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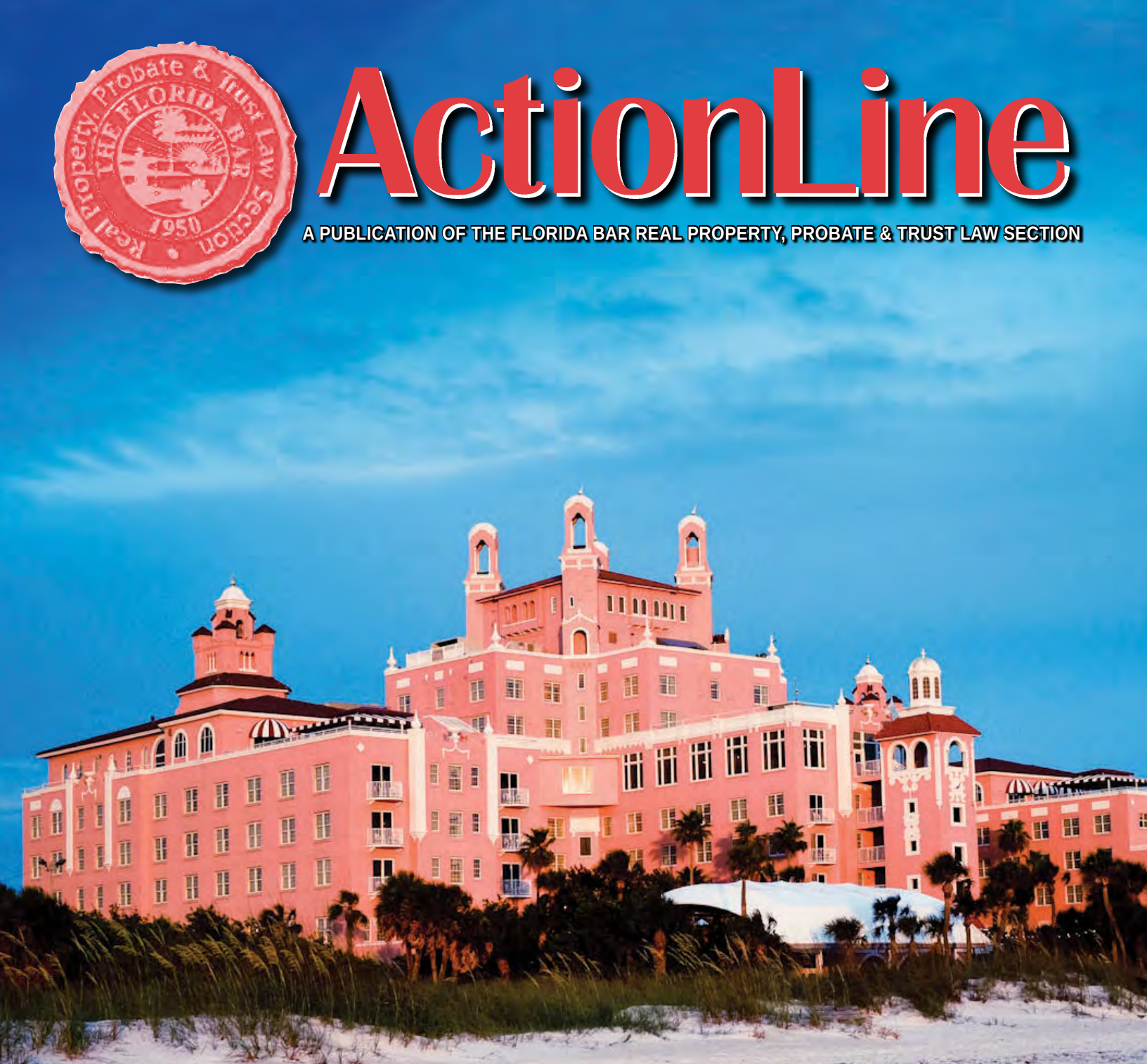
A PUBLICATION OF THE FLORIDA BAR REAL PROPERTY, PROBATE & TRUST LAW SECTION



The New (and Improved) Third-Party Legal Opinions Report

The Florida Uniform Title Standards – What Are They and Why Should We Care?

Temporary Portability Regulations Clarify Many Open Issues

Vol. XXXIII, No. 4 www.rpptl.org Summer 2012

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Thanks for the Memories

As I write this article, it's hard for me to believe that my year as Chair of the Real Property, Probate and Trust Law Section of The Florida Bar came to an end at midnight on June 30, 2012. It just amazes me how quickly the time passed. As I think back over the past year, I am reminded of the old Bob Hope theme song, "Thanks for the Memories."

I am very appreciative and thankful for having been given the opportunity to serve as the Chair of the Section. At the beginning of my term, a number of past Chairs gave me their sage advice, which when boiled down to its essence was, "don't screw it up." I like to think that besides "not screwing it up," and with the excellent assistance of all of the Executive Committee and Executive Council members, we were able to move the Section's agenda forward, making sure that its substantive activities not only were maintained, but continued to grow and develop.



Chair's Column

By George J. Meyer

Section Chair, 2011- 2012

The Section had an excellent year of CLE programming and support, including a free half-day ethics CLE program at the Section's Convention. Also, the Section's Legislative Committee and Amicus Committee very ably guided and assisted the Section to a very successful year in both arenas. Lead by its newly combined Membership & Diversity Committee, the Section stepped up its attention and emphasis on diversity and member services, resulting in the Section's membership numbers growing to a total in excess of 10,400 members. One of the great strengths of the Section is the expansive social and networking opportunities that are available at its various meetings and live CLE programs. The camaraderie, mentoring and practice support resources provided and facilitated by the Section are consistently reported by our members as one of the primary benefits they derive from Section membership. During this past year, I sought to enhance and further expand those social and networking experiences and opportunities for all Section members.

Though I very willingly will take full credit for it, if truth be told, essentially all of the Section's successes this past year are the result of the hard work and dedication of hundreds of Section members who willingly volunteered and contributed hundreds, if not thousands, of hours of their time working on the Section's various projects, programs, meetings and other activities. The quality work product produced by the Section's substantive and standing Committees, as well as that from the Section's At-Large Members, is truly exceptional. Easily over ninety percent of the Section's successes are the direct result of their work efforts.

The Section's Executive Committee provides leadership and guidance for all of the work efforts of the Section's various Committees and At-Large Members. I was blessed during the past year to have an exceptional group of individuals on the Executive Committee. The Executive Committee consisted of: Debbie Goodall - Chair of the CLE Coordination Committee; Barry Spivey - Chair of the Legislation Review Committee; Andrew O'Malley - Treasurer; Michael Gelfand - Secretary; Debra Boje - Director of the At Large Members; Michael Dribin - Director of the Probate and Trust Law Division; Peggy Rolando - Director of the Real Property Law Division; Brian Felcoski - Immediate Past Chair; and William "Fletch" Belcher - Chair Elect. I wish to thank each and every one of them for all of the support and good advice they provided to me and the Section this past year. With Fletch as Chair, and with almost all of those Executive Committee members returning, I know the Section is in very good hands and I'm sure this year will be very successful.

Every year, a key person to the success of the Section is the staff person assigned by The Florida Bar as the Section's Program Administrator. Early into my year as Chair, the Section's existing Program Administrator left to pursue other opportunities outside of the Bar. Luckily, Yvonne Sherron, a very experienced member of the Bar's staff, stepped in and assumed the Section's Program Administrator position. I wish to thank Yvonne for all of her very fine work and assistance in helping to keep the Section on track through that transition and throughout the past year.

I also wish to thank my family for their continuing love and support and especially for putting up with me this past year. I particularly wish to thank my wife Pat for all of her fabulous suggestions and assistance in helping me plan all of the Section's various Executive Council meetings, as well as all of the time and effort she put into helping me host those meetings. Having such a supportive partner not only reduced my workload, but also allowed me to be more engaged in the Section's various meetings and activities.

In closing, I wish to acknowledge my very deep appreciation to the Section for giving me this fantastic opportunity. Thanks for the memories!

George J. Meyer
Immediate Past Chair of the
Real Property, Probate and Trust Law
Section of The Florida Bar

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by Nicole Kibert.

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GENERAL INQUIRIES: For inquiries about the RPPTL Section, contact Yvonne Sherron at The Florida Bar at 800-342-8060 extension 5626, or at *ysherron@flabar.org.* Yvonne can help with most everything, such as membership, the Section's website, committee meeting schedules, and CLE seminars.

RPPTL Section's Annual Service Award is renamed the John Arthur Jones Annual Service Award



John Arthur Jones was recognized for his many years of service and dedication to the RPPTL Section during the Annual Convention. Mr. Jones, a past Section Chair, was the first recipient of the RPPTL Section's Robert C. Scott Memorial Award in 1985. In 2003, Mr. Jones was awarded the Section's first William F. Belcher Lifetime Professional Award in honor of his lifetime contributions to the Section, as well as to all Florida attorneys and the general public. As seen here, George J. Meyer, Chair of the RPPTL Section 2011-2012, presents him with the Section Proclamation renaming the Section's Annual Service Award henceforth to be known as the John Arthur Jones Annual Service Award. This is truly a fitting tribute to a Section member who embodies the Spirit of Service. Thank you, Mr. Jones, for your continued participation and devotion to the Section and its membership.

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Section members can now easily set up fast access to the RPPTL website via a cell phone or similar mobile device. Using a bar code scanner app, simply scan the Quick Response Code (QR Code) shown below with your mobile device, log in with your user name and password, and place a checkmark under "remember my password." Your device should prompt you to save the page as a shortcut or you can review your user manual for that purpose. An icon with the Section seal should appear.

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The Florida Uniform Title Standards – *What Are They and Why Should We Care?*

By Patricia P. Jones, Esq., Attorneys' Title Fund Services, LLC, Orlando, FL


P. JONES

At its June 1, 2012, Executive Council meeting, the Real Property Probate & Trust Law Section approved the "final" revised standard to the Uniform Title Standards, completing the first major update and re-write of the Uniform Title Standards since 1981.

The Uniform Title Standards, for those who toil only infrequently in the area of conveyancing, are standards for examining title to real property in Florida with the goal of resolving disagreements among real property attorneys on various types of title defects and their impact on the marketability of the title. For example, there are standards that discuss titles coming through bankruptcy proceedings, probate administration, and tax deed sales, as well as standards on homestead, liens and judgments, and legal descriptions, to name a few.

Even though few attorneys today perform title examinations, the standards still serve as a resource for attorneys representing buyers and sellers in real estate transactions, where contracts typically call for the seller to convey marketable title. The popular FR/BAR Contract for Sale and Purchase ("FR/BAR Contract") has long incorporated the Uniform Title Standards as the "standard" for determining a buyer's marketable title to the real property. Since its inception in the early 1970's, the FR/BAR Contract has provided that "(m)arketable title shall be determined according to applicable standards adopted by authority of The Florida Bar and in accordance with law."

Of equal significance to all Floridians is the fact that the Florida courts have consulted and cited to the Uniform Title Standards when confronted with title issues covered by the standards. See, e.g., *Marshall v. Hollywood, Inc.*, 236 So. 2d 114 (Fla. 1970); *City of Miami v. St. Joe Paper Co.*, 364 So. 2d 439 (Fla. 1970); and *Cunningham v. Haley*, 501 So. 2d 649 (Fla. 5th DCA 1986). Understandably, the issues in these cases dealt with the proper application of Florida's Marketable Record Title Act. Most recently, the Fifth District Court of Appeals cited to the Uniform Title Standards in a decision dealing with corporate authority to convey real property. See *DGG Development Corp. v. Estate of Capponi,* 983 So. 2d 1232 (Fla. 5th DCA 2008).

The Uniform Title Standards occupied a central role in the function of the RPPTL Section when the Section was created in 1954. In fact, the Uniform Title Standards Committee was the *first* committee established by the Section. History buffs may be interested to know that Florida's first title standards committee existed, not as a RPPTL committee but as a committee of the Board of Governors of The Florida Bar ("BOG") before there was a RPPTL Section. After the RPPTL Section was created, the BOG passed a resolution which effectively ceded responsibility for developing uniform title standards to the Section.

The first known set of published title standards is the set that appeared as a supplement to the March 1959 issue of *The Florida Bar Journal*. The Committee Chair at that time was David Catsman, who wrote in the Forward to the title standards that Florida joined 25 other states in utilizing this method of solving some of the problems involved in real property title transactions.

The next known publication of title standards was in 1975, under the leadership of Sherwood Spencer, who noted that the 1975 update was the work of a task force led by Mandell Glicksberg, Professor of Law at University of Florida School of Law, with the help of a grant from the George B. Carter Foundation. (George B. Carter was a founder of Lawyers' Title Guaranty Fund, which became Attorneys' Title Insurance Fund, Inc.) The Uniform Title Standards Committee was then set up as a continuing committee of the Section responsible for updating and revising the title standards. In the following years, revisions to the title standards would be developed under Professor Glicksberg's leadership and would utilize the resources of the University of Florida Law Review. Their work culminated in the third revision of the Uniform Title Standards in 1981 and is the version that is contained in that small blue three-ring binder that the Section used to distribute to new members and which still can be found on many law library shelves.

Since the late 1990s, the members of the Uniform Title Standards Committee, which was renamed the Title Issues and Standards Committee, undertook to research and draft revised title standards on their own, with conferencing support provided by the Section. The members of the committee are a broad representation of the title insurance industry as well as attorneys in the private practice of law. The committee completed its update and revisions to the title standard in 2012. The 2012 version of the title standards represents the first time the title standards exist solely in electronic form. They are published on the home page of the Section's website and are freely available to all visitors to the website at www.RPPTL.org/.

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The New (and Improved) Third-Party Legal Opinions Report

By David R. Brittain, Esq., Trenam, Kemker, P.A., Tampa, Florida


D. BRITTAIN

A "third-party legal opinion" is a specialized form of written opinion letter, authored by a lawyer for use in a commercial transaction. Unlike the written advice that lawyers commonly give to their clients by letter, email, and telephone, a third-party legal opinion is given by counsel representing one party to another party in the transaction who is not the opining lawyer's client. Third-party legal opinions are rendered in a wide variety of transactions, from debt or equity financings and acquisitions of stock or assets, to construction and permanent loans secured by real estate. They are usually part of the documentation exchanged between counsels for the parties as a condition of the closing of the transaction.

Third-party opinions are flexible and valuable long-standing legal tools in commercial transactions because they provide material assurances concerning the reliability and enforceability of the transaction documents and the status of parties to the transaction that cannot be provided by available commercial products such as title insurance. For example, an opinion may be expressed concerning whether documents evidencing and securing a commercial loan are the binding and enforceable obligations of the borrower; whether the execution and delivery of loan documents by the borrower conflict with other agreements to which the borrower is already obligated; or whether the lawyer rendering the opinion (and other members of the lawyer's firm involved in the transaction) are aware of litigation or proceedings pending against the lawyer's client which, if adversely decided, could have a material effect on the borrower's business or ability to perform pursuant to the transaction documents.

