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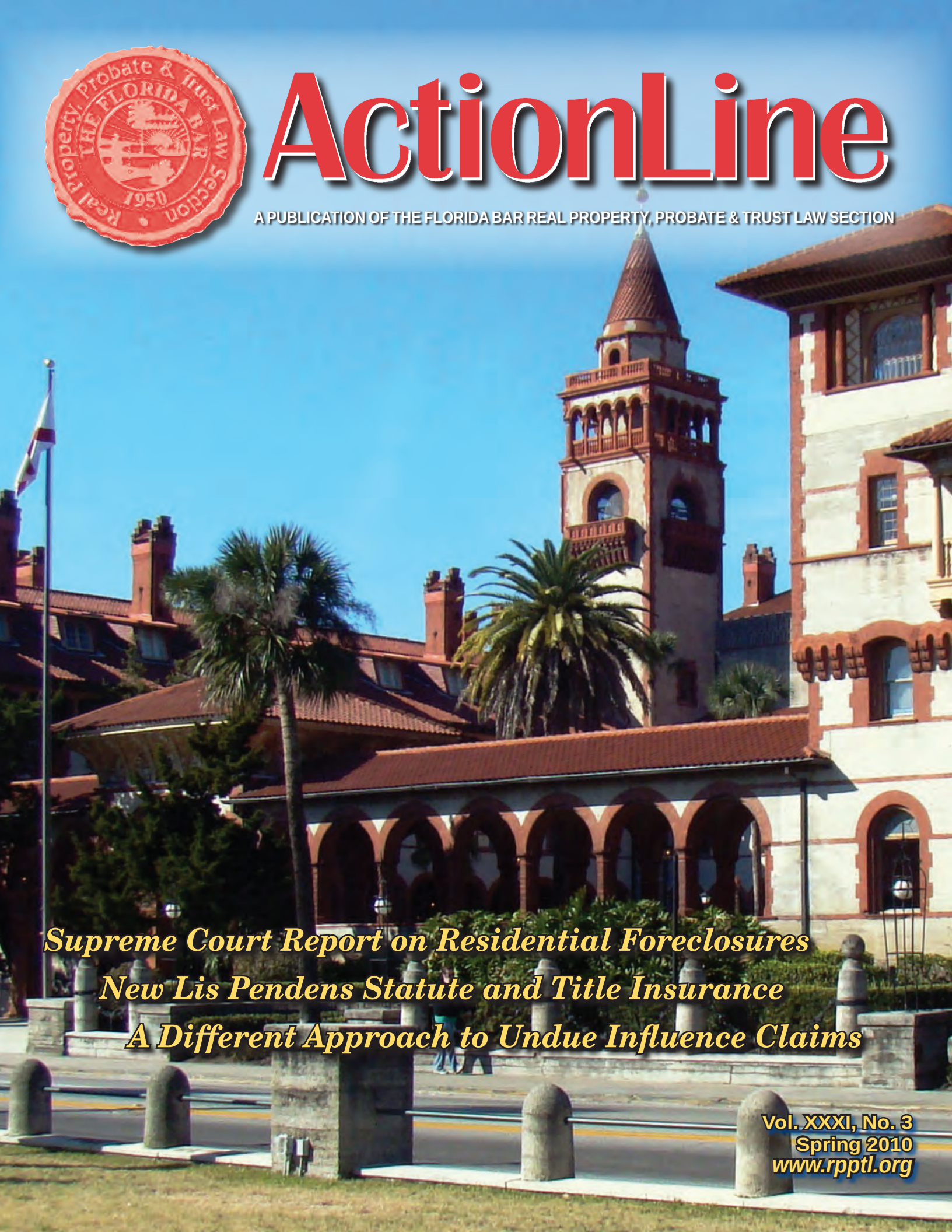

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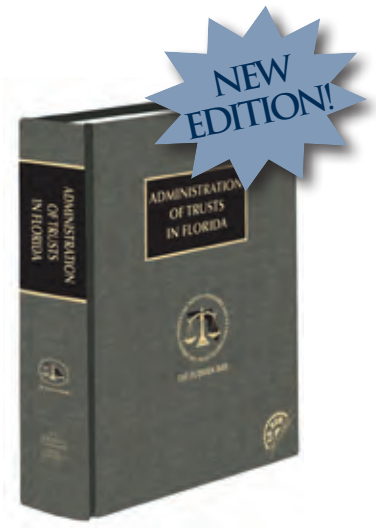

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By John B. Neukamm

Section Chair 2009 - 2010

Chair's Column

The foregoing quotation attributed to the twelfth century philosopher and scholar, Bernard of Chartres, explains, to a significant degree, the successes of the Real Property, Probate & Trust Law Section of The Florida Bar. Because we are able to "stand on the shoulders" of our predecessors, our Section's present leaders' ability to lead the Section has been greatly enhanced. While the RPPTL Section has been blessed with an abundance of bright, dedicated and productive members, had it not been for the vision and accomplishments of the leaders who preceded us (who truly were -- and are -- the "giants" of our profession), we would not be nearly as successful.

At my first Florida Bar Council of Sections meeting last year, a senior executive with The Florida Bar asked me to explain our tremendous success, and I responded that, like many other organizations, we have many extraordinarily talented members, but we are also extremely fortunate that most of our former Chairs have remained actively involved with our Section. I remarked that I had recently chaired our Section's annual Long Range Planning Committee meeting to nominate the officers and Circuit Representatives who have served with me over the past year, and 23 former RPPTL Section Chairs dating back to 1973 vigorously debated our Section's future during the course of that meeting. I have been involved with many Bar and civic organizations over the years, but I know of no other organization in which so many former leaders maintain such a significant degree of involvement.

Of the fifty-five persons who have served as Chair of the RPPTL Section since its inception in 1954, seventeen have died, but most of the remaining former Chairs who have not yet retired from the practice of law remain actively involved with the Section. Many of them, in fact, continue to contribute mightily to the work of the Section. During the last ten months (and prior to becoming RPPTL Section Chair), I have relied extensively upon the expertise and experience of my predecessors, so I would like to take this opportunity to briefly highlight some of the areas in which our former Chairs continue to serve our Section and its members.

My immediate predecessors, **Sandra Diamond** and **Melissa Murphy**, have both provided invaluable assistance and guidance to me over the last year and, with **Laird Lile**, served with me on the Steering Committee with respect to the Section's Strategic Plan. That plan has served as a guide for the Section's leaders over the last year and is expected to continue to provide goals and objectives for future Section leaders over the next four years (and beyond). In addition, at former Chief Justice Peggy Quince's request, Sandy served as a member of the Task Force on Residential Mortgage Foreclosure Cases, which issued its report to the Florida Supreme Court on August 15, 2009. She has also continued to serve on the Section's Legislative Committee, Budget Committee and various probate law committees. Melissa graciously agreed to serve as one of the Section's designated representatives to the Title Insurance Study Advisory Council established by the Florida Legislature to review and report on title insurance related issues, has served on the Section's Legislative Committee and various real property law committees and has agreed to serve as chair of the Title Insurance Committee next year.

In addition to his service on the Steering Committee for the Section's Strategic Plan, Laird agreed to serve with **Rohan Kelley** as a member of the Section's Electronic Court Filing Committee, which has worked closely with the Florida Courts Technology Commission in an effort to implement e-filing in the courts on a state-wide basis, as mandated by 2009 legislation and a July 1, 2009, Administrative Order issued by Chief Justice Peggy Quince. Laird also serves on The Florida Bar's Board of Governors, as a member of the Florida Legal Education Association ("FLEA"), on the Section's Legislative Committee and as a member of various probate law committees and is always willing to provide helpful input to me. In addition to his service as Chair of the Electronic Court Filing Committee, Rohan co-authored the 4th Edition of the popular *Florida Bar Probate System* publication this year, serves as a FLEA member and on various probate law committees. In addition, as the father of Tae Kelley Bronner, Shane Kelley and Sean Kelley, who have provided phenomenal service to the Section in the past and respectively serve as the incoming Chairs of the Section's Probate Law, Trust Law and Guardianship Law Committees, he has certainly done his best to assure that the future leadership of the Section remains in good hands.

In addition to serving as a mentor to me, **Julius ("Jay")**

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ABOUT THE COVER:

The January Executive Council meeting was held just blocks away from historic Flagler College, pictured here.

Photo courtesy of John Neukamm.

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Issue	Deadline
Spring	January 31
Summer	April 30
Fall	July 31
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For GENERAL INQUIRIES about the RPPTL Section, contact Liz Smith at The Florida Bar at 800-342-8060 extension 5619, or at *esmith@flabar.org*. Liz can help with most everything, such as membership, the Section's website, committee meeting schedules, and CLE seminars.

The Effect of the New Lis Pendens Statute on Title Insurance Coverage

By Mathai Jacob and Shari Ben Moussa, Katz Barron Squitero Faust, Miami, FL

Greater rights have been afforded to purchasers and mortgagees of real or personal property as a result of recent amendments to Florida's lis pendens statute, Section 48.23, Florida Statutes (the "Lis Pendens Statute"). However, a lingering question is whether and how title insurance companies will recognize the new statutory protections when underwriting title insurance coverage. This article discusses the effect of the revised Lis Pendens Statute on title insurance coverage provided to third party purchasers and mortgagees during a pending action when a notice of lis pendens has not been recorded, or a notice has expired, been withdrawn, or been discharged.

Pursuant to Florida law, a lis pendens is intended to protect third parties before they obtain any rights, title, and interest in personal or real property by notifying them of a pending law suit that affects the property.[1] Pursuant to Section 695.01, Florida Statutes, a bona fide purchaser or mortgagee without notice of an adverse interest in property acquires its rights, title, and interest in the property free of such interest. However, under the prior version of the Lis Pendens Statute, such parties would lose their bona fide party status once they had constructive notice of an adverse claim based on the notice of lis pendens or actual notice of a pending lawsuit affecting the property. The parties would therefore acquire their interest subject to the pending lawsuit. As a result, title insurance companies would require an insured with knowledge of the pending claims to take title with an exception for the pending action even if the lis pendens had expired or had been withdrawn or discharged.

Under the revised Lis Pendens Statute, if a notice of lis pendens has not been recorded, or if the notice has expired or been withdrawn or discharged, in connection with a pending specific performance action or action not based on a recorded instrument,[2] third party purchasers or mortgagees who acquire for value an interest in a property take the interest exempt from all claims against the property that were filed in the action and from any judgment entered in the action as if they had no actual or constructive notice of the proceeding or of the claims made. In other words, such actions would then have no effect on the title acquired by a third party purchaser or mortgagee for value. Only the parties to the action and their legal successors, personal representatives, heirs, and devisees would be subject to the disposition of the action.

As noted in the Senate Bill Analysis,[3] the Real Property, Probate, and Trust Law (RPPTL) Section of The Florida Bar proposed the statutory amendments to deal with real property actions for specific performance where the lis pendens or the simple filing of the action clouded title. The basis for the amendments was a 1998 Florida Bar Journal Article entitled *Specific Performance of Real Estate Contracts: Legal Blackmail* ("Legal Blackmail Article"), in which the authors discussed the legal battles in obtaining title insurance coverage while there was a pending action for specific performance, regardless of whether there was a lis pendens.[4] The Legal Blackmail Article explains how a buyer's filing of an action for specific performance can tie up a seller's property for a few years while the seller continues to pay litigation costs, property carrying costs, and is subject to a declining real estate market. The authors liken this to a form of "legal blackmail," in which a seller may be blackmailed to convey title to the buyer at a reduced price or to settle frivolous claims for breach of a real estate sales contract in order to sell the property to a third party.[5]

The question now is whether the legal blackmail will continue after the passage of the revised Lis Pendens Statute and to what degree pending litigation will affect the marketability of title. Of critical importance is how title insurance companies will insure parties who acquire an interest in property for value with notice of the litigation.

The Senate Bill Analysis notes that the revised Lis Pendens Statute may reduce real property litigation costs in connection with "unwarranted lawsuits involving lis pendens." However, practitioners should be aware that title insurance companies have yet to establish firm procedures on how the amendments will affect title insurance coverage. Notwithstanding the statutory amendments, title insurance companies presumably want to continue, as before, to avoid buying potential lawsuits and to safeguard against costs to defend their insureds.[6] Notably, since the effective date of the amendments, the majority of title insurance companies have published bulletins or articles providing that coverage will be reviewed on a case-by-case basis. Not until recently have any title insurance companies outlined more specific guidelines setting forth how exceptions will be analyzed.

Title insurance companies need to establish and announce new underwriting criteria to conform to the revised Lis Pendens Statute.

Unless and until there is sufficient case law considering this issue, legal blackmail may not have been completely eradicated in this context. Pursuant to the plain meaning of the revised Lis Pendens Statute, third party purchasers and mortgagees now take their interest free of these types

continued, next page

New Lis Pendens Statute

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of adverse claims notwithstanding their actual knowledge of the pending law suit. Title insurance companies need to establish and announce new underwriting criteria to conform to the revised Lis Pendens Statute. However, unless and until title insurance companies are willing to insure these third party purchasers and mortgagees without an exception for such claims, which remains to be seen, the revised Lis Pendens Statute will have had little effect.

Careful attention should be focused on whether an exception is warranted in the particular situation. Specifically, title agents should review whether a notice of lis pendens has been recorded or if the notice has expired or been withdrawn or discharged. Other considerations may include: whether the action is based on a duly recorded instrument or construction lien; the claims brought in the action; whether the lis pendens was extended; whether the discharge of the lis pendens has been contested by reconsideration or appeal and, if so, the status of the appeal. As the statutory amendments are tested and applied in practice, by title policies being underwritten without exception, legal blackmail may truly become a concern of the past which may facilitate additional real estate transactions.

Endnotes:

1 *Chiusolo v. Kennedy*, 614 So. 2d 491 (Fla. 1993).

