; while the trustee also has a fiduciary duty with respect to such authority, there is no distinction under federal tax law as to the exercise of powers and a fiduciary duty, so a fiduciary's distribution

⁹ See generally, Halpern and Wandler, *Decanting Discretionary Trusts: State Law and Tax Considerations*, 29 Tax Mgmt. Est. Gifts & Tr. J. 219 at Footnote 42, citing Restatement (Second) of Property, Donative Transfers § 19.3 (2003) and *In re Hart's Will*, 262 A.D. 190 (N.Y. Sup. Ct. 1941).

¹⁰ *Id.*

¹¹ Other states also have enacted statutes authorizing decanting under an ascertainable standard. See DEL. CODE ANN. tit. 12, § 3528; ALASKA STAT. § 13.36.157, TENN. CODE ANN. § 35-15-816(b)(27), S.D. CODIFIED LAWS § 55-2-15, N.H. REV. STAT. ANN. § 564-B:4-418 (note that the New Hampshire statute actually uses the term "decant" in its statutes), ARIZ. REV. STAT. § 14-10819 and N.C. GEN. STAT. § 36C-8-816.1.

¹² Memorandum to Assembly Bill A08297 (2011), available at http://assembly.state.ny.us/leg/?default_fld=&bn=A08297&term=&Memo=Y.

power should be treated similarly to a beneficiary's special power of appointment for federal income, estate and gift tax purposes.¹³

Further, so long as the beneficiary's interest in the trust is contingent and nonvested, the beneficiary is not effecting the transfer as all of the elements for a taxable transfer of a property interest are not present; therefore, the decant should have no gift or estate tax consequences.

(2) *The Federal Tax Treatment of a Decant by a Trustee Should Be Viewed as Similar to a Special Power of Appointment.*

The *Phipps* decision is interpreted to state that a trustee's unlimited authority to distribute property to a beneficiary can be interpreted as the power to distribute the entire trust principal to such beneficiary. The power is similar to that of a special power of appointment, except that the trustee has a fiduciary duty to exercise such power in good faith.¹⁴ For federal transfer tax purposes, however, the separate fiduciary duty is not relevant as there does not appear to be any distinction between a power held in a fiduciary capacity and one held in a nonfiduciary capacity (i.e., a power of appointment). For this reason, the transfer tax analysis of the trustee's power to distribute principal (i.e., "decanting authority") is analogous to that of the exercise of a special power of appointment. These are state law powers.

It is the "good faith" argument that restricts the ability of a trustee with respect to decanting authority over current rights. Because the trustee must act considering the interests of the beneficiaries, the trustee cannot act in a manner that would restrict or remove a current or mandatory right in a beneficiary. A beneficiary's rights in a trust can be broken down into either, (a) current or mandatory rights, and (b) contingent or future rights. It is logical to conclude that any current, vested rights in the beneficiary must be maintained; otherwise, the trustee would be circumventing such beneficiary's rights and arguably would be acting in bad faith as to such beneficiary. As to decanting, this would require that the Trustee preserve a beneficiary's mandatory current income and principal rights.

Discretionary rights, however, are different. A trustee's absolute discretionary power to distribute principal to a beneficiary does not require that such beneficiary receive the principal; on the contrary, the trustee is under no obligation to effect any distributions absent an abuse of discretion. Where the discretion of the trustee is uncontrolled in making distributions, the general rule is that, absent arbitrary acts by the trustee or the exercise of bad faith or abuses in the exercise of such discretion, the settlor's intentions regarding trustee's absolute authority regarding distributions should be upheld and a beneficiary will not be able to compel the trustee to make any payment to him or her or to apply payments for his or her benefit.¹⁵ The presentation of a "bad faith" claim would be based on a perceived abuse of discretion and the alleged "bad faith" would have to appear very obvious and egregious. One example of this is the Florida decision *Mesler v. Holly*,¹⁶ wherein the Florida Second District Court of Appeal found

¹³ Note that this is an analysis from the fiduciary perspective; for an analysis of the effects of a beneficiary's consent to a decant or failure to object to a notice of decanting, see Section 2(b) of this letter, beginning on page 8.

¹⁴ See § 105 of the UNIFORM TRUST CODE, adopted in 2003 by the National Conference of Commissioners on Uniform State Laws (the "UTC"), which prohibits a trust instrument from exonerating a trustee's duty to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

¹⁵ Grimsley, 18 FLA. PRAC., LAW OF TRUSTS § 5:1 (2010 ed.), citing *In re Martin's Trust*, 63 Pa. D. & C.2d 340, 1971 WL 13100 (C.P. 1971); *Barnett Banks Trust Co., N.A. v. Herr*, 546 So. 2d 755 (Fla. 3d DCA 1989); *Watkins v. First Nat. Bank in Fort Myers*, 204 So. 2d 736 (Fla. 2d DCA 1967); *Mesler v. Holly*, 318 So. 2d 530 (Fla. 2d DCA 1975); *In re Duncan's Will*, 80 Misc. 2d 32, 362 N.Y.S.2d 788 (Sur. Ct. 1974); and *In re Stone*, 500 So. 2d 737 (Fla. 1st DCA 1987).

¹⁶ 318 So.2d 530 (Fla. 2nd Dist. Ct. App. 1975).

an abuse of discretion where the trustee was the sole lifetime beneficiary, that she had not furnished any accounts or reports of her administration to the remaindermen, and that she was not confining her invasions of principal to herself to reasonable limits.

For this reason, it would appear to be possible and permissible for the trustee, acting in good faith, to change future income and principal rights in a beneficiary if such interests are contingent and non-vested rights.

(3) *A Change in a Beneficiary's Contingent, Non-Vested Interest Should Not Be Considered a Gratuitous Transfer of an Interest in Property.*

The question then becomes whether the change in a beneficiary's contingent, non-vested interest in the trust is somehow deemed to be a gratuitous transfer of that interest that would cause transfer taxation.

The starting point for any analysis is the requirements for a taxable gift, which are, (a) a donor is competent to make the gift; (b) a clear and unmistakable intention by the donor to make the gift (in the absence of adequate consideration); (c) a conveyance, assignment, or transfer of property (or an interest in property) sufficient to vest legal title in the donee without power of revocation at the donor's will; (d) relinquishment of "dominion and control" over the gift property by delivery; and (e) acceptance by the donee.¹⁷

The focus for this analysis is on the second and third elements, "a clear and unmistakable intention by the donor to make the gift (in the absence of adequate consideration)" and "a conveyance, assignment, or transfer of property (or an interest in property) sufficient to vest legal title in the donee without power of revocation at the donor's will." The trustee acting as a fiduciary has no capacity to express any donative intent; therefore, from the trustee perspective, there cannot be a taxable gift. From the beneficiary's perspective, since the beneficiary's interest is contingent and non-vested, it is debatable whether the beneficiary actually has an interest in property to gift. Regardless of the answer, because the decanting power lies solely with the trustee, the beneficiary is not the originator of the decant nor is the beneficiary the transferor with respect to the transfer of assets to the new trust. Therefore, from the beneficiary's perspective, all of the elements for a taxable gift are also lacking.

(4) *A Decant By a Trustee Who is an Income Beneficiary (Mandatory or Discretionary) as Trustee Should Not Diminish the Beneficiary's Income Interest.*

The provisions of this Section 2(a) infer and assume that the trustee is disinterested in the trust and does not possess a beneficial interest. The above conclusions may be different if the trustee is also an income beneficiary (either mandatory or discretionary). If the trustee has a mandatory income interest, the conclusions reached above do not change; a mandatory income interest must be maintained for a valid decant. However, if the trustee's income interest is permissive or discretionary, the conclusions may be different. Considering that decanting may be analogized to the exercise of a special power of appointment, the Service has ruled (through Treasury regulations and rulings) that an income beneficiary's exercise of an inter-vivos special power of appointment in favor of others in a manner that reduces his or her income interest, even if that interest is discretionary, may result in a taxable gift.¹⁸ For this reason, if the trustee also

¹⁷ *Gift Requirement for Gift Tax Purposes*, RIA Estate Planning, ¶47,152.

¹⁸ See generally Treas. Reg. § 25.2514-1(b)(2), Priv. Ltr. Rul. 8535020, and Rev. Rul. 79-327, 1979-2 CB 342, wherein the exercise by a beneficiary of a lifetime special power of appointment was deemed to be a taxable gift despite the non-inclusionary nature of the special power of appointment because the power holder has relinquished a portion of his or her income interest by the exercise. Contrary results were reached in *Comm. v. Walston*, 36 AFTR

possesses a beneficial interest, the trustee/beneficiary's interest should not be reduced in the decant.

(5) *Based on ACTEC Analysis, Generally, No Current Income Tax Recognition Should Occur from a Valid Decant.*

The income tax analysis under the ACTEC submission may be generally concluded as follows: under a valid decant, the new trust should be viewed as a continuation of the old trust for all elements of income taxation. ACTEC addresses several issues which require additional review and guidance from Treasury, i.e., the income tax consequences of a decanting distribution involving negative basis assets. We do not believe that those issues require further discussion. In addition, with respect to administrative issues, ACTEC advocates that the new trust succeed to the taxpayer identification number of the decanted trust.

(6) *When a Trustee Decants Only a Portion of the Trust's Assets, the New Trust Should Obtain a New Taxpayer Identification Number, and a New IRS Form Should be Filed Indicating the Proportionate Decant.*

One additional comment should be made to the income tax discussion from the ACTEC comments, which concerns the ability of a trustee to decant less than the entire assets of the original trust. Should this occur, Treasury should consider adopting a new income tax form allowing the trustee of the decanting trust to allocate a proportionate amount of the income tax items from the decanted trust to the new trust. Further, the new form would report the taxpayer identification number of the new trust so that from a record keeping perspective, Treasury is on notice as to the tax treatment of decanted assets in case the underlying custodians do not issue accurate year-end tax forms to the respective trusts.

(7) *Suggested Treasury Guidance.*

Based on the foregoing, we request that Treasury issue guidance on the following: (1) either create a definition for transfer tax purposes of a "beneficial interest" in the context of a decant, or issue a statement that, for purposes of decanting, a "beneficial interest" should be defined under applicable state law; (2) a transfer under a valid state law decant is not a gratuitous transfer by either the trustee or any beneficiary who has a contingent or non-vested interest in the trust; (3) as a general rule, decanting does not result in the immediate recognition of income taxes, but Treasury should issue guidance as to issues set forth in the ACTEC submission; and (4) if less than the entire trust is decanted, Treasury should determine that the new trust receives its proportionate share of all income tax items from the decanting trust, and, further, Treasury should release a new form whereby the trustee of the decanted trust can notify both Treasury and the trustee of the new trust as to such transferred income tax items.

b. *Neither a Beneficiary's Statutory or Voluntary Consent to a Decant or a Beneficiary's Failure to Timely Object to a Decant Results in a Taxable Gift by the Beneficiary.*

(1) *State Law Concerns Are Independent of Tax Concerns.*

1020, 168 F.2d 211, 48-1 USTC ¶10619 (4th Cir. 1948), and *Self v. U.S.*, 49 AFTR 1913, 135 Ct. Cl. 371, 142 F. Supp. 939, 56-2 USTC ¶11613 (Ct. Cl. 1956). Note that Rev. Rul 79-327 expressly states that to the extent the holding is in direct conflict with Treasury Regulations, the Service will not recognize the *Self* decision. *Self* was also distinguished in *Regester v. Comm.*, 83 T.C. 1 (1973), which stated that the *Walston* decision was fact based and that the Court of Claims in the *Self* decision misapplied the *Walston* decision by ignoring the limiting facts in *Walston*. In addition, with respect to the transfer tax valuation of a gift of a discretionary income interest, see Rev. Rul. 75-550, 1975-2 CB 357, which provides an example of the correct method of computing the value of a decedent's interest in a residuary trust subject to the discretionary power of the trustee to invade corpus for the benefit of others.

The shift in the approach of modern trust law over the past two decades is perhaps the most pronounced in the area of trust reformation. The concept of correcting mistakes or reforming a trust's provisions to take into account an unanticipated circumstance of events has led to the adoption by many states of various provisions allowing such reformations. The UTC, the purpose of which is to present model statutes embodying the current approach to trust law, has enacted a series of statutes specifically governing the reformation of trusts.¹⁹ Some of the UTC provisions require the consent of all beneficiaries (referred to thereunder as "qualified beneficiaries"), some allow a petition to the court to be filed by a qualified beneficiary, and many require notice be given to all qualified beneficiaries (similar to the requirement found in decanting statutes). In each particular statute, a state law concern²⁰ allows the court (or, in some instances, non-judicially by consent of the qualified beneficiaries) to modify or terminate a trust. The state law concern may in some instances require the formal consent of the beneficiaries.

What is obvious is that the consent or notification rights are implemented so as to protect the beneficiary's state law rights without any concern as to federal transfer tax law. Such concerns should not be skewed as to impose a gratuitous transfer subject to federal transfer tax liability; to do so would encroach the state's concern for enacting the statute.

(2) *Suggested Treasury Guidance.*

Based on the foregoing, since the distribution does not originate with the beneficiary, the beneficiary should not be penalized for any actions with respect to acquiescence to the transaction. Thus, we suggest that Treasury issue guidance stating that under a valid state law decant, a statutory requirement for a beneficiary to consent to the decant, the delivery of consent by a beneficiary where no consent is otherwise required (whether by statute or common law), the waiver by a beneficiary of a mandatory waiting period, or a failure by a beneficiary to file an objection to a decant within a prescribed time period, is not a transfer by the beneficiary subject to federal transfer tax law and, further, does not result in any additional income tax recognition to the beneficiary other than any such recognition as may be determined under the decant.

c. *The Determination of "Beneficiaries" of a Recipient Trust for Decanting Purposes Should be Determined by State Law.*

(1) *Conclusion.*

The determination of whether additional beneficiaries may be added to a trust pursuant to a valid decanting should be determined under state law. As a result, if permissible appointees of a special power of appointment are not considered to be "beneficiaries" under applicable state law, a special power of appointment granted under the new trust in a decant may expand the class of permissible appointees beyond those classified as "beneficiaries" under the decanted trust. Such actions are state law concerns and should not result in the imposition of any federal transfer taxes.

(2) *Who is a "Beneficiary"?*

As stated above, under the *Phipps* rationale, the trustee's authority to appoint in further trust is an extension of the trustee's distribution power to the beneficiaries which must be

¹⁹ See, for example, UTC § 111, Nonjudicial Settlement Agreements; UTC § 410. Modification or Termination of Trust; Proceedings for Approval or Disapproval; UTC § 411. Modification or Termination of Noncharitable Irrevocable Trust by Consent; UTC § 412. Modification or Termination Because of Unanticipated Circumstances or Inability to Administer Trust Effectively; UTC § 414. Modification or Termination of Uneconomic Trust; UTC § 415. Reformation to Correct Mistakes; UTC § 416. Modification to Achieve Settlor's Tax Objectives; and UTC § 417. Combination and Division of Trusts.

²⁰ It should be noted that in one specific instance, i.e., UTC § 416, the state law concern is linked to federal taxes, i.e., a reformation based on the settlor's tax objectives.

exercised in good faith. With respect to distributions, a trustee will always be restricted in its actions by two factors: applicable law and the terms of the governing instrument. A trustee can never exceed either of these restrictions.

With decanting, the focus is on the recipients of property in the new, recipient trust. While the trustee's discretionary authority to distribute principal may be absolute as to discretion, under the common law, it is limited as to the class of beneficiaries to whom property may be distributed, namely, the beneficiaries stated in the trust. To add beneficiaries to those initially stated in the trust agreement would appear to be a violation of the terms of the governing instrument, and thus an improper action.

Both the Restatement (Second) of Property: Donative Transfers (the "Second Restatement") and the Third Restatement codify the common law (although the Second Restatement adopts an initial minority provision that has come to be an accepted position through statutory adoption). The Second Restatement, in § 1.2, provides the historical rule that "the rule of this [§ 1.2] does not permit the creation of a non-general power to be executed by objects of the power in favor of non-objects of the original power."²¹ The Third Restatement, in § 19.14, provides that "[the recipient of the newly created special power of appointment] can only be authorized to appoint to permissible appointees of the first [special] power, excluding himself or herself."²²

However, the issue becomes blurred because state decanting statutes rarely describe persons as "permissible appointees"; rather, such statutes often refer to "beneficiaries."²³ Thus, conformity to a state statute requires defining the term "beneficiaries."

Section 103 of the UTC defines "beneficiary" as follows:

“(3) “Beneficiary” means a person that:

(A) has a present or future beneficial interest in a trust, vested or contingent; or

(B) in a capacity other than that of trustee, holds a power of appointment over trust property.”

Under the UTC, it appears to be unclear whether permissible recipients of property under a special power of appointment are considered to be beneficiaries of a trust. Consider a trust created by A which purports to benefit A's child, B, and B's descendants. The trust provides that the trustee has absolute discretion to distribute income and principal to B for B's life, and, upon B's death, B has a special power of appointment to appoint the trust property to any one or more of B's descendants; in default of the exercise of B's power of appointment, the trust property passes in shares, per stirpes, for B's descendants. Under the UTC definition of "beneficiary," it is clear that the beneficiaries of the trust are B and B's descendants. Suppose that B exercises the power of appointment by appointing the trust property in further trust for each of B's descendants, C and D, and, upon each individual's death, the individual is granted a special

²¹ RESTATEMENT (SECOND) OF PROPERTY, DONATIVE TRANSFERS § 19.4 (1986) at Reporter's Note 3 to Section 19.4, citing *Horwitz v. Norris*, 49 Pa. 213 (1865), *Hood v. Haden*, 82 Va. 588 (1866) and *McLean v. McLean*, 174 A.D. 152, 160 N.Y.S. 949 (1916).

²² RESTATEMENT (THIRD) OF PROPERTY (WILLS AND DONATIVE TRANSFERS) § 19.14 (2011) at Comment (g)(3).

²³ For example, see New York EPTL § 10-6.6(b) ("(b) An authorized trustee with unlimited discretion to invade trust principal may appoint part or all of such principal to a trustee of an appointed trust for, and only for the benefit of, one, more than one or all of the current *beneficiaries* of the invaded trust (to the exclusion of any one or more of such current *beneficiaries*..."; see also Florida Statutes § 736.04117(1)(a)1. ("...for the current benefit of one or more of such persons under the same trust instrument or under a different trust instrument; provided. 1. The *beneficiaries* of the second trust may include only *beneficiaries* of the first trust...") (emphasis added).

power of appointment to appoint among the individual's descendants and the individual's surviving spouse; in default of exercise, the property is paid outright to the individual's descendants (who would be B's remote descendants). The respective surviving spouses of C and D are not members of the class of permissible appointees under the original trust agreement; however, the UTC definition of "beneficiary" does not clarify the status of permissible appointees under a power of appointment. It may be argued in the negative that if such appointees were considered to be beneficiaries, the statute would have stated as such, so therefore, they should not be considered "beneficiaries." If that is true, the permissible appointees would *not* be considered to be beneficiaries, meaning that interpreted literally, the UTC statutory "beneficiaries" under B's exercise of the special power of appointment are still only B's descendants and the decant is permissible.

This result appears a bit clearer under Florida's Trust Code. The Florida definition of "beneficiary" under F.S. §736.0103(4), states:

“(4) “Beneficiary” means a person who has a present or future beneficial interest in a trust, vested or contingent, or who holds a power of appointment over trust property in a capacity other than that of trustee. *An interest as a permissible appointee of a power of appointment, held by a person in a capacity other than that of trustee, is not a beneficial interest for purposes of this subsection.* Upon an irrevocable exercise of a power of appointment, the interest of a person in whose favor the appointment is made shall be considered a present or future beneficial interest in a trust in the same manner as if the interest had been included in the trust instrument.

(emphasis added.)

Under the Florida Statutes, a permissible appointee under a power of appointment is specifically not considered to be a beneficiary. Therefore, C and D's respective spouses would clearly not be "beneficiaries" for purposes of F.S. § 736.04117 and, therefore, B's exercise of the special power is statutorily valid.

(3) *Suggested Treasury Guidance.*

Based on the foregoing, we suggest that Treasury issue guidance acknowledging that the determination of "beneficiaries" for decanting purposes is a matter of state law.

e. The Maximum Perpetuities Period for a Recipient Trust in a Decant Should Not Extend Beyond the Maximum Perpetuities Period In Effect at the Creation of the Decanted Trust.

(1) *Conclusion.*

A common trust provision allows the trustees to non-judicially move the trust situs and governing law to another trust. While perceivably the governing law could be shifted to allow a decant, the issue of whether such an action is permissible is a matter of state law. If the governing law is moved and if a decant thereafter occurs, the maximum applicable rule against perpetuities of the new trust should be limited to the maximum rule against perpetuities in effect at the creation of the original decanted trust. Further, if the state law governing the decanting trust is modified so that a longer rule against perpetuities is in effect, or if such state abolishes the rule against perpetuities, regardless of the application of such state law, the maximum applicable rule against perpetuities of the new trust should be limited to the maximum rule against perpetuities in effect at the creation of the original decanted trust.

(2) *Rule Against Perpetuities – Background.*

A general premise is that any trust, upon creation, must terminate within the applicable “rule against perpetuities” (“RAP”) under the law governing the trust.

