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RPPTL Section Travels to Berlin

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WHY BERLIN?

Enter a torture cell. Face an execution pit. Walk through the "death zone" of the Wall. Appreciate and defend the Rule of Law.



Chair's Column

By Michael Gelfand
Section Chair, 2015- 2016

A blink in the timeline of humanity is the lifespan of our notions of governance, freedom, liberty, and right to petition and relief. Lawyers have occupied a front-row seat, frequently serving as protagonists for what is right and just.

At the same time, though remarkably resilient, democracy and the rule of law are fragile concepts. Each is reliant on the other, and both dependent upon lawyers for protection and advancement from those who decry legal processes and in the stated quest for efficiency, depreciate our liberties.

Why Berlin? Because Berlin reminds daily that each of us, as a professional, faces choices. Most choices are mechanical, many choices are obvious, and occasionally there is the choice that impacts not only our lives, or a client, but that can reverberate and impact society.

As RPPTL Section members departed Florida for Germany, we left behind, if just for a moment, serious challenges to the legal profession. Technological changes and attacks on the independence of the judiciary are just two of the challenges. The journey reminds us that we cannot forget where we have been, nor ignore what could have been.

Our journey this autumn contrasted the past and the future, good and bad, inspirational and disturbing. The prison cell, execution pit and Berlin Wall, in context of neighborhoods and those caught in them, became tangible markers; live examples of what for many were just abstract words in history texts. In this virtual age, participants in our journey, through touching and feeling, viscerally understood what occurred in the past and are better prepared to face difficult questions as our world changes.

Why Berlin? We observed a capital city once recognized as the epitome of both the fine and the modern, a progressive tradition, the cultural center of Europe serving as a magnet for artists, academics, business persons and elites. We also observed a capital city whose population seeks to regain its former honor and place in the world's society.

We saw the new Berlin. It is a city of welcoming citizens and magnificent architecture. There was plenty of great food, and not just the so-called traditional heavy dishes but modern cuisine. Of course, there was plenty of fine wine and hearty beer.

Remarkably, in just ninety days in 1934 this capital city devolved from a democracy, mutating into one of the most violent, feared dictatorships. A time period shorter than many of your clients' wait to close a simple contract, complete a modest estate plan, or answer a complaint. We walked where literally overnight a wall was built, separating a city, families, a nation and civilizations.

In a stark comparison, upon returning home some of us sat in a comfortable cinema watching "Bridge of Spies," the true story about an otherwise unremarkable insurance defense lawyer that individually took on some of these significant issues. Watching the screen, those on the journey recall how we exited our buses, crossing on foot the real bridge of spies, Glienicke Bridge. We stood at the Checkpoint Charlie guardhouse. We walked where those fleeing the East "Democratic Republic," young and old, were machine gunned in the back merely for seeking freedom.

Why Berlin? The dictatorships centered there were not "just" about misuse of criminal laws. Real property and estate law served the dictatorships when practitioners twisted statutes and procedures. There was little organized opposition to fight the Nazi and then the Soviet dictatorships.

This journey was about our role as legal professionals, lawyers and jurists, our responsibility to our communities and society as a whole. It was a reminder of what happens when our attention to preserving democracy and the rule of law is diverted and how swiftly what preserves our values collapses.

Entering a historical location, the numbers on posters and handouts mystified and overwhelmed: 17,000; 46,000; 79,000; 126,000; and of course, 6,000,000. My faith background

continued, page 5

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ABOUT THE COVER:

Portion of the gates for
The Neues (New) Palace in Sanssouci Park, Potsdam, Germany

Photo by Michael J. Gelfand

IN THIS ISSUE:

Chair's Column: Why Berlin? 3
Jax Utilities v. Hancock Bank: Equitable Remedies No More? 7
Who Will Delete You? Fiduciary Access to Digital Assets 10
2015 Legislative Changes to Chapter 558 14
E-Recording: The Next Step in Legal Technology 16
Can I Have My Deposit Back? 18
The Meaning of "Of Counsel": Do We Know It When We See It? 21
RPPTL Section Travels to Berlin 24
RPPTL Section Executive Council Meeting, The Breakers, Palm Beach, July 30 – August 1, 2015 29
Photos: Palm Beach, Florida 30
Photos: Berlin, Germany 31
Roundtables 32
"What Is Your Authority?" --The Answer Is Found In the Revisions to Section 49.31, Florida Statutes 37
Spotlight on the Fellows 38
Reptiles Strike Again! Report on the RPPTL Section's Law School Outreach Program 41
2015 Kozyak Minority Mentoring Picnic 45
Ninth Annual Construction Law Institute Set for March 10-12, 2016 46
Practice Corner: Reasonably Ascertainable Creditors in Probate 47
Practice Corner: Forum Selection Clauses 48
Real Estate Case Summaries 49
Probate Case Summaries 54
What's Happening Within the Section 59
Actionline Bulletin Board 60

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Readers are invited to submit material for publication concerning real estate, probate, estate planning, estate and gift tax, guardianship, and Section members' accomplishments.

ARTICLES: Forward any proposed article or news of note to Silvia Rojas at srojas@thefund.com. Deadlines for all submissions are as follows:

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Mary Ann can help with most everything, such as membership, the Section's website, committee meeting schedules, and CLE seminars.

traditionally eschews counting people. Substituting numbers for names de-humanizes, removing the essence, the individuality, of a person.

In juxtaposition, we also witnessed a Germany, especially Berlin, unified and facing its past. Memorials and monuments of this decade present a society not afraid to accept responsibility, and learn from the evils of their own grandparents and great-grandparents time.

Explanations with emotive verbs described the bullied, tortured, executed and slaughtered. Thus, the current generation of German curators and educators shifted our attention from grossly large abstract numbers, to real persons. Individuals and their families in photos with their last letters, explanations of their lives, placed us face-to-face with men and women who were loved and loved, cared for and cared, allowing us to grasp the terror that abstract numbers and words in books cannot.

Section members observed what happened when lawyers and jurists turned their eyes, not confronting evil early when challenges might have changed the tide. Instead, at each threshold of repression there was the thought that it was but a slight erosion of rights, a little dilution of the law. After all, they really thought it could not get worse!