2 To support a lis pendens not based on a duly recorded instrument, the proponent bears the burden of showing "a fair nexus between the apparent legal or equitable ownership of the property and the dispute embodied in the lawsuit." *Id.* at 492 (Fla. 1993). Such actions may include, without limitation, actions dealing with fraudulent transfers and actions to quiet title, equitable liens, constructive or resulting trusts or unrecorded option actions.

3 Senate Bill Analysis and Fiscal Impact Statement, Banking and Insurance Committee, Judiciary Committee and Senator Bennett, *Lis Pendens* (April 1, 2009).

4 Gerald F. Richman and Mark A. Romance, *Specific Performance of Real Estate Contracts: Legal Blackmail*, Florida Bar Journal (November 1998).

5 *See id.*

6 *See, e.g.,* Attorneys' Title Insurance Fund, Inc. and Attorneys' Title Fund Services, LLC, Fund Title Notes, § 10.05.01 (Rev. through Dec. 2009).

Message From the Chair - On the Shoulders of Giants

from page 3

Zschau serves, with **Ed Koren**, as one of our Section's Liaisons to the ABA's Real Property, Trusts & Estates Section, is a member of various real property law committees, serves as a director of Attorneys Title Insurance Fund and has worked diligently to increase our state's influence within the American College of Real Estate Lawyers. Ed also serves as a FLEA director, on the Section's Legislative Committee and on various probate law committees. **Tom Smith** has recently agreed to serve as President of Attorneys' Title Insurance Fund and is committed to ensuring that the Fund will continue to provide excellent service to attorneys, property owners and mortgagees for years to come. He has served in a leadership capacity with the American College of Real Estate Lawyers and is a frequent lecturer at CLE presentations. When he is not engaging in the private practice of law or pursuing his twin passions of music production and raising funds to address autism issues, **Bob Goldman** works tirelessly as one of the "voices" of the Section with respect to amicus filings, and, based upon recent court decisions, he and his committee have been extraordinarily effective advocates.

Steve Hearn has worked to bring our Section's fledgling mentor program to fruition; he also serves as a FLEA member and on various probate law committees. Several of our Section members, including **David Brennan**, are capable of handling both real property and probate matters. He is probably our Section's most popular speaker, so it is fitting that he currently serves as the acting President of FLEA. Dave is also the father of Sancha Whynot, who has chaired the Section's most popular annual seminar, the Legislative and Case Law Update, and currently assists with the oversight of all of the Section's CLE programs, so it is clear that the "apple has not fallen far from the tree." Like Dave, **Michael Swaine** has been recognized for his capabilities in both of our practice areas, and, through his son, Bob (who currently chairs the Legislative and Case Law Update Committee), he has also assured that the Section's future programs will continue to remain popular. Mike also serves as a FLEA member, as a vice chair of our critical Sponsorship Committee and on many other Section committees.

In our day-to-day practice, many of us regularly use Florida Lawyers Support Services, Inc. ("FLSSI") forms, including the FAR/Bar contract, probate and guardianship pleadings, so we owe a debt of gratitude to **Roger Isphording**, who serves as FLSSI's President (as well as a FLEA director and as the Section's resident "travel consultant" with respect to out-of-state meetings). I believe that **John Arthur Jones**, a member of our "Greatest Generation" who recently celebrated his 60th anniversary as a practicing Florida lawyer, is the only RPPTL Section member who is a member of both the American College of Real Estate Lawyers and the American College of Trusts and Estates Counsel. In addition to being a mentor to many of our Section leaders and a FLEA director, John Arthur is personally responsible for most of the pleading forms that are used in probate courts across the state (and is also a very entertaining storyteller).

Roland ("Chip") Waller is the conscience of our Section; we can always count on him to debate both substan-

tive law and administrative issues arising during the course of Executive Council or committee meetings. Chip truly has the Section's best interests at heart and serves on numerous Section committees (and frequently attends meetings and offers constructive input with respect to committees in which he is not an "official member"). As a frequent and popular lecturer, he also serves as an officer of FLEA. Other active former Section Chairs, many of whom have remained vibrant members of various Section committees, participants in our Long Range Planning Committee meetings, frequent providers of email advice and very active (and often vocal) members of the "back row" during our Executive Council meetings, include **Louis Guttmann, Wilson Smith, Bruce Stone, Julie Williamson, Ruth Kinsolving, Bruce Marger, Louie Adcock, John Norris, Joan Kayser, Pat Christiansen, Walter Beales** and **John Grimsley.** In addition, **Bob Arnold** continues to entertain and educate our Section's real estate lawyers with his recent case law quizzes during each year's Fund Assembly.

Jerry Aron is deserving of special kudos this year, during which he has devoted an inordinate amount of time dealing with legislative proposals addressing non-judicial foreclosure issues. Our Section is very concerned that any legislation affecting the enforcement of liens against realty must protect property rights and assure due process. Jerry willingly agreed to chair the Section's Non-Judicial Foreclosure Task Force, which also includes experts on real estate litigation, title insurance and mortgage law, and he has worked tirelessly with timeshare developers, bankers, legislative staffers, the Section's legislative consultants and our Executive Committee to craft provisions necessary to protect fundamental rights and to oppose provisions which fail to protect such rights. Jerry's devotion to the Section, knowledge of the law and concern for the protection of property and due process rights epitomizes the degree of service provided by former Section Chairs to the Section, as well as to the citizens of the State of Florida.

Unfortunately, I must conclude by noting the recent death of one of the "giants" of our Section, Bill Sherman. Bill, who chaired the Section when I first joined in 1984, led by quiet example, with humility and grace, and was as fine a gentleman as I have known. His funeral service was held on the feast day of St. Joseph, which was quite appropriate since Bill was a father figure to many of us in the RPPTL Section. At the time of his death, Bill served as President of the Florida Legal Education Association, which has spearheaded innovations in continuing legal education programs since 1979 and continues to provide high-quality seminars through its popular Probate Team, Guardianship Team and Real Property Team programs. After service as an Army photographer at the end of World War II, Bill attended college and law school at the University of Florida (but continued his service to his country as an Army Reserve officer). During his 57 years of legal practice in DeLand, Bill served on The Florida Bar Board of Governors, was involved with the Attorney/Realtor Accord (which is responsible for the widely utilized FAR/Bar Residential Real Estate Contract), served on the commission that drafted the Florida Probate Code, served as a FLSSI director, served for nearly 47 years as outside counsel to the West Volusia County Hospital Authority, which was established to provide health care to the poor, on the Volusia County Charter Study Commission and as President of the longest continuing law firm in Volusia County. While it would be difficult to emulate Bill, as one of the Section giants, he has provided very broad shoulders upon which other Section leaders and I have been privileged to stand, so, as a result of his leadership and service, as well as the leadership and service that other former RPPTL Section Chairs continue to provide, I am confident that the Section, and its many talented and dedicated members, will continue to prosper in the future.

********Announcement of Date Change *******

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Alleging Undue Influence: Maybe You Don't Have To Be So Presumptuous

By J. Richard Caskey, J. Richard Caskey, P.A., Tampa, FL


R. CASKEY

Attorneys familiar with undue influence claims generally seek out the following facts when asserting or defending those claims: (1) whether a confidential relationship existed between the alleged undue influencer and the alleged victim; (2) whether the alleged undue influencer was active in the procurement of the instrument being contested; and (3) whether the alleged undue influencer became a substantial beneficiary under the instrument. Often, practitioners will cite to the *Carpenter*[1] case and incorrectly state that the forgoing items are the three elements required to state a cause of action for undue influence. However, that is a misstatement of Florida law. The three elements recited above are not the elements necessary to establish a *claim* for undue influence, but rather are the elements necessary to establish a *presumption* of undue influence.[2]

To establish a *claim* for undue influence, a party must show that a person was influenced by over-persuasion, duress, force, coercion, or artful or fraudulent contrivances so that the person did not act of his or her own free agency in the execution of the instrument at issue.[3] Conspicuously absent from this description is any reference to confidential relationships, substantial beneficiaries, or active procurement. Although the benefit of proving those items and establishing a presumption of undue influence is clear,[4] the question still arises: Can a party prevail on an undue influence claim without proving (or even alleging) facts sufficient to give rise to the presumption of undue influence? While such a case would certainly be difficult, Florida law appears to leave the door open for potential undue influence claims where no presumption arises.

Generally, undue influence is a species of fraud.[5] The Florida Supreme Court has stated that "[w]hat constitutes such undue influence cannot be precisely defined, and each case must be determined upon the consideration of its special facts."[6] Additionally, the means employed by the undue influencer and the extent of the influence are immaterial if their effect results in the destruction of the free agency of the testator.[7] While proving facts to establish a presumption is usually the most direct path in an undue influence case, it might not be the exclusive path. Indeed, the ultimate facts of undue influence must often be established by circumstantial evidence.[8]

In the case *In re Ates' Estate*, 60 So. 2d 275 (Fla. 1952), the Florida Supreme Court faced factual issues that do not necessarily fit squarely into the typical three-element presumption analysis. In *Ates*, the decedent favored one of his sons over the other children, and deeded certain real property to that son during his lifetime. When the other children realized the death of their father was imminent, they returned home to care for him and discovered the prior gift of real property to their brother. After that discovery, the siblings began to quarrel, and the favored son was "repeatedly and persistently accused in the presence of and to the father of 'stealing', 'taking', 'selling' his father's cattle - accusations not sustained by the evidence."[9] As the father's health declined, he was confined to his room and his contacts with other persons were limited. The other siblings lived with and cared for their father under these circumstances for almost sixteen months. A few months before his death, the father executed a will, and then a codicil, which disinherited the preferred son to the benefit of the other siblings. An action for undue influence followed.

Although counsel for the other siblings argued that his clients' actions did not constitute undue influence, but rather, at most, were "statements made by quarreling children and could have created in the mind of the testator nothing more than prejudice, as distinguished from undue influence," the Florida Supreme Court disagreed.[10] The Court upheld the trial court's finding that the will contestant had proved undue influence by a preponderance of the evidence. That ruling appears to have been based in large part upon the isolation of the decent and the accusations and misrepresentations made to the decedent. In ruling, the Court stated:

Can a party prevail on an undue influence claim without proving (or even alleging) facts sufficient to give rise to the presumption of undue influence?

> "Some of the essential steps in asserting undue influence upon a person against those for whom he has love and in whom he had confidence is for some other person (1) to have access to the person to be influenced, (2) to administer to the needs and wishes of such person, (3) to keep those for whom the person to be influenced has love and confidence in away from the person to be influenced, (4) to establish a confidential relationship, and (5) to tear down this love and confidence by insinuations and accusations."[11]

If *Ates* is to serve as a road map, it appears a party might be able to prevail on an undue influence claim based solely

continued, next page

Alleging Undue Influence

from preceding page

upon isolation of and misrepresentations to the decedent, without first establishing any presumption of undue influence.[12] If a party can prove, through other evidence, facts that establish influence to such a degree that the object of the influence did not act of his or her own free agency, then it might be unnecessary to establish, for example, the alleged influencer's active procurement of the instrument in question.[13] There is no doubt that tackling an undue influence case without the benefit of the presumption would be an arduous task. However, practitioners should at least be aware of the possibility.

Endnotes:

1 *In re Estate of Carpenter,* 253 So. 2d 697 (Fla. 1971).

2 *Id.* at 701.

3 *See Raimi v. Furlong*, 702 So. 2d 1273, 1287 (Fla. 3d DCA 1997); *Carpenter* 253 So. 2d at 704*; In re Starr's Estate*, 170 So. 620 (1936).

4 In case it is not so clear, after a presumption of undue influence has been established, the burden of proof shifts to the alleged undue influencer to prove he or she *did not* unduly influence the testator. *See Hack v. Janes*, 878 So. 2d 440 (Fla. 5th DCA 2004); s. 733.107(2), Florida Statutes.

5 *In re: Guardianship of Rekasis*, 545 So. 2d 471 (Fla. 2d DCA 1989); *O'Hey v. Van Dorn*, 562 So. 2d 405 (Fla. 4th DCA 1990).

6 *Peacock v. Dubois*, 105 So. 321 (1925).

7 *Id.* at 322.

8 *Id.*

9 *Ates* at 277.

10 *Id.* at 278.

11 *Id*. at 279.

12 Although the *Ates* opinion pre-dates *Carpenter* and does not analyze the facts from the perspective of establishing a presumption, it does secondarily point out the presence of *Carpenter* factors that typically aid in the establishment of active procurement. *Id*. Alternatively, perhaps modern courts would view the isolation and misrepresentations as indicia to evidence active procurement.

13 In *Hemker v. Abdul*, 716 So. 2d 817 (Fla. 2d DCA 1998), the court determined genuine issues of material fact precluded summary judgment against a will contestant because the alleged undue influencer's lack of knowledge regarding the procurement of the will did not conclusively establish that the will contestant could not prove her case. On the other hand, in *Davis v. Foulkrod*, 642 So. 2d 1129 (Fla. 4th DCA 1994), the court stated that if the evidence does not support a presumption of undue influence, the issue should be decided against the contestant.

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Supreme Court Report on Residential Foreclosure Cases

By Douglas C. Roland, Esq., Bricklemyer Smolker & Bolves, P.A., Tampa, FL

On December 28, 2009, the Florida Supreme Court issued an Administrative Order to address the problem of managing foreclosures. The plan in effect cedes some administrative functions to independent non-profit entities which will manage the mediation process with some accountability to and scrutiny of the circuit courts. This framework, called the Residential Mortgage Foreclosure Mediation Program (RMFMP), is limited to foreclosures on residential, homestead property pertaining to loans that are subject to the provisions of the Truth In Lending Act (TILA), Regulation Z. The Administrative Order mirrors, with few revisions, the recommendations of a 15-member Task Force appointed by the Court in April, 2009, to address the judicial foreclosure issues occasioned by the vast number of filings.