The common law definition of the RAP is set forth in § 1.1 of the Second Restatement, which provides that property interests created by donative transfers must vest within 21 years after lives in being (the measuring lives) at the time the period of the rule begins to run. Pursuant to § 1.3(2) of the Second Restatement, the “measuring lives” are, (1) the transferor if the period of the rule begins to run in the transferor’s lifetime; (2) those individuals alive when the period of the rule begins to run, if reasonable in number, who have beneficial interests vested or contingent in the property in which the non-vested interest in question exists and the parents and grandparents alive when the period of the rule begins to run of all beneficiaries of the property in which the non-vested interest exists, and (3) the donee of a nonfiduciary power of appointment alive when the period of the rule begins to run if the exercise of such power could affect the non-vested interest in question. In addition, said section provides that a child in gestation when the period of the rule begins to run who is later born alive is treated as a life in being at the time the period of the rule begins and, hence, may be a measuring life.

The position adopted by the Second Restatement is commonly referred to as the “wait-and-see” approach, which provides that an interest only fails if it does not vest within the period of the rule, as opposed to the strict interpretation which provides that an interest fails if it “might not vest” within the applicable period.²⁴

The Third Restatement removes the “wait-and-see” approach of the Second Restatement and measures the perpetuity period by generations rather than by lives in being at the creation of the interest. In addition, the Third Restatement states that the RAP is not a rule against remoteness of vesting that only applies to a contingent future interest as the distinction between a contingent and a vested future interest is irrelevant.²⁵ Instead, the Third Restatement focuses more on generational assignment, defining the “measuring lives” as the following individuals: the transferor, the beneficiaries of the disposition who are related to the transferor and no more than two generations younger than the transferor, and the beneficiaries of the disposition who are unrelated to the transferor and no more than the equivalent of two generations younger than the transferor.

Several states have codified the RAP into statutory form. For example, pursuant to F.S. §689.225(2)(a), the Florida RAP adopts a “wait-and-see” approach with the “lives in being plus 21 years” or full vesting within 90 years if the trust is created prior to January 1, 2001, or 360 years of the trust is created after December 31, 2000.

(3) *A Change in Governing Law Could Extend the RAP.*

If the trust is created under Florida law, the determining factor is set forth in F.S. §689.225(2)(a)1. in that the RAP is established at the moment that the interest is created. Other states, such as Delaware and New Jersey, have abolished the RAP. A concern is whether, through the use of a special power of appointment and a change of governing law, the length of time during which the property is held in trust could extend beyond the original RAP.

Under the common law, the exercise of a special power of appointment granted under a trust appointing property in further trust does not restart the RAP; rather, the RAP relates back to the date of the creation of the original trust. This is the accepted result in both the Second and Third Restatements. Specifically, the Second Restatement provides,

²⁴ RESTATEMENT (SECOND) OF PROPERTY, DONATIVE TRANSFERS § 1.4 (1983), Comment (a).

²⁵ RESTATEMENT (THIRD) OF PROPERTY (WILLS & DONATIVE TRANSFERS), § 27.1, Comment (a).

the period of the rule against perpetuities begins to run with respect to non-vested interests created by the exercise of the trust beneficiary's power of appointment, and as to the non-vested interests under the trust in default of the exercise of the power of appointment, on the date the trust is established, unless the donee of the power of appointment can appoint to himself or herself by a deed at any time.²⁶

Similarly, the Third Restatement provides that, "the transferor in the case of a trust or other donative disposition created by the exercise of a power of appointment is the donor of the power, unless the exercised power was a presently exercisable general power."²⁷

Some states, such as New Jersey and Delaware, have adopted statutory provisions that disregard the common law and provide that a new RAP commences upon the exercise of any power, regardless of whether the power is general or special.²⁸ Case law supports the statutory deviation from the common law. For example, in *Matter of Wold*,²⁹ a special power of appointment created before enactment of the N.J. Stat. Ann. § 46:2F-5(a),³⁰ but not exercised until after the enactment of the RAP, was judged according to the statutory 90-year "wait-and-see approach" and not the common law "lives in being plus 21" since the statute specifically provided that an interest created pursuant to a power of appointment is deemed to be created upon the exercise of the power. Thus, under the then-New Jersey statute, the exercise of the power could create non-vested interests that might vest longer than 21 years after the death of the last life in being upon the creation of the power.

The UTC provides that the trustee may change the principal place of administration without judicial approval.³¹ It is also customary for trusts to allow the trustee to also switch the governing law of a trust.³² Thus, if (a) a trustee is administering a trust in a state without a decanting statute, (b) if the trustee is qualified to act as a trustee in a state with a decanting statute, and (c) assuming that the governing instrument so authorized (and, in the absence of specific authority, as a court may order), the trustee has the ability to switch the governing law and principal place of administration to such favorable state and thereafter effect a decant. This concept of "forum shopping" should not result in any adverse transfer tax consequences because the decant would be a transfer that would have been authorized had the trust originally been governed by the favorable state's law and the provisions of state law would specifically permit the transfer.

²⁶ RESTATEMENT (SECOND) OF PROPERTY, DONATIVE TRANSFERS § 1.2 (1983), Comment (d).

²⁷ RESTATEMENT (THIRD) OF PROPERTY (WILLS & DONATIVE TRANSFERS) § 27.1 (2011), Comment (d).

²⁸ DEL. CODE. ANN. tit. 25, § 5-501, former N.J. STAT. ANN. § 46:2F-5(a) (1991).

²⁹ 310 N.J. Super. 382, 708 A.2d 787 (Ch. Div. 1998), *as cited in* BOGERT'S TRUSTS AND TRUSTEES (THROUGH 2011 UPDATE), § 213 at Footnote 59.

³⁰ Note that New Jersey has since abolished the RAP; *see* N.J. STAT. ANN. § 46:2F-9, effective for interests created after July 9, 1999.

³¹ UTC § 108(c); *see also* F.S. § 736.0108(4).

³² UTC § 107 pertains to a trust's governing law; pursuant to UTC § 105, the provisions of the UTC may be overridden by the governing instrument, except as set forth in UTC § 105(b). A trustee's ability to change the governing law is not such an exception. *See also* F.S. §§ 736.0107 and 736.0105.

(4) *Treasury Has Already Opined That No Taxable Transfer Occurs if a Trust's RAP Remains the Same After a Decant.*

In one instance, the Service has taken the position that any transfers from a trust into a new trust pursuant to the exercise of a power must retain the original trust's RAP. In Treas. Reg. § 26.2601-1(b)(4)(i)(A), informally known as the "Delaware Tax Trap" provision, with respect to the generation-skipping transfer tax ("GSTT") exempt status of a trust whereby principal from such GSTT exempt trust is distributed to a new trust, the Treasury states that one of the requirements that must be present for the new trust to succeed to the old trust's GSTT exempt status is that the terms of the governing instrument of the new trust will not extend the time for vesting beyond any life in being at the date the *original trust became irrevocable plus a period of 21 years* (emphasis added). In adopting the GSTT regulations, Treasury adopted the position that if the RAP were permitted to begin upon the date of the exercise of the special power of appointment, the power holder, in effect, would become the "transferor" for RAP purposes. Presumably, the transferor should also become the "transferor" for GSTT purposes; thus, Treasury stated that any trust that does not limit the RAP to the original RAP regardless of the applicable state law would invoke the GSTT upon the exercise of the special power of appointment.

Treasury's position on this issue could, perhaps, have been the result of the fact that the ability to extend the RAP is limited to a small handful of jurisdictions and the predominant view is that the RAP cannot be extended. We believe that since Treasury has already determined this issue in such prior instance, that this position should be extended to decanting as it is consistent with the common law and the majority of state's laws.

(5) *Suggested Treasury Guidance.*

Based on the foregoing, we suggest that Treasury issue guidance acknowledging that as to the maximum period of time that property may be held in a trust after a decant, (a) the ability to switch the principal place of administration and governing law of a trust in order to take advantage of another state's decanting laws is a matter of state law, and (b) the maximum RAP applicable to property held in trust after a decant should be limited to the RAP in effect at the time of the creation of the trust from which the property was decanted consistent with other Treasury Regulations.

3. *Summary Comments.*

In summary, we believe that the use of decanting can be beneficial to trustees and beneficiaries, creating flexibility for correction of mistakes and for correction of situations in which the grantor's original intent cannot be achieved due to changes in circumstances. Treasury should provide guidance to trustees and beneficiaries so that there are safe harbors for the implementation of decanting; safe from unforeseen income, estate, gift, and generation skipping transfer tax consequences. In order to structure their lives and implement a grantor's intent, it is important that trustees and beneficiaries be able to rely on state laws pertaining to decanting. Consistency and predictability should be achievable, but will be difficult if each type of decant results in some type of unpredictable or unforeseen tax liability.

RPPTL 2012 - 2013
Executive Council Meeting Schedule
W. Fletcher Belcher's YEAR

Date	Location
July 25 – July 28, 2012	Executive Council Meeting & Legislative Update The Breakers Palm Beach, Florida Reservation Phone # 561-655-6611 www.thebreakers.com Room Rate: \$199.00 Cut-off Date: June 25, 2012
September 13 – September 15, 2012	Executive Council Meeting Ritz Carlton Key Biscayne Key Biscayne, Florida Reservation Phone # 1-800-241-3333 http://www.ritzcarlton.com/keybiscayne Room Rate: \$169.00 Cut-off Date: August 22, 2012
November 15 – November 18, 2012	Executive Council Meeting/Out of State The Inn on Biltmore Estates Ashville, North Carolina Reservation Phone #1-866-779-6277 www.biltmore.com/stay/rates Room Rate: \$219.00 Cut-off Date: October 15, 2012
February 7 – February 10, 2013	Executive Council Meeting Hotel Duval Tallahassee, Florida Reservation Phone #1-888-236-2427 http://www.hotelduval.com Room Rate: \$149.00 Cut-off Date: January 16, 2013
May 23 – May 26, 2013	Executive Council Meeting / RPPTL Convention The Vinoy St. Petersburg, Florida http://www.marriott.com/hotels/travel/tpasr-renaissance-vinoy-resort-and-golf-club Reservation Phone # 1-888-303-4430 Room Rate \$149.00 Cut-off Date: May 5, 2013



RPPTL FINANCIAL SUMMARY

2011 – 2012 (July 1 - June 30¹)

Revenue: *\$903,824

Expenses: \$767,908

Net: \$135,916

*\$ 168,891 of this figure represents revenue from sponsors and exhibitors

Beginning Fund Balance (7-1-11)

\$ 1,070,640

YTD Fund Balance (4-30-12)

\$1,202,141

RPPTL CLE

RPPTL YTD Actual CLE Revenue
\$266,574

RPPTL Budgeted CLE Revenue
\$233,500

¹ This report is based on the tentative unaudited detail statement of operations dated 4/30/2012.



RPPTL Financial Summary from Separate Budgets

2011 – 2012 [July 1 - June 30¹]
YEAR TO DATE REPORT

General Budget

Revenue:	\$ 903,824
Expenses:	\$767,908
Net:	\$ 135,916

Legislative Update

Revenue:	\$ 63,199
Expenses:	\$ 72,563
Net:	(\$ 9,364)

Convention

Revenue:	\$ 5,995
Expenses:	\$ 2,202
Net:	\$ 3,793

Attorney Trust Officer Conference

Revenue:	\$ 6,555
Expenses:	\$ 5,740
Net:	\$ 815

Miscellaneous Section Service Courses

Revenue:	\$ 345
Expenses:	\$ 4
Net:	\$ 341

Roll-up Summary (Total)

Revenue:	\$ 979,918
Expenses:	\$ 848,417
Net Operations:	\$ 131,501

Reserve (Fund Balance):	\$ 1,070,640
GRAND TOTAL	\$ 1,202,141

¹ This report is based on the tentative unaudited detail statement of operations dated 4/30/2012.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By S. Katherine Frazier, Chair, Real Property Problems Study Committee of the Real Property Probate & Trust Law Section (RPPTL Approval Date June ____, 2012)

Address c/o Hill Ward Henderson
3700 Bank of America Plaza
101 East Kennedy Blvd.
Tampa, FL 33602
Telephone: (813) 227-8480

Position Type Real Property Problems Study Committee, RPPTL Section, The Florida Bar

CONTACTS

Board & Legislation Committee Appearance

Brian D. Leebrick, Barron, Redding, Hughes, Fite, Sanborn, Kiehn, Leebrick & Dickey, P.A., 220 McKenzie Ave., Panama City, FL 32401, Telephone (850) 785-7454.
Alan B. Fields, Florida Land Title Association, Inc., 249 E. Virginia St., Tallahassee, FL 32302, Telephone (727) 773-6664
Robert S. Swaine, Swaine & Harris P.A., 425 S. Commerce Ave., Sebring, FL 33870, Telephone (863) 385-1549
Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, FL 32302-2095, Telephone (850) 222-3533
Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533
(List name, address and phone number)

Appearances

Before Legislators (SAME)
(List name and phone # of those having face to face contact with Legislators)

**Meetings with
Legislators/staff** (SAME)
(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable,

List The Following N/A
(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position Support X Oppose ____ Tech Asst ____ Other ____

Proposed Wording of Position for Official Publication:

"Support amending s. 689.02(2), F.S. to remove inclusion of social security numbers in recorded instruments."

Reasons For Proposed Advocacy:

The advent of Internet based data resulted in public policies seeking to protect confidential personally identifiable information such as social security numbers, as stated in s. 119.0714(3)(a), F.S. Section 689.02, F.S., invites the disclosure of such information by requiring deeds to have a blank for the insertion of social security numbers.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position [NONE]
(Indicate Bar or Name Section) (Support or Oppose) (Date)

Others

(May attach list if
more than one)

[NONE]
(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

[NONE]
(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.

WHITE PAPER

Amending s. 689.02(2), F.S. to remove requirement for a blank for the grantee's social security number.

I. SUMMARY

This legislation removes a requirement that warranty deeds must have a blank for the grantee's social security number. The bill does not have a fiscal impact on state funds.

II. CURRENT SITUATION

Section 689.02(2), F.S. requires that warranty deeds have a blank for the grantee's social security number, but does not require that the social security number be included in the instrument. As part of a package of reforms in 2002 in reaction to the 16th Statewide Grand Jury's investigation into identity theft, the Legislature modified s. 119.0714, F.S., to prohibit "any person who prepares or files a record for recording in the official records as provided in chapter 28" from including "in that record a social security number ... unless otherwise expressly required by law." No corresponding change was made to s. 689.02, F.S. to remove the requirement for the blank for the social security number.

III. EFFECT OF PROPOSED CHANGES

This proposal removes the requirement from s. 689.02(2), F.S. that a warranty deeds must have a blank for the grantee's social security number.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal does not have a fiscal impact on state or local governments.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

This proposal has not direct economic impact on the private sector.

VI. CONSTITUTIONAL ISSUES

This proposal raises no constitutional issues.

V. OTHER INTERESTED PARTIES

Florida Association of Court Clerks and Comptrollers
Florida Association of Property Appraisers

1 A bill to be entitled

2
3 An act relating to warranty deeds of conveyance; amending s. 689.02, F.S.;
4 revising requirements relating to blank spaces on warranty deeds for social
5 security numbers; providing an effective date.
6

7 Be It Enacted By the Legislature of the State of Florida:
8

9 Section 1. Subsection (2) of s. 689.02, Florida Statutes, is amended to read:

10
11 689.02 Form of warranty deed prescribed.—
12

13 (2) The form for warranty deeds of conveyance to land shall include a blank space for
14 the property appraiser's parcel identification number describing the property conveyed, which
15 number, if available, shall be entered on the deed before it is presented for recording, ~~and blank~~
16 ~~spaces for the social security numbers of the grantees named in the deed, if available, which~~
17 ~~numbers may be entered on the deed before it is presented for recording.~~ The failure to include
18 such blank spaces, or the parcel identification number, ~~or any social security number,~~ or the
19 inclusion of an incorrect parcel identification number, shall not affect the validity of the
20 conveyance or the recordability of the deed. Such parcel identification number shall not
21 constitute a part of the legal description of the property otherwise set forth in the deed and shall
22 not be used as a substitute for the legal description of the property being conveyed, ~~nor shall a~~
23 ~~social security number serve as a designation of the grantee named in the deed.~~
24

25 Section 2. This act shall take effect October 1, 2013.

CHAPTER 14

SERVICEMEMBERS CIVIL RELIEF ACT

STANDARD 14.1

SERVICEMEMBERS CIVIL RELIEF ACT DEFAULT JUDGMENTS

STANDARD: A DEFAULT JUDGMENT ENTERED AFTER A SERVICEMEMBER DEFENDANT FAILS TO APPEAR IN ANY ACTION, INCLUDING ACTIONS INVOLVING TITLE TO REAL PROPERTY, ARE VOIDABLE IF THE PLAINTIFF DID NOT COMPLY WITH THE PROVISIONS OF SECTION 521 OF THE SERVICEMEMBERS CIVIL RELIEF ACT, FOR ACTIONS FILED AFTER DECEMBER 19, 2003.

Problem 1: John Doe entered military service in 2004 and remained in military service through 2006. In 2002, Doe mortgaged Blackacre to Richard Roe, who started foreclosure proceedings in 2005. Doe still held title to Blackacre, but did not appear in the action and Roe took a default judgment against him. After a final judgment of foreclosure based on the default judgment, Roe purchased Blackacre at the foreclosure sale. Roe did not file an affidavit concerning Doe's military service. Is Roe's title marketable?

Answer: No. The default judgment may be considered validly entered, but the Act gives the servicemember the right to reopen the judgment to defend the action at a later date under certain conditions. Failure to file an affidavit and meet the other requirements of the Act subjects the judgment to being vacated or set aside.

Problem 2: Same facts as in Problem 1 except that Roe filed an affidavit stating that the defendant either was not in military service or that the plaintiff was unable to determine whether the defendant was in military service, after which the court appointed an attorney to represent Doe. Is Roe's title marketable?

Answer: Yes.

Authorities & References: Servicemembers Civil Relief Act, 50 U.S.C. App., §521 (2011).

Comment: Section 521 of the Act provides protection to members of the armed services from civil default judgments being taken against them during their service in the military or within 60 days after termination of or release from such military service. This section applies only when the defendant service member has not made an appearance. However, an appearance does not include a request for a stay of proceedings. 50 U.S.C. App., §522 (c).

Judgments rendered in disregard of the Act, while voidable, are not void. If in fact the defendant was not in the military service and no affidavit to that effect was filed, an affidavit filed subsequent to final judgment indicating that at no time during the proceedings was the defendant entitled to the protection of the Act will cure, for title purposes, this defect in the judgment. *See Courtney v. Warner*, 290 So. 2d 101 (Fla. 4th DCA 1974); *Eureka Homestead Soc'y v. Clark*, 145 La. 917, 83 So. 191 (1919).

In order to set aside a default judgment, a servicemember must file an application to set aside the judgment with the court no later than 90 days after being released from military service and show that he or she was materially affected by reason of such military service in making a defense to the action and has a meritorious or legal defense to the action or some part of it. 50 U.S.C. App., §521 (2011).

Moreover, the Act contains the following important provision protecting bona fide purchasers:

If a court vacates, sets aside, or reverses a default judgment against a servicemember and the vacating, setting aside, or reversing is because of a provision of this Act, that action shall not impair a right of title acquired by a bona fide purchaser for value under a default judgment.

STANDARD 14.2

[Title Standard deleted. See archived version for text.]

CHAPTER 14

SERVICEMEMBERS CIVIL RELIEF ACT OF 2004 AND SOLDIERS' AND SAILORS' CIVIL RELIEF ACT OF 1940

STANDARD 14.1

SERVICEMEMBERS CIVIL RELIEF ACT OF 2004 AND SOLDIERS' AND SAILORS' CIVIL RELIEF ACT OF 1940 DEFAULT JUDGMENTS

STANDARD: A DEFAULT JUDGEMENT ENTERED AFTER A SERVICEMEMBER DEFENDANT FAILS TO APPEAR IN ANY ACTION, INCLUDING ACTIONS INVOLVING TITLE TO REAL PROPERTY, MAY BE SET ASIDE OR VACATED IF THE PLAINTIFF DID NOT COMPLY WITH THE PROVISIONS OF SECTION 521 OF THE SERVICEMEMBERS CIVIL RELIEF ACT, IF THE ACTION WAS FILED AFTER DECEMBER 19, 2003, OR SECTION 520 OF THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT OF 1940, IF THE ACTION WAS FILED PRIOR TO DECEMBER 19, 2003 AND AFTER OCTOBER 17, 1940.

Problem 1: John Doe entered military service on June 1, 2004 and remained in military service through 2005. In 2002, Doe mortgaged Blackacre to Richard Roe, who started foreclosure proceedings in 2005. Doe still held title to Blackacre or was otherwise a party defendant with a real interest, but did not appear in the action and Roe took a default judgment against him. After a final judgment of foreclosure based on the default judgment, Roe purchased Blackacre at the foreclosure sale. Roe did not file an affidavit concerning Doe's military service. Is Roe's title marketable?

Answer: No. The default judgment may be considered validly entered, but the Act gives the servicemember the right to reopen the judgment to defend the action at a later date under certain conditions. Failure to file an affidavit and meet the other requirements of the Act subjects the judgment to being vacated or set aside.