History of the Report

The Business Law Section of the Florida Bar made the first effort to establish standards for the rendering of third-party opinion letters in Florida with the publication in 1991 of its "Report on Standards for Opinions of Florida Counsel" (the "1991 Report").[1] The 1991 Report sought to create normative opinion standards for Florida counsel at about the same time as the American Bar Association Section of Business Law adopted its "Third-party Legal Opinion Report, Including the Legal Opinion Accord," which attempted to establish national standards for the same purpose. These were intended to be objective standards to be followed by opinion-givers and receivers based on agreement between the parties through incorporation of the standards by reference into the opinions of counsel. Thus, the 1991 Report did not so much reflect the customary opinion practices of its day, as it was an aspirational vision of what opinion practices should be binding on Florida counsel.[2]

Initially, the 1991 Report was applicable only to business transactions not involving real property; however, in 1996 and again in 2004, the Real Property, Probate, and Trust Law Section of the Florida Bar ("RPPTL Section") published its own supplement to the 1991 Report, which sought to establish normative standards for third-party opinions rendered in connection with real estate-secured financing transactions. In 1998, the Business Law Section in turn published a supplement to the 1991 Report setting forth standards for opinions of Florida counsel with respect to opinions rendered under Article 9 and Article 8 of the Uniform Commercial Code.[3]

Although the 1991 Report and later supplements were helpful attempts to define the standards that should be applicable to opinion-giving in Florida, they ran counter to certain trends that gradually reduced their usefulness. First, a number of out-of-state opinion recipients and their counsel in multi-state transactions rejected some of the approaches taken in the 1991 Report, and thus many Florida lawyers began distancing themselves from it. Second, the "express incorporation" approach to normative opinion standards was unpopular with some money-center financial institutions, which refused to allow incorporation of the 1991 Report into opinions issued for their reliance. Third, in recent years, a number of reported cases have arisen from lawsuits instituted against lawyers and their firms in connection with third-party legal opinions that they rendered. These cases focused the attention of lawyers who regularly issue such opinions upon the standard of care to which lawyers rendering third-party legal opinions are likely to be held. This, in turn, turned attention to the concept of "customary practice" and its effect on the standard of care applicable to the preparation of legal opinions in the jurisdiction in which the opinion is rendered (on which more will be written below).[4]

Finally, the 1991 Report, as supplemented, did not cover every aspect of opinion-giving comprehensively. The 1991 Report called for additional supplements covering other important topics to be prepared at a later date, but some of the supplements were not actually finalized or approved for use. Related to this was the fact that the Legal Opinion Standards Committee of the Business Law Section and the Legal Opinions Committee of the RPPTL Section (the "Committees") were not jointly addressing their common subject matter. Because of this lack of coordination between the two Sections, there had been little formal dialog

continued, next page

between the two regarding the currency of their respective work product. Thus, by 2006, the 1991 Report and its supplements were in need of substantial revision.

In 2006, responding to the above concerns, the Committees began the first truly unified and comprehensive effort to reduce to writing their common understanding of Florida customary practice in the giving of third-party legal opinions. These efforts, requiring more than five years to complete, resulted in the publication of an exposure draft of the "Report on Third-Party Legal Opinion Customary Practice in Florida" (the "Report") in January 2010. After a one year public comment period and additional drafting by the Committees to respond to comments received during that time, the Report was approved by the Committees and thereafter formally approved by the Executive Council of the Business Law Section (on December 1, 2011) and by the Executive Council of the RPPTL Section (on December 3, 2011).[5]

Purpose of Third-Party Opinions and the Role of "Customary Practice"

Both the Report and the *Restatement of the Law (Third) of the Law Governing Lawyers* ("Restatement") identify the purpose of a third-party legal opinion similarly, although not identically. Under the Report, an opinion is a "formal written letter that confirms Opining Counsel's informed and reasoned understanding of certain facts or events relating to the Client and the Transaction and the effect of certain legal principles applicable to the specific Client and Transaction."[6]

Thus, in Florida a third party legal opinion is "an expression of the Opining Counsel's informed and reasoned judgment, based upon an analysis of the facts, laws, assumptions and other matters relevant to the opinion at the time the opinion is rendered, as to how the Florida Supreme Court should decide the legal issue considered in the opinion if the Court were properly presented with that issue as of the date of the opinion."[7] The Report notes, however, that "an opinion is not a guarantee that the Florida Supreme Court would make this decision."[8]

In turn, "customary practice" establishes the criteria for determining whether a lawyer who renders a third-party opinion has satisfied the lawyer's obligations of competence and diligence. "Customary practice" is a term of art that establishes the standard of care applicable to attorneys who render third-party legal opinions. The Report states that "Florida customary practice governs every opinion regarding matters of Florida law delivered by a Florida attorney to a third-party Opinion Recipient (whether or not the Opinion Recipient is located within the State of Florida), regardless of whether the opinion letter incorporates this Report by reference or otherwise mentions Florida third-party legal opinion customary practice."[9] Thus, Florida customary practice governs the opinion letter unless, as the Report permits, counsel agrees to modify it based on their agreement, or to incorporate the customary opinion practice of another jurisdiction.[10]

The Report and Its Divisions

The Report provides guidance, in accordance with Florida customary practice, for preparing third-party legal opinions and for the diligence process necessary to render such opinions. In addition to commentary on Florida customary practice for opinion giving, the Report provides lawyers with sample language and forms, diligence checklists, and notes regarding common pitfalls facing opinion givers. The Report is divided into twenty-one subsections presented under the following subtitles:

Sections 1 through 3 of the Report contain introductory remarks, an introduction to the history and context of the

E-Mail Service Mandatory Effective Sept. 1, 2012

The Florida Supreme Court issued an opinion addressing mandatory e-mail service Thursday, June 21, 2012. This original opinion contained an effective date of July 1, 2012. However, a second corrected opinion and notice of correction were issued June 26, 2012 providing a revised effective date of September 1, 2012.

E-Mail service becomes MANDATORY on September 1, 2012 in civil, probate, small claims, and family law divisions of the trial courts, as well as in all appellate cases. Effective on this date, service solely by U.S. Mail will no longer be allowed.

Second Corrected Opinion:
(http://www.floridasupremecourt.org/decisions/2012/sc10-2101.pdf)

Notice of Correction:
(http://www.floridasupremecourt.org/decisions/2012/sc10-2101_Notice.pdf)

Report, its objectives and purposes as well as a discussion of common elements of third-party opinions that must be honored by the opinion-giver.

Background of the Report (presenting a detailed history of legal opinion-related reports in Florida and their place in the national dialog on opinion-giving);[11]

Introductory Matters (introducing the purpose and goals of the Report and fundamental considerations preceding the issuance of a third-party legal opinion, including the process of negotiation of an opinion and particular ethical considerations surrounding opinion-giving);[12]

Common Elements of Opinions (describing certain aspects of opinion-giving that are common to virtually all third-party legal opinions, including the identification of counsel, the transaction, and the transaction documents; the difference between opinions of local and general counsel; the nature and extent of permissible assumptions, and the relationship between the Report and the opinion letter in Florida);[13]

Sections 4 through 8, 10, and 11 of the Report are often referred to as the "Building Block" opinions because without such opinions (which go to the very existence of the opinion-giver's client-entity and its ability to undertake the transaction) no opinion regarding the enforceability of the transaction documents can be expressed.

Entity Status and Organization of a Florida Entity (discussing what it means to state that an entity has been "organized under Florida law" and, if applicable, that its status is "active");[14]

Authority to Transact Business in Florida (discussing the meaning of a statement that a business entity formed outside the State of Florida "is authorized to transact business in the State of Florida," and, if applicable, that its status in Florida is "active");[15]

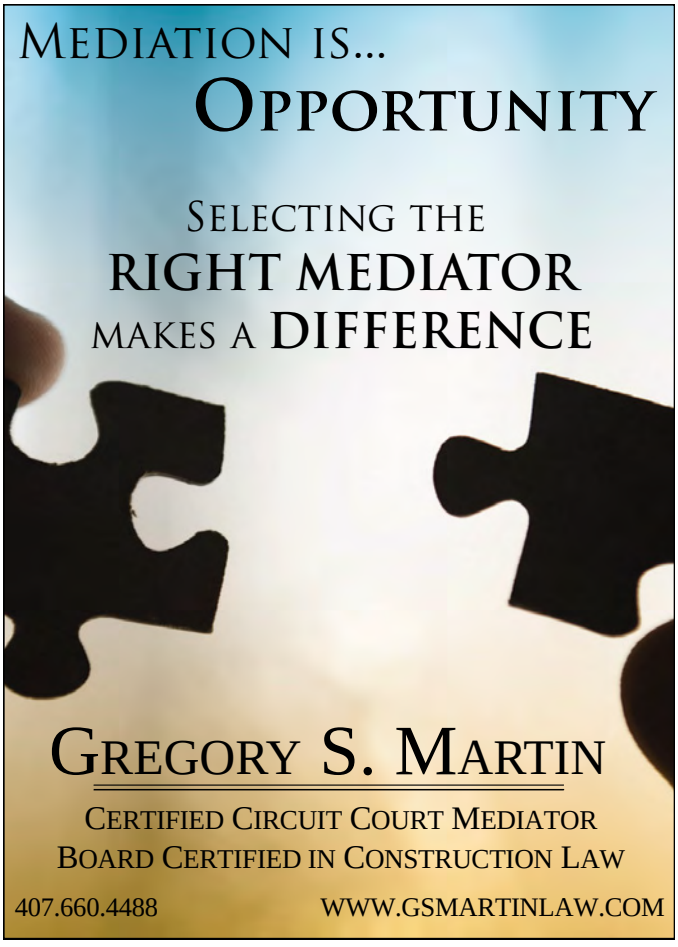
Entity Power of a Florida Entity (discussing whether an entity has the power, under Florida law and its organizational documents, to execute and deliver the transaction documents and carry out its obligations as described in them);[16]

Authorization of the Transaction by a Florida Entity (discussing whether an entity not only has the power to enter the transaction, but whether the specific transaction

continued, next page

Joint Committees of RPPTL and BLS Consider Receivership Action

The Real Property Finance and Lending Committee of RPPTL has formed an Ad Hoc Receivership Action Subcommittee to work jointly with the Receivership Study Group of the Bankruptcy/UCC Committee of the Business Law Section (chaired by Jacob Brown) in the examination of current legal standards and practices in Florida pertaining to the appointment, functions, and judicial oversight of receivers. The Chair of the RPPTL subcommittee is William McCaughan, and its Vice-Chair is Peter Monroe. The two subcommittees of the Business Law Section and RPPTL will be working jointly this year to explore the possibility of developing proposed model judicial orders appointing, authorizing, and empowering receivers in various cases, as well as standard clauses addressing typical actions required of receivers. More broadly, the joint committees will also consider whether judicial approval of such forms or further legislative or rule-making action to better define and formalize the powers of receivers is advisable.



and transaction documents have been authorized by all necessary action on the part of the entity);[17]

Execution and Delivery (discussing the surprisingly complex question of whether the transaction documents have been "executed and delivered" by the opinion-giver's client");[18]

Section 9 of the Report concerns one of the most important elements of a third-party legal opinion and, arguably, its capstone: an opinion regarding the enforceability and effectiveness of the remedies provided by the transaction documents.

The Remedies Opinion (discussing the opinion that the transaction documents are "valid and binding obligations" of the opinion-giver's client, "enforceable against the Client in accordance with their terms");[19]

No Violation and No Breach or Default (discussing the opinion that the transaction documents do not violate any terms or conditions of, or cause a default under, the terms of any other agreements under which the opinion-giver's client is already obligated);[20]

No Required Governmental Consents or Approvals (discussing whether any consents or approvals by governmental agencies are necessary to the execution, delivery, or performance of the transaction documents, which may be of special importance in the case of a transaction with a governmental or quasi-governmental entity);[21]

Sections 12 through 17 of the Report concern the rendering of either specialized opinions or the rendering of particular opinions in certain types of specialized transactions.

No Litigation (discusses the appropriate form of, and diligence to support, the "no litigation" opinion, one of the riskiest of requested opinions to the opinion-giver, which consists of an opinion that, to the knowledge of the opinion-giver, there is no present or threatened litigation against the client);[22]

Opinions With Respect to Securities (of particular interest to securities lawyers, this section discusses various opinions pertaining to the issuance of securities under Florida law and the requisite diligence to support the opinions);[23]

Opinions With Respect to Collateral Under the Uniform Commercial Code (discussing the three most commonly requested opinions with respect to property governed by the Florida Uniform Commercial Code: (a) creation and attachment of a security interest in collateral; (b) perfection of the security interest, and (c) in limited cases, priority opinions, as well as the supporting diligence with respect to all of the foregoing opinions);[24]

Opinions Particular to Real Estate Transactions (of particular interest to the real estate lawyer, this section describes opinions commonly requested by opinion

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recipients in real estate-secured transactions, including opinions regarding the creation of a mortgage lien and tax parcel status of mortgaged real estate);[25]

Florida Usury Law (discussing the correct means of opining that a loan is non-usurious under Florida law);[26]

Choice of Law (discussing certain types of permissible opinions regarding choice of the law of another state as the law governing some or all portions of the transaction documents);[27]

Sections 18 through 19 of the Report discuss particular concerns of the local or specialist counsel involved in a multi-state transaction and certain types of opinions that the Report does not cover.

Special Issues to Consider When Acting As Local Counsel (discussing the special risks and issues, including ethical issues, confronting the Florida lawyer when rendering opinions concerning the Florida-based portion of a multi-state transaction);[28]

Opinions Outside the Scope of This Report (describing particular opinions that are so complex or require such specialized skill, experience, and training that they are not covered by the Report);[29]

Appendices (containing definitions, a helpful statutory cross reference table, and a statement adopted by the Business Law Section and RPPTL regarding the role of customary practice in Florida in 2008):

Appendix "A" – Table of Definitions

Appendix "B" – Statutory Cross References

Appendix "C" – Statement On The Role of Customary Practice

Illustrative Forms of Third-party Opinion Letters (presenting four model forms of legal opinions, addressing four of the most commonly requested types of third-party legal opinions encountered by Florida lawyers):

Section A - For use in commercial loan transactions (not secured by real estate);

Section B - For use in loan transactions secured by real estate;

Section C - For use in connection with share issuance by a Florida corporation; and

Section D - For use when acting as local Florida counsel in a loan transaction.

The Report is not only a specialized tool for use by lawyers who regularly render third-party legal opinions. Because the Report presents a step-by-step approach to the analysis of many fundamental legal questions, particularly those regarding the formation, authority, and power of business entities, it is also a general resource for members of the legal profession at large, particularly lawyers who are new to commercial practice.