While the language of the Order is not couched as an immediate mandate to the circuit court, it is certainly prudent to assume that it is applicable statewide and that each of the circuits will issue new mediation orders following the Model Order adopted. The Task Force had originally requested a change to 1.720, Fla. R. Civ. P. Due to the emergency nature of the foreclosure process, the Court instead issued the Administrative Order. It did, however, charge the Committee on Alternate Dispute Resolution Rules and Policy to examine the possibility of changing the Rule. It is noteworthy that there is no timeframe within which the circuit courts are to comply with the Administrative Order.

The Administrative Order itself establishes the use of "managed mediation", thereby adding a quasi-bureaucratic layer between filing suit and finalization of the case. This Order sets the qualifications and parameters for managed mediations. It consists mostly of a discussion of the history of the Task Force and general comments to support the Court's recommendation of its various components. For your information, a link to the Order follows: *http://www.floridasupremecourt.org/pub_info/documents/AOSC09-54_Foreclosures.pdf.* The true meat of the Administrative Order lies in the Model Order to be adopted by the circuit courts. Various features of this Order appear below.

Highlights of the Model Order

1. Program Manager

Most mediations are to be handled through a Program Manager, which acts as a type of clearinghouse for plaintiffs, borrowers and mediators. This Program Manager is contemplated to be a nonpartisan, non-profit organization that has the ability to manage a large number of cases. To the extent possible, communications through the Program Manager are to be conducted electronically.

2. Foreclosure Counselor

Prior to mediation, the borrower will be directed usually by the Program Manager to a Foreclosure Counselor, who will advise the borrower of available options when facing mortgage foreclosure. These Counselors must be certified by the Department of Housing and Urban Development (HUD) or the National Foreclosure Mitigation Counseling Program.

3. Opt-Out Provision

There appear to be two methods for opting out of the system, but only partially:

Method A: Lender and borrower may agree in writing to conduct a pre-suit mediation, provided that such mediation substantially complies with the requirements of the Model Order in terms of exchange of information, foreclosure counseling, and the utilization of a certified circuit civil mediator who has been specially trained in the mediation of residential mortgage foreclosures. Whether or not these guidelines are followed can be challenged by borrower.

The Order mandates 19 new forms, 8 notices and one flowchart, and sets 37 criteria for managed mediation.

Method B: If the case has been filed, plaintiff and borrower may file a written stipulation choosing not to participate in the RMFMP. Note that there are certain required disclosures to the borrower.

Because managed mediation involves no cost to the borrower, there is little incentive for the borrower to agree to either option.

4. Additional Procedures

A. Plaintiff is required to provide to the Program Manager a completed form (a) certifying the origination of the note and mortgage, (b) that it was subject to TILA, (c) that the property is/is not the homestead property of borrower, (d) that a pre-suit mediation conference has/has not been conducted, and (e) providing a list of persons, one of whom will represent (not as counsel) plaintiff in mediation. The Program Manager is charged with contacting borrower to explain the program and disclose financial information.

B. Plaintiff is also required to provide to the Program Manager (a) borrower's payment history, (b) documentary

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Residential Foreclosure Cases

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evidence that plaintiff is the owner and holder of the note being sued upon, (c) the present net value of the mortgage loan and (d) the most current property appraisal available.

C. The Program Manager is responsible for referring borrower to a Foreclosure Counselor, advising borrower of its right to consult with an attorney and its right to apply for representation by a volunteer, pro-bono attorney.

D. Mediation is to occur within 60 to 120 days after the suit is filed, but no sooner than borrower's financial disclosure for mediation has been submitted to plaintiff. At the time of the mediation, the Program Manager is required to enter the mediation room and take attendance. If the Program Manager determines that plaintiff's representative does not have full authority to settle, the Program Manager will report that representative as not being present.

E. The lender's representative (as distinct from counsel) may appear electronically.

5. Sanctions

A. In the event that plaintiff's representative fails to appear at the mediation conference or lacks full settlement authority, the court may dismiss the action without prejudice, order plaintiff's counsel or representative to appear at the mediation conference, or impose other sanctions including, but not limited to, assessing attorneys' fees and costs if borrower is represented by counsel. The same holds true if borrower fails to attend the mediation conference.

B. The court will not set a final hearing, enter summary judgment or enter a default final judgment until the requirements of the Model Order have been met.

6. Costs

The costs of the RMFMP are borne exclusively by plaintiff. A payment of $400.00 is required at the time suit is filed and a payment of $350.00 is required within 10 days after notice of mediation conference. The payment is expected to cover reasonable program fees for the managed mediation, foreclosure counseling, mediator's fee and administration of the RMFMP. The fee would cover a second mediation session, if necessary. If borrower cannot be located, chooses not to participate in the RMFMP, or does not make any contact with the Foreclosure Counselor, plaintiff shall be entitled to a refund. That is, borrower is compelled to meet with the Foreclosure Counselor if borrower intends to participate in the mediation. The fees are also intended to provide for "neutral meeting and caucus space; scheduling telephone lines, instruments and infrastructure to support a Web-enabled information platform; a secure, dedicated email address or other system for transmittal of information; and other related expenses incurred in managing the Program."

7. Multiple Foreclosure Actions

If a plaintiff has filed five or more foreclosure actions in a judicial circuit, such plaintiff must appoint two RMFMP

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Liaisons, one of whom is to be an attorney and the other of whom is to be a representative of the entity servicing plaintiff's mortgages, if any. These Liaisons are required to track the cases, monitor whether the internal procedures are being followed with regard to each case and act as the court's point of contact in the event of plaintiff's non-compliance. The Order is silent with respect to compensation for the RMFMP Liaisons.

Comments

Correspondence with and through the Program Manager likely will increase the burden on plaintiff's counsel in tracking its cases. It is not exactly clear how the lines of communication will work, although there is a strong emphasis on electronic transmission. It is unclear whether there will be multiple Program Managers throughout the state, or what happens if there are competing managers. Other consequences are left to the imagination.

Given the maximum funding of $750.00 per case, it is questionable that knowledgeable, experienced attorney mediators will be able to accept mediations and receive the same compensation as they might be receiving presently.

It is apparent that the entire process is designed to educate the borrower, but it is questionable that this information will help a borrower in making any better deal than if there were no education offered at all. Lenders have settlement criteria which, by necessity in most cases, are fixed.

There is a blizzard of paperwork that arises out of the Model Order. The Court mandates 19 new forms, 8 notices and one flowchart. It also sets out parameters for managed mediation services, listing 37 points that are to be followed.

As a point of interest, the minority report recommended that the individual circuits be permitted to revise, edit or employ other techniques, and it sought to limit the managed mediation services to only those instances where borrower showed a genuine interest rather than making the process essentially mandatory. The minority report further objected to the bureaucracy created under the Order and, to the extent that the RMFMP is utilized, that the costs be shared between the parties. None of these were adopted by the majority or the Court.

The RMFMP effectively provides less scrupulous borrowers an additional vehicle to extend the length of their stay in a property without payment at all.

In terms of the impact on default judgments, it is conceivable that a circuit judge may require some proof of compliance with the preliminary program requirements such as payment of the initial fee to the Program Manager, and submission of the appropriate RMFMP forms with the summons and complaint, before it will enter a default judgment. That will remain to be seen. If there is no response at all and the case is otherwise ready for default, the initial $400.00 is returnable.

Whether the Model Order for the circuit courts will accelerate the foreclosure process and help clear out the backlog on the courts' dockets remains to be seen. Some counties in the Panhandle have been operating under a very similar program over the last few months and claim to have achieved a 73% settlement record. If the process will stimulate lenders to address the defaults in mortgages as early as possible, including agreed pre-suit mediation, then there is some reason to think that it might help the flow. Specifically, if part of the reason for the current crisis is that borrowers have been unable to communicate effectively with lenders, this development might be some incentive to lenders in order to avoid the bureaucracy created under this Order. That is, of course, speculative. Otherwise, the foreclosure professionals face a maze of new forms, procedures and entities not previously present, and at substantial cost.

RPPTL Section Thanks J. Craig Shaw for Years of Service

By J. Richard Caskey, J. Richard Caskey, P.A., Tampa, FL



At the RPPTL Executive Council meeting in St. Augustine, Florida on January 16, 2010, the Executive Council unanimously adopted a resolution recognizing J. Craig Shaw for his many dedicated years of service and contributions to the Section. Mr. Shaw has faithfully served The Florida Bar and the RPPTL Section for more than 30 years. During that time, he served as staff attorney and editor to the Probate Rules Committee of The Florida Bar, and was an editor of many CLE publications, including: *The Florida Bar Probate System; Practice Under Florida Probate Code; Administration of Trusts in Florida; Litigation Under Florida Probate Code; Asset Protection in Florida; Florida Guardianship Practice; and Basic Estate Planning in Florida.* Additionally, Mr. Shaw was a member of the *ActionLine* staff and provided years of contributions to this publication as Bar Staff Editor. In 2007, the Section awarded Mr. Shaw the Robert C. Scott Memorial Award in recognition and appreciation of his services and dedication. As Mr. Shaw now retires after many years of distinguished service, the Section is honored to again recognize and thank him for his commitment, devotion, and many contributions to the Section and to the practice of law.

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New Mandatory EPA Rules for Renovations of Homes Built Prior to 1978

By Ed Kinberg, Kinberg & Associates, LLC, Melbourne, FL

Starting April 22, 2010, any contractor or maintenance person performing activities that disturb painted surfaces in residences or "child occupied facilities" built prior to 1978, is subject to fines of up to $32,500.00 per day and imprisonment for failure to comply with the EPA's "Lead: Renovation and Repair Program," commonly known as the RRP program. (Title 40 Code of Federal Regulations Part 745.80 et. seq). These Rules prohibit anyone from receiving payment for work that disturbs painted surfaces in any residence or "child occupied facility" built before 1978, unless he or she is a "Certified Renovator" as defined in the Rules and the firm performing the work is a "Lead Free Certified Firm."

To become a "Lead Free Certified Firm," a company must submit an application to the EPA stating that it will comply with RRP Rules and its work will be performed under the supervision of an EPA "Certified Renovator." To become a "Certified Renovator" an individual must attend an eight-hour EPA approved certification course and pass a 50 question exam. The "Certified Renovator" is responsible for:

- Educating the owner/occupant of the property of the Rules by providing an EPA approved pamphlet; and
- Conducting testing to determine if lead is present in the paint; and
- Ensuring a containment area is properly set up; and
- Ensuring that the area has been properly cleaned and waste has been packaged and disposed of appropriately after the work is completed.

The RRP Rules are self-enforcing for the most part as there are extensive record keeping requirements, and the EPA is authorized to demand production of the records. Attorneys need to be familiar with the RRP Rules in order to be ready to assist clients who may encounter difficulties applying the Rules or become the subject of an EPA investigation.

Although the RRP Rules apply to renovations, the Rules provide that the term "renovation" does not include "minor repair" and emergency repairs. Minor repairs involve work which:

1. Will disturb less than six square feet of interior painted surfaces per room; or
2. Will disturb less than twenty square feet of exterior painted surface; or
3. Does not involve demolition of a painted surface; or
4. Does not involve the replacement of a window.

Emergency Renovations are "renovation activities that are not planned but result from a sudden unexpected event that if not immediately attended to, presents a safety or public health hazard or threatens equipment and/or property with significant damage." In an interesting example in the FAQ section of the EPA web site, the EPA states that making a hole less than six square feet in a wall with a hammer is "demolition" which requires application of the Rules but using a saw to cut the same size hole is a "minor repair" exempt from the rule.

The Rules require a contractor to provide a homeowner an EPA issued pamphlet "no more than 60 days before beginning a renovation" and obtain a "written acknowledgement that the owner has received the pamphlet" or "obtain a certificate of mailing at least seven days prior to the renovation." While the Rules and the EPA approved pamphlet contain a provision allowing a homeowner to "opt out" of certain portions of the Rules, the EPA has published a notice that this provision will be rescinded.

If the renovation will take place in a common area of multi-family housing, the contractor must:

1. Provide the owner with the EPA approved pamphlet and obtain a written acknowledgement of receipt or obtain a certificate of mailing for the pamphlet at least 7 days prior to the renovation.
2. Notify the owner/occupant of "each affected unit" in writing describing the "general nature and location of the planned renovation, providing the expected starting and ending dates and including a statement of how the occupant can obtain the pamphlet, at no charge, from the firm performing the renovation. As an alternative, the contractor can post signs containing the above referenced information which include a copy of the pamphlet or explain how an interested occupant can obtain a copy of the pamphlet.
3. Prepare, sign and date a statement describing the steps taken to notify each occupant of the intended renovation activities and to provide the pamphlet.
4. Notify each occupant if there are any changes to the starting and ending date of the renovation.

If the renovation involves a "child occupied facility, the contractor must also provide a notice to the "parents and guardians of each child using the facility" by hand delivery or mail describing the general nature of the work to be performed, the locations at which the work will be performed and the anticipated completion date. The contractor must also "prepare, sign and date a statement describing the steps taken to notify all parents/guardians of the work to be performed."