Problem 2: Same facts as in Problem 1 except that Roe filed an affidavit stating that the defendant either was not in a member of military service or that the plaintiff was unable to determine whether the defendant was in military service, after which the court appointed an attorney to represent Doe and protect his interest. Is Richard Roe's title marketable?

Answer: Yes.

Authorities & References: Servicemembers Civil Relief Act, 50 U.S.C. App., §521 (2011); Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App., §520 (1976).

Comment: Section 521 of the Act provides protection to members of the armed services from civil default judgments being taken against them during their service in the military or within 60 days after termination of or release from such military service. This section applies only when the defendant service member has not made an appearance. However, an appearance does not include a request for a stay of proceedings. 50 U.S.C. App., §522 (c).

Judgments rendered in disregard of the Act, while voidable, are not void. If in fact the

defendant was not in the military service and no affidavit to that effect was filed, an affidavit filed subsequent to final judgment indicating that at no time during the proceedings was the defendant entitled to the protection of ~~the~~^{either} Act will cure, for title purposes, this defect in the judgment. See *Courtney v. Warner*, 290 So. 2d 101 (Fla. 4th DCA 1974); *Eureka Homestead Soc'y v. Clark*, 145 La. 917, 83 So. 191 (1919).

In order to set aside a default judgment, a servicemember must file an application to set aside the judgment with the court no later than 90 days after being released from military service and show that he or she was "materially affected by reason of such ~~his or her~~ military service ~~or within 60 days after termination or release from such service~~ in making a defense to the action" and has a "meritorious or legal defense to ~~to~~ the action or some part of it." 50 U.S.C. App., §521 (2011).

Moreover, the Act contains the following important provision protecting bona fide purchasers:

If a court vacates, sets aside, or reverses a default judgment against a servicemember and the vacating, setting aside, or reversing is because of a provision of this Act, that action shall not impair a right of title acquired by a bona fide purchaser for value under a default judgment.

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With respect to the applicability of the Soldiers' and Sailors' Civil Relief Act to persons in the Public Health Service, see 50 U.S.C. App. §511 (Soldiers' and Sailors' Civil Relief Act) and 50 U.S.C. App. §464 (Selective Service Act).

STANDARD 14.2

[Title Standard deleted. See archived version for text.]

SERVICEMEMBERS CIVIL RELIEF ACT OF 2004
AND SOLDIERS' AND SAILORS' CIVIL RELIEF ACT OF 1940
FORECLOSURE OF MORTGAGES

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STANDARD: DURING A MORTGAGOR'S MILITARY SERVICE AND FOR 90 DAYS MONTHS THEREAFTER, THE SALE OF MORTGAGOR'S REAL PROPERTY IN FORECLOSURE PROCEEDINGS INVOLVING A MORTGAGE LOAN ORIGINATED BEFORE THE MORTGAGOR'S MILITARY SERVICE IS NOT VALID UNLESS IT IS PURSUANT TO EXCEPT (I) UPON A COURT ORDER GRANTED BEFORE SUCH A SALE WITH A RETURN MADE AND APPROVED BY THE COURT OR (II) IF MADE PURSUANT TO AN AGREEMENT AS PROVIDED IN TITLE 50, U.S.C. APP. SECTION 517.

Problem: John Doe was discharged from the service in June, 2005. In July, 2005, Richard Roe started foreclosure proceedings on the mortgage held by him encumbering Blackacre, owned by Doe. The mortgage was given in 1962 prior to the time of John Doe's military service. Doe did not appear, and a default was entered against him on an affidavit stating that Doe was not then in the military service. Is the subsequent sale valid?

Answer: No. The sale is not valid, unless the sale was more than three months after Doe's discharge from service.

Authorities & References: Servicemembers Civil Relief Act, 50 U.S.C. App., §533 (2011); Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. §532 (1976); III FLORIDA REAL PROPERTY PRACTICE §5.11 (CLE 2d ed. 1976).

Comment: This provision of the Act is to protect servicemembers from non-judicial foreclosure sales. See, e.g., *Hurley v. Deutsche Bank Trust Co. Americas*, 2009 WL 701006 (W.D. Mich. March 13, 2009) (holding that defendant's protection under section 533 is protection from a non-judicial foreclosure).

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CHAIR

George J. Meyer
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 Tampa, Florida 33601-3239
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 Fax: (813) 229-4133
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**REAL PROPERTY,
 PROBATE &
 TRUST LAW
 SECTION**



**THE
 FLORIDA
 BAR**

www.RPPTL.org

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William F. Belcher
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VIA FEDERAL EXPRESS

**DIRECTOR, PROBATE AND
 TRUST LAW DIVISION**

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 Harper Meyer Perez Hagen O'Connor Albert &
 Dribin LLP
 201 South Biscayne Boulevard Suite 800
 Miami, Florida 33131
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March 28, 2012

Standing Committee on the Unauthorized Practice of Law
 of The Florida Bar
 651 E. Jefferson Street
 Tallahassee, Florida 32399-2300

**DIRECTOR, REAL PROPERTY
 LAW DIVISION**

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**Re: Unauthorized Practice of Law Concerns for the Benefit of
 Florida's Citizenry & Activities that Should Constitute the Practice
 of Law Submitted Pursuant to Rule 10-9.1 of the Rules Regulating
 The Florida Bar**

SECRETARY

Michael J. Gelfand
 Gelfand & Arpe
 1555 Palm Beach Lake Blvd., Ste. 1220
 West Palm Beach, FL 33401-2323
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 Fax: (561) 655-1367
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Dear Members of the Standing Committee on the Unauthorized Practice
 of Law:

TREASURER

Andrew M. O'Malley
 Carey O'Malley Whitaker Et Al
 712 S. Oregon Avenue
 Tampa, FL 33606-2543
 (813) 250-0577
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As the Chair and on behalf of the Real Property, Probate and
 Trust Law Section of The Florida Bar ("RPPTL Section"), I am sending
 you this request for an advisory opinion from the Florida Bar's Standing
 Committee on the Unauthorized Practice of Law (the "UPL Standing
 Committee") to determine whether certain activities constitute the
 unauthorized practice of law when performed by Community
 Association Managers. The Section's primary concern in raising these
 issues is the protection of the public.

LEGISLATION CHAIR

Barry Spivey
 Spivey & Fallon, P.A.
 1515 Ringling Blvd Ste 885
 Sarasota, FL 34236
 (941) 8401991
barry.spivey@spiveyfallonlaw.com

The RPPTL Section identifies in this request certain activities
 occasioned by changes in Florida law which we believe your Committee
 has not previously considered, and we seek your guidance as to whether
 those activities constitute the unauthorized practice of law. In addition,
 the Section identifies in this request additional activities which we
 believe your Committee and the Supreme Court of Florida have
 previously considered, and we seek your confirmation that these actions
 continue to constitute the unlicensed practice of law.

DIRECTOR, AT LARGE MEMBERS

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debraboje@ruden.com

We believe that clarification of these issues will serve to protect
 the public interest, will reduce harm to the public, and will supply
 needed clarification to board members, managers and attorneys involved
 in the area of community association law.

IMMEDIATE PAST CHAIR

Brian J. Felcoski
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 (305) 446-2800
 Fax: (305) 446-2819
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PROGRAM ADMINISTRATOR

Yvonne D. Sherron
 The Florida Bar
 651 E. Jefferson Street
 Tallahassee, FL 32399-2300
 (850) 561-5626

The last time some of these issues were fully reviewed by this Committee or by the Florida Supreme Court was in 1996 when the Court affirmed the proposed opinion of the Committee in The Florida Bar re: Advisory Opinion-Activities of Community Association Managers, 681 So.2d 1189 (Fla. 1996). Since that time there have been numerous revisions, year after year, to the chapters of Florida Statutes relevant to the operation of community associations and the licensing and conduct of community association management including, but not limited to, Chapters 718, 719, 720, 723, 617, and 468, Florida Statutes.

The Court's 1996 opinion determined that the following constituted the practice of law: i) drafting a claim lien; drafting a satisfaction of lien; ii) preparing a notice of commencement; iii) determining the timing, method and form of giving notices of meetings; iv) determining the votes necessary for certain actions by community associations; v) addressing questions asking for the application of a statute or rule; and vi) advising community associations whether a course of action is authorized by statute or rule. The Court further identified a "grey area" which involved activities that may or may not constitute the practice of law depending upon the relevant facts.

I. EXISTING ACTIVITY THAT CONSTITUTES THE UNLICENSED PRACTICE OF LAW INCLUDES OF PREPARATION OF CLAIM OF LIEN (AS SHOULD ALL SIMILAR ACTIVITY).

The Supreme Court has already determined that the preparation of a claim of lien for unpaid assessments is the practice of law. *The Florida Bar Re: Advisory Opinion-Activities of Community Association Managers*, 681 So.2d 1119 (Fla. 1996). Preparation of a claim of lien for unpaid association assessments is not merely a ministerial or secretarial act. If a non-lawyer prepares an association assessment lien, then the non-lawyer is engaged in the practice of law.

Yet, most collection activities are resolved long prior to the lien stage and no one is ensuring such charges are being tabulated in accordance with Florida law. Although there is no comprehensive definition of what constitutes the unlicensed practice of law, the courts consistently cite *State ex rel. Florida Bar v. Sperry*, 140 So.2d 587 (Fla. 1962) for guidance. See also *The Florida Bar v. Neiman*, 816 So.2d 587, 596 (Fla. 2002); *The Florida Bar Re: Advisory Opinion Activities of Community Association Managers*, 681 So.2d 1119 (Fla. 1996); *The Florida Bar RE: Advisory Opinion-Non lawyer Preparation of Notice to Owner and Notice to Contractor*, 544 So.2d 1013, 1016 (Fla. 1989); *The Florida Bar v. Moses*, 380 So.2d 412, 414 (Fla. 1980); *The Florida Bar v. Brumbaugh*, 355 So.2d 1186, 1191 (Fla. 1978).

"It is generally understood that the performance of services in representing another before the courts is the practice of law. But the practice of law also includes the giving of legal advice and counsel to others as to their rights and obligations under the law and the preparation of legal instruments, including contracts, by which legal rights are either obtained, secured or given away, although such matters may not then or ever be the subject of proceedings in a court." *Sperry*, 140 So.2d at 591 (emphasis added).

The reason for prohibiting the practice of law by those who have not been examined and found qualified is "to protect the public from being advised and represented in legal matters by unqualified persons over whom the judicial department can exercise little, if any, control in the matter of infractions of the code of conduct which, in the public interest, lawyers are bound to observe." Brumbaugh at 1189 (citing Sperry at 595).

The Supreme Court held that community association managers ("CAMs") who draft documents requiring the legal description of property or establishing rights of community associations, draft documents requiring interpretations of statutes and various rules, or give advice as to legal consequences of taking certain courses of action engage in the unlicensed practice of law. See Advisory Opinion-Activities of Community Association Managers.

As the Court noted, CAMs are licensed through the Department of Business and Professional Regulation's Bureau of Condominiums and require substantial specialized knowledge of condominium law and fulfill continuing education requirements. *Id.* at 1122. Additionally, the Court recognized that "CAM's are specially trained in the field of community association management." *Id.* at 1124. Notwithstanding CAMs' licensure and specialized training, the Court held that drafting a claim of lien must be completed with the assistance of a licensed attorney. *Id.* at 1123.

"Drafting both a claim of lien and satisfaction of claim of lien requires a legal description of the property; it establishes rights of the community association with respect to the lien, its duration, renewal information, and action to be taken on it. The claim of lien acts as an encumbrance on the property until it is satisfied. ***Because of the substantial rights which are determined by these documents, the drafting of them must be completed with the assistance of a licensed attorney.***" *Id.* at 1123 (Emphasis added).

Similarly, applying the Court's logic to other community association activities, requires that only lawyers perform certain tasks.

By way of example, and often overlooked, to properly prepare a claim of lien, one must perform the following activity:

- 1) Interpret Section 718.116, Florida Stats. (or Section 720.3085, as appropriate);
- 2) Review the Declaration of Condominium (or Declaration of Restrictions, as appropriate);
- 3) Determine the relative rights of the association and owners regarding interest rates;
- 4) Determine if the association has the authority to charge late fees;
- 5) Determine the application of payments received per 718.116 or 720.3085, as applicable;

- 6) Determine any obligation to take payments;
- 7) Identify the record title holders;
- 8) Consider the application of Bankruptcy law and Fair Debt Collections Practices Act;
- 9) Interpret the delivery requirements and notice requirements for pre-lien letters;
- 10) Determine if fines, estoppel charges and other charges are both collectable and lienable;
- 11) Analyze the legal sufficiency of legal defenses and counterclaims of owners; and
- 12) Additionally, if one is collecting from a bank that is taking title, one must review the Declaration for Kaufman language (see Kaufman v. Shere, 347 So. 2d 627 (Fla. 3d DCA 1977), analyze lien priority issues, interpret Florida case law regarding joint and several liability issues, analyze unconstitutional impairment of contract rights issues under the recently-decided cases Coral Lakes v. Busey Bank, N.A., 30 So. 2d 579 (Fla. 2d DCA 2010) and Cohn v. The Grand Condominium Association, Inc., -- So. 3d (No. SCIO-430, March 31, 2011), as well as conduct a third party taking title analysis under Bay Holdings, Inc. v. 2000 Island Boulevard Condo. Assn., 895 So. 2d 1197 (Fla. 4th DCA 2005).

II. The Drafting Of The Pre-Arbitration Demand Letter Required By s. 718.1255.

The drafting of pre-arbitration letters should be considered the practice of law as it involves the interpretation of various statutes, and the application of those statutes to specific facts. The drafting of statutorily required pre-arbitration letters is complicated, even for lawyers. Section 718.1255, Florida Statutes, describes the "Mandatory Nonbinding Arbitration Program" administered by the Division of Florida Condominiums, Time Shares and Mobile Homes (the "Division"). Under section 718.1255(4)(b), Florida Statutes, prior to filing a petition for arbitration with the Division, the petitioner is required to serve a pre-arbitration demand letter on the respondent, providing advance written notice of the nature of the dispute, making a demand for specific relief, allowing the respondent a reasonable opportunity to comply, and stating an intent to file a petition for arbitration or other legal action if the demand is not met with compliance.

This particular issue is quite germane to the instant matter. By way of background, and not too long ago, a Division arbitrator held that because the law did not specifically provide an activity was the practice of law, such activity was not required to be performed by a lawyer. In Dania Chateau De Ville Condo Association v. Zalberg, Arb. Case No. 2009-04-0877 (Whitsitt/Final Order of Dismissal/August 17, 2009), the Division arbitrator held, in relevant part, that

"a pre-arbitration demand notice which demanded attorney's fees for the act of writing the demand letter was ineffective under the statute. There is no

requirement that an attorney prepare the letter and the statute does not authorize its inclusion into the demand letter."

A summary of the Division's arbitration decisions that evidence the legal complications surrounding all aspects of the statutorily required pre-arbitration letters all but demand such activities must be carried out by lawyers. A brief summary of several such cases follows:

- 1) Pre-arbitration demand letter which demands immediate removal of dog did not provide the unit owner with a reasonable opportunity to comply with the demand, and was insufficient statutory notice. Petition dismissed. Brickell Place Condominium Association v. Sanz, Arb. Case No. 2010-06-1240 (Campbell/ Final Order of Dismissal/ December 15, 2010).
- 2) Pre-arbitration demand requiring removal of trash on the outside patio within 7 days provides a reasonable opportunity for compliance. However, where letter simply provided that the failure to remove the trash would result in maintenance personnel moving it, letter did not put the owner on notice of impending legal action. Belmont at Park Central Condominium Association v. Levy, Arb. Case No. 2011-00-6468 (Lang/ Order Requiring Proof of Pre-Arbitration Notice/ February 11, 2011).
- 3) Where pre-arbitration demand letter in case where a tenant kept a prohibited dog provided that the failure to correct the problem would result in eviction along with all legal fees, or other legal action, since eviction is not available in arbitration, the letter failed to advise that arbitration would be pursued and the notice was inadequate under the statute. It was unclear in the letter whether the tenant or the dog would be evicted. Case dismissed. Biscayne Lake Gardens v. Enituxia Group, Arb. Case No. 2010-02-8314 (Lang/ Final Order of Dismissal/ July 1, 2010).
- 4) It is improper and contrary to the statute for the pre-arbitration demand notice to incorporate a demand for the payment of attorney's fees. Bixler v. Gardens of Sabel Palm Condo, Arb. Case No. 2010-03-1915 (Chavis/ Order to Amend Petition/ July 1, 2010).
- 5) Where the governing documents prohibited any dogs, pre-arbitration demand letter which offered to permit the owner to keep one illegal dog while removing other dog claimed to be a service animal and requiring a payment of \$9,812 in attorney's fees to the association does not provide the unit owner with a reasonable opportunity to comply with the documents and was not a valid pre-arbitration demand letter. Boca View Condo Association v. Kowaleski, Arb. Case No. 2010-02-2907 (Chavis/ Order to Show Cause/ May 7, 2010).
- 6) Pre-arbitration demand notice which demanded \$300 did not comply with the statute. Coach Houses of Town Place Condominium Association v. Koll, Arb. Case No. 2011-01-0234 (Lang/ Order to Show Cause/ March 9, 2011).

- 7) Pre-arbitration demand letter requirement is not a mere perfunctory step taken before a petition for arbitration is filed. Demand letter sent the same day as the mailing of the petition for arbitration did not afford respondents a reasonable opportunity to comply by providing the relief requested. Collonade Condominium Association v. Shore, Arb. Case No. 2010-01-1460 (Slaton/ Order to Show Cause/ October 15, 2010).
- 8) Posting a demand notice by attaching a copy of it to an unspecified place on the condominium property will not be considered adequate delivery of the notice. Decoplage Condo Association v. Abraham, Arb. Case No. 2009-041016.
- 9) Pre-arbitration demand notice that contained fair debt disclosure gives the impression that the letter was a debt collection effort instead of an enforcement effort. Case dismissed for lack of pre-arbitration notice. Eagles Point Condominium Association, Inc. v. DeBelle, Arb. Case No. 2011-028477 (Jones/ Order to Show Cause/ June 16, 2011).
- 10) Where association did not name a co-owner of the unit as a respondent and did not evidently serve pre-arbitration notice on the co-owner, association ordered to show cause why the petition should not be dismissed. Fiore at the Gardens Condo Association v. Anderson, Arb. Case No. 2010-00-6650 (Slaton/ Order to Show Cause/ February 16, 2010).
- 11) Petition dismissed for failure to join co-owner notwithstanding argument that the co-owner had failed to notify the association upon his acquisition of an interest in the unit in violation of the documents. Fiore at the Gardens Condo Association v. Anderson, Arb. Case No. 2010-00-6650 (Slaton/ Final Order Dismissing Petition/ March 5, 2010).
- 12) Where association had knowledge that Jake the golden retriever had been "conveyed" to two individuals, "as joint owners, with right of survivorship," the failure to join both individuals and to provide pre-arbitration notice to each putative owner rendered the petition for arbitration, defective. Grove Island Association, Inc. v. Frumkes, Arb. Case No. 2011-01-1343 (Jones/ Final Order of Dismissal/ May 4, 2011).
- 13) Where pre-arbitration notice was addressed to "Terrainind Gulf Drive" instead of the correct address Terrain de Golf Drive and where there was no proof that the pre-arbitration notice was actually received, the case was dismissed. Heatherwood Condominium Association of East Lake, Inc. v. Carollo, Arb. Case No. 2011-01-1495 (Lang/ Final Order of Dismissal/ June 20, 2011).

While this list of relevant decisions clearly evidences the need to ensure the pre-arbitration letters are drafted by lawyers, there are at least twenty more cases decided in the past two years that can be cited to illustrate this point. The need for clarification is *particularly important* because, as previously explained, the Division has specifically held in a final order that the statute does not require an attorney to draft this very important letter. As a result, non-

lawyers have accepted the Division's invitation and have begun producing these letters. It is very likely the public will be harmed because the letters will be rejected, and the petition for arbitration will be dismissed, resulting in a delay in the enforcement of the community documents and ultimately leads to increased legal expense by those who can afford it the least.

III. Other Activity That Should Constitute The Practice of Law.

There are other activities that go far beyond mere ministerial acts and are illustrative as the performance of services that can only be described as the practice of law. Determining "rights" under Florida statutes is most definitely the practice of law. Further, many of these activities generate fees, presumably, collected from unit owners or the association. Under what legal authority is the non-lawyer charging and collecting from condominium unit owners or homeowners' association parcel owners more than assessments, interest, late charges, costs and attorneys fees?

Each of the following activities should be clarified as an activity that can be performed for a Community Association only by a lawyer:

- 1) Preparation of a Certificate of assessments due once the delinquent account is turned over to the association's lawyer.
- 2) Preparation of a Certificate of assessments due once a foreclosure against the unit has commenced.
- 3) Preparation of Certificate of assessments due once a member disputes in writing to the association the amount alleged as owed.
- 4) Drafting of amendments (and certificates of amendment that are recorded in the official records) to declaration of covenants, bylaws, and articles of incorporation when such documents are to be voted upon by the members.
- 5) Determination of number of days to be provided for statutory notice.
- 6) Modification of limited proxy forms promulgated by the State.
- 7) Preparation of documents concerning the right of the association to approve new prospective owners.
- 8) Determination of affirmative votes needed to pass a proposition or amendment to recorded documents.
- 9) Determination of owners' votes needed to establish quorum.
- 10) Drafting of pre-arbitration demands (see above).
- 11) Preparation of construction lien documents (e.g. notice of commencement, and lien waivers, etc.)