Why Berlin? Traveling to Berlin provided the unique opportunity to see first-hand the consequences of the abrogation of the rule of law; yet, how today the reinstitution of the rule of law rebuilt a society.

Traveling outside of our usual boundaries - legal, geographic, and perhaps most importantly, our comfort-cultural boundaries - we were able to stop, turn-around, look back and learn. After all, why do we encourage young children to get out of the house, in middle school to travel around the state, in high school to travel around the country, and in college to travel overseas?

We urge our children to travel, and each of us travels, to learn by experience and immersion. Poised at our desks in the 21st century, in the United States, in Florida, most observers would say that RPPTL Section members occupy a very enviable position.

Each of us to understand our position in history, to understand our duty to the public, to our profession, to our families and to ourselves, seeks to travel outside our boundaries, just as we have urged others. Traveling for learning, leaving our boundaries behind, is a learning tool harkening from ancient origins. Consider the "allegory of the cave" in *The Republic* in which Plato urged his contemporizes to climb out of their boundaries into a different light to view where they were, and most importantly to shine a light on how to proceed forward. Extending our boundaries is a time-tested learning tool.

Ask those on the journey not only what they saw, but what they heard and what they were thinking, what they realized there, on the spot, in that moment.

Many early arrivals "visited" the first of the countless concentration camps, Sachsenhausen (Oranienburg). Through the entry arch we stood just as unsuspecting captives, like some of our relatives, their friends and colleagues, stood years before. There was also a wall with a narrow nondescript slit in the front it. Behind this narrow slit a gunman calculatingly shot, executing the unsuspecting captives. We left in silence, broken with a few questions, traveling through the local village. We observed homes lining the road to the camp gate just as they existed when the camp was constructed. Everyone, then and now understanding what was planned, and what was occurring. In fact, many of the Nazi soldiers overseeing the camp lived with their families in these very same homes.

Consider the Nazi SA, "storm-trooper," Papestrasse prison, an inner city torture center. We saw just as it existed in 1934, with homes across a narrow alley overlooking torture cell windows. Homes in which neighbors heard, knew, and understood the horrors in the building next door. Juxtaposed was the guide, a young lady barely in her 20's, explaining her purpose, ensuring the facts of her country's past were preserved and learned by the next generation.

Templehoff airport, stunning even today by its size and modern architecture became a transition point in our journey. Intended as a monument to Nazi planning, in the West v. Soviet "Cold War," Templehoff became a testament to Western resolve, and forged ties between former enemies as the West provided a life-line through the 1948 Berlin Airlift.

Our guide challenged us to consider that three years before the 1948 Berlin Airlift, U.S. and German soldiers were killing each other on the battlefield but in the Airlift they relied on each other as comrades. U.S. airmen had to rely on German ground crews to repair U.S. planes. Germans had to rely on the airmen to supply vital supplies. In the shadow of the Platz der Luftbrücke memorial to U.S. and U.K. airmen that died during the very dangerous, nearly warlike, airlift we heard of the U.S. "candy bomber" pilot, who when seeing the nearly starved children of Berlin took them under his wing, further strengthened ties between former enemies. Then we observed the latest urban renewal, the military airfield now serving as an open greenspace.

We grasped the stark differences between the societies of the former "East" and the "West." We walked by high rise apartment blocks built in the East without windows on the western side of the buildings so that residents would not be tempted by life in the West.

Though time and re-development has removed most of the Berlin Wall's 27 miles, we observed the resiliency of freedom and democracy, even when crushed for decades under the heal of misused law. The longest remaining Wall segment, nearly a mile, is known as the "East Side Gallery." The largest outdoor open art gallery contrasts the persecution and spying of the

past to peace and democracy of the present. Kani Alavi, a renown Persian artist, translated the vibrant murals for us, and told us the honor he felt in being selected to paint a mural on a remaining part of the Wall. It was quite a surprise when we returned home to find Kani Alavi, the Gallery, and their place in real estate development highlighted in an NPR report!

A walking tour through Berlin placed the City and its history in context. Our hotel was located in one of the "death zones" along the Berlin Wall. We were amazed at how the former death zone was transformed through legal ingenuity, coordinating development and finance, to create a modern high-rise city center while retaining the important artifacts of the history. We saw the Brandenburg Gate, a monument to Germany's imperial past, flanked by the Reichstag, Germany's parliament.

Stopping us in our tracks, imposing a sense of dislocation and loss of equilibrium, was the Memorial and Museum to the Murdered Jews of Europe. A constant stream of Germany's teenagers flowed in, learning about their grandparents and great-grandparents, described in graphic terms, no punches pulled, no truth prettied up. Unvarnished, presented in its brutality, the next generation learned how those in the past betrayed their neighbors, towns and country. Who could think that any country would dedicate in their city center, the most valuable real estate, over two full blocks, to educate their young on how their past must be condemned.

How did the rule of law move Germany from the devastation of dictatorship and then occupation, to respect personal liberty and property rights? We heard from two distinguished lawyers at our Executive Council Meeting. First, Irene Schmid of DLA Piper, Berlin, explained the modern German land transfer system, and in particular the problems of restitution. Second, Judge Rosemary Barkett of the U.S. – Iranian Claims Tribunal at the Hague spoke on approaches to international justice and the pros and cons of tribunals.

Now home, we have had time to contemplate what happened, what we observed, and what is our duty as lawyers and professionals. Especially in a society where change is swift, we have a duty to follow our teaching.

We have a duty to question. Particularly when something does not feel right, we must ask why. We abdicate our duty when we sit by passively.