A "child occupied facility" is any portion of a building built

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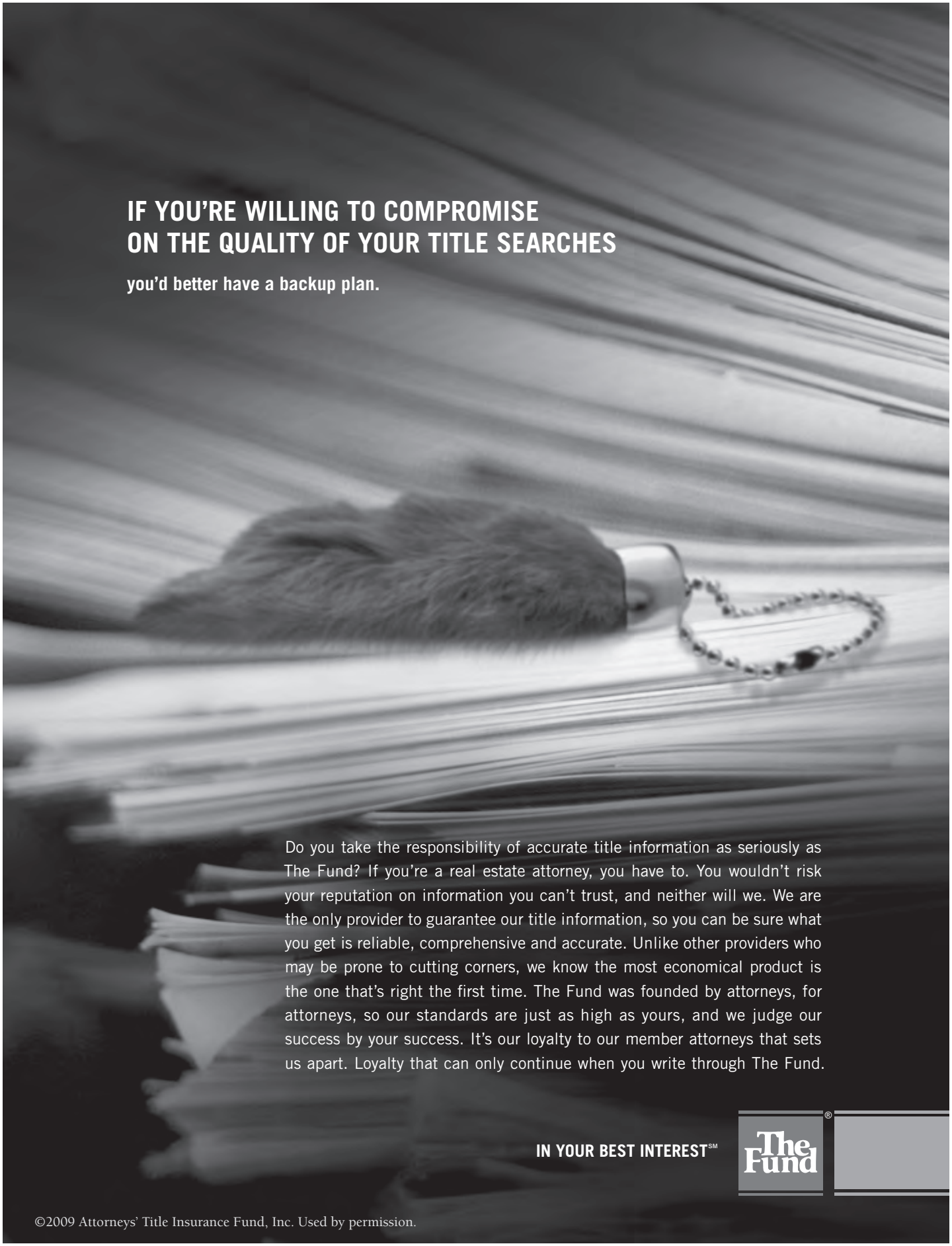
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New Mandatory EPA Rules

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before 1978 that is visited by a child under six years old whereby:

1. Visits are regularly on two different week days; and
2. Each visit lasts at least three hours; and
3. The combined weekly visits are at least 6 hours; and
4. The combined annual visits are at least 60 hours.

These Rules apply regardless of the type of building in which the "child occupied facility" is located. As such, these Rules will apply to day care centers, recreation centers, public schools and charter schools. If the "child occupied facility" is a building with common areas, the Rules only apply to those portions of the common areas that are "routinely used by children under 6 years of age such as restaurants and cafeterias." The RRP Rules also apply to any exterior areas that are "immediately adjacent" to the building and common areas routinely used by children under the age of 6.

One of the most difficult aspects of the RRP Rules is the record keeping requirements. Firms performing renovations in any building subject to the Rules must keep records "necessary to demonstrate compliance" with the Rules for three years from the date the renovation is completed. The records must include, but are not limited to, the following items:

1. Whether an inspection has determined that there is no lead paint in the building; and
2. Signed and dated acknowledgements of the owner that the owner has received the required notice or that the contractor complied with one of the methods of service authorized by the Rules; and
3. Documentation that a "Certified Renovator" was assigned to the project; and
4. Documentation that the "Certified Renovator" performed or directed the performance of the tasks required by the Rules; and
5. Documentation that the "Certified Renovator" performed the required post-renovation cleaning procedures; and
6. Documentation that training was provided in lead safe practices to the workers performing the project including the specific topics of training for each worker; and
7. Documentation that warning signs were posted at the entrances to the work area; and
8. If test kits were used, documentation of the brand that was used and the location at which the testing was performed; and
9. Documentation that the containment requirements of the rule were complied with.

These are just some of the record keeping requirements with which each firm must comply. Most trainers are recommending contractors prepare checklists to make sure they have all of the records required for each project and take photographs of the various phases of the work.

The RRP Rules provide sanctions for "failure or refusal to establish and maintain records" and give the EPA authority to conduct investigations and issue subpoenas. Refusal to comply with an EPA investigation can result in fines of up to $32,500.00 dollars per day and imprisonment for up to five years.

This article has been limited to a discussion of some of the key points of the RRP Rules. If you have clients who are involved in the renovation of residences built before 1978 or clients who own apartments, read the Rules to ensure you are ready to answer the many questions your clients are certain to have. The EPA has a portion of its web site dedicated to the RRP Rules: epa.gov/lead. It has links to all of the Rules and the various publications the EPA has produced to help contractors, homeowners and others understand the Rules.

The web site also has a "frequently asked questions" section that allows users to post their own questions and receive answers from the EPA. If you are unfamiliar with the EPA RRP Lead Safe Certified Renovator program, reading the questions and answers on the web site will give you a good understanding of the many difficult issues involved in the interpretation of the RRP Rules.

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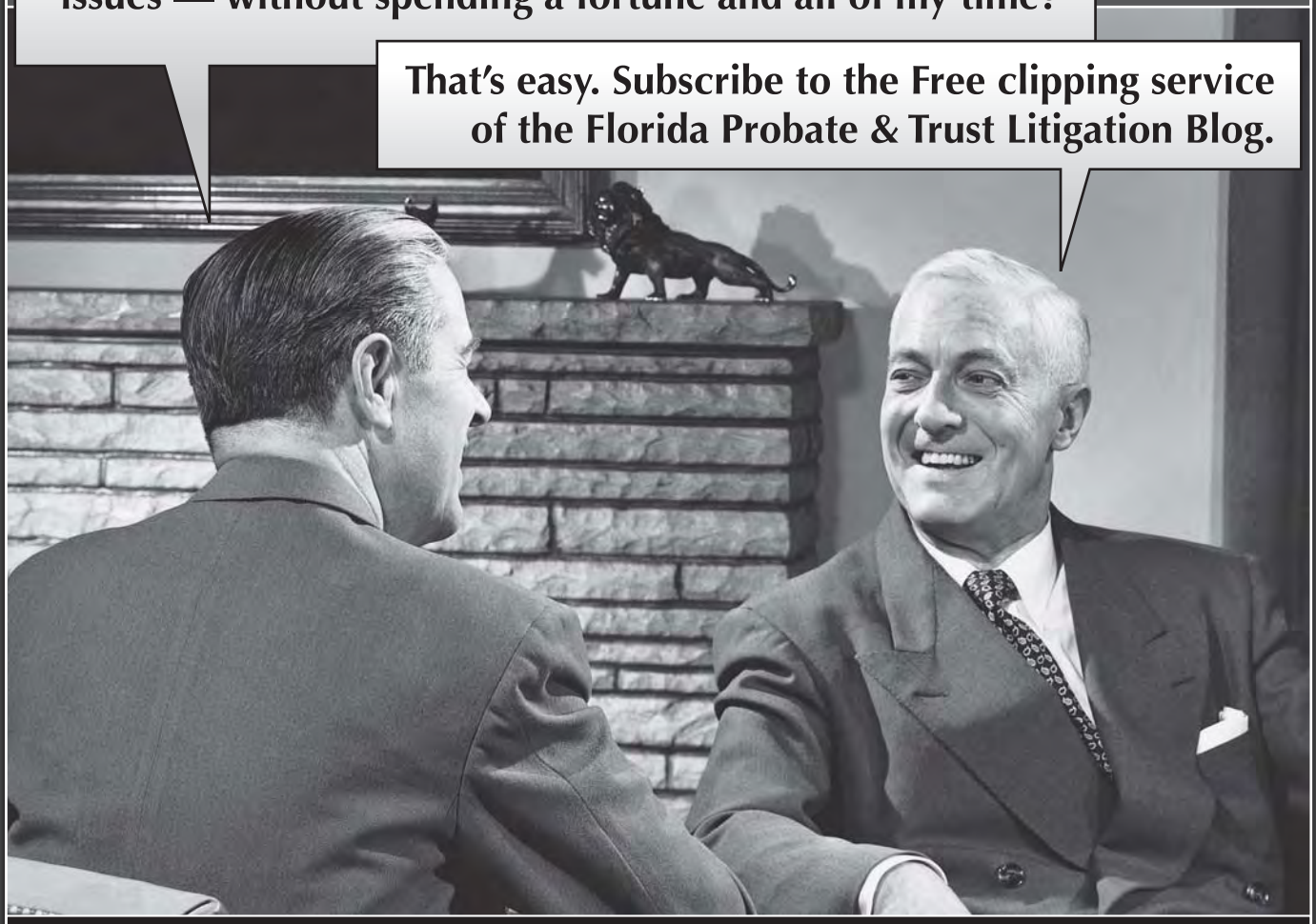

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Officer nominations for 2010 - 2011

The RPPTL Section's election meeting will take place during the Section's Annual Convention on May 28, 2010, at the Tampa Marriott Waterside Hotel & Marina, 700 South Florida Avenue, Tampa, Florida. The Section's Long-Range Planning Committee has nominated the following RPPTL Section members to serve as the Section's officers, out-of-state representatives and circuit representatives for the 2010 - 2011 Section year commencing July 1, 2010:

Chair-Elect: George J. Meyer

Real Property Division Director: Margaret Ann Rolando

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Section Executive Council Meeting

St. Augustine, January 14 – 17, 2010

By Jane L. Cornett, Esq., Cornett, Googe & Associates, P.A., Stuart, Florida
(with assistance from Nicole Kibert, Esq., Carlton Fields, P.A.)

Due to an unexpected scheduling conflict I wasn't able to attend the Executive Council meeting in St. Augustine. I did have the opportunity however, to interview Nicole Kibert who was there and who told me all about the events of that weekend. After listening to Nicole I am very sorry that I wasn't able to attend.

Committee meetings started at noon on Thursday and ran the rest of the day until 6:00 in the afternoon. As is typical, the social portion of the weekend started off with a Thursday evening welcome reception, which was held at Flagler College. Attendees were treated to a tour of the college grounds.

Bright and early Friday, the many and varied committees resumed meetings throughout the day. The full schedule can be viewed on the RPPTL Section website. If you are not involved in a committee, you are missing out on some lively discussions and a "cutting edge" view of Florida law in the making (and remaking.)

The reception and dinner on Friday evening at the Lightner Museum, Nicole reports, proved to be a unique experience. There was a very special program for the kids involving lots of fun and flashlights in a dark museum. The evening started with a cocktail party in the art gallery where everyone could view the large assembly of antique collectibles. Dinner afterwards was served in a very unusual setting. The old Lightner swimming pool has been drained, and there were tables set up in the drained pool, causing some people to be seated on a slant. Nicole reports that the ambiance of this setting was "very cool."

Saturday morning saw the typical probate and real estate roundtable breakfasts, followed by the Executive Council meeting. You may have already received copies of the minutes from your circuit representative but if you did not, they are available on the section website at *www.rpptl.org*.

Saturday afternoon was free time for visiting the many historic sites of St. Augustine. As we all know, St. Augustine is the oldest city in the state of Florida and the Casa Monica Hotel where the meetings took place is in the heart of that historic area. The Casa Monica Hotel, originally founded in 1888, is both extraordinary and unique.

Saturday night was what Nicole reports was the highlight of the weekend. Dinner was held at a small restaurant called Collage. The food and service were absolutely wonderful. Nicole described it as a "fine culinary dining experience in an intimate environment." Nicole was especially enthusiastic about the vanilla bean vinaigrette that was served on the warm goat cheese salad. She even went so far as to point me to the website where special recipes from Collage can be obtained. That website is *htt://collagestaug.com/recipes.* I tried the vinaigrette and Nicole is right, it is fabulous.

The schedule published by our section indicated that desert was to be at the Bubble Room. However, the Bubble Room apparently heard we were coming because it closed down the week before the Section arrived. The staff and deserts at Collage proved to be up to the challenge, and all attendees went home well fed.

I am really sorry that I missed the meeting, and after reading this, I hope you are too. I look forward to seeing everybody at the upcoming Executive Council meetings.

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Photos by John Neukamm; arrangements by Kelly Catoe, Photo Editor.



The RPPTL Executive Council poses for a rare group photo





Photos by John Neukamm; arrangements by Kelly Catoe, Photo Editor.