For example, suppose a transaction lawyer needs to determine whether a limited partnership a new client wants to use for a business transaction has been properly formed and is suitable for use in a particular transaction. The lawyer need only turn to the material beginning on page 42 of the Report to confirm the steps necessary to making this determination, which are to confirm that (a) a Certificate of Limited Partnership for the entity has been filed with the Florida Department of State (as required by §620.1201 of the Florida Revised Uniform Limited Partnership Act ("FRULPA"); (b) at least one general partner and at least one limited partner have agreed to carry on a business as co-owners for profit, and that no circumstance exists that would require dissolution (also required by FRULPA §620.1201), and (c) confirm that the entity has not been dissolved according to the records of the Department of State for failure to file reports or pay fees, the best evidence of such fact being a certificate from the Department of State that the entity's status is "active," pursuant to FRULPA § 620.1209(1).

For opinion-givers and recipients, because the Report is meant to be a practice guide, rather than a treatise, the illustrative forms of opinion letters that accompany the Report are especially important. When used in conjunction with the Report commentary regarding the meaning of the words in the opinions and the diligence that is recommended to give them, the illustrative forms provide a powerful tool for the efficient and effective rendition of opinions in accordance with Florida customary practice. These illustrative forms are available on-line, free of charge, as word processing file attachments to the Report on the websites of both the RPPTL Section and the Business Law Section.[30] Recognizing the importance of the Report to Florida lawyers, the two Sections have elected, for a limited time, to make printed copies of the Report available, without charge, to all of the nearly 15,000 members of the Business Law and RPPTL Sections.

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Whether a lawyer is engaged in the practice of real estate law, litigation, bankruptcy, estate planning, or corporate transactions, he or she will certainly not regret having a copy of the Report, either at desk side or on the computer hard drive.

Endnotes:

1 *See Report On Third-Party Legal Opinion Customary Practice In Florida* ("Report"), pp. 1-6.

2 *Id., pg. 1.*

3 *Id., pp. 1-2.*

4 *Id., pg. 2.*

5 *Id., pg. 6.*

6 The *Restatement of the Law (Third) of the Law Governing Lawyers* ("Restatement"), Section 95, comment c, states, in part, that: "Unless effectively stated or agreed otherwise, a legal opinion or similar evaluation constitutes an assurance that it is based on legal research and analysis customary and reasonably appropriate in the circumstances and that it states the lawyer's professional opinion as to how any legal question addressed in the opinion would be decided by the courts in the applicable jurisdiction on the date of the evaluation."

7 *Report, pp. 8-9.*

8 *Id.*

9 *Id, pg. 9.*

10 The Report notes that adoption by the Business Law Section and RPPTL Section of the *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions* (the "Customary Practice Statement") in 2008 focused the attention of lawyers "on the importance of customary practice as a source of the criteria for determining whether an opinion-giver has satisfied its obligations of competence and diligence." The Customary Practice Statement emphasizes that bar association reports (such as the Report) are valuable sources of guidance on customary practice. The Report further notes that as of October 6, 2011, the Customary Practice Statement had been adopted by 33 bar associations or sections of bar associations, including the Business Law Section and the RPPTL Section. A copy of the Customary Practice Statement is attached as Appendix "C" to the Report. *Id, pg. 3.*

11 *Id., pp. 1-7.*

12 *Id., pp. 8-17.*

13 *Id., pp. 18-37.*

14 *Id., pp. 38-57.*

15 *Id., pp. 58-67.*

16 *Id., pp. 68-75.*

17 *Id., pp. 76-87.*

18 *Id., pg. 88.*

19 *Id., pp. 91-108.*

20 *Id., pp. 109-114.*

21 *Id., pp. 115-116.*

22 *Id., pp. 118-122.*

23 *Id., pp. 123-131.*

24 *Id., pp. 132-152.*

25 *Id., pp. 153-162.*

26 *Id., pp. 163-168.*

27 *Id., pp. 169-175.*

28 *Id., pp. 176-184.*

29 *Id., pp. 185-187.*

30 Illustrative forms in MS Word format can be downloaded on the websites of the RPPTL Section and Business Law Section.



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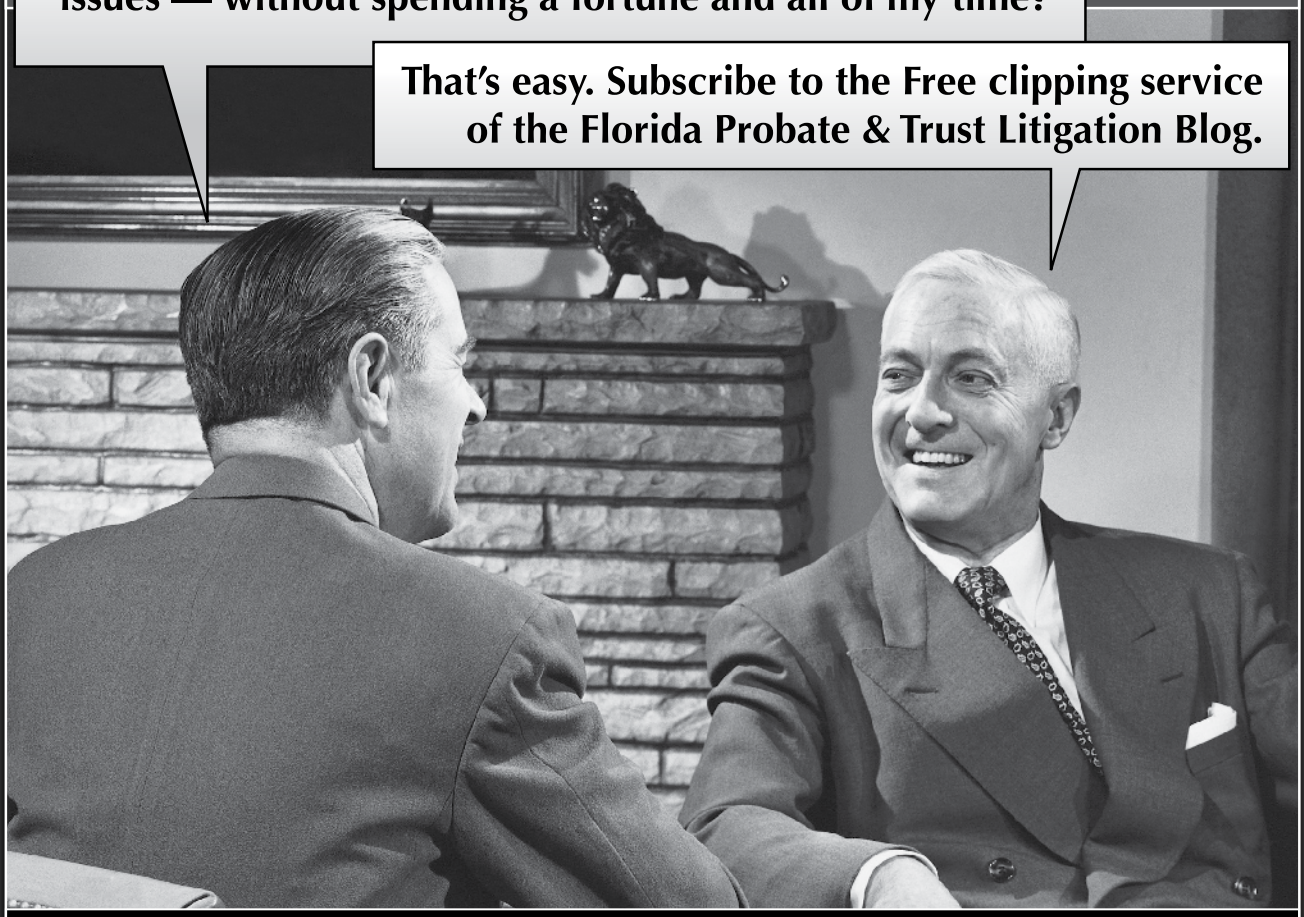

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Temporary Portability Regulations Clarify Many Open Issues

By George D. Karibjanian, Esq., Proskauer, Rose, LLP, Boca Raton, FL

The Internal Revenue Service has issued temporary regulations on portability allowing a surviving spouse to use a deceased spouse's unused (estate tax) exclusion amount.


G. KARIBJANIAN

Section 303(a) of the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010 (the "2010 Act") added a new concept to the estate and gift tax arena, that being the concept of "portability." The subject of various prior Congressional proposals, "portability," in its basic sense, is the concept of allowing a deceased spouse's unused estate and gift tax exemption amount to pass to the surviving spouse for use by such spouse. The use of portability is intended to rectify an inequality created by spouses who fail to properly utilize their respective applicable exclusion amounts.[1]

The concept is best exemplified with the following examples, wherein two married couples have combined gross estates for Federal estate tax purposes (the "gross estate") of $6 million.

H1 and W1's assets are all jointly held with right of survivorship so that upon the death of the first spouse, the surviving spouse receives all of the deceased spouse's assets. Upon H1's death, H1 has a gross estate for Federal estate tax purposes (the "gross estate") of his share of the joint property, or $3 million. Because all $3 million is jointly owned with W1, the passage of such property qualifies for the Federal estate tax marital deduction under I.R.C. §2056. This leaves H1 with a taxable estate for Federal estate tax purposes (the "taxable estate") of $0, so no Federal estate taxes are due. However, this means that with no taxable estate, H1 failed to use his estate tax exemption as the exemption is, in actuality, a credit against the tax and is utilized only after all applicable deductions (i.e., the marital deduction) are applied against the gross estate.

Assume that by the time of W1's death, (a) the value of her gross estate remains at $6 million (which is all of the property that she owned jointly with H1), and (b) the applicable exclusion amount is $5 million and the estate tax rate is 35%. Because W1's gross estate is $6 million and she has an applicable exclusion amount of only $5 million, $1 million is thus subject to estate tax, resulting in the imposition of $350,000 in taxes.

Contrast this scenario to one where H2 and W2 visited their estate planning attorney, who advised them to separate their assets so that each owned $3 million in his or her individual names. The attorney also advised both to create "bypass" or "credit shelter trusts" within their estate planning documents, so that, upon the death of the first of them to die, an amount equal to the deceased spouse's applicable exclusion amount would pass into a trust for the benefit of the surviving spouse. The credit shelter trust would be subject to Federal estate taxes, but the tax on such property would be reduced to $0 on account of the deceased spouse's applicable exclusion amount. Upon H2's death, W2 would have her own $3 million in assets and the trust created under H2's estate planning documents with $3 million; because W2 would not have any control over this trust and because the Federal estate tax marital deduction was not elected against such trust, such trust would not be includible in W2's estate upon her death. The only assets includible in W2's gross estate would be her own $3 million of assets, which is less than her applicable exclusion amount of $5 million. As a result, no Federal estate taxes due. Solely because H2 and W2 sought the advice of estate planning counsel, their descendants inherit both of their estates, with no Federal estate taxes due.

In the first example, using portability the $350,000 in estate taxes can be eliminated. With portability, because H1 failed to use any of his applicable exclusion amount, it would all pass to W1, so that W1 would be able to utilize for her estate not only her $5 million applicable exclusion amount, but also H1's unused exemption amount up to $5 million.

The portability provisions extend far beyond this basic example. Congress attempted to identify and legislate many of the collateral issues that could arise, such as what would happen if a surviving spouse remarried and then the new spouse died. However, perhaps as a result of the rush that ensued to pass the 2010 Act, many nuances were lost in the translation and many ramifications were simply not covered by the statutes.

In the days and weeks following the enactment of the 2010 Act, many practitioners commented on the potential gaps and shortfalls; one potential gap was even identified as a legislative error by the Joint Committee on Taxation (the "JCT") through the issuance of an Errata to clarify what was stated as a statutory misstatement.

On September 29, 2011, the Internal Revenue Service (the "Service") issued its Notice 2011-82,[2] requesting that the public submit comments on portability no later than October 31, 2011. After receiving such comments, the Service and the Treasury formulated the government's position on portability and, on June 15, 2012, the Treasury issued new temporary regulations on portability.[3] Also issued were proposed regulations, the text of which is the temporary regulations, with a request that comments be submitted within 90 days of issuance and the scheduling of a public hearing on October 18, 2012.[4]

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The technical aspects of the temporary regulations are beyond the scope of this article. What is important to know is that the temporary regulations clarified many open issues with portability, including the following: (a) portability is elected on the filing of an estate tax return, even if the estate is of a size under which an estate tax return would not have been required (which, in such case, the return must be filed no later than nine months from the date of the decedent's death); (b) on those small estates, items not affecting the tax calculation, i.e., marital and charitable deduction items, need not be formally valued; (c) the executor is responsible for the portability election (resolving the question as to whether a surviving spouse could elect on his or her own); (d) the explanation issued by the JCT is adopted as the true statutory intention (despite clear statutory language to the contrary); (e) the deceased spouse's unused exclusion (DSUE) amount is determined based on prior taxable gifts that utilized such spouse's gift tax exemption and not any prior taxable gifts on which gift taxes were paid (which resolves a conflict within the statutory language that would reduce the amount of available DSUE amount by taxable gifts which resulted in gift taxes payable); (f) for gift tax purposes, an "ordering rule" is adopted whereby a taxable gift utilizes any available DSUE amount prior to utilizing the taxpayer's basic exclusion amount; and (g) the perceived portability "clawback," under which a surviving spouse's utilization of a DSUE amount prior to a subsequent spouse's death in which the spouse receives a smaller DSUE amount than passed to him or her from his or her first deceased spouse, is not deemed to occur.

The Temporary (Proposed) Regulations resolve many of the issues addressed by practitioners, but some remain unanswered. Some of these issues include the portability of the generation-skipping transfer tax exemption under I.R.C. §2631 and the indexing of the DSUE amount for cost of living adjustments. In addition, the efforts may be for naught as portability is set to expire along with the 2010 Act on December 31, 2012. Even if the 2010 Act expires, it is likely that portability will be revived as part of future legislation.

Endnotes:

1 §2010(c) of the Internal Revenue Code of 1986, as amended (the "Code"); all future references to Code sections shall be to the Code.

2 IR-2011-97 (September 29, 2011).

3 T.D. 9593 (June 15, 2012).

4 REG-141832-11 (June 15, 2012).

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2012 Legislative Session Update

By Peter M. Dunbar, Esq.
Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., Tallahassee, FL


P. DUNBAR

The 2012 Regular Session of the Legislature produced a variety of changes that will affect the practice areas of RPPTL Section members, many of which were a part of the Section's legislative package. The presiding officers in both the House and the Senate were very helpful in assisting with the Section's program this year, and a special acknowledgement goes out to Senate President Mike Haridopolos and House Speaker Dean Cannon for the special assistance from their respective offices.