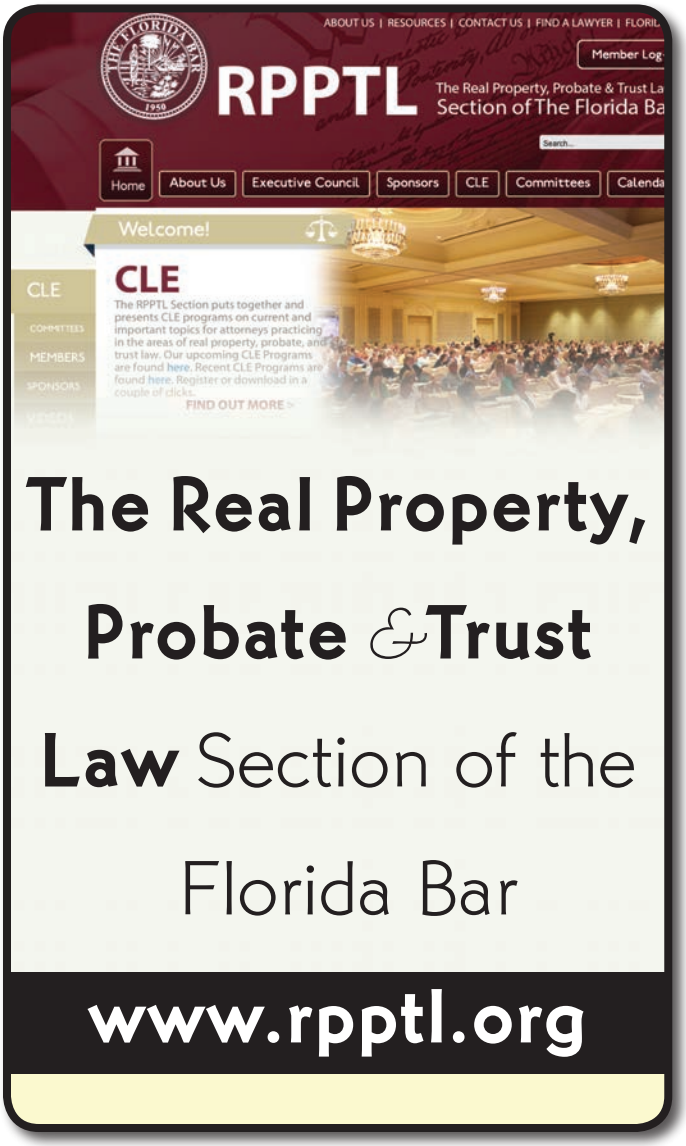
We also have had time to contemplate the concepts of rehabilitation and forgiveness. We cannot and must not forget what happened. With an increasing number of years and generations of separation, what can we learn about rehabilitation, identifying what is important to memorialize and how to move forward?

This journey reinforced our duty to stand up and be counted. We learned why the United States is referred to as the lighthouse for the world. Other countries call themselves democracies, call themselves free-enterprise capitalist systems; yet, though certainly not perfect, the U.S. is the place where seemingly everyone would like to be.

The answer may be that we have a unique rule of law reinforced with an independent judiciary where anyone, rich or poor, powerful or weak, can walk into court and challenge a mayor, a governor, or even the president.

Why Berlin? To recall that each of us as lawyers and jurists have an awesome duty to preserve and improve our legal system. When we hear something that is contrary to these concepts, whether in a committee, a council, by a candidate, or by an analyst, we have a duty to respond. This is not hyperbole, not expecting you to burst into candidate forums or start a march. This is not a Democratic, Republican or Libertarian debate. It is a shared responsibility.

This is a call to start around your dinner tables, your conference tables, your client meeting tables. Stand up and be counted for the rule of law and its counterpart, the independence of the judiciary. For as we observed, in as little as ninety days, democracy can be lost. In a day, walls can be built. Men and women of the law are called to make a difference!



Jax Utilities v. Hancock Bank: Equitable Remedies No More?

By Sean A. Mickley, Esq., Gould Cooksey Fennell, Vero Beach, Florida


S. MICKLEY

The equitable lien doctrine is firmly established in Florida…."It arises when declared by a court of equity out of a general consideration of right and justice as applied to the relations of the parties and the circumstances of their dealings in the particular case."[1] Equitable liens were mainstays in Florida as an appropriate remedy to combat lender misconduct or material misrepresentations when legal remedies were unavailable.[2] That is until the First District Court of Appeal in *Jax Utilities Management, Inc. v. Hancock Bank* recently held that Sec. 713.3471, F.S., precludes a claimant's right to bring a common law equitable lien or an unjust enrichment claim against a lender that fails to provide notice of its intention to stop making advances on a construction loan prior to the distribution of all the construction loan funds.[3] Now, if a contractor completes its work but fails to get paid on a construction project as a result of a lender's decision to cease funding the project prior to the distribution of all loan proceeds, the contractor is confined to proving a claim under Sec. 713.3471, F.S. The result imposes the necessity to prove a more difficult standard than an equitable lien or an unjust enrichment claim due to the requirement that a contractor prove the lender's intent and the timing of such intent to cease funding the loan.

Section 713.3471, Florida Statutes

Sec. 713.3471, F.S. was enacted in 1992, is part of the Construction Lien Law, and is titled "Lender responsibilities with construction loans." Sec. 713.3471(2), F.S., sets forth a lender's responsibilities to a contractor for construction work where the lender decides to stop making advances prior to the distribution of all of the construction loan funds. Specifically, subsection (2)(a) provides the following:

> Within 5 business days after a lender ***makes a final determination***, ***prior to*** the distribution of all funds available under a construction loan, ***that the lender will cease further advances*** pursuant to the loan, the lender shall serve written notice of that decision on the contractor and on any other lienor who has given the lender notice. The lender shall not be liable to the contractor based upon the decision of the lender to cease further advances if the lender gives the contractor notice of such decision in accordance with this subsection and the decision is otherwise permitted under the loan documents. [emphasis added]

Subsections (2)(b) and (2)(c) define a lender's liability where it fails to provide the requisite notice:

> (b) The failure to give notice to the contractor under paragraph (a) renders the lender liable to the contractor to the extent of the actual value of the materials and direct labor costs furnished by the contractor plus 15 percent for overhead, profit, and all other costs from the date on which notice of the lender's decision should have been served on the contractor and the date on which notice of the lender's decision is served on the contractor. The lender and the contractor may agree in writing to any other reasonable method for determining the value of the labor, services, and materials furnished by the contractor.
>
> (c) The liability of the lender shall in no event be greater than the amount of undisbursed funds at the time the notice should have been given unless the failure to give notice was done for the purpose of defrauding the contractor. The lender is not liable to the contractor for consequential or punitive damages for failure to give timely notice under this subsection. The contractor ***shall have a separate cause of action*** against the lender for damages sustained ***as the result of the lender's failure to give timely notice*** under this subsection. ***Such separate cause of action*** may not be used to hinder or delay any foreclosure action filed by the lender, ***may not be the basis of any claim for an equitable lien or for equitable subordination of the mortgage lien***, and may not be asserted as an offset or a defense in the foreclosure case. [emphasis added]