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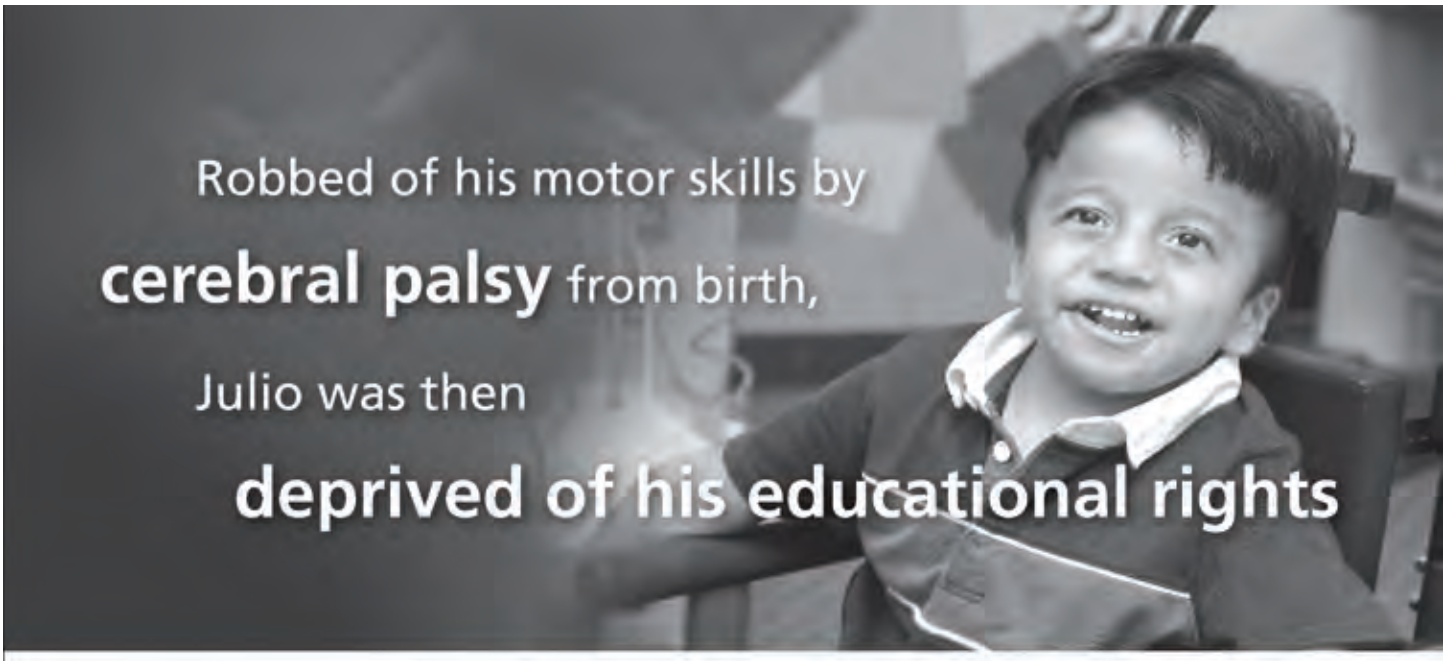

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Probate Case Summaries

Prepared by Hung V. Nguyen

Welbaum Guernsey, Coral Gables, Florida

Trial court is required to hold evidentiary hearing to determine whether trustees/trust beneficiaries for a trust administered in Nebraska were interested persons in decedent's estate being administered in Florida in order for Florida court to have jurisdiction over them. Personal representative needed to show that he will suffer irreparable harm, has no adequate legal remedy, enjoys a clear legal right to the relief sought, and the injunction will serve the public interest for temporary injunctive relief to prevent trustees/trust beneficiaries from dispensing with trust assets where there was dispute regarding whether assets belonged to the trust or estate.

Kountze v. Kountze, 20 So. 3d 428 (Fla. 2d DCA 2009)

When the decedent passed away in Florida, he had an inter vivos trust which was being administered in Nebraska. The personal representative in Florida filed a petition to determine the whereabouts and value of assets in the estate which were allegedly missing and stated that he believed the missing assets were in the possession of beneficiaries and trustees of the decedent's trust in Nebraska. This occurred in the Florida proceedings.

In response to the petition to determine whereabouts and the value of missing assets, the trustees/trust beneficiaries filed a motion to dismiss arguing lack of service of process and that the Florida court lacked personal as well as subject matter jurisdiction over them. No hearing was held on this motion and the Florida court never addressed whether it had subject matter jurisdiction.

Subsequently, the personal representative filed a formal notice and notice of the personal representative's taking possession of the assets of the estate in the Florida proceeding. Two months later, the Florida trial court *sua sponte* entered an order on the notice, ruling that the personal representative was entitled to take possession of the listed trust assets. The trustees/ trust beneficiaries filed a motion to set aside the order which was denied. However, the trial court did not address the jurisdictional issues.

In the meantime, the trustees/trust beneficiaries filed a petition for trust administration in Nebraska. After various adversarial motions were filed between them and the personal representative, the Nebraska court held a hearing and then entered its evidentiary rulings, findings, and orders, which held that it had jurisdiction over the trust and that the Florida court had no jurisdiction over the trust or the assets therein. The Nebraska court held that the Florida court's order regarding the personal representative's right to take possession of the trust assets was void.

After the Nebraska court's ruling, the personal representative filed a motion to enforce the Florida court's order allowing him to take possession of the listed trust assets in the Florida proceeding. In response, the trustees/trust beneficiaries reasserted that the Florida court lacked jurisdiction over them. They also reiterated that their prior motion to dismiss had not been ruled on by the trial court.

The personal representative filed an emergency motion to impose stay, alleging that the estate would suffer irreparable harm without it.

The trial court held a hearing on the motion to enforce order, motion to dismiss, and several other motions, and ultimately ruled that it had jurisdiction over the trustees/trust beneficiaries and ordered them to maintain the status quo with regard to the disputed assets.

In reversing, the appellate court held that the trial court was required to hold an evidentiary hearing to determine if it had jurisdiction over the trustees/trust beneficiaries. The personal representative claimed that there was jurisdiction because he served the trustees/trust beneficiaries with formal notice pursuant to Section 731.301(2), Florida Statutes (2005-2009). However, the trustees/trust beneficiaries claim that no jurisdiction lies because they had disclaimed any interest in the estate and they argue the assets in question are solely trust assets, separate and distinct from the estate assets. Therefore, the trustees/ trust beneficiaries argue that they would not reasonably be expected to be affected by the outcome of the estate proceeding. The appellate court noted that the trial court did not state in its order the basis for asserting personal jurisdiction and remanded for an evidentiary hearing to determine whether the trustees/trust beneficiaries are interested persons within the meaning of section 731.201(23), Florida Statutes. Furthermore, the appellate court ruled that if the trustees/trust beneficiaries are not interested persons under such statute, the trial court should decide whether Florida's long-arm jurisdiction as set forth in Section 48.193, Florida Statutes is applicable to obtain jurisdiction. If the personal representative pled and proved sufficient facts to obtain long-arm jurisdiction, the court would also need to determine whether the trustees/trust beneficiaries possess sufficient minimum contacts with Florida such that they

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should anticipate being haled into court there.

The appellate court also held that if the requirements of jurisdiction are met, then the trial court must determine whether the personal representative has met the requirements for imposing a temporary injunction. The order ruling that the trustees/trust beneficiaries were required to maintain the status quo with regard to the disputed trust assets was in the nature of temporary injunctive relief. In order to obtain injunctive relief, a plaintiff must show that it will suffer irreparable harm, no adequate legal remedy exists, the plaintiff enjoys a clear legal right to the relief sought, and the injunction will serve the public interest. The cause was remanded to determine if the four elements had been pled and proven.

A trial court's order denying a personal representative and his bonding company's motion to dismiss is not a final, appealable order, even if it implicitly establishes the standard of proof the personal representative and his bonding company must meet at trial.

Auto-Owners Insurance Company v. Governor of Florida ex rel. Hall, 23 So. 3d 779 (Fla. 4th DCA 2009)

The residual beneficiaries of an estate filed suit against the personal representative and his surety bonding company for losses the estate suffered through alleged inappropriate investments and to remove the personal representative. The personal representative and his bonding company filed motions to dismiss based on language in the will which states that the personal representative would only be liable for "willful misconduct."

The trial court denied the motions to dismiss and the personal representative and his bonding company appealed. The residual beneficiaries moved to dismiss the appeal for lack of jurisdiction.

In their appeal, the personal representative and his bonding company concede that the order denying the motions to dismiss is not an appealable, non-final order, but they argue that it is a final order of the circuit court over which the appellate court has plenary appellate jurisdiction. The appellate court disagreed and dismissed the appeal, citing a line of cases where appellate courts in Florida have dismissed appeals from an order denying a motion to dismiss.

The appellate court noted that the order denying the motions to dismiss merely decided that the residual beneficiaries had stated a cause of action and is not a final order even if it implicitly establishes the standard of proof appellants must meet if the case is actually tried.

Failure to provide a record or transcript is fatal to an appeal requiring factual determination. However, where an order is on its face fundamentally erroneous, such as an order evicting the son of a decedent from real property which did not belong to the estate because it was homestead and which passed to the son, the appellate court could reverse without a record or transcript.

Buettner v. Fass, 21 So. 3d 114 (Fla. 4th DCA 2009)

The trial court entered an order determining that 2 units of an apartment complex owned by the deceased constituted the deceased's homestead and passed to the deceased's son. The trial court also entered an order evicting the son from the entire premises of the apartment building.

The son of the decedent appealed an order of the trial court arguing that the court should have included 4 apartment units as part of the decedent's homestead instead of 2 units, which ultimately passed to the son. Since there was no record or transcript for the appellate court to review, it denied the son's appeal on the authority of *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150 (Fla. 1979).

The son also appealed the trial court's order evicting him from the entire premises of the apartment building and directing the personal representative to recover possession of the entire premises. Even though no record or transcript was provided, the appellate court reversed the trial court's eviction of the son because the order was fundamentally erroneous on its face in that it purports to evict the son from the homestead premises which by law are not a part of the decedent's estate and which passed to the son. Because part of the apartment building was homestead, the personal representative had no possessory interest in that part and could not evict the son from the entire premises.

Trustee of family trust, who was also a trust beneficiary, was entitled to compensation for her management of trust asset, though trust instrument provided that a beneficiary of the trust could not receive compensation for serving as trustee, as the instrument allowed trustee to compensate a beneficiary for business management duties.

Burgess v. Prince, 25 So. 3d 705 (Fla. 2d DCA 2010)

The trial court removed the trustee and ordered that she may not be compensated for managing a business, which was a trust asset, and that all compensation she received be charged against her distributive share of the trust.

On appeal the appellate court upheld the removal without discussion but reversed the part of the final judgment which ruled that the trustee could not be compensated for managing the business which was a trust asset.

Although the trust instrument provided that a trustee who is also a beneficiary shall serve as trustee without compensation, the appellate court found that the trustee received compensation from the trust for operating the business, rather than as compensation as trustee.

The appellate court relied on language in the trust instrument which plainly states that the trustee can employ various individuals, including any trustee, if such employment was deemed necessary or desirable and to pay reasonable compensation for their services. In addition, the trust instru-

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ment has language which allows a trustee to employ any beneficiary or individual fiduciary in any capacity.

Abuse of discretion standard is employed where the trial court denied a motion for substitution of counsel where a ward's right to contract had been removed by an order determining incapacity so new counsel did not have the legal authority to represent the ward.

Colson v. Ehrisman, 24 So. 3d 1270 (Fla. 1st DCA 2009); and *McCallum v. Ehrisman*, 24 So. 3d 1270 (Fla. 1st DCA 2009)

In these related cases, the appellate court affirmed the trial court's order denying the motion for substitution of counsel because the trial court did not abuse its discretion.

The court affirmed on the authority of *In re Guardianship of Bockmuller*, 602 So. 2d 608 (Fla. 2d DCA 1992), which ruled that when a ward's right to contract had been removed by an order determining incapacity, the ward had no power to contract with an attorney to represent her.

Since counsel was not legally authorized to represent the ward, the appellate court dismissed the remaining issues raised by the attorney on appeal.

A trial court can order buccal swab DNA testing of legitimate children of a decedent to determine the paternity of unsubstantiated children claiming they are also children of the decedent where the requirements of Rule 1.360, "Examination of Persons", of the Florida Rules of Civil Procedure are met, including the "good cause" and "in controversy" requirements.

Doe v. Suntrust Bank, 2010 WL 323031 (Fla. 2d DCA 2010)

The appellate court used fictitious names in place of the parties' real names to protect their privacy.

A bank brought a petition for declaratory judgment in its capacity as trustee of various trusts established by the settlor, who was deceased, to determine who the beneficiaries of the trusts were. The trusts provided that upon the settlor's death, the remaining assets are to be held in trust for the benefit of his "children" or "descendants" in equal shares. The settlor had two legitimate children, and it was alleged that two other children born and living in Costa Rica were also his. The two children in Costa Rica had different mothers.

The trial court appointed guardians ad litem to represent each of the Costa Rican children and they traveled to Costa Rica to investigate the paternity claims. One of the Costa Rican children had documents from the Civil Registry in Costa Rica identifying her as the settlor's daughter, including a document bearing the settlor's signature and passport number. The other Costa Rican child did not have any official documentation supporting her paternity claim. As a result, her guardian ad litem filed a motion seeking an order compelling the settlor's two legitimate children in Florida to provide buccal swab for DNA testing to determine paternity.

In support of her motion seeking the buccal swab, the child, without any documentation that would establish paternity, argued that Section 742.12, Florida Statutes (2005), provides for scientific testing in actions to determine paternity. The legitimate children objected stating that the court was without authority to compel them to submit to DNA testing because Section 742.12 provides for testing of only the mother, child, and alleged fathers – not the legitimate children of a deceased putative father. As a result, the court denied the motion.

The unsubstantiated child, without any documentation that would establish paternity, filed a second motion requesting the buccal swab and cited Section 732.108(2)(b), Florida Statutes (2005), which recognizes that a child born out of wedlock may obtain an adjudication of paternity after the death of the father. Again, the legitimate children objected arguing the court was without authority to compel them to submit to DNA testing. They also argued Section 760.40, Florida Statutes (2005), prohibits the court from ordering them to submit a DNA sample for testing. After a hearing, the trial court granted the motion and the legitimate children filed a petition for certiorari.