The Section is also appreciative of the Members of the House and Senate that sponsored initiatives this year, and these members are acknowledged below with the legislation that passed during this past Session.

All of the bills from this year's Regular Session appear with a brief summary along with the applicable Chapter Law citation for each initiative. The final status and full text of each enrolled bill, including the legislative staff reports and Chapter Law citations, are available on the legislative web sites (www.leg.state.fl.us; www.flsenate.gov; www.myfloridahouse.com).

Legislation Containing Section Positions and Initiatives

SALE OF BUSINESS—TRANSFER OF TAX LIABILITY: HB 103 by Representative John Wood and Senator Thad Altman is the Section's tax liability initiative pursued in cooperation with the Business Law Section. The legislation clarifies that the transfer of business assets is considered the sale of the business and clarifies the tax liability in conjunction with the transaction. **(*Chapter 2012-55, Laws of Florida*.)**

INSURANCE AND DESIGNATIONS--DIVORCE: CS/HB 401 by Representative George Moraitis and Senator David Simmons is the Section's initiative to declare the designations of a beneficiary and other designations occurring prior to a divorce to be inapplicable in the event of a divorce and subsequent death of the designating party. **(*Chapter 2012-148, Laws of Florida*.)**

UNIFORM COMMERCIAL CODE—SECURED TRANSACTIONS: CS/HB 483 by Representative Kathleen Passidomo and Senator Garrett Richter updates the Florida version of Article 9 of the Uniform Commercial Code to the changes previously adopted in the uniform act. This legislation was a joint initiative of the Business Law Section and RPPTL. **(*Chapter 2012-59, Laws of Florida*.)**

"BULK BUYER" EXTENSION: CS/HB 517 by Representative Jamie Grant and Senator Ellyn Bogdanoff is a bill dealing with streamlining of regulations at the Department of Business and Professional Regulation. The Section's initiative to extend the "Bulk Buyer" provisions in Part VII of the Condominium Act passed as an amendment to the bill and is found in Section 36 of the legislation. **(*Chapter 2012-61, Laws of Florida*.)**

TITLE INSURANCE: CS/CS/HB 643 by Representative George Moraitis and Senator Thad Altman revises the regulation of title insurance agents and agencies; requires attorney-agents to maintain separate escrow accounts; provides for the licensure of agents and agencies and imposes reporting requirements for agents and insurers doing business in the state; provides continuing education requirements for agents; and revises the grounds for renewal, revocation and suspension of licenses. The legislation contains several concepts supported by the Section. **(*Chapter 2012-206, Laws of Florida*.)** HB 645 is the companion bill exempting certain proprietary information from the public records. **(*Chapter 2012-207, Laws of Florida*.)**

PROBATE—HOMESTEAD PROTECTION AND INTESTATE SUCCESSION: HB 733 by Representative Marty Kiar and Senator Arthenia Joyner contains five of the Section's probate initiatives. The first two relate to protected homestead property—(1) descent of homestead property under s. 732.401 and (2) protected homestead property under s. 731.201. The legislation also includes (3) a correction to the effective date for the language in s. 732.102 relating to a spouse's share of a intestate decedent's estate; (4) clarifies the time that an attorney in fact must file a petition for authority to make an election to take an undivided interest in homestead property; and (5) amends Chapter 732 to bar inheritance through intestate succession of a natural or adoptive parent from or through a child when the parental rights have previously been terminated. **(*Chapter 2012-109, Laws of Florida*.)**

CONSTRUCTION LIENS: CS/HB 897 by Representative George Moraitis and Senator Ellyn Bogdanoff makes clarifying changes to s. 255.05 regarding payment bonds and amends sections 713.132 713.16, 718.18 and 713.22 in the construction lien chapter relating to notice for parties having direct contact with the owner and the manner of providing notice, requiring a description of the project, and clarifying the effect of a lien that extends for more than one year. The legislation was also amended to include the Section's initiative correcting the notice procedures from last year's legislation. **(*Chapter 2012-211, Laws of Florida*.)**

NATURAL GUARDIANS: SB 990 by Senator Arthenia Joyner and Representative Elaine Schwartz is the Section

initiative amending Chapter 744 to include natural guardians of a minor child within the meaning of "parents" and changes "custody" to "parental responsibility" where applicable in Chapter 744. **(*Chapter 2012-48, Laws of Florida*.)**

CONSTRUCTION WARRANTIES: CS/HB 1013 by Representative Frank Artiles reverses the decision by the District Court of Appeal in *Lakeview Reserve Homeowners Association v. Maronda Homes* and modifies the common law doctrine in *Gable v. Silver* concerning common law warranties of fitness and merchantability for off-site improvements to residential real estate. The Section opposed this legislation. **(*Chapter 2012-161, Laws of Florida*.)**

UPIA: The UPIA initiative was amended onto CS/SB 1050 by Senator Ellyn Bogdanoff and Representative Charles McBurney. It was the Section's initiative to revise and clarify the provisions of Florida's version of the Uniform Principle and Income Act, and it also contained the subsequent purchaser initiative. **(*Chapter 2012-49, Laws of Florida*.)**

SUBSEQUENT PURCHASER PAYOFF: CS/SB 1050 by Senator Ellyn Bogdanoff and Representative Mack Bernard is the Section's initiative to require mortgagees to provide the unpaid balance of the mortgage to parties having an ownership interest in the property. It was amended to include the Section's UPIA initiative. **(*Chapter 2012-49, Laws of Florida*.)**

Legislative Initiatives of Interest

SUBMERGED LAND LEASES: HB 13 by Representative Jim Frishe provides that maximum initial lease term for residential and multi-family residential docks will be 10 years, and it provides that there will be no lease payments when the number of docks does not exceed the number of upland residential units. **(*Chapter 2012-202, Laws of Florida*.)**

ADDITIONAL HOMESTEAD EXEMPTION—SURVIVING SPOUSE: CS/HJR 93 by Representative Shawn Harrison is a proposed constitutional amendment that would permit additional ad valorem property tax relief for the surviving spouse of military veteran or first responder killed in the line of duty. **(*November 2012 General Election Ballot*.)**

ADDITIONAL HOMESTEAD EXEMPTION--SENIORS: CS/HJR 169 by Representative Jose Oliva is a proposed constitutional amendment that would permit counties to grant an additional homestead exemption for citizens 65 years of age or older with a low household income as defined by general law. **(*November 2012 General Election Ballot*.)**

PREMISES LIABILITY: CS/CS/HB 313 by Representative Leonard Bembry limits the liability of a property owner who makes his or her property available to the public for use for outdoor recreation purposes, including hunting, fishing or wildlife viewing. Eligibility for the limited liability is conditioned on no charge being made by the land owner and posting of notice on the land to disclose the limitation on liability. **(*Chapter 2012-203, Laws of Florida*.)**

ADDITIONAL HOMESTEAD EXEMPTION--SENIORS: CS/HB 357 by Representative Jose Oliva is the implementing legislation for CS/HJR 169 and would take effect upon the passage of the constitutional amendment giving the option to grant additional home exemption to citizens 65 years of age or older. **(*Chapter 2012-57, Laws of Florida*.)**

VETERAN'S GUARDIANSHIP: SB 520 by Senator Oscar Braynon repeals s. 744.103 relating to incapacitated world war veterans. **(*Chapter 2012-40, Laws of Florida*.)**

ENVIRONMENTAL PERMITTING: CS/CS/CS/CS/HB 503 by Representative Jimmy Patronis provides for changes to the developmental permitting process. Among its provisions, it eliminates the requirement by a local government that state and federal permits be obtained before the local permit is issued; it shortens the response time to a permit application from 90 to 60 days under s. 373.4141; it authorizes water management districts to implement voluntary programmatic permitting for wetlands of 3 acres or less; simplifies the permitting of stormwater management systems of less than 10 acres; and eases the requirements for permitting waste-to-energy facilities and solid waste management sites. **(*Chapter 2012-205, Laws of Florida*.)**

EVIDENCE CODE: HB 701 by Representative Ana Logan permits the consideration of statements against a party when an individual is unavailable as a result of a party's wrong doing or acquiescence to wrongfully causing the person's unavailability for the proceeding. **(*Chapter 2012-152, Laws of Florida*.)**

LIMITED AGRICULTURAL ASSOCIATIONS: CS/HB 827 by Representative Elizabeth Porter provides procedures for the conversion of a limited agricultural association organized under ss. 604.09-604.14 to convert to a corporation-not-for-profit under Chapter 617. **(*Chapter 2012-71, Laws of Florida*.)**

LEGAL NOTICES—ELECTRONIC PUBLICATION: CS/CS/HB 937 by Representative Rich Workman requires that newspapers publishing legal notices and advertisements also publish the notices on the website of the newspaper at no additional charge, and it caps the cost of a second publication at 85% of the cost of the initial publication. The objective is to optimize visibility of the notices, and the new requirements will include foreclosure proceedings. **(*Chapter 2012-212, Laws of Florida*.)**

continued, next page

GROWTH MANAGEMENT—DRI's: CS/CS/HB 979 by Representative Jose Diaz allows for an alternate review process for developments of regional impact that remain subject to state review; provides that increase in peak hour traffic would not constitute a substantial deviation of a DRI; and it includes a provision allowing for the rezoning of certain agricultural enclaves to the zoning designation of the surrounding property without local government approval. **(*Chapter 2012-75, Laws of Florida*.)**

TIMESHARE RE-SALES: CS/HB 1001 by Representative Eric Eisnaugle provides for a new regulatory scope for the timeshare re-sales and the re-sellers of timeshare estates. **(*Chapter 2012-76, Laws of Florida*.)**

TANGIBLE PERSONAL PROPERTY TAXES: CS/HJR 1003 by Representative Eric Eisnaugle is a proposed constitutional amendment that would authorize a local government to provide personal property tax exemptions of up to $50,000 for small businesses. **(*November 2012 General Election Ballot*.)**

STORM WATER PERMITTING: CS/HB 7003 by Representative Steve Crisafulli directs the Department of Environmental Protection to promulgate uniform, consistent statewide rules for permitting the construction, maintenance, modification and removal of stormwater management systems. The legislation provides that a local government may provide for stricter standards, but the duplicative permitting processes are eliminated and the provisions of the Bert Harris Act will continue to apply. **(*Chapter 2012-94, Laws of Florida*.)**

GROWTH MANAGEMENT: CS/HB 7081 by Representative Rich Workman makes numerous revisions to the state's growth management and development policies. Included in the legislation are provisions that (1) exempt municipal development orders for fewer than 50 residential dwellings for public school concurrency provisions of s. 163.31777; (2) requires expedited review of plan amendments under s. 163.3180; and (3) subjects DRI's identified in s. 380.06 (24) and (29) to the provisions of s. 380.115. **(*Chapter 2012-99, Laws of Florida.***

PROPERTY TAX ADMINISTRATION: CS/HB 7097 by Representative Matt Caldwell is a comprehensive package dealing with the administration on property taxes. Among its provisions is the right to reschedule a hearing under s. 192.0105 (Section 2) and s. 194.032 (Section 10) when the original hearing is not held within 2 hours of the originally scheduled time. **(*Chapter 2012-193, Laws of Florida*.)**.



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Executive Council Meetings – The Three Step Approach – Spotlight on Roundtables

By Silvia B. Rojas, Esq., Attorneys' Title Fund Services, LLC, Miami, FL and Amber Jade F. Johnson, Esq., Amber Jade F. Johnson, P.A. Maitland, FL

On behalf of its Section members, the Executive Council is hard at work answering the following questions: What is the problem or situation? Where are we going? How can we get there?

The Real Property and Trust Law Section Executive Council meetings are efficiently managed in three steps: the committee meetings, the real estate division and the probate and trust law division roundtables, and the main Executive Council meeting.

Each Executive Council committee chair decides whether to meet with the members in person prior to the division and main Executive Council meetings and/or hold telephone conferences during the year. Section members are encouraged to attend as observers or become members of their chosen committee and assist with the special projects of that committee. The substantive law committees under each division are the long term workhorses of the Section where specific laws are discussed, new laws are drafted or modified to address concerns, cases are reviewed, and problems affecting the law practice are discussed to find solutions. In addition to the substantive law committees within each division, there are also general standing committees and the At-Large Members of the Executive Council (ALMS), formerly known as Circuit Representatives, that regularly meet in person.

The division roundtables, which usually last between two to three hours, bring the division committee leaders together to share and discuss the committees' activities and to garner support for the committee projects and any proposals ripe for a vote at the Executive Council meeting. The in-depth discussion of issues during roundtable reveal the support or lack thereof for a particular committee's proposals and effectively sets the tone for the discussions, if any, at the main Executive Council meeting, where committee proposals are voted on by the Executive Council's members. The exceptional work performed by the substantive law committees on behalf of the Section members are highlighted at the division roundtables. The roundtables are crucial to an efficiently run and effective Executive Council meeting.

The ALMS sent out an email to all Section members with a copy of the minutes of each division roundtable meeting and proposes to do the same after each future Executive Council meeting. This issue of *ActionLine* and subsequent issues will publish a brief bullet point summary of notable roundtable presentations to keep as a reference to those minutes and as an impetus to Section members to become an observer and eventually a member of a division committee or committees.

Roundtable Highlights

The following briefly identifies for future reference some notable presentations at the division roundtables held at the Executive Council meeting on June 1, 2012, at the Don CeSar Hotel in St. Petersburg, FL.

Real Property Division Roundtable

Real Property Problems Study Committee: Proposal to revise Sec. 689.02(2), F.S., to delete blank space for social security number. Approved.

Title Issues and Standards Committee: Finished updating the last of the Uniform Title Standards. Approved.

Ad Hoc Committee on Foreclosure Reform: Worked on drafts of the Florida Fair Foreclosure Act. Work to be continued to the next legislative session as the proposed bill did not make it to the Senate floor.

Amicus Committee: Filed a brief with regards to a case before the Supreme Court of Florida outlining the Section's position on clarifying laws after passage of time.

Condominium and Planned Development Committee: Requested and expected to attend a public hearing (June 22, 2012) regarding unauthorized practice of law by community association managers.

Property & Liability Insurance/Suretyship Committee: Reviewing issues of flood insurance and changes to FAR/BAR contract to accommodate those issues

Real Estate Entities and Land Trust Committee: Discussed a proposal for the bifurcation of the land trust statute into two statutes and to make changes to the existing statute to differentiate it from the provisions of Ch. 736, F.S. The proposal will be ready for a vote at the Breaker's meeting.

Probate and Trust Division Roundtable

New Digital Assets Committee: Formed this new committee to study drafting/amending statutes to include digital assets (such as web domain names) in the assets that a personal representative or an agent named in a power of attorney would have authority over.

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2012 RPPTL Section Convention



Convention host Phillip Baumann along with some of the ethics presentation speakers, Kim Bald, Nancy Stuparich and Mark Criser.