The obvious purpose of Sec. 713.3471, F.S., is to prevent the unjust termination of payments to a contractor who continues to work, without any notice from the lender that payments will be terminated. [4]

Equitable Remedies Prior to *Jax Utilities*

Prior to *Jax Utilities*, the Florida courts consistently held that a lender should not be unjustly enriched by being allowed to retain the undisbursed construction loan funds while also obtaining title to land improved by the contract that secured the loan.[5] In *First Florida Bank v. Advantage Builders of America, Inc.*,[6] only six years prior to the *Jax Utilities* case, the Second District Court of Appeal upheld the aforementioned principle of Florida law despite Sec. 713.3471(2)(a) – (c), F.S., being in the same form in which they are today.[7] Notwithstanding the same language of Sec. 713.3471, F.S., Florida courts continued to uphold the common law remedies of equitable lien and unjust enrichment when a lender ceased making construction loan payments prior to the distribution of all loan proceeds.

Further, in *Emerald Designs, Inc. v. Citibank, a* case that predated *Jax Utilities,* the court made it clear that a contractor

could establish an equitable lien claim without allegations or evidence of intent.[8] In *Emerald Designs*, the issue was whether a subcontractor could claim an equitable lien against a lender's undisbursed construction loan funds, where the construction project is completed, but the lender forecloses. The lender convinced the trial court that the subcontractor had to allege fraud or misrepresentation to establish an equitable lien. The Fourth District Court of Appeal reversed the trial court and held (1) that if the construction project is complete, and if there are undisbursed construction funds held by the lender, which foreclosed on the security, the claimant does have a cause of action for an equitable lien;[9] and (2) that the subcontractor did not need to allege fraud or misrepresentation to establish an equitable lien.[10]

Florida courts recognized that if all of the funds to be distributed under a construction loan had not been disbursed by the time construction has been completed, and the lender also received the security for the loan, i.e., the land through foreclosure, the lender received more security than it bargained for and it was being unjustly enriched.[11] This analysis makes sense given the equitable principles on which our legal system was founded.

Jax Utilities Management, Inc. v. Hancock Bank

On June 11, 2015, the First District Court of Appeal in *Jax Utilities* entered an opinion that completely abolished common law remedies for contractors seeking compensation for work performed when the lender decided to cease funding prior to all construction loan funds being disbursed. In *Jax Utilities*, the contractor, Jax Utilities Management, Inc. ("Jax"), filed an action against Hancock Bank on a failed housing development project and asserted an equitable lien and unjust enrichment claim. Hancock Bank moved for summary judgment on its affirmative defense that Sec. 713.3471, F.S., precluded both of Jax's common law claims.

The facts on summary judgment showed that the owner and Jax entered into an agreement to construct over 400 builder lots and amenities. Hancock Bank's predecessor-in-interest, Peoples First Community Bank, entered into a construction loan with the owner for $15,975,000. Under the loan, the owner was to make payments and submit pay requests. Between 2006 and 2009, the owner made payments on the loan; however, on June 1, 2009, the owner's capital source, Stokes Land Group, advised Peoples First that it would no longer fund the project. As such, in June 2009, Peoples First informed the owner that it would cease funding on the construction loan; however, the record did not indicate that Peoples First ever served notice on Jax in accordance with the statute. On June 27, 2009, the owner missed an interest payment on the loan. Although on June 30, 2009, Jax submitted two pay applications to the owner, in the amounts of $11,922.98 and $468,680.10, the owner failed to pay them and failed to submit them to the Peoples First. In December 2009, Peoples First's assets and liabilities were assumed by Hancock Bank. On March 21, 2011, Hancock Bank initiated a foreclosure action and obtained Final Judgment of Foreclosure on the project in September 2011.[12]

On Hancock Bank's summary judgment against Jax, the trial court entered Final Summary Judgment against Jax and concluded, among other things, that Jax's common law remedies were precluded by Sec. 713.3471, F.S., and reasoned that the Legislature clearly intended to alter the common law and that the statute is so repugnant to Jax's common law claims that they cannot coexist. Jax appealed the trial court's decision to the First District Court of Appeal, which affirmed the trial court's ruling. In so holding, the *Jax Utilities* court found that Sec. 713.3471 F.S., changed the common law by imposing an affirmative duty on lenders to notify contractors that further funding will not be forthcoming. To reach this conclusion, the *Jax Utilities* court reasoned that Sec. 713.3471, F.S., expressly forbids such claims for several reasons, including that a common law claim would conflict with the statute.[13] Further, because Sec. 713.3471, F.S., lacked a provision expressly preserving common law remedies, the *Jax Utilities* reasoned that the Legislature intended to abrogate a contractor's right to pursue common law remedies.[14]

Implications of *Jax Utilities*

The implications of *Jax Utilities* are yet to be seen, but the court tried to make clear that contractors, such as Jax, cannot forego their rights under the lien law in favor of common law claims against lenders. Unfortunately, the analysis does not end there. In fact, it is arguable that the *Jax Utilities* court analysis is slightly flawed in that it precluded both equitable liens and unjust enrichment claims where the statute only provides that a cause of action under Sec. 713.3471, F.S., cannot be the basis for an equitable lien claim. Although the Legislature failed to provide a clause that all common law remedies were preserved, the plain language of the statute does not forbid a claim for unjust enrichment or quantum meruit.

It is the author's opinion that absent a complete abolition of common law remedies under Sec. 713.3471, F.S., a contractor's claims of unjust enrichment or quantum meruit should continue to be enforceable. This is particularly true when one analyzes the language of subsection (2)(c), which states: "***Such separate cause of action*** may not be used to hinder or delay any foreclosure action filed by the lender, ***may not be the basis of any claim for an equitable lien or for equitable subordination of the mortgage lien***, and may not be asserted as an offset or a defense in the foreclosure case." The plain language of this provision evinces an intention to prevent a contractor's claim from impeding a lender's right to foreclose on the security for the construction loan, not to preclude all common law remedies, and certainly not to preclude a contractor from being made whole. A logical interpretation is that the Legislature did not want the lender's ability to enforce its security interest hindered by an unpaid contractor's

claim to undisbursed loan funds, but still recognized that a contractor could potentially have an unjust enrichment or similar equitable claim. Applied outside of the First District Court of Appeal, this analysis may very well lead to a differing opinion by another district court and a conflict that may require resolution by the Florida Supreme Court.