The appellate court first analyzed whether the issue of paternity is relevant to the underlying case and determined that it was because the trusts provide that the settlor's children are the beneficiaries. The appellate court then analyzed Section 760.40 in light of the legitimate children's arguments. In particular, the legitimate children argued that Section 760.40 states, "DNA analysis may be

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Probate Case Summaries

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performed only with the informed consent of the person to be tested." They argue that they are not giving informed consent, and as a result, no testing can occur. The appellate court rejected the legitimate children's argument and interpreted the term "informed consent" not as the consent of the person whose DNA is being tested to having their DNA tested, but rather the appellate court stated "informed consent is an aspect of the relationship between a DNA analyst and the person whose DNA is to be analyzed – it has nothing to do with the reason an individual may be providing a sample for testing. From the perspective of an entity or individual performing DNA analysis, when an individual presents themselves and provides a DNA sample for analysis, they have consented to having the analysis performed. The fact that the individual may have done so pursuant to a court order is beside the point in determining whether, from the analyst's perspective, an individual has consented to having their DNA analyzed."

Furthermore, the appellate court rejected the legitimate children's argument that DNA testing can only be done without an individual's informed consent through the exceptions listed in Section 760.40(2)(a), by citing Florida statutory and case law where testing can be ordered.

Although the appellate court rejected the legitimate children's argument that the trial court was categorically prohibited from ordering the buccal swab, the court nonetheless quashed the trial court's order because it held that DNA testing must satisfy Rule 1.360 "Examination of Persons," of the Florida Rules of Civil Procedure. In particular, the requester must show that the condition that is the subject of the examination is in controversy and the requesting party has good cause for the examination. The court noted that the "in controversy" requirement could have been met with an affidavit from the illegitimate child's mother. The "good cause" requirement could have been met with (i) evidence that a comparison of the illegitimate child's DNA and the legitimate child's DNA would have proved a genetic link between the illegitimate child and the settlor, and (ii) some showing of need, such as the fact that no DNA samples could be obtained from the settlor. Finally, the court noted that the discovery matters of the competing interests must be balanced, and appeared to indicate that an illegitimate child's right to establish paternity would outweigh a legitimate child's right to privacy .

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Real Estate Case Summaries

Prepared by Meredith Freeman, Bush Ross, Tampa, FL

The Fourth DCA vacated its previous opinion dated September 23, 2009 after Toll Brothers, Inc. and Florida Home Builders Association timely filed motions to appear amicus curiae and motions for rehearing.

Home Devco/Tivoli Isles LLC v. Silver, 26 So. 3d 719 (Fla. 4th DCA 2010)

The Fourth DCA vacated its previous opinion which held that the developer was not exempt from the Interstate Land Sales Full Disclosure Act, where the purchase contract included a *force majeure* clause that allowed the developer to extend the two year build requirement for circumstances that would not be contract defenses under Florida law. After rehearing, the Appellate Court held that a *force majeure* clause may include a condition that is not a contract defense under Florida law, provided that the condition is outside the developer's control and that the developer is obligated to complete construction within the two year period. The Appellate Court noted that it relied heavily on *Stein v. Paradigm Mirasol*, *LLC*, 551 F. Supp. 2d 1323 (M. D. Fla. 2008) in its original opinion, and the Eleventh Circuit reversed *Stein* a week after the Appellate Court issued its original opinion. *See Stein v. Paradigm Mirasol, LLC* 586 F. 3d 849 (11th Cir. 2009).

The Appellate Court adopted the following objective test from the 4th DCA to determine whether changes to the Condominium Offering were material: "[W]ould a reasonable buyer under the purchase agreement find the change to be so significant that it would alter the buyer's decision to enter into the contract?"

WCI Communities, Inc. v. Stafford, 34 Fla. L. Weekly D2337a (Fla. 2nd DCA 2009).

Colin Stafford (the "Purchaser") contracted to buy a condominium unit from WCI Communities, Inc. (the "Developer"). After the purchase agreement was signed, the Developer made changes to the condominium offering. The Purchaser rescinded the contract, claiming that the changes to the condominium offering were material and adverse to the Purchaser. The trial court entered summary judgment in favor of the Purchaser. The Appellate Court reversed the trial court's order granting final summary judgment because there was a material issue of fact as to whether the changes to the condominium offering were material and adverse to the Purchaser. The Appellate Court adopted the following objective test from the 4th DCA to determine whether the changes were material: "[W]ould a reasonable buyer under the purchase agreement find the change to be so significant that it would alter the buyer's decision to enter into the contract?"

The trial court erred in awarding attorney's fees after a denial of a petition for temporary injunctive relief because the award was premature.

Nine Island Avenue Condominium Association, Inc. v. Siegel, 23 So. 3d 1248 (Fla. 3d DCA 2009).

A condominium association needed to make concrete restoration repairs as part of its responsibility to maintain the common elements of the condominium. The condominium association needed access to a particular unit in order to perform the repairs. The owner of that condominium unit would not allow the condominium association access to his unit. The condominium association filed a petition for non-binding arbitration pursuant to § 718.1255 Florida Statutes. The condominium association also filed a petition for temporary injunctive relief in the trial court. The trial court denied the petition for a temporary injunction, reasoning that the condominium association did not establish that the work needed to be completed on an emergency bases and that the association had an adequate remedy at law in the arbitration already pending. The trial court awarded the owner his attorney's fees. The Appellate Court reversed, holding that the owner was not entitled to his attorney's fees because the non-final order denying the petition for injunction did not end the litigation between the parties.

Although Florida Statute § 687.06 limits the trial court's discretion to review the reasonableness of attorney's fees, Plaintiff must still prove that the attorney's fees were actually incurred.

Coastal Community Bank v. Jones, 23 So. 3d 757 (Fla. 1st DCA 2009).

In a mortgage foreclosure action, Plaintiff made a claim for its attorney's fees pursuant to the terms of loan documents and relied on Florida Statute § 687.06. Florida Statute § 687.06 alleviates the necessity of proving that an attorney's fee is reasonable as long as the fee does not exceed ten percent of the principal sum of the loan. The trial court refused to award Plaintiff its attorney's fees. The Appellate Court affirmed and held that while § 687.06 limits the trial court's discretion to review the reasonableness of fees, Plaintiff must still prove that the attorney's fees were actually incurred.

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Real Estate Cases

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A mortgage holder with a clear superior interest cannot be compelled to be a party in a foreclosure action filed by a junior lien holder. To the extent the validity or priority of the mortgages is in question, the Court must have an evidentiary hearing before the entry of summary judgment.

Citimortgage, Inc. v. Henry, 24 So. 3d 641 (Fla. 2nd DCA 2009).

Defendants first delivered a mortgage to Mortgage Electronic Registrations Systems Incorporated (MERS). Defendants subsequently delivered two mortgages to Wachovia. MERS' mortgage was recorded first in time. Wachovia filed a foreclosure action listing MERS as a defendant even though MERS' mortgage was first in time. A default was entered against MERS. MERS assigned its interest to Citimortgage. Citimortgage then filed a foreclosure action naming Wachovia as a defendant. Wachovia answered and raised the affirmative defense of res judicata arguing that the prior final judgment of foreclosure adjudicated MERS' (now Citimortgage's) interest. Wachovia also challenged the validity of MERS' mortgage. The trial court entered summary judgment in favor of Wachovia based on Wachovia's affirmative defense. The Appellate Court reversed because a mortgage holder with a superior interest could not be compelled to be a party in a junior lien holder's foreclosure action. Accordingly, if Citimortgage's mortgage was superior, the final judgment in foreclosure was void to the extent it extinguished Citimortgage's interest. However, if Citimortgage's mortgage was inferior, the final judgment in foreclosure should stand. The Appellate Court also found that the trial court erred in entering summary judgment without first holding an evidentiary hearing to determine whether Citimortgage's interest was superior to Wachovia's interest and remanded the case.

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Thursday, June 24

11:30 a.m. – 5:30 p.m. **Twentieth Annual Scramble Golf Tournament and Lunch**
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4:15 p.m. – 7:45 p.m. **Name Badge Pick Up**

6:15 p.m. – 7:45 p.m. **Reception (Spouses Welcome)**
Hosted by Gibraltar Private Bank & Trust and Frank Crystal & Company

Friday, June 25

7:30 a.m. – 8:15 a.m. **Breakfast**
Hosted by SunTrust Bank

8:15 a.m. – 8:30 a.m. **Welcome and Announcements**
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8:30 a.m. – 9:00 a.m. **The Financial Services Industry in Light of Madoff & Stanford**
Scott Kellett, Lydian Bank, Naples

9:00 a.m. – 9:45 a.m. **Trust Committee Meetings – What Really Goes On? Handling the Insane Beneficiary**
John Cole, Ivan, Cole, Bonnett & Kane, PA, Jacksonville
George Cotto, Wells Fargo Private Bank, Jacksonville
Mary Biggs Knauer, First Guaranty Bank, Jacksonville

9:45 a.m. – 10:15 a.m. **2010 Florida Trust and Probate Legislative Update**
Debra L. Boje, Ruden McClosky, PA, Tampa

10:15 a.m. – 10:30 a.m. **Break**
Sponsored by Fiduciary Trust International of the South

10:30 a.m. – 11:15 a.m. **Charging Extraordinary Fees – Trustee and Attorney**
David R. Carlisle, Duane Morris LLP, Miami

11:15 a.m. – 12:15 p.m. **Trustee Replacement – Fight or Roll Over – Trust Modification**
Michael A. Dribin, Harper Meyer Perez Hagen O'Connor Albert & Dribin LLP, Miami
Joan K. Crain, BNY Mellon Wealth Management, Ft. Lauderdale
Frank Adams, Katz Baron Squitero Faust, Ft. Lauderdale

12:15 p.m. – 1:30 p.m. **Lunch/Breakout Sessions**
Hosted by Northern Trust, NA

1:30 p m. – 2:15 p.m. **Celebrity Estate Planning Disasters**
Richard E. Warner, Law Offices of Richard E. Warner, PA, Marathon

2:15 p.m. – 3:00 p.m. **Homestead Issues**
Shane Kelley, The Kelley Law Firm PL, Ft. Lauderdale

3:00 p.m. – 3:15 p.m. **Break**
Sponsored by Fiduciary Trust International of the South

3:15 p.m. – 4:00 p.m. **Case Law Update**
Steven L. Hearn, Steven L. Hearn, PA, Tampa
Sponsored by Harris Private Bank

4:00 p.m. – 4:30 p.m. **Risk Management for the Life Insurance Trust Trustee**
Patrick J. Lannon, Goldman Felcoski & Stone, PA, Coral Gables

4:30 p.m. – 5:15 p.m. **Practical Issues – Converting to Total Return Unitrusts**
Paul S. Lee, Bernstein Global Wealth Management, New York

5:30 p.m. – 7:00 p.m. **Reception (Spouses Welcome)**
Hosted by BNY Mellon Wealth Management and Marsh Private Client Solutions

Saturday, June 26

7:30 a.m. – 8:30 a.m. **Breakfast**
Hosted by Florida Bar Foundation

8:30 a.m. – 9:15 a.m. **Valuation of Unique Assets – Fiduciary Liability**
Paul Provost, Christie's, New York
Martin E. Basson, Internal Revenue Service, Ft. Lauderdale
Mitchell A. Hipsman, Mitchell A. Hipsman, PA, Miami Beach, Moderator

9:15 a.m. – 10:15 a.m. **Estate Tax Update**
Professor Jeffrey N. Pennell, Emory University School of Law, Atlanta
Sponsored by Community Foundations of Florida

10:15 a.m. – 10:30 a.m. **Break**

10:30 a.m. – 11:15 a.m. **Trust Accounting Issues – Principal and Income**
John W. "Randy" Randolph, Jr., Pressly & Pressly, PA, West Palm Beach

11:15 a.m. – 11:45 a.m. **Creditors' Rights in Non-Exempt/Non-Probate Assets**
Sandra Fascell Diamond, Williamson, Diamond & Caton, PA, Seminole

11:45 a.m. – 12:15 p.m. **Spousal Rights Litigation**
John C. Moran, Gunster, Yoakley & Stewart, PA, West Palm Beach

12:15 p.m. – 1:00 p.m. **Family Dynamics & Estate Planning**
Keith Whitaker, Ph.D., Wells Fargo Private Bank

6:00 p.m. – 8:30 p.m. **Reception (Spouses Welcome)**
Hosted by the following Law Firms and CPA Firms:
Baskin Fleece; Broad and Cassel; Buchanan Ingersoll & Rooney PC; Buckingham Doolittle & Burroughs; Chapin Ballerano & Cheslack; Dunwody White & Landon, PA; Elizabeth A. Dunn, CPA, PA; Fowler White Burnett, PA; Goldman Felcoski & Stone, PA; Greenberg Traurig, PA; Gunster Yoakley & Stewart, PA; Gutter Chaves Josepher Rubin Forman Fleisher PA; Holland & Knight LLP; Ira M. Herschbein, CPA, PA; Morrison Brown Argiz & Farra, LLP; Proskauer Rose LLP; Shapiro, Blasi, Wasserman & Gora, PA; Shutts & Bowen, LLP; Squire, Sanders & Dempsey, L.L.P.; Tescher & Spallina, PA

Sunday, June 27

9:00 a.m. – 10:30 a.m. **Breakfast: Post Conference Discussion**
Hosted by U.S. Trust, Bank of America Private Wealth Management

Sponsorship Coordinators: Patrick Lannon, Goldman Felcoski & Stone, P.A, Coral Gables
Robert Bulloch, Quarles & Brady LLP
Mary Jane Olsavsky, BNY Mellon Wealth Management, Fort Lauderdale
Mary Biggs Knauer, First Guaranty Bank
Sharon Dabrusco, U.S. Trust, Bank of America Private Wealth Management

Speaker Coordinators: Lydia Sprankle, Coconut Grove Bank, Coconut Grove
Mitchell A. Hipsman, Mitchell A. Hipsman, PA, Miami Beach

Break-Out Session Coordinator: Katherine S. Dely, Law Offices of Katherine S. Dely, PL, Lighthouse Point
Perry Brown, Northern Trust, NA, West Palm Beach

Event and General Sponsors:
BNY Mellon Wealth Management
Christiana Bank & Trust Company
Community Foundations of Florida
Fiduciary Trust International of the South
Florida Bar Foundation
Frank Crystal & Company
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Harris Private Bank; Marsh, Inc.
Marsh Private Client Solutions
Northern Trust, NA
Regions Morgan Keegan Trust
SunTrust Bank
U.S. Trust, Bank of America Private Wealth Management
Wells Fargo Private Bank

Continuing Legal Education Requirement Credit
(Maximum 13.5 hours)
General: 13.5 hours
Ethics: 1.0 hour

Certification Credit
(Maximum 13.5 hours)
Elder Law: 13.5 hours
Real Estate: 1.0 hour
Tax Law: 13.5 hours
Wills, Trusts & Estates: 13.5 hours

CFP Credit: Pending
CTFA Credit: Pending

Course No. 1035R

Hotel Reservation Information

To reserve a sleeping room with the The Ritz Carlton, Naples, please call (239) 593-2000. The Florida Bar group rate starts at $185/night and is guaranteed until May 14th, or until the room block is sold out. If the room block is sold out you may be able to get on a wait list pending cancellations.