Florida Bar President Gwynne Young speaks to Section members at the Saturday morning Executive Council meeting.



2011 - 2012 Section Chair George Meyer, and his wife, Pat, were honored at Friday evening's dinner and reception. Thank you for your leadership this past year George!



George Meyer with Debbie Goodall recognizing her service as the Section's CLE Coordinator and her son, Steven, who did an outstanding job assisting with the convention events.



(L-R) Stetson law students, Sean Hernandez and Paige Baker, with Section member, Jason Ellison.



Phillip Baumann and Jack Falk were two of the speakers at the Section's CLE seminar, which was free to all Section members and provided 3.5 hours of ethics credits.





Above: Section members attending the CLE Seminar "Avoiding Pitfalls in the Electronic Age: Ethics for Real Estate and Probate Lawyers" at the Annual Convention.

Left: Report to the Real Property Roundtable given by Anne Pollack, Chair of the Government Regulation Committee.

More photos available on the Section website.





Section members taking a moment from their tour of the Dali Museum in downtown St. Petersburg.



Mark and Cathy Brown enjoying a cool drink on the Dali Museum grounds.

For more photos of the event, log in to www.rpptl.org, Section Information tab



Thanks for a fun fantasy Casino evening!



George Meyer with Mark Curriden, who gave an inspirational talk based upon his award-winning book, "Contempt of Court: A Turn-of-the-Century Lynching That Launched a Hundred Years of Federalism."



Section Administrator, Yvonne Sherron sounding off a few strokes on the glass to quiet the Thursday evening crowd for some words from our much-appreciated sponsors



Larry and Lisa Miller, Susan and Jerome Wolf, and Sara and Rex Moule enjoying the evening festivities





Left: Fred Jones with Patricia P. Hendricks Jones, recipient of the 2012 John Arthur Jones Annual Service Award; Jennifer and Reed Bloodworth at the Friday night dinner.

Right: Kathy Neukamm with two entertaining past Chairs of the Section, David Brennan and Chip Waller, at Casino night.

Photos by Michael Gelfand and John Neukamm

Report on the *Wandry v. Commissioner* case: A resounding tax payer victory in a tax memorandum decision 2012-88, March 26, 2012 TCM. Parents had 4 kids and 5 grandchildren and listed specific dollar amounts of gifts but also had formula language: while the number of units gifted is fixed on the date of the gift, that number is based on the fair market value of the gifted units, which cannot be known on the date of the gift but must be determined after such date based on all relevant information as of that date. The court distinguished a "savings clause" from a "formula clause". This is the fifth loss in a row on defined value clauses but this is the first case that used a formula that limits the amount of transfer. This is the first time the tax court has blessed it and first time where a charity was not involved. This case gives planners more certainty and allows planners to simplify their documents.

Ad hoc Conflict of Interest Committee: Drafted a proposed statute addressing gifts to lawyers by written instrument or gifts to a person related to lawyer. Such gifts are void if the lawyer prepared the document or solicited the gift unless they are related.

Elder Law Liaison committee: Discussed current house bill 5001 - an appropriations bill mandating accelerated death benefits be offered in all life insurance and annuities for the express purpose of paying for long term care. It seems the state of Florida wants to mandate all Floridians must have long term care insurance.

Guardianship Committee: Discussed automatic dismissal of incapacity hearings under certain circumstances.

IRA and Insurance Benefits Committee: CS/HB 401 passed - the bill generally nullifies upon divorce the designation of a spouse as a beneficiary of non-probate assets such as life insurance policies, individual retirement accounts (IRAs) and payable on death accounts. Now, working on a glitch bill. The committee is putting together a paradigm regarding IRAs for practitioners which will be posted on the RPPTL website. Volunteers are requested to work on a book for IRAs in Florida. In light of recent cases disciplining attorneys, there was an extensive discussion on attorney's role in insurance and annuity advising. The chair is encouraging bankers/trustees/fiduciaries to join the committee because their input is desired.

LLC committee: Will try to present at the next RPPTL meeting the proposed legislation overhauling the LLC statutes.

Power of Attorney Committee: Drafting a glitch bill to vote on at the next RPPTL meeting.

Probate and Trust Litigation Committee: Re-opened burden of proof in a trust contest discussion to consider shifting the location of the burden of proof presumption to a separate statute under Ch. 731, F.S., and want to finish it at next meeting. Discussed the need to articulate a specific standard regarding recovery of fees and costs awarded against a particular beneficiary's share because there is not one.

Probate Law and Procedure Committee: Looking at drafting statutes regarding tenants by the entireties for personal property. A joint committee may be formed. The committee has finished reviewing and revising the proposed family trust company legislation and it is now being reviewed by the bankers. The committee had a lively discussion of making the ages older on uniform transfers to minor's act account and it was tabled until the next meeting.

Trust Law Committee: Approved proposed statutory language regarding land trusts. There is a problem with the current statute in that it may inadvertently create a land trust in deeds with the Florida Trust Code Ch. 736 language. A land trust is a trust that contains the powers under Sec. 689.071, F.S., but also does not have additional duties found in Ch. 736. To make it clearer, the proposed language states going forward, if any other powers are listed, then Ch. 736 applies and it is not a land trust.

If you are interested in finding out more information regarding any of the matters discussed at the division roundtables, sharing some information you may have regarding such matters, and/or becoming a member of any of the Section committees to further assist in the work of the committees, please contact the committee chairs or vice-chairs listed on our Section website.

CLE Opportunity: Judge for a Day

University of Florida Mock Trial needs attorney volunteers to judge its upcoming Growlin' Gator Mock Trial Invitational Tournament to be held the weekend of October 13-14, 2012. Twenty college mock trial teams compete in four rounds (morning and afternoon each day), so please vounteer for one or more rounds. No experience necessary (they will train you; they will also feed you breakfast and lunch). For information, contact Victoria Sheets (tournament coordinator) at vsheets@ufl.edu or Dr. Laura Sjoberg (faculty sponsor) at Sjoberg@ufl.edu.

A Tribute to George J. Meyer

By Jane L. Cornett, Esq. • Law Offices of Cornett, Googe & Associates, P.A. • Stuart, Florida

George Joseph Meyer, the outgoing Chair of the Real Property, Probate and Trust Law Section of The Florida Bar has a long history of involvement with the Section, as he has been a member of the Section since first being admitted to the Bar in 1986. 1986 is also the year George joined the Carlton Fields law firm in their Tampa office, where he is now a shareholder. George has been devoted to both the Section and his law firm ever since his arrival in Florida.

George started his professional life as an engineer, working in Manhattan, New York, after graduation from the State University of New York at Stony Brook with a B.S. in engineering and a B.A. in economics. He then moved to Tulsa, Oklahoma where he was a Senior Engineer with Getty Oil. While working as a Senior Engineer, he attended law school at the University of Tulsa with the initial thought of moving into upper management at Getty Oil; but law school made him realize that he wanted to be in private practice. After graduation from law school, George and his wife, Pat, gave serious thought to where they wanted to live and Florida won out over several options, mainly because of family ties in Florida. Thus, in 1986, after considering offers from several firms around Florida, George accepted a position with Carlton Fields and has been there ever since. George's practice (when he has time off from all the work he does for the Section) mainly involves real estate and construction contracts. George has had the pleasure of working on many, many, many contracts for arenas, ballparks, and stadiums all across the United States and Canada, including several right here in Florida: Miami's Marlins Ballpark; Orlando's Amway Center; Tampa's Raymond James Stadium and Tampa Bay Times Forum and St. Pete's Tropicana Field.

George started his involvement with the Section's Executive Council around 1990, when one of his law partners, who was involved in the Executive Council's leadership, reached out to him and convinced him to get directly involved. George started as the Vice-Chair, then Co-Chair of the Survey Committee (which subsequently has been merged into another Section Committee), after which he then served as the Vice-Chair then Chair of the Construction Law Committee. During his years in leadership of the Construction Law Committee, the Committee initiated the practice of having an annual Construction Law seminar (which eventually evolved into the annual Construction Law Institute) and developed a set of standard construction law jury instructions, some of which subsequently have been adopted by the Florida Supreme Court. It also was during George's term as Chair of the Construction Law Committee, the Committee first began the process of getting The Florida Bar to establish a certification category for construction law. George has been certified in construction law since it was first established in 2005, In fact, George was appointed by The Florida Bar to its first Construction Law Certification Committee, which was created to establish the standards and requirements for construction law certification, as well as to develop and grade the construction law certification exams.

George has been involved with many other Section Committees, including Chair of the Sponsorship Committee and Annual Convention. In his first year as Chair of the Sponsorship Committee, George revamped the sponsorship categories and introduced the idea of year-long sponsorship (as opposed to the prior practice of soliciting sponsors on a meeting-to-meeting basis), thereby significantly increasing the Section's sponsorship revenues. At the end of his first year as Chair of the Sponsorship Committee, George received the Section's Annual Service Award.

George began his journey to the position of Section Chair as Director of Circuit Representatives for a three (3) year period, then served as the Section's Secretary for two (2) years, then the Director of the Real Property Division for two (2) years, then Chair-Elect and finally Chair. While George acknowledges that serving as Chair has been a tremendous time commitment by both he and his spouse, George says that it has been an extremely rewarding experience and is one he would still recommend to everyone.

George confided that it was a goal of his, in addition to upholding and continuing the already excellent substantive content of the Executive Council meetings, to make certain the social events associated with those meetings really were outstanding. George states (and it is obvious by the result) that he and Pat put a great amount of time and effort into the planning of the various Executive Council social events and he feels all of that planning paid off. I think all of us who have benefited from George and Pat's efforts heartily agree. George was especially pleased by the out-of-state Prague trip and the year-end Section Convention at the Don CeSar.

George relates that he feels he had a successful year, but was also quick to state the main reason behind that success was the outstanding group of people he got to work with on the Executive Committee. As George noted, having that kind of quality support and backup really lightens the load.

While George is looking forward to his well-deserved position in the "back row," he's also looking forward to an opportunity to become reengaged with some of the Section's substantive committees, since upper leadership limits a person's ability to have that kind of active involvement.

Each and every one of us owes a big debt to gratitude to George and Pat for all their time and effort in making the past year of Executive Council meetings both productive and downright fun!

probate litigation

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The hiring of a lawyer is an important decision that should not be based solely upon a vertisements. Before you decide, ask us to send you free written information about our qualifications and experience. West Palm Beach.

Section Fellows Announced for 2012 - 2014

By Navin R. Pasem, Esq., Tampa, Florida
Section Fellow (2010 – 2012)


NOELLE MELANSON


TARA RAO


BRIAN HOFFMAN


NISHAD KAHN

At the Section's 2012 Legislative Update & Executive Council Meeting, held at The Breakers in Palm Beach, Florida the Section proudly announced the selection of four new attorneys to the Section's Fellowship Program. The Section's third class of Fellows will consist of **Noelle Melanson** of Ft. Myers, **Tara Rao** of Lutz, **Brian Hoffman** of Pensacola and **Nishad Khan** of Orlando. Ms. Melanson and Ms. Rao will serve as Probate and Trust Law Fellows, while Mr. Hoffman and Mr. Khan will serve as Real Property Fellows. The Section received over 65 applications from highly qualified attorneys throughout the state for the 4 positions.

The Section's Fellowship Program was created in 2007, modeled after the successful Fellowship Program of the American Bar Association. The mission of the Fellowship Program is to attract and retain young lawyers to the Section and provide them with the opportunity to participate in the Section's substantive committees, work with the Section's leadership and eventually represent the Section as future leaders. To that end, the Program is open to all lawyers who are members of the Section and (a) have been admitted to the Bar for fewer than 12 years or (b) are younger than 38 years of age. Applicants should also be able to demonstrate that a substantial portion of their practice is focused in the area of real property, probate or trust law. The Section has over 50 active committees representing a wide range of issues directly related to the practice areas of real property, probate and trust law. The Fellowship Program is also designed to supplement and support the efforts of the Section's Membership, Diversity & Law School Liaison Committee.

The Section looks forward to having the newly-selected Fellows become involved with the various substantive committees which fit within their current areas of practice. On the probate and trust law side, Noelle Melanson focuses her practice on estate planning, probate administration and real estate law. During her tenure as a Fellow with the Section, she plans to become involved in the Estate and Trust Tax Planning committee and the Probate Law and Procedure committee. Tara Rao practices in the areas of probate, guardianship, estate planning, and business planning. She is looking to become involved in the Probate Law and Procedure committee and the Estate and Trust Tax Planning committee. As for the real property fellows, Brian Hoffman practices real property litigation, including representation of lenders in debt enforcement actions. Brian looks forward to becoming more involved in the Real Property Litigation committee, among others. Nishad Khan practices in all areas of real estate with an emphasis on the purchase or sale of both commercial and residential distressed properties. To help bring consistency and a better understanding in these practice areas, he is interested in the Residential Real Estate & Industry Liaison committee, among others.

Fellowships are provided for a two-year term and the Section provides each Fellow with a stipend so they are able to attend each of the four annual Section and Executive Council meetings that take place in various parts of the state. The Section's membership is currently hovering around 10,000 members and the Executive Council has more than 225 active members who serve as the leadership for the Section. After successful completion of the Fellowship Program, the goal is for the Fellows to also join the Executive Council.

The eight attorneys who are now alumni of the Section's Fellowship Program remain largely active with the Section's substantive work with the majority serving on the Executive Council. The next opportunity for applicants interested in the Section's Fellowship Program will be in the spring of 2014. Additional information on the Fellowship Program can be obtained from the current chair of the Fellows and Mentoring committee, Marsha G. Madorsky, at mmadorsky@carltonfields.com or tel. #305-539-7436.

The *Morgenthau* Creditors' Claim Trap

By Eric Virgil, Esq. and Hung V. Nguyen, Esq., Coral Gables, FL

Probate practitioners are aware that if they represent a creditor of a decedent, pursuant to § 733.702(1) (unless otherwise indicated, section references shall be to the Florida Statutes), a claim must be filed on behalf of that creditor within 3 months after the Notice to Creditors is published (the "3 Month Publication Period") or, if the creditor is reasonably ascertainable, within 30 days after the creditor is served with the Notice to Creditors (whichever date is later) (together, the "Claims Deadline"). However, all claims must be filed within 2 years from the decedent's date of death. *See* § 733.710; *May v. Illinois Nat. Ins. Co.*, 771 So.2d 1143 (Fla. 2000). Whether a creditor is reasonably ascertainable is not only of vital importance, but is a constitutional issue, as a reasonably ascertainable creditor is entitled to greater due process than just publication notice. *See Tulsa Prof. Collection Svcs. v. Pope,* 485 U.S. 478 (1988). Under the statutory scheme established by § 733.702, a reasonably ascertainable creditor's time limit to file a claim is triggered by the service of the Notice to Creditors upon the creditor.