Further, the provisions of Sec. 713.3471, F.S., do not define or contemplate what happens when the lender may be discussing cessation of funding, but did not reach a final determination, prior to the contractor completing its work. This is an important distinction because if the *Jax Utilities* analysis is held to be accurate and a contractor cannot prove the lender intended to cease funding prior to all funds being disbursed and the completion of work, then the contractor may be left without any remedy, as many owners of failed development projects are defunct and uncollectable. This certainly places a much higher burden on the unpaid contractor than prior case law that allowed for both a statutory claim and common law remedies.

Conclusion

An attorney representing a contractor for a claim on undisbursed construction loan funds, when the facts permit, should always plead a cause of action under Sec. 713.3471, F.S. Otherwise, there is a good chance that if the trial court agrees with the *Jax Utilities* interpretation of the statute, the contractor will be precluded from any recovery under a non-statutory claim. Although *Jax Utilities* is new precedent, the interpretation of subsection (2)(c) in terms of precluding all common law remedies is certainly still open for discussion. It may be best for an attorney practicing outside of the First District Court of Appeal to acknowledge the *Jax Utilities* opinion, but to preserve appellate rights, explain to the trial court why, despite the *Jax Utilities* opinion, subsection (2)(c) should not preclude all common law remedies.

Endnotes

1 *Peninsular Supply Co. v. C.B. Day Realty of Florida, Inc.*, 423 So. 2d 500, 502 (Fla. 3d DCA 1982) (holding equitable liens could exist where construction lien had not been perfected).

2 *Edd Helms Elec. Contracting, Inc. v. Barnett Bank of South Florida, N.A.*, 531 So. 2d 238, 239 (Fla. 3d DCA 1988).

3 *Jax Utilities Management, Inc. v. Hancock Bank,* 164 So. 3d 1266 (Fla. 1st DCA 2015).

4 *Whitehead v. Tyndall Fed. Credit Union*, 46 So. 3d 1033, 1036 (Fla. 1st DCA 2010).

5 *Blosam Contractors, Inc. v. Republic Mortgage Investors,* 353 So. 2d 1225 (Fla. 2d DCA 1978); *Morgan-Osgood Associates, Inc. of Florida v. Continental Mortgage Investors*, 323 So. 2d 684 (Fla. 4th DCA 1975); *Emerald Designs, Inc. v. Citibank F.S.B.,* 626 So. 2d 1084 (Fla. 4th DCA 1993); and *First Florida Bank v. Advantage Builders of America, Inc.*, 21 So. 3d 921 (Fla. 2d DCA 2009) (per curiam).

6 *First Florida Bank*, 21 So. 3d at 921.

7 In 2003, the Florida Legislature moved the subject statutory provisions to subsections (2)(a) – (c) in order to include the current subsection (1) which provides for a mandatory loan disbursement warning. *See*, Laws of Florida, ch. 2003-177. The subject statutory provisions have not been amended since the enactment of Sec. 713.3471, F.S.

8 *Emerald Designs, Inc.,* 626 So. 2d at 1084.

9 *Id*. at 1085.

10 *Id.*

11 *J.G. Plumbing Service, Inc. v. Coastal Mortgage Co.*, 329 So. 2d 393, 395 (Fla. 2d DCA 1976).

12 *Jax Utilities Management, Inc.*, 164 So. 3d at 1268-69.

13 *Id.* at 1272.

14 *Id*.

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Who Will Delete You? Fiduciary Access to Digital Assets

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"When I can no longer access my assets, I need my fiduciary to be able to, otherwise commerce stops."[1]

— Florida Senator Dorothy Hukill.


S. KLEIN

Digital assets[2] dominate our everyday lives. They have largely replaced tangible ones changing the way we interact and conduct business. Documents are now stored in the cloud, photographs are uploaded to websites, conversations are now text messages and stacks of letters are now email folders. We clearly live in the "Digital Age."

As a culture we are amassing significant digital assets. Our smartphones, computers and online accounts have accumulated valuable and significant electronic data, which continues to increase daily. From Facebook to banking, password protected sites are used to perform daily affairs for business and pleasure alike, with a reliance on the promise of security of access. When one dies or becomes incapacitated, what happens to that security promise? As a result of this question, the law to plan for fiduciary access to digital assets was born.

Federal And State Law – Barriers To Access

The growth of digital assets has outpaced the State and Federal laws as well as the regulatory laws that govern them. Terms of Service Agreements, *those pesky "small print" documents that pop up when establishing an account that people typically check "agree" without reading* ("TOSA"), as well as Federal and State laws, do not contemplate that death or incapacity may prevent access to digital assets. With the expanding prevalence of digital assets, permitting access to them after death or incapacity is a must. Without proper planning, administering them can be a nightmare…or even a crime.

Federal Privacy Laws. The Fourth Amendment to the United States Constitution provides citizens with a strong expectation of privacy in their home. That same expectation of privacy exists when using a home computer network. Computer networks, however, are not physically located or being accessed within computers or in homes. They, therefore, are NOT protected by the Fourth Amendment. To fill that gap, Congress enacted the Stored Communications Act ("SCA") in 1986.[3]

While well intended, Congress did not contemplate the digital revolution and that the SCA would ultimately become a barrier for fiduciaries. The SCA creates privacy rights protecting the *content* of a user's electronic communications/files and governs the conduct of custodians, the companies that store digital assets on their servers ("Custodians"). The SCA's inherent privacy rights prohibit such Custodians from disclosing a user's content to third parties, including a fiduciary, unless an exception under the SCA applies.