- 12) Preparation, review, drafting and/or substantial involvement in the preparation/execution of contracts, including construction contracts, management contracts, cable television contracts, etc.
- 13) Identifying, through review of title instruments, the owners to receive pre-lien letters.
- 14) Any activity that requires statutory or case law analysis to reach a legal conclusion.

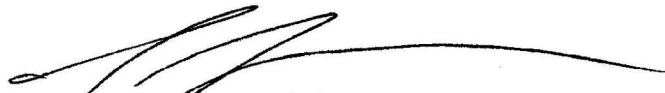
With the aforementioned in mind and pursuant to Rule 10-9.1 of the Rules Regulating The Florida Bar, the UPL Standing Committee may issue proposed formal advisory opinions concerning activities which may constitute the unlicensed practice of law. The RPPTL Section kindly requests that the UPL Standing Committee do so as noted herein.

IV. Final Considerations.

Simply put, many attorneys find they are devoting more and more resources responding to the types of issues noted in this request that would not have occurred, but for what appears to be the continued rendering of legal advice by non-lawyers.

With few exceptions, there remains great uncertainty as to which specific activities when performed by Community Association Managers, constitute the unlicensed practice of law. To provide greater clarity and protection of the public, we believe it is incumbent upon the UPL Standing Committee of The Florida Bar to bring these issues to the Supreme Court of Florida for the Court's consideration.

Very Truly Yours,



George J. Meyer, Chair
Real Property, Probate and Trust Law Section

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Ad Hoc Estate Planning Conflicts of Interest Committee of the Real Property Probate & Trust Law Section

Address William T. Hennessey, Chair, Gunster, Yoakley, 777 S. Flagler Drive, Suite 500E, West Palm Beach, FL 33401; Telephone: (561) 650-066

Position Type Ad Hoc Estate Planning Conflicts of Interest Committee, RPPTL Section, The Florida Bar

CONTACTS

Board & Legislation Committee Appearance William T. Hennessey, Gunster, Yoakley, 777 S. Flagler Drive, Suite 500E, West Palm Beach, FL 33401, (561) 650-0663
Barry F. Spivey, Adams and Reese LLP, P.O. Box 49017, Sarasota, Florida 34230-6017 (941) 316-7600
Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, FL 32302-2095, (850) 222-3533
Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, FL 32302-2095, (850) 222-3533

Appearances before Legislators Same

Meetings with Legislators/staff Same

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

**If Applicable,
List The Following**

(Bill or PCB #)

(Bill or PCB Sponsor)

Indicate Position	XX	Support	Oppose	Technical Assistance	Other
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Proposed Wording of Position for Official Publication "Support legislation that would render any part of a written instrument which makes a gift to a lawyer or a person related to the lawyer void if the lawyer prepared or supervised the execution of the written instrument, or solicited the gift, unless the lawyer or other recipient of the gift is related to the person making the gift."

Reasons For Proposed Advocacy Rule 4-1.8 of the Rules Regulating the Florida Bar prohibits a lawyer from soliciting a substantial gift from a client, or preparing an instrument making a substantial gift to the lawyer from the client, unless the lawyer and client are related. However, a violation of this Rule does not give rise to a civil cause of action or render the gift to the lawyer void as a matter of law. As a consequence, a lawyer may violate this Rule and, under certain circumstances, still be entitled to retain a gift or bequest from his or her client even though the lawyer is subject to discipline. Further, even if the bequest or gift is set aside, the ultimate beneficiaries of the estate or trust may be forced to deplete the assets of the estate or trust or expend personal funds in attorneys' fees and costs challenging the validity of the gift. The proposed legislation will

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position None
(Indicate Bar or Name Section) (Support or Oppose) (Date)

Others
(May attach list if None
more than one)
(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

1. Professional Ethics Committee of the Florida Bar
(Name of Group or Organization) (Support, Oppose or No Position)
2. (Name of Group or Organization) (Support, Oppose or No Position)
3. (Name of Group or Organization) (Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.

WPB_ACTIVE 5084524.1

1 A bill to be entitled

2 An act relating to gifts to lawyers and other disqualified persons; creating s.
3 732.806; providing that a gift to a lawyer or person related to the lawyer is void if
4 the lawyer prepared or supervised the execution of the written instrument or
5 solicited the gift unless the lawyer or other recipient of the gift is related to the
6 person making the gift; providing an effective date.

7
8 Be It Enacted by the Legislature of the State of Florida:

9
10 Section 1. Section 732.806, Florida Statutes, is created to read:

11 732.806 Gifts to Lawyers and Other Disqualified Persons.-

12 (1) Any part of a written instrument which makes a gift to a lawyer or a person
13 related to the lawyer is void if the lawyer prepared or supervised the execution of the written
14 instrument, or solicited the gift, unless the lawyer or other recipient of the gift is related to the
15 person making the gift.

16 (2) This section is not applicable to a provision in a written instrument appointing a
17 lawyer, or a person related to the lawyer, as a fiduciary.

18 (3) A provision in a written instrument purporting to waive the application of this
19 section is unenforceable.

20 (4) If property distributed in kind, or a security interest in that property, is acquired
21 by a purchaser or lender for value from a person who has received a gift in violation of this
22 section, the purchaser or lender takes title free of any claims arising under this section and
23 incurs no personal liability by reason of this section, whether or not the gift is void under this
24 section.

25 (5) In all actions brought under this section, the court shall award taxable costs as in
26 chancery actions, including attorneys' fees. When awarding taxable costs and attorneys' fees
27 under this section, the court, in its discretion, may direct payment from a party's interest, if any,
28 in the estate or trust, or enter a judgment that may be satisfied from other property of the party,
29 or both. Attorneys' fees and costs shall not be awarded against a party who, in good faith,
30 initiates an action under this section to declare a gift void.

31 (6) If any part of a written instrument is invalid by reason of this section, the
 32 invalidity shall not affect any other part of the written instrument that can be given effect,
 33 including terms which make an alternate or substitute gift, and to this end the invalid parts are
 34 severable. In the case of a power of appointment, this section does not affect the power to
 35 appoint in favor of persons other than the lawyer or a person related to the lawyer.

36 (7) For purposes of this section:

37 (a) A lawyer shall be deemed to have prepared, or supervised the execution of, a
 38 written instrument if the preparation, or supervision of the execution, of the written instrument
 39 was performed by an employee or lawyer employed by the same firm as the lawyer.

40 (b) A person is "related" to an individual if, at the time the lawyer prepared or
 41 supervised the execution of the written instrument or solicited the gift, the person is:

42 (1) A spouse of the individual;

43 (2) A grandparent, or lineal ascendant or descendant of a grandparent, of the spouse
 44 of the individual;

45 (3) A grandparent, or lineal ascendant or descendant of a grandparent, of the
 46 individual;

47 (4) A relative of the individual, or of the individual's spouse, with whom the lawyer
 48 maintains a close, familial relationship;

49 (5) A spouse of a person described in subparagraph (b)(3). or subparagraph (b)4.; or

50 (6) A person who cohabitates with the individual.

51 (c) The term "written instrument" includes, but is not limited to, a will, a trust, a
 52 deed, a document exercising a power of appointment, or a beneficiary designation under a life
 53 insurance contract or any other contractual arrangement which creates an ownership interest or
 54 permits the naming of a beneficiary.

55 (d) The term "gift" includes an inter vivos gift as well a testamentary transfer of real
 56 or personal property or any interest therein, regardless of whether the gift is outright or in trust,
 57 and regardless of when the transfer is to take effect; and the power to make such a transfer,
 58 whether the power is held in a fiduciary or non-fiduciary capacity.

59 (8) The rights and remedies granted in this section are in addition to and not in
 60 derogation of any other rights or remedies any person may have at law or equity.

61 (9) This section shall take effect on July 1, 2013 and shall apply to all written
62 instruments executed after its effective date.

63
64 Section 2. This act shall take effect July 1, 2013 and shall apply to all written
65 instruments executed after its effective date.
66

WHITE PAPER

PROPOSED LEGISLATION REGARDING GIFTS TO LAWYERS

I. SUMMARY

The Supreme Court of Florida has adopted Rules Regulating the Florida Bar (the "Rules"). Chapter 4 of the Rules contains the Rules of Professional Conduct for lawyers. Rule 4-1.8 deals with issues concerning conflict of interest and prohibited transactions. Rule 4-1.8(c) provides in pertinent part as follows:

A lawyer shall not solicit any substantial gift from a client, including a testamentary gift or prepare on behalf of a client an instrument giving the lawyer or person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to client.

On its face, Rule 4-1.8 appears to prohibit a lawyer from preparing a will, trust, or other written instrument making a testamentary or inter vivos gift to the lawyer or the lawyer's family except in the limited circumstance when the lawyer or recipient of the gift is related to the client. Given the nature of the confidential relationship between a lawyer and a client, Rule 4-1.8(c) serves the important purpose of protecting the client from potential overreaching and impropriety by the lawyer by prohibiting the lawyer from preparing the instrument which makes the gift.

The violation of this Rule, however, does not give rise to a civil cause of action or render the gift to the lawyer void as a matter of law. As a consequence, a lawyer may violate this Rule and, under certain circumstances, still be entitled to retain the gift or bequest from his or her client even though the lawyer is subject to discipline. Further, even if the bequest or gift is set aside, the ultimate beneficiaries of the estate or trust may be forced to deplete the assets of the estate or trust or expend personal funds in attorneys' fees and costs challenging the validity of the gift. To that end, the Rule does not go far enough in protecting the public.

The Real Property Probate and Trust Law Section of the Florida Bar created an ad hoc committee in 2010 to examine the law in the area and determine whether a statute specifically addressing the issue of gifts to lawyers was necessary. The Ad Hoc Estate Planning Conflicts of Interest Committee has proposed a new statute, Florida Statutes § 732.806, to address this issue. The proposed legislation makes a gift to a lawyer, or certain people related to, or affiliated with, the lawyer, void if the lawyer prepares the instrument making the gift, or solicits the gift, unless the lawyer or recipient of the gift is related to the client.

II. CURRENT LAW

The issue of whether an attorney may draft a will in which he or she is named as a beneficiary is not a new or novel question. Indeed, as explained by Honorable Judge Lauren C. Laughlin in the Estate of Virginia Murphy, Case 06-6744ES-4 (Fla. Cir. Ct. August 1, 2008), the prohibition on the scrivener of a will inheriting under it dates back to Roman law. Murphy, at 7 (citing Dig. 48.15 supplement to the *lex cornelia* ordered in edict by Emperor Claudius). Nevertheless, Florida law does not specifically prohibit such a practice.

In fact, in the absence of a specific statutory prohibition, Florida courts have held that a violation of Rule 4-1.8 does not render a gift to the lawyer in violation of the Rule void. In Agee v. Brown, 73 So. 3d 882 (Fla. 4th DCA 2011), the 4th DCA reversed the trial court which had found that a gift to a drafting lawyer under a will was void as a matter of law because it violated Rule 4-1.8 and public policy. The Agee court held that the trial court had improperly “incorporated Rule 4-1.8(c) of the Rules Regulating The Florida Bar into the statutory framework of the probate code.” Id. at 886. The court found that this interpretation was erroneous as “[i]t is a well-established tenet of statutory construction that courts are not at liberty to add words to the statute that were not placed there by the Legislature.” Id. The court noted that the “best way to protect the public from unethical attorneys in the drafting of wills . . . is entirely within the province of the Florida Legislature.” Id. at 887.

In the absence of a specific statute rendering a gift void, beneficiaries are left to challenge the instrument based upon standard allegations of fraud, undue influence, and duress. *See id.* This is precisely what happened in the Estate of Murphy decision. In that case, the decedent’s heir-at-law challenged gifts to, among others, the lawyer who drafted the decedent’s will, the lawyer’s secretary, and the decedent’s accountant. The lawyer, secretary, and accountant had each entered into an agreement not to sue each other for actions in connection with Mrs. Murphy’s estate planning. The court referred to this agreement in her opinion as a document which “wreaks of consciousness of fraud.” Murphy, at 22 (Exhibit B).

Like Agee, the Murphy court refused to find the gift void as a matter of law. Instead, the decedent’s heir-at-law was forced to rely upon a claim for undue influence. The court noted the difficulties of proof which a contestant can face in such cases:

“The nature of the attorney-client relationship in matters testamentary is a particularly circumspect matter for the courts. The decisions that go into the drafting of a testamentary instrument are inherently private. Because the testator will not be available to correct any errors that the attorney may have made when the will is offered for probate, a client is especially dependent upon an attorney’s advice and professional skill when they consult an attorney to have a will drawn. A client’s dependence upon, and trust in, an attorney’s skills, disinterested advice, and ethical conduct exceeds the trust and confidence found in most fiduciary relationships. Seldom is the client’s dependence upon, and trust in, his attorney greater than when, contemplating his own mortality, he seeks the attorney’s advice, guidance and drafting skill in the preparation of a will to dispose of his estate after death. These consultations are among the most private to take place between an attorney and his client.”

Murphy, at 8.

Judge Laughlin discussed the fact that Rule 4-1.8 itself is not enough to prevent or dissuade overreaching by lawyers in the area of testamentary gifts. “The court cannot help but speculate on whether the lawyer made a cost/benefit analysis, weighing the risks of being charged with a disciplinary infraction (having no intention of continuing to practice law) against the economic benefits to be derived from the conduct.” Id. at 26.

III. EFFECT OF PROPOSED STATUTORY CHANGE

The proposed legislation adds a new section to the Florida Probate Code that would render any part of a written instrument which makes a gift to a lawyer or a person related to the lawyer void if the lawyer prepared or supervised the execution of the written instrument, or solicited the gift, unless the lawyer or other recipient of the gift is related to the person making the gift. This new section makes the gift *void* rather than *voidable*. The new statute will prevent unnecessary litigation over whether the client intended to make the gift to the lawyer taking the case out of a contested evidentiary proceeding after the decedent's death. The statute does not prevent a lawyer from inheriting from a client. Indeed, a client is free to draft a will or other instrument making a gift to the lawyer or the lawyer's family. The statute merely prevents the lawyer or persons related to the lawyer from preparing the document making the gift. In such circumstances, the client should be advised to go to an independent lawyer to have the instrument making the gift prepared. The statute makes an exception for the typical situation in which the lawyer prepares a document for a family member or other related person.

A section-by-section analysis of the proposed legislation captioned "Section 732.806. Gifts to Attorneys and Other Disqualified Persons" follows:

A. Effect of Subsection (1) to § 732.806

Subsection (1) provides that any part of a written instrument which makes a gift to a lawyer or a person related to the lawyer is void if the lawyer prepared or supervised the execution of the written instrument, or solicited the gift, unless the lawyer or other recipient of the gift is related to the person making the gift.

Under Subsection (1), the gift is void. As a consequence, the lawyer or other disqualified person will not be permitted to defend the gift by arguing intent or offering other proof of the legitimacy of the gift once it is proven that the lawyer prepared or supervised the execution of the written instrument, or solicited the gift. The client may still make a gift by having independent counsel prepare the written instrument.

Subsection (7) of the statute defines terms used in Subsection (1) including when a person is deemed to have prepared or supervised the execution of an instrument and when a person is deemed to be "related" for purposes of the statute. Those definitions will be discussed below.

B. Effect of Subsection (2) to § 732.806

Under Florida law, a lawyer may prepare a will or trust nominating the lawyer as a fiduciary. The Rules specifically recognize that such a practice is not prohibited. The comment to Rule 4-1.8 provides that the "rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as personal representative of the client's estate or to another potentially lucrative fiduciary position." Subsection (2) makes it clear that the proposed statute does not prevent a lawyer from preparing a document naming the lawyer as fiduciary or otherwise appoint to render such an appointment void.

C. Effect of Subsection (3) to § 732.806

Subsection (3) of the proposed statute makes it clear that the application of the statute cannot be waived by the client. The risk of overreaching by the lawyer in obtaining a waiver in such circumstances is too great. Further, the difficulties involved in proving whether the client gave informed consent for the waiver is not practical given the fact that in many circumstances the client is deceased at the time of the challenge.

D. Effect of Subsection (4) to § 732.806

Subsection (4) provides that purchasers for value and lenders take title free of any claims arising under this section and incur no personal liability by reason of this section, whether or not the gift is void under this section. This Subsection is intended to protect bona fide purchasers and lenders who deal with a recipient of a gift which is otherwise void under this section. In such a circumstance, the beneficiaries would have no claim against the bona fide purchaser or lender, but would have a claim to recover the proceeds of the sale from the recipient of the invalid gift.

E. Effect of Subsection (5) to § 732.806

Subsection (5) provides that the court shall award taxable cost as in chancery actions, including attorney's fees in claims made under this section. When awarding fees and costs in the context of an estate or trust, the court has discretion to direct all or part of the payment from a party's interest in an estate or trust, or to enter a judgment that may be satisfied from other property of the party. The subsection also provides that attorneys' fees and costs shall not be awarded against a party who, in good faith, initiates an action under this section to declare a gift void. This subsection is intended to deter persons from drafting wills in violation of the section by placing them at risk for fees and costs and to encourage beneficiaries and other interested persons to initiate good faith challenges to invalid gifts.

F. Effect of Subsection (6) to § 732.806

Subsection (6) provides that if any part of a written instrument is invalid by reason of this section, the invalidity shall not affect any other part of the written instrument that can be given effect, including terms which make an alternate or substitute gift, and to this end the invalid parts are severable. It also provides that in the case of a power of appointment, this section does not affect the power to appoint in favor of persons other than the lawyer or a person related to the lawyer. Subsection (6) is intended to make it clear that only the gift to the lawyer or other disqualified person is invalid. The remainder of the written instrument is to be given effect unless it is invalid for other reasons.

G. Effect of Subsection (7) to § 732.806

Subsection (7) defines several of the key terms and concepts used in the section.

A lawyer is deemed to have "prepared, or supervised the execution of, a written instrument" if the preparation, or supervision of the execution, of the written instrument was

performed by an employee or lawyer employed by the same firm as the lawyer. This definition is intended to prevent a lawyer from avoiding the application of the statute by having another lawyer or employee in their firm prepare the document.

A person is "related" to an individual if, at the time the lawyer prepared or supervised the execution of the written instrument or solicited the gift, the person is: (a) a spouse of the individual; (b) A grandparent, or lineal ascendant or descendant of a grandparent, of the spouse of the individual; (c) a grandparent, or lineal ascendant or descendant of a grandparent, of the individual; (d) a relative of the individual or of the individual's spouse with whom the lawyer maintains a close, familial relationship; (e) a spouse of any persons listed in (c) or (d) above; or (f) a person who cohabitates with the individual. This definition recognizes that it is natural for a lawyer to be asked to prepare a written instrument making a gift by a relative or other person with whom the lawyer shares a close, familial relationship. The statute does not render a gift a void in such circumstances.

The term "written instrument" includes, but is not limited to, a will, a trust, a deed, a document exercising a power of appointment, or a beneficiary designation under a life insurance contract or any other contractual arrangement which creates an ownership interest or permits the naming of a beneficiary. The statute is intended to cover all forms of written instruments by which a donor/client may be able to grant property rights.

The term "gift" includes an inter vivos gift as well a testamentary transfer of real or personal property or any interest therein, regardless of whether the gift is outright or in trust, and regardless of when the transfer is to take effect; and the power to make such a transfer, whether the power is held in a fiduciary or non-fiduciary capacity. The time or form in which the lawyer receives the gift should not matter. Accordingly, the statute is intended to cover all manner of gifts.

G. Effect of Subsection (8) to § 732.806

Subsection (8) provides that the proposed statute does not limit the rights that any litigant may have under existing Florida law. There may be other causes of action available when a lawyer prepares an instrument making a gift to the lawyer or solicits a gift from the client. For example, there may be claims for breach of fiduciary duty, tortious interference with an expectancy, fraud, duress, or undue influence. This statute is not intended to limit such claims.

H. Effect of Subsection (9) to § 732.806

Subsection (9) provides that the statute only applies to written instruments executed after the effective date of the statute.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

This proposal does not have a fiscal impact on state or local governments.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The proposal will prevent financial benefits from passing to a lawyer in favor of the

innocent beneficiaries. Therefore, no net impact on the private sector is expected.

VI. CONSTITUTIONAL ISSUES

There do not appear to be any constitutional issues that arise as a result of this proposal.

VII. OTHER INTERESTED PARTIES

Florida Banker's Association

Professional Ethics Committee of the Florida Bar

WPB_ACTIVE 5000453.1

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Probate Law and Procedure Committee of the Real Property Probate & Trust Law Section

Address Tae Kelley Bronner, Chair, Tae Kelley Bronner, PL, 10006 Cross Creek Blvd., PMB #428 Tampa, FL 33647;
Telephone: (813) 907-6643

Position Type Probate Law and Procedure Committee, RPPTL Section, The Florida Bar

CONTACTS

Board & Legislation Committee Appearance Tae Kelley Bronner, Tae Kelley Bronner, PL, 10006 Cross Creek Blvd., PMB #428 Tampa, FL 33647
Telephone: (813) 907-6643
Barry F. Spivey, Spivey and Fallon, 1515 Ringling Blvd., Suite 885, Sarasota, FL 34236 (941) 840-1991
Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, FL 32302-2095, (850) 222-3533
Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, FL 32302-2095, (850) 222-3533

Appearances before Legislators Same

Meetings with Legislators/staff Same

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable,
List The Following

(Bill or PCB #)

(Bill or PCB Sponsor)

Indicate Position **XX** Support Oppose Technical Assistance Other

Proposed Wording of Position for Official Publication Support amendment clarifying that a probate caveator need not serve itself with its own petition for administration and providing effective date.