So what happens when a creditor is reasonably ascertainable, or believes it is reasonably ascertainable, but is never served with the Notice to Creditors? If the creditor fails to file a claim within the 3 Month Publication Period and is not reasonably ascertainable, the claim is barred under the statute without the need for any objection to be filed. *See* § 733.702(3). However, if the creditor is reasonably ascertainable, the Claims Deadline should not apply to the creditor because the second prong of the Claims Deadline determination – the service of the Notice to Creditors – has not yet occurred.

These statutory procedures raise some interesting issues. For example, how does the personal representative determine whether a claim is automatically barred or whether the creditor should have been served with the Notice to Creditors if the creditor files a claim after the 3 Month Publication Period? In such a situation, what mechanism is available to allow the courts to adjudicate the issue of the ascertainable status of the creditor? Is the burden of proof regarding ascertainable status on the personal representative or the creditor?

These issues were addressed in *Morgenthau v. Estate of Andzel*, 26 So.3d 628 (Fla. 1st DCA 2009) and then subsequently in the similar case of *Lubee v. Adams*, 77 So.3d 882 (Fla. 2d DCA 2012).

In *Morgenthau*, the creditor, Morgenthau, filed a Statement of Claim after the 3 Month Publication Period had expired. In the claim, Morgenthau stated that he never received the Notice to Creditors and that he was reasonably ascertainable; however, at no time did Morgenthau ever request an extension of time to file his claim. The personal representative moved to strike the claim on the grounds of timeliness. During the trial court proceedings, Morgenthau conceded his claim was "untimely." The probate court subsequently entered an order granting the motion, thereby striking the claim. Morgenthau appealed the order without moving the court for rehearing on the order striking the claim. The First District Court of Appeal (the "1st DCA") upheld the probate court and stated that even if a reasonably ascertainable creditor is entitled to notice and did not receive such notice, it cannot file a claim after the 3 Month Publication Period without first obtaining an order from the court granting an extension of time to file the claim. Even in the absence of an objection, untimely claims, which the 1st DCA seemingly defined as claims filed outside the 3 Month Publication Period or outside of 30 days from when the Notice to Creditors is served, are barred unless an extension is granted. The 1st DCA determined that every previous appellate case upholding late-filed claims involved claims in which the creditor requested an extension of time to file the claim.

The problem with the *Morgenthau* decision is that it requires a reasonably ascertainable creditor who was never served with the Notice to Creditors to file a motion for an extension of time in order to assert a claim. Such a requirement appears to be contrary to the statutory requirements because technically, the time limit for filing the claim does not begin to run until such reasonably ascertainable creditor is served with the Notice to Creditors. In addition, the 1st DCA did not address the fact that if the creditor was reasonably ascertainable, the personal representative would have been required to give the creditor notice, which would start the claim filing period.

Subsequently, the Second District Court of Appeal, in *Lubee v. Adams*, 77 So. 3d 882 (Fla. 2d DCA 2012), agreed with the *Morgenthau* decision where it also held that a creditor claiming that he was reasonably ascertainable was required to file a motion for extension of time or have his claim barred if the claim was filed outside of the 3 Month Publication Period.

While some of have criticized *Morgenthau* and *Lubee* as unconstitutional and otherwise defective, a review of the statutory framework, case law and the courts' reasoning shows that the problem lies not necessarily with the courts but rather with the language of § 733.702.

For instance, § 733.702(3) states, "Any claim not timely filed *as provided in this section* is barred even though no objection to the claim is filed unless the court extends the time in which the claim may be filed. An extension may be granted only upon grounds of fraud, estoppel, or insufficient notice of the claims period...." (Emphasis added.) Part of the confusion lies in the words "as provided in this section" because the section provides that a reasonably ascertainable creditor has 30 days after it is served with the Notice to Creditors to file a claim. *See* § 733.702(1) This begs the question as to why should a reasonably ascertainable creditor, who was never served with the Notice to Creditors and is thus not late, be required to file a motion for extension of time? Another issue is that the Probate Code

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does not appear to have a mechanism for determining whether a creditor is reasonably ascertainable. It appears from the *Morganthau* and *Lubee* decisions that the courts believe this issue can be addressed by requiring the filing of a motion for extension of time.

A problem for the *Morgenthau* and *Lubee* courts was that it appears that the respective creditors never demonstrated that they were reasonably ascertainable. The determination of whether a creditor is reasonably ascertainable is an evidentiary matter. The creditor must prove to the court that it was reasonably ascertainable by the personal representative. *See Faerber v. D.G.*, 928 So.2d 517 (Fla. 2d DCA 2006); *Jones v. Sun Bank/Miami, N.A.*, 609 So.2d 98, 101 (Fla. 3d DCA 1992). Going forward, requiring creditors who may be reasonably ascertainable, and entitled to notice, to file motions for extension of time whenever they desire to file a claim after the publication period is not a practical or just solution. While such a procedure may provide some uniformity, it appears to be contrary to the statutory language and, perhaps more importantly, defeats an intended goal of the Probate Code which is to allow creditors to initially file claims without requiring the retention of counsel.

As a result of this apparently procedural divide, the Probate Law and Procedure Committee of the RPPTL Section of the Bar is hard at work fashioning a statutory fix to this problem. In the meantime, practitioners should be careful not to fall into this creditor claim trap. Even if a client believes it is reasonably ascertainable but is outside of the 3 Month Publication Period, the creditor must file a motion for extension of time to file the claim and plead to the court that it is reasonably ascertainable by the personal representative. Based on the *Morganthau* and *Lubee* decisions, a personal representative has the authority to move to strike any claim filed outside the 3 Month Publication Period by a creditor who was not served with the Notice to Creditors regardless of whether the creditor was reasonably ascertainable. As a final thought, query whether the reasonably ascertainable creditor who has a claim barred has a cause of action against the personal representative for failing to serve such creditor with the Notice to Creditors?

Applications for 12 Florida Bar board certification areas due Aug. 31, 2012

Florida Bar members must submit applications postmarked by Aug. 31, 2012, for these legal specialization areas: admiralty and maritime law, adoption law, appellate practice, aviation law, civil trial, education law, elder law, immigration and nationality, international law, labor and employment law, marital and family law and tax law. **Find applications on The Florida Bar's website at *www.floridabar.org/certification.***



Separate Trust Accounts Required for Title or Real Estate Settlement Services

By R. Norwood Gay III, Esq., Attorneys' Title Fund Services, LLC,, Orlando, Florida


N. GAY

Effective July 1, 2012, Florida law requires that attorneys serving as title or real estate settlement agents maintain a separate trust account for funds received in connection with such transactions. Ch. 2012-206, Laws of Fla.

Senate bill 1404/House bill 643 grew out of the report of the Title Insurance Study Advisory Council to the Florida Legislature in December, 2009. Of the four principal provisions in the legislation, § 626.8473(8), Fla. Stat. (2012) has been the subject of most discussion among Fund members.

§ 626.8473(8) requires attorneys to "deposit and maintain all funds received in connection with transactions in which the attorney is serving as a title or real estate settlement agent into a separate trust account that is maintained exclusively for funds received in connection with such transactions and permit the account to be audited by its title insurers, unless maintaining funds in the separate account for a particular client would violate applicable rules of The Florida Bar". The drafters' intent with respect to the last clause was to cover the possibility that at some future date the Florida Bar might change its position on Ethics Opinion 93-5. There are presently no known rules of the Florida Bar that would be violated by complying with the requirements of § 626.8473(8).

Reading Florida Bar Ethics Opinion 93-5 is essential to a more comprehensive understanding of the requirements of this new law, as the Opinion permits an attorney agent to allow a title insurer "to audit a special trust account used exclusively for transactions in which the attorney acts as the title or real estate settlement agent" without obtaining client consent.

Reading together the report of the Title Insurance Study Advisory Council, § 626.8473(8), Florida Bar Ethics Opinion 93-5, and informed by the intent of the drafters of § 626.8473(8), the following matters should be considered in complying with the requirements of the legislation:

1. There need be only one "separate" or "special" trust account set up to handle all funds received in connection with transactions in which the attorney is serving as either the title agent or as the real estate settlement agent, or both, in a given transaction. The law does not require the creation of a separate trust account for each separate file or transaction handled by an attorney in either of the mentioned capacities.

2. If an attorney writes for more than one title insurer, there is no requirement that a separate trust account be set up for each such insurer. Both the law and the Ethics Opinion speak of "a separate" or "a special" trust account for all funds received in connection with title or real estate settlement services. If a particular firm or attorney wishes to set up separate trust accounts for each insurer it represents, neither the law nor the Ethics Opinion would preclude this.

3. A law firm may open up a single separate or special trust account into which each member of the firm handling title or settlement services will deposit funds received in connection with such transactions. There is no requirement in either the Ethics Opinion or the legislation that each attorney in a firm establish a separate trust account for his or her own title or real estate settlement services. Please note that the temporary deposit of operating account funds into the newly created separate or special trust account for the purposes of satisfying bank requirements in opening the account will not violate the intent of the statute because (1) it is necessary to do so and (2) the deposited start-up funds can be re-deposited into the operating account once title and settlement trust funds begin flowing into the account.

4. The trust account the attorney or firm establishes for the deposit of all funds received in connection with title or real estate settlement services must be one used *exclusively* for such purposes. Therefore, the attorney or firm will likely need a general trust account for all other funds held in trust by the attorney or firm, such as retainers and funds held as contract deposits for transactions in which the attorney will not be issuing title insurance or acting as real estate settlement agent. If title or settlement funds are inadvertently wired into the wrong trust account by third parties, no harm should be done to the spirit or intent of the statute if the attorney or firm transfers the funds to the proper trust account as soon as the error is noted.

5. Neither the Ethics Opinion nor the legislation addresses the issue of IOTA accounts. Therefore, neither of them prohibits designating the separate or special title or real estate settlement trust account as an IOTA account, and the Florida Bar has advised at least one attorney that such separate or special trust accounts must be IOTA accounts. There is no other known limitation on the number of IOTA accounts an attorney or firm may have.

Real Estate Case Summaries

Prepared by Benjamin B. Bush, Esq.,
Gardner, Bist, Wiener, Wadsworth, Bowden, Bush, Dee, LaVia & Wright, P.A., Tallahassee, FL

Where sole consideration for promissory note was an operational agreement, and trial court declared that the operational agreement was void due to lack of mutual assent, note is unenforceable for lack of consideration.

Broide v. Alvarez, 37 Fla. L. Weekly D1271 (Fla. 4th DCA 2012)

The trial court awarded damages in the amount of $100,000 to Carlos Alvarez and Brasero's Restaurants International, LLC (collectively "Plaintiffs") based on a promissory note given by Israel Broide and Weston Steakhouse, LLC (collectively "Defendants").

On December 2, 2004, Plaintiffs and Defendants both signed a written Operational and Administrative Agreement ("Operational Agreement") and a Promissory Note ("Note"). In their complaint, Plaintiffs specifically alleged that Defendants executed the Note "'[i]n consideration' of the Operational Agreement." The Fourth District Court of Appeal noted that it was undisputed by the parties that the Operational Agreement was the sole consideration for the Note. In a counterclaim for declaratory judgment, the trial court declared that the Operational Agreement was void due to a lack of mutual assent by the parties. Again, the Fourth District Court of Appeal noted that neither party disputed this conclusion.

The Fourth District Court of Appeal found that the Note was unenforceable for a lack of consideration due to the fact that the sole consideration for the Note was the Operational Agreement and the Operational Agreement had been declared to be void, citing Section 673.3031(2), Fla. Stat. (2004) ("The drawer or maker of an instrument has a defense if the instrument is issued without consideration.") and Section 673.3051(1)(b), Fla. Stat. (2004) ("[T]he right to enforce the obligation of a party to pay an instrument is subject to … [a] defense of the obligor that would be available if the person entitled to enforce the instrument were enforcing a right to payment under a simple contract…"). The Fourth District Court of Appeal reversed and remanded the case stating that the trial court erred in entering a final summary judgment in favor of Plaintiffs on their claim for breach of the Note.

Circuit court departed from essential requirements of law by failing to hold evidentiary hearing prior to entering order requiring parties to post bond in amount exceeding $700,000 so long as lis pendens remains valid and enforceable as to properties identified therein and prior to entering subsequent order discharging lis pendens as to one of the parcels at issue.

Blythe v. ATLAS Industrial Enterprises, Inc., 37 Fla. L. Weekly D1303 (Fla. 5th DCA 2012)

The Fifth District Court of Appeal reviewed an order from the trial court that required Blythe to post a bond in the amount of $747,143 "so long as the lis pendens filed by and on their behalf remains valid and enforceable as to Respondent's properties identified therein…" Also, the Fifth District Court of Appeal reviewed a later order from the trial court that the lis pendens be discharged as to one of the parcels at issue.

The Fifth District Court of Appeal concluded that the trial court "departed from the essential requirements of law by failing to hold an evidentiary hearing prior to entering the aforesaid orders." *See Suarez v. KMD Constr., Inc.*, 965 So.2d 184 (Fla. 5th DCA 2007) (trial court required to control or discharge notice of lis pendens by considering at evidentiary hearing whether lis pendens should remain in place and, if so, amount of bond required); *Licea v. Anllo*, 691 So. 2d 29 (Fla. 3rd DCA 1997)(before setting amounts of lis pendens bond, trial court is to afford parties evidentiary hearing on issues of whether property-holder would likely incur damage if lis pendens is unjustified, and, if so, amount of such loss); *see also Mitchell v. Metro. at Lake Eola, LLC*, 947 So. 2d 1263 (Fla. 5th DCA 2007)(burden is on party seeking lis pendens bond to demonstrate by evidence amount of potential damage it might suffer if later determined notice of lis pendens was unjustified). The Fifth District Court of Appeal quashed the orders.

Condominium that is subject to a long-term leasehold may qualify as homestead to be protected from forced sale to pay creditors of deceased owner—When a lessee's interest in leasehold estate includes the right to use and occupy the premises for a long term, and the lessee has made the residence his principal and exclusive residence, such an interest is entitled to Florida's homestead exemption from forced sale—Trial court erred in declining to apply homestead exemption based on its determination that the homestead protection at issue was actually that of descent and devise.

Geraci v.Sunstar EMS, 37 Fla. L. Weekly D1545, 2012 WL 2401793 (Fla. 2nd DCA 2012)

Lawrence Geraci, as personal representative of the Estate of Mary J. Geraci ("Geraci") appealed an order

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determining that the deceased's condominium was not a homestead exempt from forced sale under article X, section 4 of the Florida Constitution. The Second District Court of Appeal recognized the question before them as "whether a condominium that is subject to a long-term leasehold may qualify as a homestead to be protected from forced sale to pay the creditors of the deceased owner."