The SCA *includes* language that the user can provide "lawful consent" for disclosure, but the SCA is silent with respect to fiduciaries.[4] There is evidence that Congress intended fiduciaries be able to authorize disclosure;[5] however, it is not explicit. Moreover, cases have been brought under the SCA for third party access to digital assets and civil damages awarded![6]

State and Federal Computer Fraud and Abuse Laws (CFAA).[7] The CFAA criminalizes the unauthorized access of computer hardware and devices and the data stored thereon.[8] If a fiduciary violates the access rules of that Custodian's TOSA, a potential crime under the CFAA exists for "exceeding authorized access" to online accounts.

The CFAA calls for authorization by the owner of a computer or system. Even with the user's authorization, a fiduciary's access to the user's account may be a crime. Why? Access to a user's online account requires accessing the Custodian's computers, which requires the Custodian's further authorization! Many TOSAs prohibit a third-party, including a fiduciary, from accessing an account. If a fiduciary accesses such account, even with the user's authorization, the fiduciary violates the TOSA and thereby exceeds authorized access to the Custodian's system. The Department of Justice has used the CFAA to prosecute defendants based solely on violations of a website's TOSA.[9]

State Probate Codes. The probate codes of most states are silent with respect to digital assets. They do not include a definition or default rules governing fiduciary access.

The lack of specific probate laws on this subject creates a "Catch 22": fiduciaries risk civil liability if they refuse to manage a decedent's digital assets or criminal and/or civil liability if they perform their duties!

Advancing The Cause - UFADAA

"UFADAA does not break new legal ground; it simply applies the tried and true laws governing fiduciaries to the digital assets that are widely used today."

– ULC's statement.

The Uniform Law Commission ("ULC") recognized the obstacles fiduciaries face when dealing with digital assets after death or incapacity and, in response, created the Uniform Access to Digital Assets Act (UFADAA). The UFADAA was drafted to ensure that appointed fiduciaries can access, delete, preserve, and pass along digital assets as they deem appropriate. Longstanding fiduciary law exists that allows a representative to stand in the shoes of a deceased or incapacitated person to recover real or tangible property. The UFADAA is meant to clarify those same laws and apply them to digital property. The UFADAA does not forge new ground; it modernizes fiduciary law for the Digital Age.[10] In other words, the UFADAA fills a void by creating a legal right where none had existed.

The UFADAA was approved by the Uniform Law Commission on July 16, 2014. Eight states (as described in the chart on page 12) have previously enacted more limited laws on fiduciary authority regarding digital assets. Delaware was the ninth state to enact such laws, but the first state enactment based on the UFADAA.

Opposition To The UFADAA:

"Two Cultures Colliding"
—Florida Representative Jay Fant.[12]

The UFADAA is model legislation that can be enacted by state legislatures and does not become law until approved and enacted by such states. Twenty-seven states have introduced the UFADAA in their legislative process for 2015, including Florida, but only Delaware adopted the UFADAA as law.[13]

> 2015 Introductions: Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, Washington.

Nearly every state legislature faced strong opposition from the Custodians. Florida introduced the Florida Fiduciary Access to Digital Assets Act based on the UFADAA, but, like all of the other states with similar legislation, was faced with stiff resistance from some of the largest Custodians, including Yahoo, Google and Facebook. Ultimately, the UFADAA failed to pass during the 2015 Legislative session.[14]

The Custodians presented three compelling arguments in opposition of the UFADAA: Privacy, Consent and Contract. Below is a brief commentary on their arguments.

1. **Privacy**. The Custodians argued that users do not want their information shared with a fiduciary after death or incapacity and such Custodians postured themselves as the protector of a user's privacy, maintaining that the SCA sets "Privacy On" by default.[15]
2. **Consent/Pre-emption**. The Custodians advocated that disclosure to a fiduciary in compliance with UFADAA placed them in violation of the SCA, which as explained above, prohibits the disclosure of the content of a user's electronic communications to basically anyone, including a fiduciary. Custodians did not fully accept that a fiduciary can "stand in the shoes of the user" for purposes of providing the necessary consent. It did not help that the SCA is totally silent with respect to Fiduciaries.
3. **Contract**. The Custodians stated that the law would improperly override their TOSAs, making them null and void.

Notwithstanding the Custodian's arguments, both the ULC and the Custodians realize that legislation addressing the issue of fiduciary access to digital assets is critically important. Fiduciaries play an essential role in our economy, acting on behalf of living, incapacitated and deceased individuals.

"When you're searching for answers and you're hurting and you're grieving, you need access, and you need some level of comfort that you've done everything you can to honor your loved one's life." – Ricky Rash, father of Eric Rash.

Where Are We Now? Revised UFADAA: "Back To The Drawing Board!"

"Applying Fiduciary Law to Digital Assets, shouldn't be a reach."
—Florida Representative Jay Fant.

By summer 2015, the ULC and the Custodians "went back to the drawing board" and drafted the Revised Uniform Fiduciary Access to Digital Assets Act (Revised UFADAA). The Revised UFADAA is basically a complete re-write of the original act. Florida's version of the Revised UFADAA is on the docket for the 2016 Florida legislative session. The following are some of the key points from the Revised UFADAA:

1. **"Online Tool" Concept.** A new way to direct fiduciary access. The Revised UFADAA specifically authorizes a Custodian to offer an online tool and affords that a direction regarding disclosure using an online tool supersedes a contrary direction in any estate plan. An online tool is an electronic service by the Custodian that is distinct and separate from the TOSA, *e.g.,* Facebook's Legacy Contact and Google's Inactive Account Manager.
2. **Content v. Catalogue.** The Revised UFADAA provides that under certain conditions, a fiduciary can receive from the Custodian a "Catalogue" of a communication (which is the essential parameters of a communication, such as "to," "from" and "subject matter") without express prior consent. Contrasting that with "Content," where a fiduciary would be required to present actual express prior consent from the user to the fiduciary.
3. **Court Orders.** The Revised UFADAA appears to allow a Custodian to require a court order when the Custodian feels it is necessary.