Reasons For Proposed Advocacy The proposed change will eliminate confusion as to whether persons filing a caveat must serve themselves with formal notice of their petition for administration.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position

None

Others

(May attach list if
more than one)

None

(Indicate Bar or Name Section)

(Support or Oppose)

(Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

1. (Name of Group or Organization) (Support, Oppose or No Position)
2. (Name of Group or Organization) (Support, Oppose or No Position)
3. (Name of Group or Organization) (Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.

A bill to be entitled

An act relating to probate; amending s. 731.110, F.S.; clarifying that a probate caveator need not serve itself with its own petition for administration and providing effective date.

Be It Enacted by the Legislature of the State of Florida;

Section 1. Subsection (3) of Section 731.110, Florida Statutes, is amended to read:

(3) If a caveat has been filed by an interested person other than a creditor, the court may not admit a will of the decedent to probate or appoint a personal representative until formal notice of the petition for administration has been served on the caveator or the caveator's designated agent and the caveator has had the opportunity to participate in proceedings on the petition, as provided by the Florida Probate Rules. Notwithstanding the foregoing, nothing in this subsection shall require that a caveator be served with formal notice of its own petition for administration.

Section 2. This act shall take effect on July 1, 2012 and shall apply only to estates of decedents dying on or after the effective date.

WHITE PAPER

PROPOSED AMENDMENT TO § 731.110(3), FLA. STAT.

I. SUMMARY

The proposed changes to section 731.110(3) of the Florida Statutes are intended to clarify that a caveator who later files a petition for administration is not required to serve formal notice on him or herself (as caveator) before probate of a decedent's estate can commence.

II. CURRENT SITUATION:

Florida Statutes, Section 731.110(3) currently provides as follows:

(3) If a caveat has been filed by an interested person other than a creditor, the court may not admit a will of the decedent to probate or appoint a personal representative **until formal notice of the petition for administration has been served on the caveator or the caveator's designated agent** and the caveator has had the opportunity to participate in proceedings on the petition, as provided by the Florida Probate Rules.

The above described subsection has created confusion in that some circuits when the caveator later files a petition for administration. In those circuits, the caveator is required to actually serve formal notice of the petition on him or herself, as caveator, before the petition for administration can be considered by the court, or, in the alternative, withdraw the caveat. In withdrawing the caveat, a window is opened which permits another party to file a competing petition for administration and actually secure appointment without consideration of the caveat.

III. EFFECT OF PROPOSED CHANGES:

The proposed change will amend section 731.110(3) to clarify that a caveator need not serve formal notice of his or her own petition for administration on him or herself before the

court may consider the petition. The change also alleviates the caveator's need to withdraw the caveat should it fail to provide itself formal notice of its own petition for administration. The changes will eliminate an unnecessary delay in the issues of Letters of Administration to an otherwise qualified personal representative.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

There will be no impact on state and local governments.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

There will be no direct economic impact on the private sector.

VI. CONSTITUTIONAL ISSUES

The proposed change will be applied only to estates of decedents dying on or after the effective date and therefore will have no constitutional issues.

VII. OTHER INTERESTED PARTIES

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Probate Law and Procedure Committee of the Real Property Probate & Trust Law Section

Address Tae Kelley Bronner, Chair, Tae Kelley Bronner, PL, 10006 Cross Creek Blvd., PMB #428 Tampa, FL 33647;
Telephone: (813) 907-6643

Position Type Probate Law and Procedure Committee, RPPTL Section, The Florida Bar

CONTACTS

Board & Legislation Committee Appearance Tae Kelley Bronner, Tae Kelley Bronner, PL, 10006 Cross Creek Blvd., PMB #428 Tampa, FL 33647
Telephone: (813) 907-6643
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Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, FL 32302-2095, (850) 222-3533
Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, FL 32302-2095, (850) 222-3533

Appearances before Legislators Same

Meetings with Legislators/staff Same

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

**If Applicable,
List The Following**

(Bill or PCB #)

(Bill or PCB Sponsor)

Indicate Position	XX	Support	Oppose	Technical Assistance	Other
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Proposed Wording of Position for Official Publication Support amendment to F.S. § 732.901 clarifying that an original will deposited with the court must be maintained in its original form for a period of not less than 20 years.

Reasons For Proposed Advocacy With the implementation of electronic filing and electronic record keeping systems for clerks of courts, there is a risk that original wills will be destroyed as files are converted into electronic records. Original wills are a unique document for which the original must be maintained for examination for evidentiary purposes for many years after the death of the decedent or the close of an estate administration.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position

None

Others

(May attach list if
more than one)

None

(Indicate Bar or Name Section)

(Support or Oppose)

(Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

1. (Name of Group or Organization) (Support, Oppose or No Position)
2. (Name of Group or Organization) (Support, Oppose or No Position)
3. (Name of Group or Organization) (Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.

1 A bill to be entitled

2 An act relating to probate; amending s. 732.901; clarifying that the original will
3 deposited with the court must be maintained in its original form for a period of
4 not less than 20 years, and providing for an effective date.

5
6 Be It Enacted by the Legislature of the State of Florida:

7
8 Section 1. Subsections (1) and (2) of section 732.901, Florida Statutes, are
9 amended and Subsections (3), (4) and (5) are created to read:

10 732.901 Production of wills.—

11 (1) The custodian of a will must deposit the will with the clerk
12 having venue of the estate of the decedent within 10 days after receiving
13 information that the testator is dead. The custodian must supply the testator's date
14 of death or the last four digits of the testator's Social Security number to the clerk
15 upon deposit.

16 (2) Upon petition and notice, the custodian of any will may be
17 compelled to produce and deposit the will as ~~provided in subsection (1)~~. All
18 costs, damages, and a reasonable attorney's fee shall be adjudged to petitioner
19 against the custodian if the court finds that the custodian had no just or reasonable
20 cause for failing to timely deposit the will.

21 (3) An original will submitted to the clerk with a petition or other
22 pleading shall be deemed to have been deposited with the clerk.

23 (4) Upon receipt of an original will, the clerk must retain and
24 preserve that will in its original form for a period of not less than 20 years. If the
25 probate of a will is initiated, the original will may be maintained by the clerk with
26 the other pleadings during the pendency of the proceedings, but the will must at
27 all times be retained in its original form for the remainder of the 20 year period
28 whether or not the will has been admitted to probate or the proceedings are
29 terminated. Transforming and storing a will on film, microfilm, magnetic,
30 electronic, optical or other substitute media or recording a will onto an electronic
31 record keeping system, whether or not in accordance with the standards adopted

32 by the Supreme Court of Florida, or permanently recording a will does not
33 eliminate the requirement to preserve the original will.

34 (5) For purposes of this section, the term "will" shall include a
35 separate writing described in s. 732.515.

36
37 Section 2. This act shall take effect July 1, 2013.
38

39 WPB_ACTIVE 5087113.1

WHITE PAPER

PROPOSED AMENDMENT TO § 732.901, FLA. STAT.

I. SUMMARY

The proposed changes to section 732.901 of the Florida Statutes are intended to require that an original will deposited with the clerk of court must be held in its original form for a period not less than 20 years.

II. Current Situation

The Florida Supreme Court is currently considering changes to the Rules of Judicial Administration to facilitate the implementation of electronic filing and record keeping for all circuit courts in the state of Florida. While the Real Property, Probate and Trust Law Section supports the implementation of electronic filing, the proposed rule changes will have a significant impact on the records retention rules for all probate documents. Of particular concern is the impact the proposed amendments will have on the retention of original wills and codicils.

Original wills and codicils are unique documents for which the original must be retained for an extended period of time for evidentiary purposes. In probate proceedings, original wills and codicils and information regarding the identity of interested persons is often submitted ex parte. If the proper notice is not provided, it may be months or even years before the true heirs of the decedent learn of the administration. If proper notice was not provided, the interested person may be able to petition to reopen the estate even after a final order is issued. In addition, in many cases a will or codicil is filed and the estate is never opened. It may be years later, upon the death of another family member, that the prior original will and its deposit with the court may be discovered, or if known, that probate of the will may be required. If a forgery has occurred or a will has been altered in some way, the retention of the original documents is crucial from an evidentiary standpoint to establish the true beneficiaries of an estate.

Because of the unique nature of the documents, F.S. 732.901 currently provides that original wills are “deposited”, not filed with the clerk. Further, the Clerk’s Schedule (GS-11) for the General Records Schedules for all agencies, posted on the Department of State’s Division of Library Services website, requires the clerk to retain an original will deposited for safekeeping for 20 years. However, once a probate proceeding is initiated, the will may be added to the court file. While this does not currently pose a danger, under the proposed amendments to the Rules of Judicial Administration the addition of the original will to the court file appears to permit the clerk to scan the original, store the copy within the electronic record keeping system and then destroy the original will.

To clarify the unique evidentiary importance of the original will and codicil, the Probate Rules Committee has requested the Florida Supreme Court enact the following rule which provides as follows:

Rule 5.043

Notwithstanding any rule to the contrary, and unless the court orders otherwise, any original executed will or codicil deposited with the court shall be retained by the clerk in its original form and may not be destroyed or disposed of by the clerk for 20 years after submission regardless of whether the will or codicil has been permanently recorded as defined by Rule 2.430, Florida Rules of Judicial Administration.

The proposed changes to F.S. 732.901 mirror the proposed new probate rule and clarify that all wills and codicils are “deposited” not filed. In addition, regardless of where the original is maintained by the clerk, the original will or codicil must be maintained in its original form for a period not less than 20 years.

III. EFFECT OF PROPOSED CHANGES:

The proposed changes will amend section 732.901, Fla. Stat., to clarify that all original wills and codicils submitted to the clerk are deposited not filed. The amendment also clarifies when an original will or codicil can be submitted. Any original will or codicil deposited with the clerk must then be maintained by the clerk in its original for a period of not less than 20 years.

For record keeping purposes, the clerk may maintain the will or codicil as part of the probate file, however, the original will or codicil may not be scanned and destroyed during the 20 year period. Further, the amendment clarifies that the term “will” shall also include a separate writing as defined in section 732.515, Fla. Stat., to avoid any confusion. Separate writings permitted by statute to be referred to in a will often contain devises of valuable pieces of art or other tangible property and are subject to the same dangers of forgery or alteration as an original will or codicil.

Finally, the amendment revises the statute to require only the last four digits of the decedent’s social security number be supplied to the clerk upon deposit of the original document to comply with the new confidentiality rules.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

There will be no impact on state and local governments.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

There will be no direct economic impact on the private sector.

VI. CONSTITUTIONAL ISSUES

The amendment does not involve any constitutional issues.

VII. OTHER INTERESTED PARTIES

Florida Association of Court Clerks and Comptrollers

Florida Clerks of Court

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Shane Kelly, Chair, Trust Law Committee of the Real Property Probate & Trust Law Section (RPPTL Approval Date _____, 2012)

Address 3365 Galt Ocean Drive
Fort Lauderdale, Florida 33308
Telephone: 954-563-1400

Position Type Prepared by Trust Law Subcommittee on Unclaimed Property, RPPTL Section, The Florida Bar, Stacey Cole as Subcommittee Chair

CONTACTS

Board & Legislation Committee Appearance

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Barry F. Spivey, Spivey & Fallon, PA, 1515 Ringling Blvd., Suite 885,
Sarasota, FL 34236 Telephone 941-840-1991
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10095, Tallahassee, Florida 32302-2095, Telephone (850) 222-3533
Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O.
Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533

Appearances

Before Legislators (SAME)
(List name and phone # of those having face to face contact with Legislators)

**Meetings with
Legislators/staff** (SAME)
(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable,

List The Following N/A
(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position Support ☒ Oppose _____ Tech Asst. _____ Other _____

Proposed Wording of Position for Official Publication:

"Support proposed legislation that would shorten the holding period for a trustee under a trust instrument of unclaimed property held in trust from five years to two years. Clarify that existing statute will continue to apply to all fiduciaries other than those governed by the new proposed section and by an existing statute that governs personal representatives."

Reasons For Proposed Advocacy:

At present, a trustee holding unclaimed property for which a beneficiary cannot be located must retain the property for five years before being permitted to use Section 717.112(1) to deliver the unclaimed property

to the Florida Department of Financial Services.

Corporate fiduciaries who are acting as trustees have procedures in place to continue to manage unclaimed assets for the presently existing five-year time frame. However, individuals who serve as trustees may not realize that they must manage unclaimed assets for five years before being able to deliver the assets to the Department of Financial Services. Additionally, the current requirement that an individual trustee manage unclaimed assets for a five year time period is unduly burdensome to some trustees, especially in instances of trusts that are supposed to terminate upon the death of the grantor. Shortening the time frame from five years to two years to deliver unclaimed property would benefit the public by facilitating a way for the rightful owners to seek and claim the property. The proposed changes do not decrease the time frame a rightful owner has to claim unclaimed property, but instead increases the time the property is held with the State versus the trustee.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position None
(Indicate Bar or Name Section) (Support or Oppose) (Date)

Others

(May attach list if
more than one)

N/A
(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

Florida Bankers Association Support
(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.

1 A bill to be entitled

2 An act relating to disposition of unclaimed property; amending s. 717.112, F.S.;
3 relating to property held by fiduciaries; adding s. 717.1125, F.S.; relating to
4 holding period for trustees of unclaimed property; amending s. 717.101, F.S.;
5 relating to the definition of trust instrument; providing an effective date.
6

7 Be it Enacted by the Legislature of the State of Florida:
8

9 Section 1. Subsection (1) of Section 717.112, Florida Statutes, is amended to read:

10 717.112. Property held by agents and fiduciaries –

11 (1) Except as provided in 717.1125 and 733.816, Florida Statutes, all intangible property
12 and any income or increment thereon held in a fiduciary capacity for the benefit of another
13 person is presumed unclaimed unless the owner has, within 5 years after it has become payable
14 or distributable, increased or decreased the principal, accepted payment of principal or income,
15 communicated concerning the property, or otherwise indicated an interest as evidenced by a
16 memorandum or other record on file with the fiduciary.

17 Section 2. Section 717.1125, Florida Statutes, is added to read:

18 717.1125. Property held by fiduciaries under trust instruments -- All tangible and
19 intangible property and any income or increment thereon held in a fiduciary capacity for the
20 benefit of another person under a trust instrument is presumed unclaimed unless the owner has,
21 within 2 years after it has become payable or distributable, increased or decreased the principal,
22 accepted payment of principal or income, communicated concerning the property, or otherwise
23 indicated an interest as evidenced by a memorandum or other record on file with the fiduciary.

24 Section 3. Subsection (24) is added to Section 717.101, Florida Statutes, to read:

25 717.101. Definitions -- As used in this chapter, unless the context otherwise requires:

26 (24) "Trust instrument" means a trust instrument as defined in chapter 736.

27 Section 4. This act shall take effect _____, 2013.

REAL PROPERTY, PROBATE AND TRUST LAW SECTION OF THE FLORIDA BAR

WHITE PAPER

REVISION TO SECTION 717.112 and ENACTMENT OF 717.1125 and 717.101, F.S., CONCERNING UNCLAIMED PROPERTY

I. SUMMARY

The proposed legislation would shorten the time for a trustee under a trust instrument to hold unclaimed property in trust from the current five years to two years. At the end of the two year period, the trustee would deliver the unclaimed property to the Florida Department of Financial Services in the same manner as is done currently.

II. CURRENT SITUATION

Chapter 717, Florida Statutes, provides the means by which unclaimed property is determined and disposed of, including delivery to the Florida Department of Financial Services. Property is unclaimed as a result of the holder of the property being unable to find the lawful owner, because no lawful owner is known, or when the lawful owner refuses to accept the property.

At present, a trustee under a trust instrument holding property for which a beneficiary cannot be located must retain the property for five years before the property is presumed unclaimed under s. 717.112(1). Specifically, funds held by a financial organization (including a trust company), an agent, or a fiduciary are presumed unclaimed after five years unless the owner has increased or decreased the principal, accepted payment of principal or income, communicated concerning the property, or otherwise indicated an interest as evidenced by a memorandum or other record on file with the fiduciary. After such time, the trustee must report and deliver the unclaimed property to the Department of Financial Services in accordance with s. 717.117.

Thus, a trustee must hold the property for a period of five years before seeking to utilize the escheat process to deliver the unclaimed funds to the state. Corporate fiduciaries have procedures in place to continue to manage unclaimed assets for the presently existing five year time frame. Concern arises when individuals serve as trustees who may not realize that they must *manage* unclaimed assets during the five year period. Failure to manage the assets (e.g. if the duty is unduly burdensome) could potentially create risk of fiduciary breach.

Once the unclaimed property is turned over to the Department of Financial Services, the public has a means by which to search and locate missing property. By shortening the holding period from five years to two years, the unclaimed property would reach a public forum sooner, facilitating a way for the rightful owners to seek and claim the property.

Conversely, the Florida Probate Code, s. 733.816(1), provides a mechanism whereby a personal representative holding unclaimed property can obtain an order from the court to sell the property and deposit the funds in the registry of the court. A personal representative does not have a time restraint on how long it must hold the unclaimed funds before seeking a court order. Once a personal representative obtains an order determining that the funds are unclaimed, the Clerk of the Court need only hold the funds for six months after publishing a notice.

III. EFFECT OF PROPOSED CHANGES

The proposal would amend s. 717.112 and s. 717.101(24) as well as create s. 717.1125 to specifically address unclaimed property held by trustees of trusts being administered pursuant to Chapter 736 of the Florida Statutes. The proposed changes would decrease the time period that a trustee must hold the property before seeking to utilize the escheat process to deliver the unclaimed funds to the state from a period of five years to a period of two years. The proposed changes do not alter the mechanism for determining what constitutes unclaimed property nor does it change the existing procedure for delivery of unclaimed property to the Department of Financial Services. Additionally, the proposed changes do not decrease the time frame a rightful owner has to claim unclaimed property, but instead increases the time the property is held with the State instead of the trustee. The specific statutory provisions are as follows:

- A. Section 717.112 – Clarifies that s. 717.112 will continue to apply to all fiduciaries other than those governed by the new s. 717.1125, which applies solely to trustees of trusts administered pursuant to Chapter 736 of the Florida Statutes, and personal representatives, which are already governed by s. 733.816.
- B. Section 717.1125 – Creates a new s. 717.1125, for “Property held by fiduciaries under Trust Instruments”. This new statute states that the holding period for fiduciaries under trust instruments of property that has not been claimed by the owner is two years (as opposed to five years). The section mirrors the actions required under existing s. 717.112(1) which provides the various factors used to determine when property is presumed to be abandoned by the owner (in this case the trust beneficiary).
- C. Section 717.101(24) – Specifies a definition, 717.101(24), for “trust instrument”, which is not currently defined in Chapter 717. The definition is identical to that provided the Florida Trust Code (see s. 736.0103(20)), and this addition provides clarification as to which fiduciaries can utilize the new statutory provision.

Other than detailed above, the existing statutory provisions that provide guidance and structure for the delivery of unclaimed property remain in place. Those include the following:

- 1. Section 717.101 (14) defining intangible property;
- 2. Section 717.102 setting forth the general rule regarding unclaimed property and establishing the time frame of 5 years unless otherwise provided by chapter 717;
- 3. Section 717.103 setting forth the general rules for how the Department of Financial Services takes custody of unclaimed property;
- 4. Section 717.112(5) detailing what the holder of unclaimed property must do to file a petition to have a determination made regarding unclaimed property;
- 5. Section 717.117 setting forth what the report to the Department of Financial Services must contain and when it must be filed;
- 6. Section 717.118 providing how the apparent owners of unclaimed property are notified;
- 7. Section 717.119 providing the procedure for the payment or delivery of the unclaimed property to the Department of Financial Services;

8. Section 717.1201 providing that the holder who delivers property to the state per this section is relieved of further liability;
9. Section 717.122 providing for public sale of the unclaimed funds by the Department of Financial Services; and
10. Section 717.124 providing for how a purported owner can make a claim for unclaimed property.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal does not have a fiscal impact on state or local governments.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The proposal does not have a direct economic impact on the private sector.

VI. CONSTITUTIONAL ISSUES

There appear to be no constitutional issues raised by this proposal.

VII. OTHER INTERESTED PARTIES

Florida Department of Financial Services.

Florida Bankers Association.