Alternate Hotel Information

Inn at Pelican Bay • 800 Vanderbilt Beach Road • Naples 34108 • Phone (239) 597-8777
Fairways Resort • 103 Palm River Boulevard • Naples 34110 • Phone (239) 597-8181
Hampton Inn Naples • 2630 Northbrooke Plaza Drive • Naples 34119 • Phone (239) 596-1299

REFUND POLICY: Requests for refund or credit toward the purchase of the audio CD or course books of this program **must be in writing and postmarked** no later than two business days following the course presentation. Registration fees are non-transferrable, unless transferred to a colleague registering at the same price paid. A $25 service fee applies to refund requests. Registrants who do not notify The Florida Bar by 5:00 p.m., June 18, 2010 that they will be unable to attend the seminar, will have an additional $200 retained. Persons attending under the policy of fee waivers will be required to pay $200.

The Florida Bar Real Property, Probate & Trust Law Section

2010 Attorney Trust/Officer Liaison Conference

Program Registration Form

Course No. 1035R

MAIL PROGRAM REGISTRATION FORM TO: The Florida Bar, Order Entry Department, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, with a check in the appropriate amount made payable to The Florida Bar or credit card information filled in below.

Name _____ Florida Bar # _____

Guest Name _____

Address _____

City _____ State _____ Zip Code _____

Phone Number _____ *Email Address (Required) _____

***Your materials will be sent to the email address you keep on file with The Florida Bar. If you are not a member of The Florida Bar or wish to use a different email address, please list one.**

METHOD OF PAYMENT: ❑ Check enclosed made payable to The Florida Bar

FAX # 850-561-5816

❑ MASTERCARD ❑ VISA ❑ DISCOVER ❑ AMEX Exp. Date: _____/_____ (MO./YR.)

Signature: _____

Name on Card: _____ Billing Zip _____

Card No. _____

Conference Registration

(Lunch and Onsite parking fees included in registration)

❑ Registrant: $395 **1035R304**

❑ Registrant: (06/18/10 or AFTER): $420 **1035R304**

****Course Materials** (This material will be electronically sent via e-mail 72 hours prior to the course. You must provide your e-mail address above)

A flash drive with the course materials will also be provided on-site at no additional charge. **Sponsored by Christiana Bank & Trust Company

Conference Events for Registrants

(Course materials and the following Conference Events are included in registration fee. Please check the events you plan to attend.)

Thursday, June 24

❑ Reception **1035S3041**

Friday, June 25

❑ Continental Breakfast **1035S3042**

❑ Luncheon **1035S3043**

❑ Reception **1035S3044**

Saturday, June 26

❑ Continental Breakfast **1035S3045**

❑ Reception **1035S3046**

Sunday, June 27

❑ Breakfast **1035S3047**

Conference Events for Spouses

(The following events are open to spouses. Please check the events your spouse plans to attend. An additional fee applies where indicated.)

Thursday, June 24

❑ Reception **1035S3041**

Friday, June 25

❑ Continental Breakfast $25 [$23.58 plus $1.42 tax] **1035S3042**

❑ Reception **1035S3044**

Saturday, June 26

❑ Continental Breakfast $25 [$23.58 plus $1.42 tax] **1035S3045**

❑ Reception **1035S3046**

Sunday, June 27

❑ Breakfast $25 [$23.58 plus $1.42 tax] **1035S3047**

Thursday, June 24 – Scramble Golf Tournament *(Sponsored by Wells Fargo Private Bank)*

NOTE: An additional fee applies to both registrants and spouses. (Please provide us with your Handicap or Average Score)

❑ Golf $75 **1035S3048** Handicap or Average Score _____

❑ Golf - Spouse/Guest $75 **1035S3048** Handicap or Average Score _____

Total Amount Enclosed $_____

❑ Please check here if you have a disability that may require special attention or services. To ensure availability of appropriate accommodations, attach a general description of your needs. We will contact you for further coordination.

COURSE BOOK – AUDIO CD

Private taping of this program is not permitted. **Delivery time is 4 to 6 weeks after 6/25/10. TO ORDER COURSE BOOKS OR AUDIO CD,** fill out the order form above, including a street address for delivery. **Please add sales tax to the price of books or CD.**

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❑ **COURSE BOOK ONLY** **(1035M)**
Cost $60 plus tax
(Certification/CLER credit is not awarded for the purchase of the course book only.)
TOTAL $ _____

❑ **AUDIO CD** (includes electronic course book) **(1035C)**
$360 plus tax
TOTAL $ _____

The Florida Bar Continuing Legal Education Committee and the Construction Law Committee of The Florida Bar Real Property, Probate and Trust Law Section present

3rd Annual Construction Law Institute 2010

COURSE CLASSIFICATION: ADVANCED LEVEL

Course No. 1218R

COURSE BOOK & AUDIO CD ORDER FORM

Conference Chair:	*Conference Co-Vice Chairs:*	*Construction Law Committee:*
Lee A. Weintraub, Ft. Lauderdale	**Michelle A. Reddin, Orlando** **Wm. Cary Wright, Tampa**	**Brian A. Wolf, Ft. Lauderdale, Chair** **April A. Atkins, Orlando, Co-Vice Chair** **Arnold D. Tritt, Jacksonville, Co-Vice Chair**

Day 1 – Audio Recorded Presentations

8:30 a.m. – 8:45 a.m.
Opening Remarks
Lee Weintraub, Ft. Lauderdale – Program Chair

8:45 a.m. – 9:45 a.m.
Workshop A: Interpreting Construction Documents: How to Find that Hidden Nugget to Support your Client's Position from Typical Construction Documents
George Meyer, Tampa
Charlie Cacciabeve, Orlando

10:15 a.m. – 11:45 a.m.
* **Integration of, and Conflicts Between, Insurance Policies, Bonds and Contract Clauses Provided by Contractors, Subcontractors, and Design Professionals**
Wm. Cary Wright, Tampa
Gary Smith, Tallahassee

11:45 a.m. – 1:30 p.m.
Lunch Presentation
* **Ethics and open microphone issue on the State of Prevailing Party Attorney Fee Awards in Florida after Trytek**
Mindy Gentile, Ft. Lauderdale
Lee Weintraub, Ft. Lauderdale

Day 2 – Audio Recorded Presentations

8:00 a.m. – 9:30 a.m.
* **Breakfast: State of the Economy in Construction**
Ken Simonson – Chief Economist for Associated General Contractors of America, Washington, D.C.

9:30 a.m. – 11:00 a.m.
* **Workshop B: Federal and State Public Construction Contracting and False Claims Act**
Michael Sasso, Winter Park
Ed Kinberg, Melbourne

12:30 p.m. – 1:30 p.m.
* **Legislative & Case Law Update**
Fred Dudley, Tallahassee

CLE CREDITS

CLER PROGRAM	CERTIFICATION PROGRAM
(Max. Credit: 9.0 hours)	(Max. Credit: 9.0 hours)
General: 9.0 hours	Business Litigation: 9.0 hours
Ethics: 2.0 hours	Construction Law: 9.0 hours
	Real Estate Law: 9.0 hours

"3rd Annual Construction Law Institute 2010" Seminar

TO ORDER COURSE BOOKS OR AUDIO CD BY MAIL, SEND THIS FORM TO The Florida Bar, Order Entry Department: 651 E. Jefferson Street, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 850/561-5831.

Name _____ Florida Bar # _____

Address _____

City/State/Zip _____ Phone # _____

LCS: Course No. 1218R

METHOD OF PAYMENT (CHECK ONE):

❑ Check enclosed made payable to The Florida Bar

❑ Credit Card (Advance registration only. Fax to 850/561-5816.) ☐ MASTERCARD ☐ VISA ☐ DISCOVER ☐ AMEX

Signature: _____ Exp. Date: ____/____ (MO./YR.)

Name on Card: _____ Billing Zip Code: _____

Card No. _____

TO ORDER COURSE BOOKS OR AUDIO CD, fill out the order form above, including a street address for delivery. **Please add sales tax to the price of CD or books. Tax exempt entities must pay the non-section member price.**

Please include sales tax unless ordering party is tax-exempt or a nonresident of Florida. If this order is to be purchased by a tax-exempt organization, the audio CD or books must be mailed to that organization and not to a person. Include tax-exempt number beside organization's name on the order form.

❑ **COURSE BOOK ONLY** **(1218M)**
Cost $60 plus tax
(Certification/CLER credit is not awarded for the purchase of the course book only.)
TOTAL $ _____

❑ **AUDIO CD of select presentations*** **(1218C)**
(includes course book)
$250 plus tax (section member)
$275 plus tax (non-section member)
TOTAL $ _____

The Florida Bar Continuing Legal Education Committee and the Real Property, Probate & Trust Law Section present

Advanced Real Estate Law and Certification Review Course

COURSE CLASSIFICATION: ADVANCED LEVEL

Course No. 1219R

AUDIO CD & DVD ORDER FORM

Day 1

8:25 a.m. – 8:30 a.m.
Introduction
W. Theodore Conner, Program Chair

8:30 a.m. – 9:00 a.m.
FAR/BAR Contract
G. Thomas Ball, Orlando

9:00 a.m. – 9:40 a.m.
Case Law and Statutory Update
Eugene E. Shuey, Gainesville

9:40 a.m. – 10:15 a.m.
Construction Liens
Lee A. Weintraub, Ft. Lauderdale

10:30 a.m. – 11:00 a.m.
Selection of Business Entity
Barry B. Ansbacher, Jacksonville

11:00 a.m. – 11:50 a.m.
Florida Homestead
Wilhelmina F. Kightlinger, Tampa

1:10 p.m. – 1:35 p.m.
Tax Liens and Tax Titles
Robert G. Stern, Tampa

1:35 p.m. – 2:00 p.m.
Title Insurance – Affirmative Coverages
Alan K. McCall, Winter Park

2:00 p.m. – 2:30 p.m.
Marketable Record Title Act & Curative Statutes
Melissa Scaletta, Orlando

2:30 p.m. – 3:15 p.m.
Foreclosures
Alfred LaSorte, West Palm Beach

3:25 p.m. – 3:55 p.m.
Homeowners Associations
Michael J. Gelfand, West Palm Beach

3:55 p.m. – 4:30 p.m.
Condominiums and Condominium Associations
William P. Sklar, West Palm Beach

4:30 p.m. – 5:00 p.m.
Surveys and Legal Descriptions
Richard W. Taylor, Deland

5:00 p.m. – 5:15 p.m.
Comments on Certification Examination
Jennifer Slone Tobin, Orlando

5:15 p.m. – 6:15 p.m.
Reception (complimentary to attendees)

Day 2

8:25 a.m. – 8:30 a.m.
Opening Remarks
Arthur J. Menor, West Palm Beach

8:30 a.m. – 9:10 a.m.
Documentary Stamp Taxes
E. Burt Bruton, Jr., Miami

9:10 a.m. – 9:35 a.m.
Environmental Issues
Roger Schwenke, Tampa

9:35 a.m. – 10:00 a.m.
Tenancies and Conveyancing Issues
Robert M. Schwartz, Boca Raton

10:10 a.m. – 11:15 a.m.
HUD-1 Settlement Statement
Roland D. Waller, New Port Richey

11:15 a.m. – 11:45 a.m.
Zoning and Permitting
Richard Davis, Tampa

11:45 a.m. – 12:15 p.m.
Landlord/Tenant Disputes and Evictions
Guy Norris, Lake City

1:15 p.m. – 2:00 p.m.
Bankruptcy Issues
Marsha Rydberg, Tampa

2:00 p.m. – 2:25 p.m.
Public Lands and Water Boundary Issues
Alan B. Fields, St. Petersburg

2:25 p.m. – 2:50 p.m.
Real Estate Opinion Letters
David R. Brittain, Tampa

3:00 p.m. – 3:30 p.m.
Land Trusts
Andrew M. O'Malley, Tampa

3:30 p.m. – 4:00 p.m.
Judgments & Judgment Liens
Patricia J. Hancock, Maitland

CLE CREDITS

CLER PROGRAM
(Max. Credit: 16.0 hours)
General: 16.0 hours
Ethics: 0.0 hours

CERTIFICATION PROGRAM
(Max. Credit: 16.0 hours)
Business Litigation: 16.0 hours
Real Estate Law: 16.0 hours
Tax: 1.0 hour

"Advanced Real Estate Law and Certification Review Course" Seminar

TO ORDER AUDIO CD / DVD BY MAIL, SEND THIS FORM TO The Florida Bar, Order Entry Department: 651 E. Jefferson Street, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 850/561-5831.