STATE	DATE ENACTED	SUMMARY	LIMITATION
Connecticut Statutes § 45a-334a	June 24, 2005	Gives personal representatives (PR) the power to access or copy contents of a decedent's email accounts.	Only Applies to PRs. Also, Falls Short of the Existing Types of Digital Assets.
Indiana Statutes § 29-1-13-1.1	March 30, 2007	Allows PRs to access or copy any of the decedent's documents or information stored electronically by a "custodian."	Only Applies to PRs.
Rhode Island General Laws Chapter 33-27	July 2, 2007	Same as Connecticut.	Same as Connecticut.
Oklahoma Statutes §58-269	April 29, 2010	Gives a PR the power to "take control of, conduct, continue, or terminate" a decedent's email account, social networking account, microblogging account or short messaging service website.	Only Applies to PRs. Also, Falls Short of the Existing Types of Digital Assets.
Idaho Statutes §15-3-715(28) & §15-5-424(3)(z)	March 16, 2011	Same as Oklahoma, but also gives this power to a person's conservator.	Only Applies to PRs And Conservators. Also, Falls Short of the Existing Types of Digital Assets.
Virginia §64.2-110	March 13, 2013	Gives a PR of a minor decedent (not an adult) the power to assume the minor's terms of service agreement for an online account for purposes of consenting to and obtaining the disclosure of the contents of the minor's communications and subscriber records.	Only Applies to Deceased Minors. It Does Not Address Access to the Digital Accounts of an Adult.
Virginia PEAC Act[11]	March 2015	Provides the PR may receive a list of all persons to or from whom the decedent sent or received electronic communications within the last year (and the communications) with a court order.	Only Applies to PRs. Addresses Only How a Fiduciary Would Gain Access, Doesn't Give Access. Requires Court Order to Access Digital Assets.
Nevada Revised Statutes §143.188	June 1, 2013	Gives the PR the power to direct the termination of any online account or similar electronic or digital asset of the decedent.	Only Applies to PRs. Also, Does Not Address Powers to Access the Online Accounts or Copy the Contents.
Louisiana Code of Civil Procedure Article 3191	June 19, 2014	Gives the representative the power to take control of, handle, conduct, continue, distribute, or terminate any digital account of the decedent, unless the Will specifies otherwise. Gives the Custodian 30 days to provide access after receiving copy of documents showing the representative's authority. The law states that is supersedes any contrary provision in a terms of service contract for the decedent's digital accounts.	Only Applies to PRs. Also, Does Not Address Powers to Access the Online Accounts or Copy the Contents.

4. **Presumptive Access v. Possible Access.** The Revised UFADAA bestows a greater importance and emphasis to ***explicit*** direction provided in the estate plan with respect to digital assets. Previously, the UFADAA attempted to vest all fiduciaries with presumptive access to digital assets.

5. **Protection for the Custodians.** The Revised UFADAA provides immunity to the Custodians for an act or omission done in good faith compliance with the Act.

"Delectable or detestable, all depends on what you place on the table."
— Constance Chuks Friday

Plan, There Is No Excuse!

With the Revised UFADAA it is more important than ever to plan and address fiduciary access within that plan. Take control of "Who Will Delete You" by:

1. **Inventory/Roadmap.** Keep an updated list of valuable and significant digital assets, including accounts, usernames, passwords, etc. This list can be written, stored electronically or both.

2. **Tangible Media**. Regularly back up data, e.g., digital photos, to a local storage media (computer's hard drive, DVD, USB flash drive, etc.).

3. **Online Tool.** Use an online tool, a/k/a third party access, where available, e.g.., Google Inactive Account Manager[16] or Facebook's Legacy Contact,[17] to name another person to manage and have access to your account after death or incapacity. Many other Custodians are looking to create similar online tools.

4. **Estate Plan.** Include specific language in the estate planning documents authorizing Custodians to release data to the fiduciary during incapacity or upon death. Key word to remember: "Consent."

5. **Intervivos Digital Asset Trust.** Create a trust to own the digital asset (more practical for a valuable asset). If the digital asset is already owned, it must be transferable. Upon client's death or disability, the trustee has access and control of the asset, and can handle it according to the client's stated intent within the trust.

"Big Data doesn't trump your ability to control your assets. We need this law now, you can't tell your clients that a digital asset provision will work because there is no law that authorizes fiduciary access to digital assets. Our momentum is to give people the right to determine who will act with respect to their digital assets. Ensure the law is catching up with what's happening today. We know this is needed. Not a crisis today. It is a problem that will become a crisis. Let's get in front of it now. Without the law, it's like locking the door to your house after somebody robbed it. It's too late."

– Senator Hukill[14]

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Endnotes

1 Sponsor for Senate Bill 102 - Florida Fiduciary Access to Digital Assets Act.

2 A person's digital property and electronic communications are referred to as digital assets.

3 SCA is codified as 18 U.S.C. Section 2701-2711, as part of the Electronic Communications Privacy Act ("ECPA").

4 SCA §2702(b)(3).

5 Senate Report No. 99-541 on ECPA, taken from the comments to §2702 (page 37).

6 A federal jury in Massachusetts awarded a plaintiff $450,000 in damages in a civil action brought under the SCA. The defendant had been given the plaintiff's email account password, so she could access it to read consultation reports when the two parties practiced medicine together. When the defendant left the practice and a business dispute arose, she used the plaintiff's unchanged password to access the account for reasons connected to the business dispute. The plaintiff sued, alleging her later access was unauthorized under the SCA. Despite very thin (or nonexistent) testimony to support the damage claim, the jury awarded the plaintiff $450,000 for the unauthorized intrusion. Cheng v. Romo, No. 11-cv-10007-DJC, 2012 WL 6021369, (D. Mass. Nov. 28, 2012).

7 Each state and Congress has enacted a Computer Fraud and Abuse law.

8 Codified at 18 U.S.C. § 1030(a)(2)(C). Florida Computer Related Crimes is found at §§ 815.01 to 815.07.

9 **Aaron Swartz case**. He was an internet activist who impermissibly downloaded 4.8 million academic articles from the JSTOR library system. While facing prosecution, Mr. Swartz committed suicide in 2013. **Lori Drew case**. She created a fake profile on MySpace, which was in violation of MySpace's TOSA. She then allegedly bullied a 16 year old girl into committing suicide. In 2008, Ms. Drew was prosecuted and convicted on a misdemeanor charge of accessing a computer involved in interstate or foreign communication without authorization or in excess of authorization to obtain information. Ultimately, the trial court overturned her conviction holding that the conscious violation of a TOSA is not automatically a criminal violation of the CFAA.