The condominium at issue is subject to a 100-year lease that began in 1976 and the decedent owned the remaining term on the lease. Following decedent's death, multiple creditors filed claims against the decedent's estate. In response to those claims, Geraci filed a petition to determine whether, under article X, section 4(a)-(b) of the Florida Constitution, the condominium qualified as a homestead and was exempt from forced sale to pay creditor's claims. The trial court ruled that the condominium did not qualify as a homestead because it is a leasehold and not a fee simple interest in land. Geraci appealed the ruling.

Citing *Snyder v. Davis*, 699 So. 2d 999 (Fla. 1997), the Second District Court of Appeal recognized that Florida homestead is significant with respect to (i) taxation, (ii) exemption from forced sale and (iii) descent and devise. The Second District Court of Appeal went on to recognize that the instant case revolved around exemption from forced sale pursuant to article X, sections 4(a)-(b) of the Florida Constitution. The Second District Court of Appeal stated that the question to be answered in the instant case is "whether the leasehold interest in the condominium qualifies as a 'homestead' for purposes of this exemption."

The Second District Court of Appeal recognized that article X, section 4(a) does not make any distinction as to the kinds of ownership interest that are entitled to the homestead exemption against forced sale. *Citing In re Alexander*, 346 B.R. 546, 549-50 (Bankr. M.D. Fla. 2006). The Florida Supreme Court has adopted the general rule that a fee simple estate is not necessary to the exemption from forced sale and that "any beneficial interest in land" may qualify for the exemption. *See Bessemer Props., Inc. v. Gamble*, 27 So. 2d 832, 833 (Fla. 1941). The Second District Court of Appeal went on to recognize that, in determining the exemption from forced sale, a court must "focus on the debtor's intent to make property his homestead and the debtor's actual use of the property as his principal and primary residence." *Quoting In re Dean*, 177 B.R. 727, 729 (Bankr. S.D. Fla. 1995). The Second District Court of Appeal stated that where a lessee's interest in a leasehold estate includes the right to use and occupy the property as his principal and primary residence for a long period of time, then such an interest qualifies for Florida's homestead exemption from forced sale. *Id*. At 729-30. The Second District Court of Appeal reiterated the "important public policy consideration such as promoting the stability and welfare of the state by encouraging property ownership and independence of its citizens by preserving a home where a family may live beyond the reaches of economic misfortune." *Quoting In re McAtee*, 154 B.R. 346, 347-48 (Bankr. N.D. Fla. 1993).

The trial court declined to apply the homestead exemption to the condominium based on the theory that the homestead protection at issue is that of descent and devise. The Second District Court of Appeal stated that even the trial court seemed to recognize that the homestead exemption from forced sale may be applied to condominiums under a long term lease, but the trial court decided the instant case under the context of descent and devise citing *In re Estate of Wartels*, 357 So. 2d 708, 710 (Fla. 1978). The Second District Court of Appeal distinguished the instant case from *In re Estate of Wartels* stating that the instant case should be decided in the context of exemption from forced sale, whereas the *In re Estate of Wartels* case was decided in the context of descent and devise.

The Second District Court of Appeal ruled that the trial court erred in determining that the decedent's condominium was not homestead for purposes of the exemption from forced sale because it was not a fee simple interest. The Second District Court of Appeal reversed the denial of Geraci's petition to determine homestead status and directed the trial court to afford the condominium homestead status under article X, section 4 of the Florida Constitution with respect to the creditor's claims.

Trial court did not err in refusing to enforce forum selection clause which provided that any claim or cause of action shall be tried by court trial without a jury in one party's county and state of choice—Clause is so overbroad and lacking in specificity that it fails to provide adequate indicia of parties' intent.

Lopez v. United Capital Fund, LLC, 88 So. 3d 421 (Fla. 4th DCA 2012)

United Capital Fund, LLC ("United") filed a multi-count complaint against the appellants/defendants. The complaint was filed in Martin County, where United was located. The complaint was based on several contracts that contained a forum selection clause. Portions of the forum selection clause stated "EACH OF THE PARTIES HERETO AGREES THAT ANY SUCH CLAIM OR CAUSE OF ACTION SHALL BE TRIED BY A COURT TRIAL WITHOUT A JURY IN SELLER'S COUNTY AND STATE OF CHOICE" and "BUYER AGREES THAT A LEGAL MEDIATION SHALL TAKE PLACE IN COUNTY AND STATE OF SELLER'S CHOICE BEFORE ANY COURT TRIAL." Most of the appellants/defendants moved to dismiss the complaint, or to transfer the case to the circuit court in Hillsborough County arguing that the forum selection clause was valid and enforceable and that Hillsborough County was their county of choice. The trial court denied the appellants'/defendants' motion to dismiss or transfer.

The trial court's interpretation of a contractual forum

selection clause is reviewed *de novo*. *TECO BargeLine, Inc. v. Hagan*, 15 So. 3d 863, 865 (Fla. 2nd DCA 2009). The Fourth District Court of Appeal recognized that if the language of the contract is clear and unambiguous then the courts must interpret the intent of the parties, which is divined from the language of the contract. *Bombardier Capital Inc. v. Progressive Mktg. Grp.*, Inc., 801 So. 2d 131, 134 (Fla. 4th DCA 2001). The Fourth District Court of Appeal determined that the language of the instant contracts was clear and unambiguous.

"Forum selection clauses are presumptively valid and 'should be enforced in the absence of a showing that enforcement would be unreasonable or unjust'" *Id*. quoting *Manrique v. Fabbri*, 493 So. 2d 437, 440 (Fla. 1986). The Florida Supreme Court has explained that such clauses "eliminate uncertainty as to the nature, location, and outlook of the forum in which parties . . . might find themselves." *Manrique*, 493 So. 2d at 439 (relying on *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13-15 (1972)). The Fourth District Court of Appeal stated that it was the total uncertainty of the clauses found in the instant contracts that renders them unenforceable.

The appellants/defendants urged a reversal of the trial court's order arguing that the failure of the instant forum selection clauses to state a specific forum did not render them so indefinite as to be unenforceable. The appellants/defendants relied on *Liberty Bank, F.S.B. v. Best Litho, Inc.*, 737 N.W. 2d 312 (Iowa Ct. App. 2007). The forum selection clause in the *Liberty* case stated that the rental agreement would be construed by the laws of the state where the lessor's principal offices were located, or if the rental agreement was assigned, by the laws of the state where the assignee's principal offices were located. On appeal the renters argued that the forum selection clause was unenforceable and unreasonable because it did not designate a particular forum. The appellate court rejected that argument and found that "the forum selection clause does designate the state of suit unequivocally: it is the state where the principal offices of the [landlord] are located or, if the contract has been assigned, the state where the principal offices of the assignee are located. *Id*. at 316. The *Liberty* court ruled that the forum selection clause in that case was enforceable. *Id*. at 317.

The Fourth District Court of Appeal distinguished the forum selection clause in the *Liberty* case from the instant forum selection clause stating that the forum selection clause in the *Liberty* case was known as a "floating" forum selection clause. The Fourth District Court of Appeal cited that a floating forum selection clause is:

A clause which, rather than designating a forum by immutable geographical place name, designates the exclusive forum for all litigation regarding the agreement which contains the clause by reference to mutable facts, namely, the location of the main office, headquarters, principal office, or principal place of business of one of the parties to the agreement, or that party's assigns. Dale Joseph Gilsinger, *Enforceability of Floating Forum Selection Clauses*, 39 A.L.R. 6th 629, Section 2 (2008).

The Fourth District Court of Appeal followed the *Liberty* court in noting that the weight of authority holds that floating forum selection clauses are enforceable. *Citing IFC Credit Corp. v. Aliano Bros. Gen Contractors, Inc.*, 437 F. 3d 606 (7th Cir. 2006). The Fourth District Court of Appeal went on to state that floating forum selection clauses are different from the totally unspecific clauses in the instant case. The Fourth District Court of Appeal found that the instant forum selection clauses are not tied to any mutable and identifiable fact, rather they were tied to the whim of the appellants'/defendants' choice. The Fourth District Court of Appeal stated that the instant clauses did not eliminate forum uncertainty by providing criteria for determining the forum like floating forum selection clauses. Therefore, there could be no meeting of the minds on the location of a forum. The Fourth District Court of Appeal affirmed the trial court's decision in denying the appellants'/defendants' motions to dismiss or transfer.

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Probate Case Summaries

Prepared by Theodore S. Kypreos, Esq.
Jones, Foster, Johnston & Stubbs, P.A., West Palm Beach, FL

Reversal of trial court's order approving settlement agreement and modifying trust to permit appointment of corporate custodian in place of corporate trustee.

Bellamy v. Langfitt, 86 So. 3d 1170 (3rd DCA 2012)

Decedent Robert R. Bellamy was the trust settlor of the Robert R. Bellamy Trust dated July 1, 1982, as amended. Decent died in 2006, after which the remaining co-trustees of his Trust were Decedent's widow Jean Scott Bellamy ("Mrs. Bellamy"), Decedent's two adult daughters from a prior marriage, Decedent's accountant, and Northern Trust as corporate trustee. The Trust included provisions concerning the appointment of a successor corporate trustee if the acting corporate trustee failed or ceased to serve, and further provided that "there shall always be a corporate trustee after the Settlor ceases to serve." The Trust also contained a provision prohibiting judicial modification of the Trust under § 737.4031 (2), Fla. Stat. "or any statute of similar import."

In 2009, one of Decedent's daughters filed a petition seeking the removal of Decedent's accountant as co-trustee, alleging the accountant breached her fiduciary duty. The daughters reached a settlement with the accountant which allowed her to resign without liability. That settlement was thereafter approved by the trial court over Mrs. Bellamy's objection. In January 2011, the daughters and Northern Trust entered into a settlement agreement which provided for Northern Trust to be discharged as corporate trustee and co-personal representative of Decedent's estate, and released from liability. Additionally, the settlement agreement provided that Merrill Lynch would act as custodian (not co-trustee) to receive and hold the income from the Trust assets and to pay Trust expenses. The settlement agreement between the daughters and Northern Trust was subject to court approval.

The daughters thereafter filed a joint petition seeking approval of the settlement agreement and Northern Trust's resignation and discharge as co-trustee. Mrs. Bellamy filed her answer and defenses in response to the joint petition, and also filed a counter-petition seeking Northern Trust's removal as co-trustee and requesting the appointment of a successor corporate co-trustee. After hearing, the trial court entered an Order granting the daughters' joint petition, finding that the settlement agreement was "fair, reasonable and in the best interests" of the Trust, Decedent's estate, and the Trust's beneficiaries. The trial court approved Northern Trust's resignation and released it from liability, and further directed Northern Trust to transfer the Trust's cash and securities to Merrill Lynch to act as custodian. Additionally, the trial court's Order provided that, to the extent the Trust is construed as requiring the replacement of the corporate trustee, the Trust was being modified to permit a corporate custodian to hold the Trust's cash and securities because the purpose of the corporate co-trustee was no longer served because the Trust was substantially administered. Lastly, the trial court's Order dismissed Mrs. Bellamy's counter-petition with prejudice as being moot given the Court's ruling on the joint petition.

Mrs. Bellamy appealed and the Third District reversed the trial court's Order. The Third District found that the Trust's terms clearly required a corporate trustee at all times, and that the trial court was without authority to modify the trust and change the requirement of the corporate trustee given the Trust's express provision prohibiting judicial modification. Moreover, the Court found that the trial court's conclusion that the Trust had been "substantially administered" was not supported by competent substantial evidence, as the purpose of the Trust had not been fulfilled and more than routine, ministerial functions remained. Accordingly, the Third District reversed the trial court's approval of the settlement agreement and its dismissal of Mrs. Bellamy's counter-petition, and reinstated Northern Trust as corporate co-trustee.

Reversal of trial court's determination of limited incapacity in guardianship proceeding.

Losh v.McKinley, 86 So. 3d 1150 (3rd DCA 2012)

In the fall of 2010, Frances Losh, a 93 year old widow, fell at home and broke her tailbone. She was subsequently hospitalized and later returned to her home in December 2010. Once home, Ms. Losh received 24-hour help from a certified nursing assistant. Ms. Losh also paid her daughter, Carlin McKinley, to come to Miami to help her. Ms. McKinley spent approximately ten days in Miami. On January 5, 2011, Ms. McKinley filed a Petition to Determine Incapacity with respect to her mother. An examining committee was appointed and two of its members recommended no guardianship and found that Ms. Losh was able to make her own decisions and that her insight and judgment were intact. The third examining committee member concluded Ms. Losh was "partially oriented."

On March 7, 2011, the trial court entered an order discharging one examining committee member and appointing a replacement. The trial court also ordered a second evaluation by the entire examining committee. Upon examining Ms. Losh, one examining committee member recommended no guardianship, a second member recommended a limited guardianship, and the third member

recommended a limited guardianship only as to Ms. Losh's ability to manage property or make gifts. At the hearing, the trial court received testimony from the examining committee members, Ms. McKinley and Ms. Losh's bankers. The trial court also received testimony from Ms. Losh, who testified extensively about her family, personal finances, property, health status, and prescribed medications.

After the hearing, the trial court expressed concern about Ms. Losh's vulnerability to undue influence and ability to handle her affairs going forward. The trial court thereafter entered an Order determining limited incapacity. The trial court determined that Ms. Losh was incapable of exercising almost all of her rights, including her ability to consent to invasive medical and mental health treatments, and the ability to manage property or to make any gift or disposition of property. In support of its conclusion that Ms. Losh had diminished ability to manage her assets, the trial court noted that Ms. Losh had been late paying her credit card bills; she intentionally did not carry liability insurance on improved, unencumbered real property; she kept her money in lower interest rate money market accounts rather than pursuing higher interest rates through certificates of deposit; and sometimes other people wrote checks for her.

On appeal, the Third District reversed the trial court's ruling, finding there was not clear and convincing evidence of Ms. Losh's incapacity sufficient to justify the removal of her rights to the extent contained in the Order determining limited capacity. In reaching its decision, the Third District relied heavily on Ms. Losh's testimony at the hearing. The Court found Ms. Losh to be coherent and fully aware of her circumstances, both financially and medically. Although the Court acknowledged that the trial court's ruling was with good intentions, the Third District found the trial court's bases for its ruling were insufficient to justify a finding of incapacity. For example, the Court noted that it was not indicative of incapacity for a 93 year old woman to leave her money in liquid money market accounts rather than subjecting herself to potential early withdrawal penalties associated with long-term certificates of deposit.

The Third District therefore reversed the trial court's Order determining limited capacity and remanded with instructions that Ms. Losh be restored to her full capacity, and that the guardianship proceeding be dismissed.