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Address _____

City/State/Zip_____ Phone # _____

LCS: Course No. 1219R

METHOD OF PAYMENT (CHECK ONE):

❑ Check enclosed made payable to The Florida Bar
❑ Credit Card (Advance registration only. Fax to 850/561-5816.) ☐ MASTERCARD ☐ VISA ☐ DISCOVER ☐ AMEX

Signature: _____ Exp. Date: ____/____ (MO./YR.)

Name on Card: _____ Billing Zip Code: _____

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TO ORDER AUDIO CD / DVD, fill out the order form above, including a street address for delivery. **Please add sales tax to the price of CD / DVD. Tax exempt entities must pay the non-section member price.**

Please include sales tax unless ordering party is tax-exempt or a nonresident of Florida. If this order is to be purchased by a tax-exempt organization, the CD / DVD must be mailed to that organization and not to a person. Include tax-exempt number beside organization's name on the order form.

❑ **AUDIO CD** (includes course book) **(1219C)**
$425 plus tax (section member)
$450 plus tax (non-section member)
TOTAL $ _____

❑ **DVD** (includes course book) **(1219D)**
$500 plus tax (section member)
$525 plus tax (non-section member)
TOTAL $ _____

The Florida Bar Continuing Legal Education Committee and the Real Property, Probate and Trust Law Section present

Wills, Trusts and Estates Certification Review and Advance Practice Update 2010

COURSE CLASSIFICATION: ADVANCED LEVEL

Course No. 1220R

COURSEBOOK, AUDIO CD / DVD ORDER FORM

Those who have applied to take the certification exam may find this course a useful tool in preparing for the exam. It is developed and conducted without any involvement or endorsement by the BLSE and/or Certification committees. Those who have developed the program, however, have significant experience in their field and have tried to include topics the exam may cover. Candidates for certification who take this course should not assume that the course material will cover all topics on the examination.

Day 1

8:00 a.m. – 8:05 a.m.
Introduction and Welcome
Anne K. Buzby, Jacksonville – Program Chair
Deborah Lynn Russell, Naples – Program Vice Chair

8:05 a.m. – 8:45 a.m.
Case Law Update
David C. Brennan, Orlando

8:45 a.m. – 10:15 a.m.
Estate Administration and Probate
Richard E. Warner, Marathon

10:30 a.m. – 12:00 noon
Fiduciary Accounting
F. Gordon Spoor, CPA, St. Petersburg

1:30 p.m. – 5:00 p.m.
Taxes - Part 1
Prof. David Powell, Tallahassee

Day 2

8:25 a.m. – 8:30 a.m.
Introduction and Welcome
Anne K. Buzby, Chair
Deborah Lynn Russell, Vice Chair

8:30 a.m. – 12:00 noon
Taxes - Part 2
Prof. David Powell, Tallahassee

1:00 p.m. – 2:15 p.m.
Probate and Trust Litigation
William Hennessey, III, West Palm Beach

2:15 p.m. – 2:55 p.m.
Elective Share, Homestead and other Statutory and Constitutional Rights
Tami F. Conetta, Sarasota

3:10 p.m. – 4:40 p.m.
Trust Administration - Florida Trust Code
Richard R. Gans, Sarasota

4:40 p.m. – 5:10 p.m.
Board Certification Examination Preparation
Gary B. Leuchtman, Pensacola
Chair – Wills, Trusts and Estates Certification Committee

CLE CREDITS

CLER PROGRAM
(Max. Credit: 17.0 hours)

General: 17.0 hours
Ethics: 0.0 hours

CERTIFICATION PROGRAM
(Max. Credit: 17.0 hours)

Elder Law: 17.0 hours
Tax Law: 17.0 hours
Wills, Trusts & Estates: 17.0 hours

"Wills, Trusts and Estates Certification Review and Advance Practice Update 2010" Seminar

TO ORDER AUDIO CD / DVD OR COURSE BOOK BY MAIL, SEND THIS FORM TO The Florida Bar, Order Entry Department: 651 E. Jefferson Street, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 850/561-5831.

Name _____ Florida Bar # _____

Address _____

City/State/Zip _____ Phone # _____

LCS: Course No. 1220R

METHOD OF PAYMENT (CHECK ONE):

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Signature: _____ Exp. Date: ____/____ (MO./YR.)

Name on Card: _____ Billing Zip Code: _____

Card No. _____

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Please include sales tax unless ordering party is tax-exempt or a nonresident of Florida. If this order is to be purchased by a tax-exempt organization, the CD / DVD or course book must be mailed to that organization and not to a person. Include tax-exempt number beside organization's name on the order form.

❑ **COURSE BOOK ONLY (1220M)**	❑ **AUDIO CD (1220C)**	❑ **DVD (1220D)**
Cost $60 plus tax	(includes course book)	(includes course book)
(Certification/CLER credit is not awarded for the purchase of the course book only.)	$351 plus tax (section member)	$500 plus tax (section member)
	$376 plus tax (non-section member)	$525 plus tax (non-section member)
TOTAL $ _____	**TOTAL $** _____	**TOTAL $** _____

Florida Lawyers Support Services, Inc.
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NEW

2008 REAL PROPERTY FORMS

Interactive CD Formatted for both WordPerfect and MS Word
= Fill In The Forms, Save To Your Computer & Print

The Real Property Forms Committee of the Real Property, Probate & Trust Law Section of The Florida Bar has completed the arduous task of preparing suggested forms with comments for the Real Property Practitioner. The forms are available through Florida Lawyers Support Services, Inc. to RPP&TL Section members. Please note this disk **DOES NOT** include the FAR/BAR Contracts or Riders, those are available at www.flssi.org.

ONLY $100

INCLUDES SALES TAX AND SHIPPING

Firm: _____

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Street Address: _____ (WILL NOT DELIVER TO P.O. BOX)

City/State/Zip: _____

MUST CIRCLE ONE: COMMERCIAL Address or RESIDENTIAL Address

Phone: (_____)_____ Fax: (_____)_____

E-mail address: _____

CHECK PAYMENT

I have enclosed check #_____

MAIL CHECK TO:

Florida Lawyers Support Services, Inc.
Post Office Box 568157
Orlando, Florida - 32856-8157

CREDIT CARD PAYMENT

Card (Circle One): Visa or Master Card

Card Number: _____

Exparation Date: _____/_____

Signature of Cardholder: _____

CUSTOMERS ORDERING WITH A CREDIT CARD
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scan and email to info@flssi.org

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Post Office Box 568157 - Orlando, Florida - 32856-8157 (407) 515-1501 Fax (407) 515-1504 www.flssi.org

FAR/BAR CONTRACTS & RIDERS

FOR THE SALE AND PURCHASE OF RESIDENTIAL PROPERTY

Approved by The Florida Bar, Real Property, Probate & Trust Law Section and The Florida Association of Realtors

_____ Set of 25 FAR/BAR **CONTRACTS (Revised September 2007)**
- $50.00 per set

_____ Set of 25 FAR/BAR **"AS IS" CONTRACTS (Revised February 2008)**
- $50.00 per set

_____ Package of FAR/BAR **COMPREHENSIVE RIDERS** (**Revised January 2009)**
- $25.00 per package (each package is one copy of each rider listed below)

"As Is"
Assumption of Existing Mortgage(s)
Back-up Contract
Buyer's Attorney Approval
Coastal Construction Control Line
Condominium Association Disclosure
Condominium Governance Form
Evidence of Title (ABSTRACT)
Evidence of Title (SOUTH FLORIDA CONTRACTS)
Existing Tenant(s)
US Department of VA/FHA
Foreign Investment in Real Property Tax Act ("FIRPTA")
Homeowners' Association/Community Disclosure
Insulation Disclosure for New Residence
Kick Out Clause
Lead-Based Paint Disclosure
Post-Occupancy by Seller
Pre-Occupancy by Buyer
Rezoning Contingency
Right to Inspection and Right to Cancel
Sale of Buyer's Property
Seller Financing
Seller's Attorney Approval

Order Sub-Total	$_____
Sales Tax 6.5%	$_____
Shipping & Handling	$_____8.00
TOTAL	**$**_____

Firm:_____

Attn: _____ Attorney Bar #: _____

Street Address:_____ (WILL NOT DELIVER TO P.O. BOX)

City/State/Zip:_____

PLEASE CIRCLE ONE: COMMERCIAL or RESIDENTIAL Address

Phone: (_____)_____ Fax: (_____)_____

E-mail address: _____

METHOD OF PAYMENT

I have enclosed check #_____, in the amount of $_____, on _____ / _____ / _____

or

Please Circle One: VISA or MASTER CARD Amount to be charged $_____

_____ _____/_____ _____
Card Number Exp. Date Signature of Cardholder (REQUIRED)

FLSSI USE ONLY

SHIP DATE _____/_____/_____ **LB**_____ **$**_____ **#** ___ ___ ___ ___ ___ ___ ___ ___

AUTHORIZATION DATE _____/_____/____ **#** ___ ___ ___ ___ ___ ___ ActionLine September 2009

Florida Lawyers Support Services, Inc.
PO Box 568157 - Orlando, Florida - 32856-8157 407.515.1501 Fax 407.515.1504 www.flssi.org

2010 PROBATE & GUARDIANSHIP FORMS

Effective **January 1, 2010**

Developed by members of the Real Property, Probate and Trust Law Section of The Florida Bar. **Forms carry the Supreme Court required 3" x 3" blank square for Court Clerk's use. Probate Judges prefer and some require the use of 2010 FLSSI form**

Firm: _____

Attorney Name: _____ Attorney Bar #:_____

Physical Address: _____

City/State/Zip: _____

Phone: (_____)_____ E-mail Address: _____

2010 PROBATE FORMS AND INDEX - .PDF ON DISK . . . . . $ 379.10

This disk provides forms in locked .pdf format which only will only allow the user to open and print forms. These forms are not interactive and are not able to be saved or modified in any way. If you are looking for the forms in an interactive or program format please visit www.flssi.org to view our list of official licensed vendors.

2010 PROBATE FORMS AND INDEX - 1 PHYSICAL COPY OF EACH . . . . . $ 399.20

2010 GUARDIANSHIP FORMS AND INDEX - .PDF ON DISK . . . . . $ 333.10

This disk provides forms in locked .pdf format which only will only allow the user to open and print forms. These forms are not interactive and are not able to be saved or modified in any way. If you are looking for the 2010 Guardianship Forms in an interactive or program format please visit www.flssi.org to view our list of official licensed vendors.

2010 GUARDIANSHIP FORMS AND INDEX - 1 PHYSICAL COPY OF EACH . . . . . .$ 353.20

If you would like to order individual forms, please visit www.flssi.org to download our "long" order forms which lists each form for separate purchase.

==========

METHOD OF PAYMENT

Either mail this form with check to the address listed above or include credit card information and fax to 407.515.1504. Prices include shipping, handling and sales tax.

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What's Happening Within the Section...

As one of the largest sections of The Florida Bar, the RPPTL Section provides numerous opportunities to meet and network with other attorneys who practice in real property and probate & trust areas of the law, whether through getting involved in one of the various RPPTL Section committees or attending a RPPTL Section sponsored CLE course. Members have access to a wealth of information on the RPPTL Section website, including up-to-date news and articles regarding case law and legislative changes, other publications such as ActionLine, upcoming RPPTL Section sponsored CLE courses, and a whole host of relevant links to other real property, probate & trust law websites.

Additionally, the Section is working on human resources pages where searches can be done for out-of-state licensed Section members, law students available for clerkships or special project assistance, and other classifications. Further, Section committees each have list serves that discuss issues and current hot topics, available to committee members.

SCHEDULE

EXECUTIVE COUNCIL MEETING

May 27-30, 2010

Tampa Marriott – Waterside Hotel & Marina
Tampa, Florida

Reservation Phone # 800-228-9290
Room Rate: $159.00 (Single/Double)
$179.00 (Triple)
$199.00 (Quad)
Cut-off Date: April 27, 2010

29TH ANNUAL ATTORNEY TRUST OFFICER CONFERENCE

"Life and Death in 4-D – Division, Devise, Descent and Dissension"

June 24 - 27, 2010

The Ritz Carlton Golf Resort
Naples, Florida

Reservation Phone # (239) 593-2000
Course Registration: (850) 561-5619

EXECUTIVE COUNCIL MEETING & LEGISLATIVE UPDATE

August 4 – 7, 2010

The Breakers
Palm Beach, Florida

Reservation Phone # 561-655-6611
Room Rate: $185.00
Cut-off Date: July 4, 2010

EXECUTIVE COUNCIL MEETING

September 22 – 26, 2010

The Ritz-Carlton Orlando, Grande Lakes
Orlando, Florida

Reservation Phone # (407) 206-2400
Room Rate: $219.00
Cut-off Date: August 25, 2010

For the most up-to-date information on Section activities, visit the Section website (www.rpptl.org) or The Florida Bar's website (www.floridabar.org).

The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300

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NATIONAL FLOOD INSURANCE PROGRAM EXPIRED MARCH 28, 2010

If you are involved in real estate closings, and obtaining flood insurance is a condition for financing, then you will be interested to know of the expiration of the National Flood Insurance Program on March 28, 2010. FEMA which administers the Program, posted a notice anticipating that the Program will be re-authorized, likely with a retroactive date, when Congress reconvenes and the Senate is able to address HR 4851. See *http://www.fema.gov/business/nfip/*. Additional information can be found at: *http://bsa.nfipstat.com/wyobull/w-09068.pdf*

ARTICLES

... for the next issue of ActionLine are still being accepted.

Contact:

jrcactionline@gmail.com

If you are working on an interesting case or memo of law that you'd be willing to turn into an article for ActionLine, we would love to publish it for you! No article is too small or too large. (Submission information inside.)