Real Property, Probate and Trust Law Section

July 23, 2010

1. Opposes any legislation limiting property owners' rights or limiting attorneys' fees in condemnation proceedings.
2. Opposes any efforts to enact a statutory will.
3. Supports a constitutional amendment removing the restriction on devise of homestead property; also to provide that homestead rights are limited to the head of a family with a surviving spouse or dependent heir.
4. Supports amendments to Chapter 718, *Florida Statutes*, Condominiums, and Chapter 719 *Florida Statutes*, Cooperatives, to require that engineers, architects and other design professionals and manufacturers warrant the fitness of the work they perform on condominiums or cooperatives.
5. Opposes any portion of the National Association of Insurance Commissioners Title Insurers Model Act and Title Insurance Agent Model Act that may adversely affect Florida attorneys' ability to participate in real estate closing and the issuance of title insurance.
6. Supports amendment to Chapter 723, *Florida Statutes*, specifying that each mobile home owner/owners shall have only one vote at elections or meetings, and to allow association bylaws to specify less than a majority for a quorum.
7. Supports amendment to §162.09(3), *Florida Statutes*, to clarify the relative priority of recorded municipal code enforcement liens created pursuant to the Local Government Code Enforcement Boards Act.
8. Supports amendment to §673.3121, *Florida Statutes*, to provide a cross reference in it to §673.4111, *Florida Statutes*, stating that if an official check is not paid, then the person entitled to enforce the official check is entitled to compensation from the obligated bank for refusing to pay.
9. Supports legislation to amend the Baker Act to include a provision under which a guardian may request that the court grant the guardian the authority to involuntarily hospitalize a ward pursuant to the Baker Act.
10. Opposes efforts to create a lien on real property for work that does not add value to the property, and would permit liens against the property of a person other than the party owing a debt.
11. Opposes amendments to §718.1255, *Florida Statutes*, or targeted budget reductions or other governmental action having the purpose or effect of diminishing or eliminating the jurisdiction of the Arbitration Division of the Department of Business and Professional Regulation's Division of Land Sales.
12. Supports legislation to amend F.S. §744.444(16) to allow a guardian, without court approval, to pay from the assets of the guardianship estate the costs and fees of persons -- including attorneys, auditors, investment advisers or agents -- employed by the guardian to advise or assist the guardian in the performance of his or her duties.
13. Supports legislation to amend F.S. §394.467 to add as criteria for involuntary placement the substantial and imminent likelihood of inflicting serious emotional or psychological harm on another person, and the causation of significant damage to property in the recent past with substantial and imminent likelihood of doing so again.

14. Supports legislation to amend F.S. §725.06 to make contracts for indemnity for acts of omissions of an indemnitee unenforceable except in certain limited situations and/or to the extent of insurance coverage.

15. Supports the regulatory approval of a proposed ALTA Junior Loan Policy Form, but opposes legislation that would exclude from the statutory definition of title insurance the insuring of mortgage liens covering second mortgages and home equity line mortgages.

~~DELETE~~ (16) Opposes SB 2300 (condominium association pre-litigation disclosures) which imposes burdensome pre-suit disclosures for condominium homeowners associations members, but supports changes to mitigate some of these requirements.

17. Supports amendment of §55.141, *Florida Statutes*, to also allow the clerk of court to issue a satisfaction of judgment, rather than only the judgment holder

18. Supports legislation to repeal §734.1025, *Florida Statutes*, because the dollar amount for summary administrations found in § 735.201-2063, *Florida Statutes*, has been increased thus, making §734.102, *Florida Statutes*, duplicative.

~~DELETE~~ (19) Support legislation to amend §201.02, *Florida Statutes*, to clarify and better define the circumstances under which the documentary stamp tax will apply to instruments conveying real property to and from various entities.

~~DELETE~~ (20) Oppose legislative restrictions on condominium associations' rights to govern themselves and their own documents, but do not oppose further disclosure requirements to a purchaser concerning rental provisions.

21. Opposes proposed §518.117, *Florida Statutes*, and related amendments abrogating a trustee's duties of loyalty and duties of full and fair disclosure in connection with affiliated investments by a corporate trustee.

22. Opposes legislation requiring multiple disclosures by sellers of real property, creating contract rescission rights for buyers and seller liability for damages.

~~DELETE~~ (23) Supports legislation to preserve homeowner association governance and/or assessment regimes notwithstanding extinguishment of community covenants and restrictions by the Marketable Record Title Act.

~~DELETE~~ (24) Supports an amendment to F. S. 222.01 to provide persons with the same procedure for determination of real property homestead status against foreign judgments as currently is provided against domestic judgments.

25. Supports condominium unit owner's ability to exercise self-government and undertake fair and efficient community administration, including the exercise of basic contract and investment decisions.

~~DELETE~~ (26) Supports the revision of 718.117 F. S. process for terminating condominium property.

27. Supports amending 29.007 F. S. to provide authority to appoint and compensate attorneys and professional guardians to serve as guardian advocates and guardian ad litem for indigents in civil commitment and treatment proceedings in proceedings under the mental retardation statutes (ch. 393), Baker Act (ch. 394) and Marchman Act (ch. 397).

- ~~DELETE~~ (28) Supports amending §704.01(2) to provide landlocked landowners with a statutory way of necessity.
29. Opposes Section 2 of Senate Bill 298 creating §117.055, which requires that notaries keep a detailed journal of all notarial acts including: the date, time and type of notarial act; the date, type and description of each document; the name of the signer; and description of the evidence of identity.
30. Supports changes to the Florida Construction Lien Laws governing conditional payment bonds and changing procedures for determining whether a claim will be covered by such bonds.
- ~~DELETE~~ (31) Technical Assistance - The section does not oppose House Bill 113 as originally drafted, but favors additional changes to numerous construction bond and lien statutes.
32. Opposes legislation requiring parties to record notices, warnings or reports regarding the physical condition of land or improvements in the public records regarding the title to real property.
- ~~DELETE~~ (33) Opposes SB 1520's definition of "travel club" which would remove one type of timeshare program from the traditional regulatory supervision of the Department of Business and Professional Regulation.
- ~~DELETE~~ (34) Supports legislation to clarify the law to ensure that communications between a lawyer and client acting as a fiduciary in estate- and trust-related matters are privileged to the same extent as if the client were not acting as a fiduciary.
35. Opposes amendment to §733.302, F. S., to expand the class of non-residents which may serve as personal representative because of a concern that any addition to the class may subject the entire statute to a renewed constitutional challenge.
- ~~DELETE~~ (36) Supports the amendment of § 627.404 F. S. to make explicit the requirement of an insurable interest, detail those who may have an insurable interest in the life of another, clearly require the insured's consent to the purchase of a policy of insurance by another, and address the liability of the insurer in the absence of the necessary insurable interest.
- ~~DELETE~~ (37) Opposes proposed omnibus amendments to Florida Statutes Chapter 617, the Florida Not for Profit Corporation Act. The changes intended to facilitate to charitable corporate governance with voluntary membership would impair other non profit corporations' governance with required membership.
38. Supports legislation to maintain the integrity of the recording system in the State of Florida.
- ~~DELETE~~ (39) Supports limitation of creditor remedies against partner interest in general and limited liability partnerships and member interests in limited liability companies to charging liens and to prohibit foreclosure against such interests.
- ~~DELETE~~ (40) Supports legislation to provide that the charge by a condominium association or homeowners' association for an estoppel certificate is an obligation of the owner of the unit for whose benefit the estoppel certificate is requested and not the obligation of the closing agent; and to provide for enforcement of any assessment for the charge made for such an estoppel certificate.
41. Opposes changes to Florida Statute 732.103 that would extend the intestate distribution scheme to the level of the decedent's great-grandparents.
- ~~DELETE~~ (42) Supports proposed amendments to Florida Statutes Chapter 718, the Condominium Act. The proposed changes are intended to clarify that changes to a developer prospectus' estimated operating budgets prepared in good-faith that are beyond the control of the developer do not trigger rescission rights under Section 718.503(1), Florida Statutes.
43. Supports legislation to permit condominium unit owners to further subdivide or partition their interest in the condominium and common elements appurtenant thereto pursuant to a sub-declaration of

condominium, which subdivided units shall remain subject and subordinate to the existing declaration of condominium, provided such existing declaration of condominium allows for the subdivision.

44. Oppose HB 1437/SB1460, which would require a foreclosing creditor to notify the debtor that filing a bankruptcy petition before the foreclosure sale may permit the debtor to retain the property and reorganize the indebtedness.

45. Oppose the creation of "pilot" court divisions without funding, evaluation criteria, rules of procedure, and competency criteria for magistrates without consideration for current alternate dispute resolution processes.

DELETE (46) Opposes HB 1373 (2007) and SB 2816 (2007) because they contain amendments to community association regulations which are unconstitutional, impossible or impractical to implement, contradictory, and undermine the ability of volunteers to administer associations.

DELETE (47) Supports the adoption of §689.28 F. S. to provide that transfer fee covenants recorded after effective date do not run with the title to real property and are not binding on successor owners, purchasers or mortgagees.

48. Supports legislation to amend Chapter 765, Florida Statutes, to improve the law concerning advance directives and to integrate federal HIPPA privacy laws with Florida law.

DELETE (49) Supports legislation to amend §733.604 Florida Statutes, to treat inventories which are filed with the clerk of court in a probate proceeding in connection with the spousal elective share procedure the same as estate inventories in terms of not being subject to public inspection.

50. Supports legislation to provide for alienation of plan benefits under the Florida Retirement System (§121.131 and §121.091 Florida Statutes) Municipal Police Pensions (§185.25 Florida Statutes) and Firefighter Pensions (§175.241 Florida Statutes) in a dissolution proceeding and authorizing such alienation of benefits in a dissolution of marriage under §61.076 Florida Statutes.

51. Supports legislation to (1) change the titles of §222.11 Florida Statutes to clearly reflect that this statute applies to earnings and is not limited to "wages" (2) provide an expanded definition of "earnings" because the term "wages" is not the exclusive method of compensation and (3) add deferred compensation to the exemption statute.

DELETE (52) Supports amendment of F.S. §§ 689.01 & 692.01, to permit a corporation to execute certain instruments conveying, mortgaging or affecting interests in real property, whether on the corporation's own behalf or in a representative capacity.

DELETE (53) Supports amendment of F.S. §732.402 to update limitations on "exempt property" to: (i) increase the dollar limitation on household goods, from \$10,000 to \$20,000; (ii) change the personal "automobile" limitation to a "motor vehicle" limitation based on gross weight and limit the exemption to two motor vehicles; and (iii) include all qualified tuition plans authorized by IRC § 529.

DELETE (54) Supports amendment of F.S. §718.111(11) to clarify what are or are not common expenses when insurance proceeds are insufficient for reconstruction, as well as to restructure the statute to clearly describe and state the adequacy and scope of insurance and responsibilities in the event of reconstruction following a casualty.

DELETE (55) Supports amendment of F.S. §718.115 to provide that unless the manner of payment or allocation of common expenses is otherwise addressed in the declaration of condominium, the expenses of items or services required by any governmental entity, such as water or sewer meters or fire safety equipment required to be installed by a governmental entity, are common expenses under Chapter 718.

56. Opposes the adoption of summary guardianship proceedings outside the protections of Chapter 744,

Florida Statutes.

57. Opposes amendments to F.S. §393.12 that would (i) remove the existing requirement that a guardian advocate for a developmentally disabled adult must be represented by an attorney if the guardian advocate is delegated authority to manage property, (ii) remove the existing requirement that the petition to appoint a guardian advocate must disclose the identity of the proposed guardian advocate, and (iii) expand the list of individuals entitled to receive notice of the guardian advocate proceedings.

58. Opposes amendments to Chapter 720, F.S., that would require both pre-suit mediation and pre-suit arbitration before filing a civil action over homeowners' association disputes.

59. Supports amendment of F.S. §736.0813 to clarify the meaning of the requirement that a trustee furnish qualified beneficiaries with a "complete copy" of a trust document.

~~DELETE~~ (60) Supports amendment of F.S. §736.0306 to provide that a trustee cannot be given authority to appoint "designated representatives" for trust beneficiaries to whom the trustee can account in lieu of accounting directly to the beneficiaries.

~~DELETE~~ (61) Supports amending F.S. §§736.0302 and 736.0103(4) to provide that a "permissible appointee" under a power of appointment is not a "beneficiary" of a trust unless the power of appointment is irrevocably exercised in favor of the appointee, and that the potential interests of permissible appointees can be represented by those who take the trust property if the power of appointment is not exercised.

~~DELETE~~ (62) Supports amendment of F.S. §738.602 to provide a method for trustees to characterize payments from deferred compensation plans, annuities, retirement plans, IRAs or other similar arrangements as principal or income when payable to a trust named as the beneficiary.

63. Supports amendment to F.S. §501.1377 to exclude lawyers, law firms, pro-bono and legal aid programs, title agents and the servicing, restructuring and workout companies employed by the holders of mortgages from the definition of "foreclosure rescue consultant."

~~DELETE~~ (64) Supports amendment of F.S. §193.155(3) to clarify that transfers of ownership interests, whether legal or equitable, pursuant to which the same person or that person's spouse continues to hold legal or equitable title of the homestead real property or otherwise continues to qualify for the homestead exemption under the requirements of F.S. §196.031, Florida Statutes, will not be treated as a change in ownership for purposes of re-setting the "Save Our Homes" cap.

~~DELETE~~ (65) Supports clarification of F.S. 193.1556 regarding: (i) whether a separate notice to the property appraiser of a change of ownership of real property is required when the real property is conveyed by an instrument recorded in the public records; (ii) whether any notice to the property appraiser is required pursuant to the statute with respect to transfers of interests in publicly traded companies or parent companies; and (iii) whether the statute requires disclosure of the identity of beneficial owners of trusts or of business entities.

66. Supports continuation and improvement of the Florida brownfield redevelopment program, including the voluntary cleanup tax credit (VCTC) program pursuant to F.S. §376.30781.

67. Opposes adoption of a "file and use" system for the determination of title insurance rates in the State of Florida, supplanting a promulgated rate system in which the state regulatory agency determines rates based on actuarial analysis of statutorily determined criteria.

68. Oppose amendment of F.S. §607.1202 and §608.4262 to require a Florida corporation or limited liability company to publish notice of its proposed sale of assets other than in regular course of business, or to publish notice of dissolution.

69. Supports amendment to F.S. §695.01 and ch 162 to reduce problems regarding hidden liens by: (i) requiring all governmental liens (other than taxes, special assessments and those for utility services) to be recorded in the official records and to state their priority; (ii) clarifying the priority of liens asserted by local governments; and (iii) expanding the homestead determination mechanisms of F.S. §222.01 to apply to other types of lien.

DELETE (70) Supports legislation retroactively and prospectively to ratify the validity of all electronic documents submitted to and accepted by a county recorder for recordation, whether or not such electronic documents were in strict compliance with the statutory or regulatory framework then in effect, and that all such filings be deemed to provide constructive notice.

71. Opposes legislation expanding the definition of sovereign beaches, public beaches or beach access rights over privately owned property without due process of law or compensation for taking of private property rights.

72. Supports requiring financial institutions to create a record memorializing any items removed from a safe deposit box, including amendment to F.S. § 655.935.

73. Supports clarification of a person's rights to direct disposition of his or her remains, providing guidance to courts and family members, especially when disputes arise, and absent specific directions, clarifying who is authorized to decide the place and manner of the disposition of a decedent's remains, including an amendment replacing F.S. § 732.804.

DELETE (74) Supports clarification to the Condominium, Cooperative and Homeowners' Association Acts, to clarify and amend duties of owners, directors and associations to each other, including definition of common expenses; protection of private information; bulk buyer rights; and, procedures for: restriction amendments, records access, financial reporting, assessment levy and collection, delinquent collection of assessments from tenants and resulting suspension of rights, payment of delinquent assessments, meeting notice, election procedures; and, disclosures to purchasers.

75. Supports recommendations to the Title Insurance Study Advisory Council concerning the providing and regulation of title insurance."

DELETE (76) Supports the treatment of assets in certain estate tax-planning irrevocable trusts under the Florida Trust Code as having been contributed by the settlor's spouse as the lifetime beneficiary of the trust, and not by the settlor, including an amendment to F.S. 736.0505.

77. Supports clarification of the definition of "income" for calculating Veterans guardianship fees, including an amendment to §744.604, Fla. Stat.

DELETE (78) Supports creation of a new statute, F.S. § 732.703, which would provide a rebuttable presumption that, upon the death of a Florida resident, a surviving former spouse would not inherit certain assets or accounts, including but not limited to life insurance, annuities, IRAs, transfer-on-death accounts and pay-on-death accounts, and would be treated as if they predeceased the decedent, subject to certain exceptions.

DELETE (79) Supports legislation that would permit a challenge to certain property and inheritance rights that inure to a surviving spouse who procured a marriage by fraud, duress, or undue influence.

DELETE (80) Supports legislation to clarify that two annual gift tax exclusion amounts are exempt from the claims of creditors of a trust beneficiary having a power to withdraw trust assets when contributions to the trust are made by a married person whose spouse makes a "split gift election" under the Internal Revenue Code.

DELETE (81) Supports legislation to clarify that a decedent's will and revocable trust must be read together in determining the source of payment of administration expenses and obligations of the decedent's estate, and the order in which gifts under a will and trust are appropriated to pay expenses and obligations if an

estate is insolvent.

- ~~DELETE~~ (82) Supports amendments to F.S. § 736.0206 that: Deletes duplicative statutory provisions on court review of attorneys' fees of trustees; deletes redundant notice provisions; and provides that in judicial proceedings to determine compensation for a trustee or person employed by a trustee, the court has discretion to award a reasonable expert witness fee from the assets of the trust unless it finds that the expert testimony did not assist the court.
- ~~DELETE~~ (83) Supports Legislation that would provide a surviving spouse with an election between a life estate interest or a tenancy in common interest in the homestead property which would also allow either the descendants or the surviving spouse to partition the property if necessary, including amendments to F.S. §§ 732.401 and 744.444(9).
- ~~DELETE~~ (84) Supports legislation that would clarify that forced descent of homestead property pursuant to F.S. § 732.401 does not apply to property which is held either as a joint tenancy with right of survivorship or as a tenancy by the entireties.
- ~~DELETE~~ (85) Supports legislation to clarify post-death disclaimers of homestead interests and provide for a defined result upon such a disclaimers, including amendments to F.S. §§ 732.401 and 732.4015.
- ~~DELETE~~ (86) Supports amendment of the Florida Trust Code to add new provisions limiting certain trustee fiduciary duties with respect to policies of insurance on the life of the settlor if the limitations are consented to by the settlor or the qualified beneficiaries of the trust; supports amendment of F.S. s. 518.112 to harmonize notice procedures under that statute with notice procedures in the Florida Probate Code and the Florida Trust Code.
- ~~DELETE~~ (87) Opposes amendment of Article II, §7 of the Florida Constitution ("Hometown Democracy") that would remove a local government's authority to adopt a local comprehensive plan, or amend a local comprehensive plan, without a vote by referendum by the general electorate.
88. Opposes the adoption of the Uniform Adult Guardianship and Protective Proceedings Act.
89. Supports legislation to allow a parent, legal guardian or legal custodian of a minor child to designate a health care surrogate to make health care decisions for the minor if the parent, legal guardian or legal custodian is not reasonably available.
90. Opposes any amendment to existing Florida law governing real property foreclosures unless those amendments carefully preserve and protect the property rights and due process rights of the holders of interests in or affecting Florida real property.
- ~~DELETE~~ (91) Supports legislation that would permit a self proving affidavit or oath of an attesting witness to a will to be admitted into evidence in a will contest to establish prima facie evidence of due execution and attestation of a will.
92. Supports amendment of F.S. §718.203, Florida Statutes, amending to add electrical elements to three-year warranty, extend subcontractor and supplier warranties to the contractor and to clarify start date for five-year warranty deadline set forth in F.S. §718.203(1)(e).
93. Opposes abolishment of causes of action for architect, engineer, surveyor and mapper professional negligence and other professional breaches of duty.
- ~~DELETE~~ (94) Supports repeal F.S. §689.262(2008), providing for disclosure of windstorm mitigation rating, including supporting an override of the veto of HB 545.

December 10, 2010

~~DELETE~~ (96) Supports amendments to the Florida Condominium Act: to clarify the definitions of bulk assignee and bulk buyer; to clarify the liabilities of a bulk assignee and bulk buyer; to clarify provisions pertaining to appointment of directors and transition of control; to clarify bulk assignee responsibilities for financial information and disclosures to be provided to purchasers; to create an exemption from disclosures if all units are being conveyed in bulk to a single purchaser; to clarify the application of the part to acquisitions occurring on or after July 1, 2010; and to provide an effective date.

~~DELETE~~ (97) Supports clarification to the Homeowners' Association Act: to authorize and provide procedures for homeowners associations to enter into communications and internet services contracts on a bulk rate basis; to provide the ability for homeowners to cancel the bulk rate contract upon a proper vote; to permit certain defined homeowners to opt out of communications or internet services contracts and not have to pay for the portion of the contract price allocated to such homeowner's property; to provide a right of access for owners and residents to franchised providers other than the bulk contract providers; and to provide an effective date.

98. Supports expanded publication of notices of judicial sales, permitting notices to be posted on the Internet, including amendments to F.S. Chapters 45, 50 and 702.

~~DELETE~~ (99) Supports adoption of the Uniform Power of Attorney Act with Florida modifications, including repeal of Chapter 709, Florida Statutes.

~~DELETE~~ (100) Supports a decedent's surviving spouse's receipt of 100% of an intestate estate, provided all of the decedent's descendants are also descendants of the surviving spouse and the surviving spouse does not have any other descendants, otherwise the surviving spouse shall receive 50% of the intestate estate, amending Section 732.102.

~~DELETE~~ (101) Supports clarification of the deadline for seeking attorney's fees and costs in trust proceedings, including an amendment to F.S. §736.0201.