In proceeding to establish lost codicil, reversing trial court's determination that computer-generated copy of codicil was not a "correct copy" under § 733.207, Fla. Stat., but affirming trial court's ruling that co-personal representatives seeking to prove lost codicil were not disinterested witnesses.

Smith v. DeParry, 86 So. 3d 1228 (Fla. 2d DCA 2012)

Lance Smith and Thomas Allen were the Co-Personal Representatives of the decedent's estate. Mr. Allen was the decedent's longtime attorney who drafted his last will and testament and codicil. Mr. Allen's office misplaced the codicil after it was executed by decedent. The codicil contained a bequest of $40,000 to establish a pet trust for the health, care, and welfare of the decedent's dogs. The codicil named Mr. Smith as trustee of the pet trust.

In the probate proceeding, the Co-Personal Representatives petitioned to establish and probate the lost codicil. At the time, Mr. Smith had already transferred $40,000 of the estate's money to fund the pet trust and had assumed the care, custody, and control of the dogs. The Co-Personal Representatives offered a computer-generated copy of the codicil to the probate court. At an evidentiary hearing, Mr. Allen's office assistant who prepared the codicil testified that the computer-generated copy of the codicil was identical to the document she prepared for the decedent's approval and signature. The probate court addressed the provisions of § 733.207, Fla. Stat., which provides that the testimony of one disinterested witness is sufficient to prove the content of a lost will or codicil if the proponent can produce a "correct copy" of the instrument. The probate court relied on *In re Estate of Parker*, 382 So. 2d 652 (Fla. 1980) where the Florida Supreme Court held that a preliminary, handwritten draft of a typewritten original of a lost will is not a "correct copy" of a will. In *Parker*, the Court held that a "correct copy" means a copy conforming to an approved or conventional standard, such as a carbon or photostatic copy.

As a result, the probate court ruled that (1) the computer-generated copy of the codicil from Mr. Allen's office computer did not qualify as a correct copy because it was a preliminary draft under *Parker*; and (2) the testimony of the two Co-Personal Representatives could not be used to prove the specific content of the codicil because they were not disinterested witnesses; rather they were "interested persons" under § 731.201(23), Fla. Stat.

On appeal, the Second District affirmed under the tipsy coachman doctrine, disagreeing with the probate court's reasoning, but concurring with the result. Specifically, the Second DCA found that the probate court misconstrued *Parker* and held that, in line with advancements in technology, the identical computer-generated copy of the codicil was a "correct copy" under § 733.207, Fla. Stat.

However, with respect to the Co-Personal Representatives status as disinterested witnesses, the Second District clarified that there is a significant distinction between an "interested person" under § 732.201(23), Fla. Stat. and a "disinterested witness" under § 733.207, Fla. Stat. An "interested person" is one with standing and with the right to notice and an opportunity to be heard in a particular proceeding pending in a probate or guardianship matter. Personal Representatives are virtually always interested persons. Disinterested witnesses are those free of bias, prejudice, or partiality. The Second District held that both

continued, next page

Mr. Smith and Mr. Allen were not disinterested witnesses. The Court found that Mr. Smith stood to gain or lose as a direct result of the probate court's ruling on the petition to establish the lost codicil. Additionally, the Court found Mr. Allen was subject to a claim for damages from Mr. Smith because Mr. Allen was directly responsible for the loss or destruction of the codicil under which Mr. Smith was to benefit. The Court further noted that Mr. Allen was exposed to liability to the beneficiaries as a co-fiduciary in the event Mr. Smith failed to return the $40,000 to the estate with interest. Because the testimony of the other witnesses presented at the evidentiary hearing was insufficient to prove the content of the lost codicil, the Court affirmed the probate court's denial of the Co-Personal Representatives petition to establish the lost codicil.

Granting writ of prohibition and precluding evidentiary hearing on Petition to Admit Codicil after Petition to Admit Codicil was voluntarily dismissed and withdrawn.

Cutler v. Cutler, 84 So. 3d 1172 (3rd DCA 2012)

Decedent Edith Cutler died on June 6, 2004. On October 14, 2004, Edward Cutler, an estate beneficiary, filed a petition to admit codicil. The alleged February 2004 codicil purported to release Edward Cutler from various financial obligations, including the repayment of a mortgage loan on Decedent's home. Edward Cutler's sister, Cynthia Cutler, was the intended recipient of the home, and she filed a response to the petition to admit codicil alleging undue influence.

Two weeks before the evidentiary hearing on Edward Cutler's petition to admit codicil was to occur, and after six years of discovery, Edward Cutler filed a Notice of Voluntary Dismissal and Withdrawal of Petition to Admit Codicil. After Cynthia Cutler's counsel advised the trial court that he intended to proceed with the hearing on the petition to admit codicil, notwithstanding Edward Cutler's voluntary dismissal, the trial court notified the parties that the hearing would proceed as scheduled. Edward Cutler thereafter sought an emergency writ of prohibition to preclude the trial court from holding the evidentiary hearing on his petition to admit codicil.

Although Fla. R. Civ. P. 1.420 generally deprives a trial court of jurisdiction over the subject matter of any claim that is voluntarily dismissed, the Third District noted an exception to this general rule occurs when the party taking the voluntary dismissal is perpetrating a fraud on the court. Cynthia Cutler argued to the Third District that the purported codicil was procured through undue influence and that her defense against the codicil was costly to the estate. She further argued that an evidentiary hearing on

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the petition to admit codicil was necessary because, in the event the trial court determines the purported codicil was procured through undue influence, Edward Cutler would not be entitled to attorneys' fees awarded but not paid from the estate. Although the trial court had the authority to reject the voluntary dismissal, the Third District observed that Cynthia Cutler did not file any pleading objecting to or attacking the withdrawal of the petition to admit codicil, nor was there anything in the record to suggest the trial court did not accept Edward Cutler's voluntary dismissal. Instead, the Court found that Cynthia Cutler was simply attempting to have the trial court conduct a hearing on the withdrawn petition. Given these circumstances, the Third District granted Edward Cutler's writ of prohibition to the extent the trial court was persuaded to have a hearing on the withdrawn petition to admit codicil. The Third District's granting of the writ was without prejudice to Cynthia Cutler to seek review of any misconduct or fraud allegedly committed in the procurement or prosecution of the purported codicil. AL.

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- ❑ Member of the Alternative Dispute Resolution Section, Real Property Probate and Trust Law Section: $245 — WEBCAST: ❑ $280
- ❑ Non-section member: $295 — WEBCAST: ❑ $330
- ❑ Full-time law college faculty or full-time law student: $168
- ❑ Persons attending under the policy of fee waivers: $40

Members of The Florida Bar who are Supreme Court, Federal, DCA, circuit judges, county judges, magistrates, judges of compensation claims, full-time administrative law judges, and court appointed hearing officers, or full-time legal aid attorneys for programs directly related to their client practice are eligible upon written request and personal use only, complimentary admission to any live CLE Committee sponsored course. Not applicable to webcast. (We reserve the right to verify employment.)

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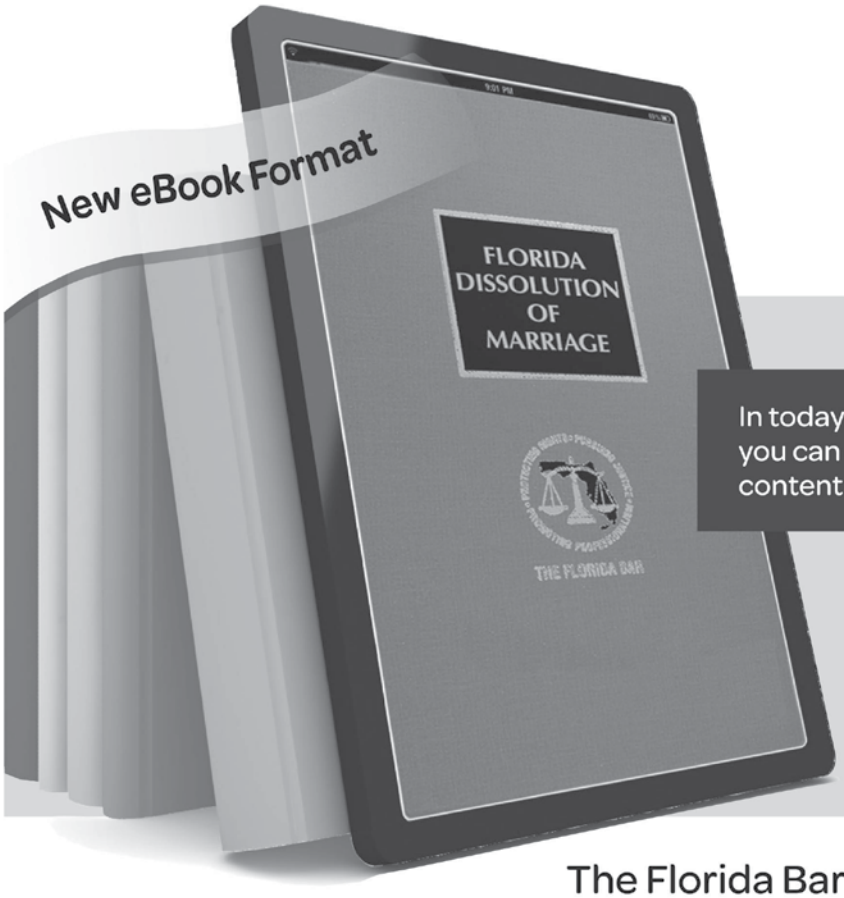
❑ Enclosed is my separate check in the amount of $35 to join the Alternative Dispute Resolution Section. Membership expires June 30, 2013.

❑ Enclosed is my separate check in the amount of $50 to join the Real Property Probate and Trust Law Section. Membership expires June 30, 2013.

Related Florida Bar Publications can be found at http://www.lexisnexis.com/flabar/



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The Florida Bar Real Property, Probate and Trust Law Section,, the Real Property, Probate and Trust Law PAC and the RPPTL-PAC present the Section's

32nd Annual Legislative and Case Law Update Seminar

Up to 8 Hours of CLE CREDIT now available on audio CD!

Recorded: Friday, July 27, 2012

Course No. 1425C

AUDIO CD ORDER FORM

TOPICS & SPEAKERS

8:00 a.m. – 8:05 a.m.
Opening Remarks

Section Welcome and Introduction to RPPTL-PAC
Wm. Fletcher Belcher, St. Petersburg
Roland D. ("Chip") Waller, New Port Richey

Legislative Potpourri and Session Review
Peter M. Dunbar, Tallahassee

Sale of Business/Transfer of Tax Liability
E. Burt Bruton, Jr., Miami

Probate and Guardianship Medley
Tae Kelley Bronner, Tampa

Construction Case Law and Legislative Update
Wm. Cary Wright, Tampa

Elder Law Legislative and Case Law Update for Estate and Trust Lawyers
Charlie F. Robinson, Clearwater

Confidentiality and E-Filing Issues
Rohan Kelley, Fort Lauderdale

Forward (and Back) to the Future of Principal and Income Accounting
Edward F. Koren, Tampa
F. Gordon Spoor, St. Petersburg

There's a New Appellate Rule in Town – Rule 9.170 Appeal Proceeding in Probate and Guardianship
Thomas M. Karr, Miami

Practical Pointers for Powers of Attorney
Deborah Russell, Naples

Homestead for Heroes
Shane Kelley, Fort Lauderdale

Recent Developments in Property Taxation
Arthur J. Menor, West Palm Beach

Managing Growth and Protecting the Environment – What is Working and What is Not
Ronald L. Weaver, Tampa

Follow the Money: Data Calls, Trust Accounts & Payoffs
Ted Conner, Orlando

Tainted Gifts – Ethical Rules for Drafting Attorneys
William T. Hennessey, West Palm Beach

Uniform Commercial Code – Recent Revisions to Article 9
R. James Robbins, Jr., Tampa

Ethics and Professionalism in a Challenging Business World
Paul R. Lipton, Miami

2:30 p.m. – 2:50 p.m.

Till Divorce Do Us Part
Linda S. Griffin, Clearwater

Real Property Case Law Update: Practical Implications of Significant Decisions
Michael J. Gelfand, West Palm Beach

The Vote's in Your Court – Judicial Merit Retention
Sandra Fascell Diamond, Seminole

Til Death Do Us Part – Florida Cases and News from Planet Zarcon
David C. Brennan, Orlando

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(Please note this disk DOES NOT include the FR/BAR Contracts or Riders, those are available at www.flssi.org.)

Interactive CD Formatted for both WordPerfect and MS Word

Fill In The Forms, Save Updated Form To Your Computer & Print

(Current update 2008)

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.

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

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Homeowners Insurance
Foreign Investment in Real Property Tax Act ("FIRPTA")
Interest-Bearing Account
"As Is"
Right to Inspection and Right to Cancel
Defective Drywall
Coastal Construction Control Line
Insulation Disclosure for New Residence
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Sales Tax 6.5%	$_____
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TOTAL	**$**_____

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The FLSSI forms are 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 2012 FLSSI forms.**

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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 resource 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, each Section committee has list serves that discuss issues and current hot topics, available to committee members.

SCHEDULE

EXECUTIVE COUNCIL MEETINGS

SEPTEMBER 13-16, 2012

Ritz Carlton Key Biscayne
Key Biscayne, Florida

Reservations: 800/241-3333
www.ritzcarlton.com/keybiscayne
Room Rate $169.00
Cut-off Date: August 22, 2012

Watch your mail and email for more information.

2012 CLE SCHEDULE:

Note: Detailed information can be found on the Florida Bar website: www.floridabar.org/CLE. Search by course number.

SEPTEMBER 18, 2012
Alternate Dispute Resolution*
(Course #1507)
Buena Vista Palace, Orlando

OCTOBER 5 & 6, 2012
The Probate Team
Caribe Royale
Orlando, Florida
Reservations: 888/258-7501
Room Rate: $139.00
Cut-Off Date: Sept. 1, 2012

NOVEMBER 30, 2012
Joint Estate Tax/Asset Protection*
(Course #1509)
Tampa*

** Webcast & Live*
Courses scheduled later in the year will appear in future editions of ActionLine.

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).

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What's this? See page 5.

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ARE YOU AWARE...

of new Fla. R. Jud. Admin. 2.516 requiring service by email?

See article on page 5.

Section launches QR code access to website!

See article, page 5.

ARTICLES

... for the next issue of ActionLine are being accepted. Contact: spence@carltonfields.com

DON'T FORGET...

about Fla. R. App. P. 9.170 governing probate and guardianship appeals.

Do You Know...

The Florida Bar's CLE is available to you **24/7**? Visit *www.floridabar.org/CLE* and check it out!

Coming up:

The Florida Bar Midyear Meeting

September 19-22, 2012
Buena Vista Palace Hotel & Spa
Lake Buena Vista, Florida

Special group room rate will be available August 2012. Reservations: (866)397-6515

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 on page 4 inside.)