~~DELETE~~ (102) Supports defining options for landlords to protect against construction liens arising from work authorized by tenants, including amendments to §§713.10 and 713.13, Florida Statutes.

~~DELETE~~ (103) Supports clarification of the treatment of an inherited individual retirement account as defined in §408(c)(3) of the Internal Revenue Code, as a fund or account exempt from claims of creditors of the owner, beneficiary, or participant, including an amendment to §222.21, Florida Statutes.

January 3, 2011

~~DELETE~~ (104) Supports legislation permitting the reformation and modification of wills in Florida to provide for an award of taxable fees and costs, including attorneys fees and guardian ad litem fees in such actions, including creating sections 732.615, 732.616, and 733.1061.

~~DELETE~~ (105) Supports amendments providing that the revocation of a will or a revocable trust can be challenged on the grounds of fraud, duress, mistake or undue influence after the death of the testator or settlor, including proposed amendments to F.S. 732.5165, 732.518, 736.0207, 736.0406 and 744.441.

January 20, 2011

~~DELETE~~ (106) Supports clarification that the charging order lien is the sole and exclusive remedy which judgment creditors of a member use to satisfy a judgment from a judgment debtor's membership interests in a multi-member LLC, including an amendment to F.S. §608.433.

July 29, 2011

107. Supports amendment of F.S. §718.403 to permit the addition of proposed phases to a condominium beyond 7 years from the recording of the declaration of condominium upon association membership

approval and recorded amendment to the declaration of condominium.

~~DELETE~~ (108) Supports amendment of F.S. §734.301 to use the defined term 'parents' as the natural guardians of a minor child, and to change the current references to 'custody' to 'parental responsibility'.

October 21, 2011

~~DELETE~~ (109) Supports creation of F.S. § 7321081 barring inheritance through intestate succession of a natural or adoptive parent from or through a child for whom their parental rights have previously been terminated.

~~DELETE~~ (110) Supports amendment to F.S. § 732.401 clarifying the period in which an attorney-in-fact or guardian must file a petition for authority to make an election to take a tenancy in common interest in a homestead and the tolling effect such a petition has on the election deadline.

~~DELETE~~ (111) Supports amendment to F.S. § 732.401 clarifying that the defined term "protected homestead" for purposes of the probate code does not include property owned by the decedent in joint tenancy with rights of survivorship.

~~DELETE~~ (112) Supports extension of the sunset of the Distressed Condominium Relief Act until July 1, 2012, through amendment to Section 718.707, F.S.; to provide an effective date.

113. Supports additional guidance and regulation respecting the creation of a condominium within a condominium unit, through creation of Section 718.406, F.S.; to provide an effective date.

114. Supports clarification of Ch 718, F.S.: to confirm that certain operational provisions do not apply to nonresidential condominium associations; to define "nonresidential condominiums;" to clarify that the Division's arbitration program only pertains to residential condominiums; to provide an effective date.

~~DELETE~~ (115) Supports amendment of F.S. § 701.04 to require mortgagees to provide subsequent owners of property with payoff information as to mortgages encumbering the property.

116. Supports amendments: to s. 95.11(2) and (5), F.S., as to the statute of limitations for actions on payment bonds; to s. 713.08(3) (the statutory form for a claim of lien) to include the separate statement required by F.S. 713.08(1)(c); to s. s. 713.13, F.S. to delete the requirement that the notice of commencement be verified and to clarify the timing of the expiration date of the notice of commencement; to s. 713.18, F.S. as to electronic confirmation of delivery through the U.S. Postal Service.

~~DELETE~~ (117) Supports creation of a new statute F.S. § 732.703 which provides that when an individual dies after a divorce, a beneficiary designation created by the individual prior to the divorce which designates the spouse as a beneficiary, becomes void upon the divorce and the spouse is deemed to have predeceased the decedent.

~~DELETE~~ (118) Supports creation of new Fla.Stat. 765.2021 and 765.3031 to terminate the authority of a health care surrogate or surrogate appointed under a living will upon the divorce or annulment of the marriage between the surrogate and the principal.

~~DELETE~~ (119) Supports clarification of Florida Statutes, Section 213.758 "Transfer of tax liabilities" in order to streamline the transfers of businesses, stocks of goods, and certain real estate transactions.

~~DELETE~~ (120) Support the proposed amendments to F.S. Chapter 738 to bring the Florida Uniform Principal and Income Act into conformity and alignment with the Uniform Act and Federal tax law and to clarify existing ambiguities representing further and ongoing technical corrections to our Act.

November 4, 2011

~~DELETE~~ 121 Supports amendment to F.S. § 732.102 clarifying the effective date and application of changes made during the 2011 legislative session to the amount of the intestate share of a surviving spouse.

December 9, 2011

122. Supports amendment of: F.S. §713.10(2)(b) to provide that a blanket notice recorded by a landlord remains valid and the landlord's property interest will not be liable for liens arising from tenant improvements even if the leases contain different versions of the lien prohibition language or no lien prohibition language at all, under certain circumstances; and F.S. §713.10(3) to require inclusion of specific language in any claim of lien premised on a landlord's failure to comply so as to provide record notice of the basis of such a claim by a lienor, and to provide that any lien will not take effect as to third parties without notice until 30 days after the recording of the claim of lien.

January 27, 2012

123. Opposes the expansion of classes that are to serve as agents under a power of attorney beyond the current class of individuals and financial institutions with trust powers.

124. Opposes elimination of the requirement that title insurance agencies deposit securities having a value of \$35,000 or a bond in that amount for the benefit of any title insurer damaged by an agency's violation of its contract with the insurer.

IN THE SUPREME COURT OF FLORIDA

RECEIVED
THOMAS D. HALL

APR 03 2012

CASE NO: SC12-75

DCA Case Nos.: 3D10-2230 & 3D10-2231
CLERK, SUPREME COURT
BY _____

NORTH CARILLON, LLC,
Appellant,

v.

CRC 603, LLC, ET. AL.
Appellees.

_____/

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The Real Property, Probate and Trust Law Section of The Florida Bar ("RPPTL Section" or "Section"), pursuant to Fla. R. App. P. 9.370, moves for leave to file an amicus brief in this case that does not support either party. In support of this motion, the Section states:

1. The RPPTL Section is a group of over 10,000 Florida lawyers who practice in the areas of real estate, trust and estate law and who are dedicated to serving all Florida lawyers and the public in these fields of practice.
2. In addition to producing educational materials and seminars for its members and the public, the Section has long provided its neutral, legal expertise to each branch of Florida's government. The Section has drafted and advised on legislative enactments. It has drafted and proposed rules of administrative and

judicial procedure. And, it has routinely befriended federal and state courts confronted with interpreting the meaning and purpose of both substantive law and procedural rules in these areas of law.¹

3. The specialized areas of law in which the RPPTL Section's members practice are infrequently litigated at the appellate level. Therefore, this Court's jurisprudence on the "retroactive" application of laws the legislative branch has clarified is very important to the Section's members.

4. Clarifying law so that it is applied and enforced as originally intended is a fundamental responsibility of each branch of government. However, assuring that a clarification does not violate constitutional limitations is a unique responsibility of the judicial branch. An amicus brief from the RPPTL Section will assist the Court in the disposition of this case by addressing this area of jurisprudence, especially as this jurisprudence involves laws not judicially interpreted for years after their enactment.

5. If granted leave to file, the Section's amicus position would be that the passage of time between a legislative enactment and a subsequent clarifying

¹ For example, see *McKean v. Warburton*, 919 So.2d 341 (Fla. 2005); *May v. Illinois Nat. Ins. Co.*, 771 So.2d 1143 (Fla. 2000); *Sims v. New Falls Corp.*, 37 So.3d 358 (Fla. 3d DCA 2010); *JPG Enterprises, Inc., v. McLellan* 31 So.3d 821 (Fla. 4th DCA 2010); *Skylake Insurance, Inc. v. NMB Plaza, LLC*, 23 So.3d 175 (Fla. 3d DCA 2009)

amendment does not necessarily preclude the retroactive application of the clarifying amendment.

6. The RPPTL Section is neutral as to the parties and the Court's ultimate decision in this case. The Section's amicus brief would not address whether the 2010 amendment to section 718.202, Florida Statutes should be applied retrospectively to clarify the existing law.

7. The Section's Executive Council voted unanimously, subject to approval by The Florida Bar Board of Governors, to appear as amicus in this case on the issue set forth above if the Court permits.

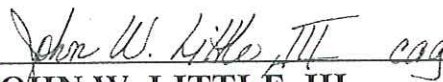
8. Pursuant to Standing Board Policy 8.10, the Board of Governors of The Florida Bar (typically through its Executive Committee) must review a Section's amicus brief and grant approval before it can be filed with Court.² Accordingly, the Section respectfully requests that if the Court grants this motion, the Section be permitted to serve its amicus brief within fifteen (15) days after the Court's Order on the motion. This requested enlargement of time is fairly needed in order to complete the preparation of the amicus brief and to allow for the Board of Governors' review of the brief prior to filing with the Court.

² Although reviewed by the Board of Governors, the amicus brief will be tendered solely by the Section and supported by the separate resources of this voluntary organization - - not in the name of The Florida Bar, and without implicating the mandatory membership fees paid by any Florida Bar licensee.

9. The Section's counsel has contacted counsel for Appellant and Appellees. The Appellant has no objection to the Court granting this motion. The Appellees oppose this motion.

WHEREFORE, the Real Property, Probate and Trust Law Section of The Florida Bar respectfully requests this Court grant leave to file an amicus brief in this matter and that the Section be permitted to serve its brief within fifteen days (15) of the Court's Order ruling on this motion.

Respectfully submitted this 3rd day of April, 2012.


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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been filed via e-file@flcourts.org, with the original and one copy mailed to the Clerk, Florida Supreme Court, 500 South Duval Street, Tallahassee, Florida, 32399, and copies furnished via U.S. Mail on the 3rd day of April, 2012, to the Offices of:

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing motion complies with the font requirement of Fla.
R. App. P. 9.210(a)(2) and is submitted in Times New Roman 14-point font.



JOHN W. LITTLE, III

Supreme Court of Florida

THURSDAY, APRIL 19, 2012

CASE NO.: SC12-75

Lower Tribunal No(s): 3D10-2230,
3D10-2231,
08-24578,08-24568

NORTH CARILLON, LLC

vs. CRC 603, LLC, ET AL.

Appellant(s)

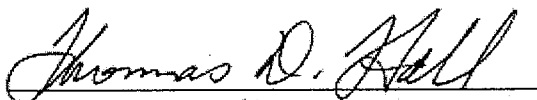
Appellee(s)

The motion for leave to file brief as amicus curiae filed by Real Property, Probate and Trust Law Section of The Florida Bar ("RPPTL Section) is hereby granted and they are allowed to file an amicus brief. The brief by the above referenced amicus curiae shall be served pursuant to Florida Rule of Appellate Procedure 9.370(c).

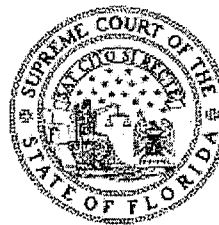
Per this Court's Administrative Order In Re: Mandatory Submission of Electronic Copies of Documents, AOSC04-84, dated September 13, 2004, counsel are directed to transmit a copy of all briefs in an electronic format as required by the provisions of that order.

A True Copy

Test:



Thomas D. Hall
Clerk, Supreme Court



jn

Served:

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ADAM ABRAHAM SCHWARTZBAUM
DAVID P. DRAIGH
RAOUL G. CANTERO, III
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CARY ALAN LUBETSKY
LAWRENCE RICHARD METSCH

KENNETH BRADLEY BELL
RODOLFO SORONDO, JR.
JASON RYAN BLOCK

file

**IN THE SUPREME COURT OF FLORIDA
CASE NO: SC12-75**

NORTH CARILLON, LLC,
Appellant,

L.T. Case Nos.:
3D10-2230 & 3D10-2231

v.

CRC 603, LLC, and CRC 1103, LLC,
Appellees.

**ON MANDATORY REVIEW OF A DECISION OF THE DISTRICT
COURT OF APPEAL, THIRD DISTRICT DECLARING INVALID A
STATE STATUTE**

**BRIEF OF THE REAL PROPERTY, PROBATE AND TRUST LAW
SECTION OF THE FLORIDA BAR**

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STATEMENT OF IDENTITY OF AMICUS CURIAE

Your *amicus curiae* is the Real Property, Probate and Trust Law Section of The Florida Bar (the “Section”). We are a group of Florida lawyers who principally practice in the areas of real estate and trust and estates law and are dedicated to serving all Florida lawyers and the public in these fields of practice. We produce educational materials and seminars, assist the public *pro bono*, draft legislation, draft rules of procedure and occasionally befriend courts to assist on issues related to our fields of practice. Our Section has over 9,000 members.

Our entire Section membership is impacted by this case. We draft legislation to clarify statutes when a court’s decision reveals a misinterpretation of a law warranting clarification, and we regularly befriend courts to assist them in clarifying case law, rules and statutes. Often, these efforts involve the clarification of laws related to pending matters. In some cases though, these efforts involve clarification of laws that apply retroactively to past transactions. *See, e.g.* section 689.07, Florida Statutes (2004), and *Raborn v. Menotte*, 974 So. 2d 328, 330 (Fla. 2008) (“In 2004, the Florida Legislature, however, added an amendment to section 689.07(1). Responding to *Raborn I* and a request by the Real Property, Probate and Trust Section of the Florida Bar, the Legislature amended the statute to add a fifth condition that would cause a conveyance to be in trust: language in the deed identifying the trust by either name or date. This 2004 bill expressly provided that

the amendment ‘was intended to clarify existing law and shall apply retroactively.’ Ch.2004-19, §2, Laws of Florida.”); *MacIntyre v. Wedell*, 12 So. 3d 273 (Fla. 4th DCA 2009) and subsequent legislative action to clarify the law pertaining to contesting the validity of revocations of trusts at Chapter 2011-183, §9, Laws of Florida.

One implication of the district court of appeal’s decision is that the clear intent of the Legislature in attempting to clarify a law will simply become irrelevant if, by happenstance, the law is not misinterpreted (revealing the need for clarification) during the relatively short window of time in which the adopters of the original legislation are still legislators. Hence, our interest in this case.¹

Pursuant to Section bylaws, the Executive Council of the Section voted unanimously to appear in this case if permitted by the Court. The Executive Committee of the Board of Governors of the Florida Bar has approved the Section’s involvement in this case.² Kenneth B. Bell, Robert W. Goldman, and

¹ To the extent the Florida Rules of Appellate Procedure require that we align ourselves with a party, our position on the point addressed herein would align us with the Appellant.

² This brief was reviewed by the Executive Committee of the Board of Governors of The Florida Bar and approved on Wednesday, May 9, 2012, consistent with applicable standing board policies. It is tendered solely by the Real Property, Probate and Trust Law Section and is supported by the separate resources of this voluntary organization - - not in the name of The Florida Bar, and without implicating the mandatory membership fees paid by any Florida Bar licensee.

John W. Little, III, are three of the co-chairs of the *amicus* committee of the Section, which is charged with preparing *amicus* briefs for the Section.

SUMMARY OF ARGUMENT

All three branches of government engage in the behavior of clarifying law. Administrative agencies do it. The Legislature does it. Courts do it.

The decision of the district court of appeal is predicated in part on the thesis that the mere passage of time between the adoption of a law, and subsequent legislation intended to clarify that law, bars the Legislature from undertaking statutory clarification which would have retroactive effect.

That thesis does not stand up to reason or Florida law. It appears to be predicated on a current legislature being unable to discern what an earlier legislature intended when it enacted a law. The Legislature, however, repeals and re-enacts all existing general law each year and is presumed to know the law and judicial interpretations of that law. And, just as this Court does, the Legislature has access to legislative history.

Further, the Florida Constitution places certain limitations on the legislative process, but none involves a bar to the Legislature clarifying terms of a statute already in existence. And, that clarifying legislation, or clarifying court rulings for that matter, can be applied retroactively is beyond any doubt. So, what then is the genesis of the issue before this Court? There are, of course, times when courts

cannot discern with certainty whether the Legislature intended that a statutory amendment serve to clarify the law and apply retroactively. That uncertainty spawns rules of statutory construction to assist courts in discerning legislative intent. Where the law is clear and the legislative intent on this point is certain, however, these rules of statutory construction cannot be employed.

In this case, the Legislature's clarifying amendment was clear. The Legislature expressly stated in its amendment that the legislation was clarifying existing law and the terms added to the statute were unambiguous. Therefore, the application of rules of statutory construction by the district court of appeal to the amendment was inappropriate.

The only question in this case should be whether the purported clarification was in fact just that, or amounts to a substantive change in existing law. The mere passage of time between enactment of section 718.202 and the purported clarifying amendment to that law should have nothing to do with the Court's analysis and resolution of that issue.

ARGUMENT

THE LEGISLATURE SHOULD NOT BE ESTOPPED FROM CLARIFYING A LAW IT ENACTED SIMPLY BECAUSE TIME HAS PASSED BETWEEN A STATUTE'S ENACTMENT AND CLARIFICATION OF IT BY STATUTORY AMENDMENT

As noted above, the Section befriends the Court in this case to address the district court of appeal's holding that the mere passage of time precludes the Legislature from clarifying a previously adopted law by amending it and having that amendment apply retroactively.

In *Amos v. Conkling*, 99 Fla. 206, 126 So. 283, 288 (1930), this Court held that when interpreting a law:

(I)t is proper to consider, not only acts passed at the same session of the Legislature, but also acts passed at prior or subsequent sessions, and even those which have been repealed.

In *Gay v. Canada Dry Bottling Co. of Florida*, 59 So. 2d 788, 790 (Fla. 1952), quoting from, *General Petroleum Corp. of Cal. v. Smith*, 62 Ariz. 239, 157 P.2d 356, 360 (1945), this Court held: " 'The rule seems well established the interpretation of a statute by the legislative department goes far to remove doubt as to the meaning of the law. The court has the right and the duty, in arriving at the correct meaning of a prior statute, to consider subsequent legislation.' "

This Court applied the rationale established in both of those rules in determining that a 1977 amendment to a statute was merely intended to clarify the

law in existence prior to the amendment. *Ivey v. Chicago Ins. Co.*, 410 So. 2d 494, 497 (Fla. 1982).

In *Lowry v. Parole and Probation Com'n*, 473 So. 2d 1248 (Fla. 1985), this Court addressed legislation that was unclear as to whether it was intended as a clarification of law and applied retroactively. Because of that uncertainty, this Court applied the following rule of statutory construction:

When, as occurred here, an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof.

473 So. 2d at 1250. That rule of statutory construction was subsequently followed in *Palma Del Mar Condominium Ass'n No. 5 of St. Petersburg, Inc. v. Commercial Laundries of West Fla., Inc.*, 586 So. 2d 315, 317 (Fla.1991) ("Consequently, it is appropriate for this Court to consider chapter 86-175, Laws of Florida, particularly since there had been a judicial interpretation after the original enactment of section 718.3025 which the legislature believed was contrary to its original intent."); *State v. Nuckolls*, 606 So. 2d 1205, 1207 (Fla. 5th DCA 1992); *State v. Sedia*, 614 So. 2d 533, 535 (Fla. 4th DCA 1993); *Brown v. MRS Mfg. Co.*, 617 So. 2d 758 (Fla. 4th DCA 1993); *Lincoln v. Florida Parole Com'n*, 643 So. 2d 668, 672 (Fla. 1st DCA 1994); *State v. Patterson*, 694 So. 2d 55, 58 (Fla. 5th DCA 1997); *Matthews v. State*, 760 So. 2d 1148, 1150 (Fla. 5th DCA 2000); *Burgos v. State*, 765 So. 2d 967, 968 (Fla. 4th DCA 2000) (all concluding that it is appropriate to determine

legislative intent by considering a subsequent clarifying amendment enacted shortly after a judicial interpretation of the existing statute).

Importantly, the rule announced by this Court in *Lowry* and the other cases cited above (the “*Lowry* rule”) was designed to aid courts properly engaged in statutory construction. Statutory construction and its attendant rules, particularly the rules cited above, may be implicated in interpreting the meaning of an ambiguous law and, therefore, *might* be of use in discerning the meaning of section 718.202 as it existed before the 2010 amendment. Indeed, this Court’s holding in *Gay*, quoted above, even suggests courts would have a duty to consider the 2010 amendment as they construe the pre-amended law. But, the intent of the Legislature in adopting the clarifying amendment to section 718.202 is refreshingly unambiguous and the use of statutory rules of construction to discern the intent of the amendment seems inappropriate. *See* section 718.202(11) Florida Statutes (2011); *Petty v. Florida Ins. Guar. Ass’n*, 80 So. 3d 313, 316 n.3 (Fla. 2012); *Kephart v. Hadi*, 932 So. 2d 1086, 1091 (Fla. 2006); *St. Petersburg Bank & Trust Co v. Hamm*, 414 So. 2d 1071, 1073 (Fla. 1982). Whether the Legislature achieved its goal of clarifying the law, or changed it, is another matter that we leave to the litigants in this dispute and to this Court.

Unfortunately, our jurisprudential sojourn does not end here. In *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55, 62 (Fla.1995), this Court seemed to

limit its well-reasoned *Lowry* rule of statutory construction by adding an additional rule of construction potentially amounting to legislative estoppel. The Court noted:

It would be absurd, however, to consider legislation enacted more than ten years after the original act as a clarification of original intent; the membership of the 1992 legislature substantially differed from that of the 1982 legislature.

That limitation on the *Lowry* rule also appears in *McKenzie Check Advance of Florida LLC v. Betts*, 928 So. 2d 1204, 1210 (Fla. 2006), where the legislative time-bar for clarifying its laws was shortened from ten to seven years.

At first blush a time-limitation rule may have appeal and seem logical. But, it is inconsistent with the legislative process and well-worn legal presumptions involving the Legislature and its work. Under Florida law, general laws like section 718.202, are repealed and re-enacted by the Legislature each year. *See, e.g.* sections 11.2421, 11.2422, Florida Statutes (2011). Statutes used to be repealed and re-enacted every two years. *See, e.g.* Chapter 97-97, §2, Laws of Florida; *Dockery v. Hood*, 922 So. 2d 258, 261 (Fla. 1st DCA 2006); *State v. Rothauser*, 934 So. 2d 17, 19 (Fla. 2d DCA 2006) (discussing the statutory repeal and re-enactment process). Since the late 1800s, there was never a window of time

between the enactment of a law and a clarifying amendment that exceeded two years.³

The legislative action of repealing and re-adopting laws is as real as any other legislation, and should be accorded the presumptions that the Legislature knew what they were re-enacting and knew of prior judicial interpretations of the law they re-enacted. *See Dockery v. Hood*, 922 So. 2d at 262 (Legislature presumed to know existing law when it enacts a statute, including sections 11.2421 and 11.2422); *Woodgate Development Corp. v. Hamilton Inv. Trust*, 351 So. 2d 14, 16 (Fla. 1977) (Legislature, in re-enacting laws in accordance with section 11.2421, is presumed to know the law); *Mathis v. State*, 31 Fla. 291, 12 So. 681 (Fla. 1893) (the repeal and re-enactment of the general laws of Florida involves constitutional law making by the Legislature and is entitled to that deference). Just as constitutional defects are often cured by the repeal and re-enactment legislation in Chapter 11, Florida Statutes, so too is the *Laforet* time bar for clarifying legislation. *See State v. Rothauser*, 934 So. 2d at 19 (“It has long been established in Florida that this legislative act of statutory adoption or codification cures any constitutional defect concerning the title of a law.”).

³ To our knowledge, no case espousing “legislative estoppel” as a rule of statutory construction addressed the legislative process and how it actually works.

Your *Amicus* respectfully submits that the explanation as to why “legislative estoppel” should not occur can end here. Nonetheless, putting aside the legislative process and corresponding argument discussed above, we also note that when clarifying a law and legislative intent, it is common for this Court and the district courts of appeal to consider legislative history in order to understand the original intent of a law, even if the law was enacted years earlier. *See e.g. Universal Ins. Co. of North America v. Warfel*, 82 So. 3d 47, 63 (Fla. 2012) (interpreting legislative history of law enacted in 2005); *West Florida Regional Medical Center, Inc. v. See*, 79 So. 3d 1, 18 (Fla. 2012) (interpreting legislative history of 1986 federal legislation); *Johnson v. State*, 78 So. 3d 1305, 1312-13 (Fla. 2012) (interpreting legislative history from 2003); *Samples v. Florida Birth-Related Neurological*, 40 So. 3d 18, 23 (Fla. 5th DCA 2010) (interpreting 1989 legislative history).

In other words, courts are often called upon to look back over many years, even decades, to the initial history of a law to discern the legislative intent. How is it then that the very branch of government that created that history is time-barred from looking back in the same manner when enacting a clarifying amendment some years after the original enactment of the law? This question calls out all the more loudly where the clarifying amendment is in response to a recent judicial

interpretation of the law in question. We were unable to locate a sound reason to treat these two branches of government differently on this topic.

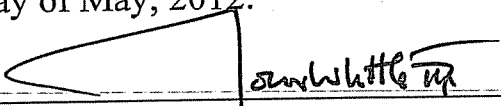
We also reviewed the Florida Constitution and found nothing in it that limits the time for the Legislature to clarify existing law. If no such limitation exists, then the Legislature's power cannot be so limited. *See Sun Ins. Office, Limited v. Clay*, 133 So. 2d 735, 742 (Fla.1961) ("Although the Federal Constitution bestows power only in specific grants and is a document of delegated powers, the Florida Constitution is a limitation on power as distinguished from a grant of power, particularly with regard to legislative power.") (quoting 6 Fla. Jur. *Constitutional Law*, § 37 (1956)); *Browning v. Fla. Hometown Democracy, Inc., PAC*, 29 So. 3d 1053, 1079 (Fla. 2010) (" 'The legislative branch looks to the [Florida] Constitution not for sources of power but for limitations upon power.' ").

To be sure, this Court may find in a particular, unusual case that the Legislature's purported clarification is really a substantive change to the law. But, that should have nothing to do with the passage of time and everything to do with the terms of the purported clarifying amendment juxtaposed with the prior version of the law.

CONCLUSION

For these reasons, as the Court navigates and resolves the issues presented by the litigants, we respectfully request that the Court clarify the proper judicial analysis of purported clarifying legislation and remove any suggestion that the mere passage of time between initial enactment and subsequent legislation is a bar to clarifying amendments and their retroactive application.

Respectfully submitted this 10th day of May, 2012.


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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been filed via e-file@flcourts.org, with the original and seven copies mailed to the Clerk, Florida Supreme Court, 500 South Duval Street, Tallahassee, Florida, 32399, and copies furnished via U.S. Mail on the 10th day of May, 2012, to the Offices of:

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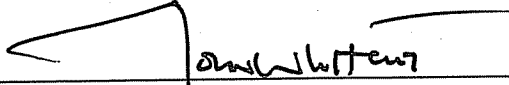
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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the font requirement of Fla. R. App. P. 9.210(a)(2) and is submitted in Times New Roman 14-point font.



JOHN W. LITTLE, III

RPPTL 2012-2013 CLE Calendar				
Date	Seminar	#	Location	Program Chair (s)
July 25, 2012	Power of Attorney	1536	Breakers *	
July 26 - 28, 2012	Legislative Update	1425	Breakers *	
September 13-16, 2012	EC Meeting		Key Biscayne	
September 18, 2012	Alternate Dispute Resolution	1507	Buena Vista Palace, ORL *	
October 5-6, 2012	FLEA Probate Team		Orlando	
February 15	Condo Law	1456	Orlando	
October 11, 2012	Mortgage Law	1508	Tampa *	
November 29 or 30	Joint Estate Tax/Asset Protection	1509	Tampa*	
November 15 - 18, 2012	EC Meeting		Asheville, NC	
January 18, 2013	RPPTL / Environmental Land Use	1455	Tampa *	
February 7 - 10, 2013	EC Meeting		Tallahassee	
Feb. 15 - 16, 2013	Real Property Certification Review Course	1450	Orlando*	
February 21, 2013	Probate Law	1510	Tampa *	
March 21 - 23, 2013	Construction Law Certification Review Course	1452	Orlando	
March 21 - 23, 2013	6th Annual Construction Law Institute	1453	Orlando	
April 5 - 6, 2013	Wills, Trust & Estate Certification Review Course	1451	Orlando*	
April 5, 2013	Condo Law	1456	Orlando*	
April 12, 2013	Real Property Litigation	1506	Tampa*	
May 9-11, 2013	Fund Assembly			
May 10, 2013	Trust & Estate Symposium	1460	Tampa *	
May 24, 2013	Convention Seminar	1511	St. Pete	Convention
June 14-15, 2013	Attorney/Trust Officer Liaison Conference	1462	Breakers	

* Webcast & Live

FINAL POST SESSION REPORT

NUMERICAL INDEX SUMMARY OF 2012 LEGISLATIVE ISSUES

Barry Spivey, Legislative Committee Chairman
and
Peter M. Dunbar, Martha J. Edenfield,
Howard "Gene" Adams and Josh Aubuchon
RPPTL Legislative Counsel

May 7, 2012

The *final* post-Session report follows below. The Session produced a variety of changes that will affect the practice areas of RPPTL Section members, many of which were a part of the Section's legislative package. The Section's initiatives and bills where the Section provided technical assistance appear in the first part of the summary. The parts following list other items of interest that passed and items of interest that did not pass.

The Governor has taken final action on the measures, and the appropriate Session Law number follows the summary on each bill. The full text of each enrolled bill, as well as applicable legislative staff reports, are available on the legislative web sites (www.flsenate.gov; www.myfloridahouse.com; and www.leg.state.fl.us). A summary of each measure that passed appears below in numerical bill order.

I. SECTION INITIATIVES AND TECHNICAL ASSISTANCE

Sale of Business—Transfer of Tax Liability: HB 103 by Representative Wood and Senator Altman is the Section's tax liability initiative pursued in cooperation with the Business Law Section. The legislation clarifies that the transfer of business assets is considered the sale of the business and clarifies the tax liability in conjunction with the transaction. (*Chapter 2012-55, Laws of Florida.*)

Insurance and Designations--Divorce: CS/HB 401 by Representative Moraitis and Senator Simmons is the Section's initiative to declare the designations of a beneficiary and

other designations occurring prior to a divorce to be inapplicable in the event of a divorce and subsequent death of the designating party. (**Chapter 2012-148, Laws of Florida.**)

Uniform Commercial Code—Secured Transactions: CS/HB 483 by Representative Passidomo and Senator Richter updates the Florida version of Article 9 of the UCC to the changes previously adopted to the uniform act. It is a joint initiative of the Business Law Section and RPPTL. (**Chapter 2012-59, Laws of Florida.**)

“Bulk Buyer” Extension: CS/HB 517 by Representative Grant is a DBPR bill dealing with streamlining of regulations at the department. The Section’s initiative to extend the “Bulk Buyer” provisions in Part VII of the Condominium Act passed as an amendment to the bill and is Section 36 of the legislation. (**Chapter 2012-61, Laws of Florida.**)

Title Insurance: CS/CS/HB 643 by Representative Moraitis and Senator Altman revises the regulation of title insurance agents and agencies; requires attorney-agents to maintain separate escrow accounts; provides for the licensure of agents and agencies and imposes reporting requirements for agents and insurers doing business in the state; provides continuing education requirements for agents; and revises the grounds for renewal, revocation and suspension of licenses. The legislation contains concepts previously approved by the Section. (**Chapter 2012-206, Laws of Florida.**) HB 645 is the companion bill exempting certain proprietary information from the public records. (**Chapter 2012-207, Laws of Florida.**)

Probate—Homestead Protection and Intestate Succession: HB 733 by Representative Kiar and Senator Joyner contain five of the Section probate initiatives. The first two relate to protected homestead property—(1) descent of homestead property under s. 732.401 and (2) protected homestead property under s. 731.201. The legislation also includes (3) a correction to the effective date for the language in s. 732.102 relating to a spouse’s share of a intestate decedent’s estate; (4) clarifies the time that an attorney in fact must file a petition for authority to make an election to take an undivided interest in homestead property; and (5) amends Chapter 732 to bar inheritance through intestate succession of a natural or adoptive parent from or through a child when the parental rights have previously been terminated. (**Chapter 2012-109, Laws of Florida.**)

Construction Liens: CS/HB 897 by Representative Moraitis and Senator Bogdanoff makes clarifying changes to s. 255.05 regarding payment bonds and amends sections 713.132 713.16, 718.18 and 713.22 in the construction lien chapter relating to notice for parties having direct contact with the owner and the manner of providing notice, requiring a description of the project, and clarifying the effect of a lien that extends for more than one year. The legislation was also amended to include the Section’s initiative correcting the notice procedures from last year’s legislation. (**Chapter 2012-211, Laws of Florida.**)

Natural Guardians: SB 990 by Senator Joyner and Representative Schwartz is the Section initiative that amends Chapter 744 to include natural guardians of a minor child with meaning of “parents” and changes “custody” to “parental responsibility” where applicable in the chapter. (**Chapter 2012-48, Laws of Florida.**)

Construction Warranties: CS/HB 1013 by Representative Artiles seeks to reverse the decision in *Lakeview Reserve Homeowners Association v. Maronda Homes* and modify the common law doctrine in *Gable v. Silver* concerning common law warranties of fitness and merchantability for off-site improvements to residential real estate. The Section opposed this legislation. (**Chapter 2012-161, Laws of Florida.**)

UPIA: The UPIA initiative was amended onto CS/SB 1050 by Senator Bogdanoff and Representative McBurney. It is the Sections initiative to revise and clarify the provisions of Florida's version of the Uniform Principle and Income Act, and it also contains the subsequent purchaser initiative. (**Chapter 2012-49, Laws of Florida.**)

Subsequent Purchaser Payoff: CS/SB 1050 by Senator Bogdanoff and Representative Bernard is the Section's initiative to require mortgagees to provide the unpaid balance of the mortgage to parties having an ownership interest in the property. It was amended to include the Section's UPIA initiative. (**Chapter 2012-49, Laws of Florida.**)

II. INITIATIVES OF INTEREST

Submerged Land Leases: HB 13 by Representative Frishe provides that maximum initial lease term for residential and multi-family residential docks will be 10 years, and it provides that there will be no lease payments when the number of docks does not exceed the number of upland residential units. (**Chapter 2012-202, Laws of Florida.**)

Additional Homestead Exemption—Surviving Spouse: CS/HJR 93 by Representative Harrison is a proposed constitutional amendment that would permit additional ad valorem property tax relief for the surviving spouse of military veteran or first responder killed in the line of duty. (**November 2012 General Election Ballot.**)

Additional Homestead Exemption--Seniors: CS/HJR 169 by Representative Oliva is a proposed constitutional amendment that would permit counties to grant an additional homestead exemption for citizens 65 years of age or older with a low household income as defined by general law. (**November 2012 General Election Ballot.**)

Premises Liability: CS/CS/HB 313 by Representative Bembry limits the liability who of a property owner who makes his or her property available to the public for use for outdoor recreation purposes, including hunting, fishing or wildlife viewing. Eligibility for the limited liability is condition on no charge being made by the land owner and posting of the land to disclosure the limitation on liability. (**Chapter 2012-203, Laws of Florida.**)

Additional Homestead Exemption--Seniors: CS/HB 357 by Representative Oliva is the implementing legislation for CS/HJR 169 and would take effect upon the passage of the constitutional amendment giving the option to grant additional home exemption to citizens 65 years of age or older. (**Chapter 2012-57, Laws of Florida.**)

Veteran's Guardianship: SB 520 by Senator Braynon repeals s. 744.103 relating to incapacitated world war veterans. (**Chapter 2012-40, Laws of Florida.**)

Evidence Code: HB 701 by Representative Logan permits the consideration of statements against a party when an individual is unavailable as a result of party's wrong doing or acquiescence to wrongfully causing the person's unavailability to the proceeding. (***Chapter 2012-152, Laws of Florida.***)

Limited Agricultural Associations: CS/HB 827 by Representative Porter provides procedures for the conversion of a limited agricultural association organized under ss. 604.09-604.14 to convert to a corporation-not-for-profit under Chapter 617. (***Chapter 2012-71, Laws of Florida.***)

Legal Notices—Electronic Publication: CS/CS/HB 937 by Representative Workman requires that newspapers that publish legal notices and advertisements also publish the legal notices on their websites at no additional charge and caps the cost of a second publication at 85% of the cost of the initial publication. (***Chapter 2012-212, Laws of Florida.***)

Growth Management—DRI's: CS/CS/HB 979 by Representative Diaz allows for an alternate review process for developments of regional impact that remain subject to state review; provides that increase in peak hour traffic would not constitute a substantial deviation of a DRI; and it includes a provision allowing for the rezoning of certain agricultural enclaves to the zoning designation of the surrounding property without local government approval. (***Chapter 2012-75, Laws of Florida.***)

Timeshare Re-Sales: CS/HB 1001 by Representative Eisnaugle provides for a new regulatory scope for the timeshare re-sales and the re-sellers of timeshare estates. (***Chapter 2012-76, Laws of Florida.***)

Tangible Personal Property Taxes: CS/HJR 1003 by Representative Eisnaugle is a proposed constitutional amendment that would authorize a local government to provide personal property tax exemptions of up to \$50,000 for small businesses. (***November 2012 General Election Ballot.***)

Storm Water Permitting: CS/HB 7003 by Representative Crisafulli directs the Department of Environmental Protection to promulgate uniform, consistent statewide rules for permitting the construction, maintenance, modification and removal of stormwater management systems. The legislation provides that a local government may provide for stricter standards, but the duplicative permitting processes are eliminated and the provisions of the Bert Harris Act will continue to apply. (***Chapter 2012-94, Laws of Florida.***)

Growth Management: CS/HB 7081 by Representative Workman makes numerous revisions to the state's growth management and development policies. Included in the legislation are provisions (1) that exempt municipal development orders for fewer than 50 residential dwellings for public school concurrency provisions of s. 163.31777; (2) it requires expedited review of plan amendments under s. 163.3180; and (3) subjects DRI's

identified in s. 380.06 (24) and (29) to the provisions of s. 380.115. (**Chapter 2012-99, Laws of Florida.**

Property Tax Administration: CS/HB 7097 by Representative Caldwell is a comprehensive package dealing with the administration on property taxes. Among its provisions is the right to reschedule a hearing under s. 192.0105 (Section 2) and s. 194.032 (Section 10) when the original hearing is not held within 2 hours of the originally scheduled time. (**Chapter 2012-193, Laws of Florida.**)

III. INITIATIVES OF INTEREST THAT FAILED

Florida Fair Foreclosure Act: CS/HB 213 by Representative Passidomo and Senator Latvala is a Section-supported initiative reforming the judicial foreclosure process. The bills died on the Senate Calendar.

Community Associations: CS/CS/HB 319 by Representative Moraitis and CS/SB 680 by Senator Bogdanoff contained 3 of the Section's initiatives—(1) revisions to the phasing provisions to allow a 3-year extension to complete the project; (2) extension of the “bulk-buyer” language in Part VII until 2015, and (3) the implementing language for “condo-in-a-condo” developments. The bills died on the Senate Calendar.

Hidden Liens: CS/HB 671 by Representative Wood and CS/SB 670 by Senator Ring is the Section's initiative to provide a uniform process for creating and recording liens that are authorized by municipal or county ordinances. The bills died on the Senate Special Order Calendar.

Inheritance from a Minor Child: CS/HB 1123 by Representative Steinberg and SB 1686 by Senator Fasano would have disqualified a parent from inheriting from a deceased child when the parent has been accused of abuse, abandonment or neglect of the child. The Section opposed the bills, and the bills died in committee.

Powers of Attorney: SB 1642 by Senator Storms would have expanded the provisions of s. 709.2105 and authorized charitable and religious not-for-profit corporations to act under a power of attorney. The Section opposed the bill, and the bill died in committee.

Title Insurance: SB 1694 by Senator Hays and HB 4147 by Representative Logan deleted the surety bonding requirement for a title insurance agency as a condition of licensure with the Department of Financial Services. The Section opposed the bills, and the bills died in committee.

RPPTL Law School Liaison Committee

What We've Been Up To . . .

This past year, we have worked with other committees to get students involved with RPPTL projects and initiatives, specifically the Condominium and Ethics Committees. Thank you to Lee Weintraub, Rob Freedman and Steve Mezer for spearheading these projects. In addition, we appreciate our members' efforts to welcome the students that have attended our executive council and committee meetings around the state. At the Ponte Vedra meeting, 10 students (2 from FSU and 8 from Florida Coastal) attended.

Our New Vice Chairs & Committee Members . . .

Welcome to our new vice chairs, Ben Bush, Jennifer Jones & Mary Karr, and committee members, Raul Perez Ballaga, Brenda Ezell and Jason Ellison.

2012/2013 Initiatives . . .

- **"Dinner Talk".** In connection with the Membership and Diversity Committees, a pilot program will be held for 3-4 schools (we have tentatively chosen FSU, Florida Coastal, UM and FAMU). A small group of students will be paired with practitioners (judges, experienced attorneys and new attorneys) for dinner to discuss student questions, the section and RPPTL areas of practice. Student selection will be based on involvement with the student RPPTL organization and school input.
- **Student RPPTL Membership/Involvement.** In connection with the membership, mentorship and diversity committees, we will be focusing on student membership and participation. What better way to showcase the benefits of RPPTL membership than to show future members what RPPTL is about? We will continue to host students at the meetings. And, students will continue to keep the Ethics & Professionalism Committee's database current. Please contact us if your committee is interested in involving student volunteers. Many students need volunteer hours to graduate.
- **Outreach Programs (RPPTL Panels & Speakers).** In addition to Dinner Talk, we will be working with each of the 11 Florida Law Schools to provide speakers/host events where the students have an opportunity to interact with RPPTL members. Some of those events will include: speed networking, lunch and learn programs and placement of panel speakers at student group meetings. The speakers and panel members will discuss their respective practice area, involvement in the section and tips for students interested in our area of the law.

Our plan is to also feature our volunteers in [ActionLine](#). If you are interested in volunteering at one of the schools or have ideas for our committee, please contact Stacy at stacy.kalmanson@fnf.com.

Stacy Kalmanson and Fred Dudley, Co-Chairs

P.S. Fred – you will be missed since you are rotating to a new committee – hopefully, you'll still find time to spend with the students – you are always a favorite. -Stacy