10 Jimm Lamm, *Bitcoin is Creating New Headaches for Estate Planners, Though It May Someday Cure Them.* Electronic Commerce & Law Report, Vol. 19; No. 19 (May 14, 2014) and Benjamin Orzeske, ULC Legislative Counsel, *Why Your State Should Adopt The Uniform Fiduciary Access to Digital Assets Act.*

11 As of March 2015, the Privacy Expectations Afterlife Choices Act has passed a vote of the legislature in Virginia and is merely awaiting the signature of the governor before enactment. Available at http://netchoice.org. This model act was drafted by the Providers led by their trade association NetChoice.

12 Sponsor for House Bill 313 – Florida Fiduciary Access to Digital Assets Act.

13 Delaware's enactment was based on a previous draft of the UFADAA and not the final version, which was introduced in the other 26 states.

14 The sponsors for the Florida legislation are Senator Dorothy Hukill and Representative Jay Fant.

15 One should take note that these same Custodians make a living invading our privacy. Google and Microsoft both analyze/scan, basically for better words, read the content of your emails when they are *sent, received, and stored*.

16 Google through its online tool – Inactive Account Manager – now allows users to send Gmail messages and other Google data to a trusted person after death or incapacity.

17 Previously after a user died, Facebook did not allow anyone to access or modify the decedent's Facebook account, but the account could be memorialized or closed. Now a Facebook Legacy Contact can be named to (1) download a copy of what the deceased user shared on Facebook, (2) write a pinned post for the deceased user's profile to share a remembrance or final message, (3) respond to a new friend request and (4) update the deceased user's profile picture and cover photo. Among other things, a Legacy Contact cannot log in to the deceased user's account. The Legacy Contact must be an existing Facebook friend of the decedent account holder.

2015 Legislative Changes to Chapter 558

By Sanjay Kurian, Esq., Becker & Poliakoff, Ft. Myers, Florida

Another legislative session has come and gone and the big news was, rightfully, the budget and Medicaid. However, for those of us in the construction world, the changes were not as newsworthy as the state budget, but will be important in the years to come. The legislature passed, and the Governor signed, House Bill 87 modifying some of the requirements of Chapter 558, Florida Statutes ("Chapter 558"). The changes noted below took effect on October 1, 2015.[1]

Background

The original intent of Chapter 558, enacted in 2003, was to create a mandatory pre-suit process before claims for construction defects could be brought in court.[2] In fact, Sec. 558.001, F.S., describes the "dispute resolution mechanism" as "an opportunity to resolve the claim through confidential negotiations without resort to further legal process."[3] For many reasons, including changes this year, it appears that the purpose of the statute is moving away from dispute resolution.

For those unfamiliar with Chapter 558, the general process is intended to be simple. Unfortunately, the reality of the Chapter 558 process and compliance with it are not so simple. Chapter 558 has become a pre-litigation battlefield with lawyers positioning their clients to challenge the quality of the notice required by Chapter 558, the quality of the observations or testing related to the claim, and the parties' technical compliance with Chapter 558, rather than the stated purpose of resolving defect claims without litigation.

Originally, claims subject to Chapter 558 were limited to residential defect claims, but now all residential and commercial project claims for defects are included.[4] All public projects are also included except for public transportation projects.[5] However, Chapter 558 does not apply to projects that have not reached the stage of completion of the building or improvement.[6]

Chapter 558 requires written notice from the claimant to the construction or design professionals believed to be responsible for defects or deficiencies prior to initiating an action.[7] It further provides timeframes for the construction or design professionals to review the claims, inspect the property and respond.[8] Responses from recipients of the claims could include an offer to repair the defects at no cost to the claimant, pay a monetary settlement, dispute the claim and decline to remedy or pay for some or all of the claimed defects, or a combination of these options.[9]

2015 Enacted Amendments

The amendments to Chapter 558 include a variety of changes, a number of which, in the opinion of this author, will make pre-suit resolution more difficult. The changes are:

Sec. 558.001, F.S., previously stated that the "contractor, subcontractor, supplier, or design professional" should have the opportunity to resolve the claim without further legal process, but now includes "the *insurer* of the contractor, subcontractor, supplier, or design professional" as a party that should additionally have such an opportunity. However, there remains no requirement that Notices of Claim be served on insurers, which from the claimant's standpoint is appropriate as the claimant often will not be able to identify the insurers.[10] (emphasis added)

Sec. 558.001, F.S. was further changed to add that the opportunity to resolve the claim shall be "through confidential settlement negotiations."[11]

Several changes were made to Sec. 558.004(1)(b), F.S. The first is that the words "if known" were added to modify the requirement that the claimant identify the damage or loss resulting from the defect.[12]

The second change to Sec. 558.004(1)(b), F.S. is potentially more significant for all parties involved. The Notice of Claim must now "identify the location of each alleged construction defect sufficiently to enable the responding parties to locate the alleged defect without undue burden." Such identification must be based upon at least a visual inspection. Although defect identification may be easy for a single family home, complying with such a requirement becomes more difficult for condominiums, hotels, schools and other structures with multiple units or rooms where the same defect may exist in numerous locations. There will probably be much dispute pre-suit, and likely in litigation, about the quality of the Notices of Claim and what the term "undue burden" means. Such dispute and disagreement will result in parties not attempting to resolve defect claims but instead arguing statutory compliance, which is anathema to the intent of the statute.[13]

The third change made to Sec. 558.004(1)(b), F.S., is a statement that the claimant has "no obligation to perform destructive or other testing for purposes of this notice." This change makes clear that the visual observation referenced previously is just that, a visual observation.[14]

Sec. 558.004(13), F.S., provides that a Notice of Claim provided to an insurer does not constitute a claim under that insurance policy "unless the terms of the policy specify otherwise." The author has yet to see an insurance policy that deems a Notice of Claim under Chapter 558 as a claim against the insurance policy, so this change may be of little impact.[15]

Sec. 558.004(15), F.S., requires the exchange of certain documents related to the alleged defects in the Notice of Claim. This section was revised to delete the requirement that "design drawings or specifications" be exchanged.[16]

Sec. 558.004(15), F.S., is further revised to require that maintenance records can be requested. Although the failure to maintain components may be a defense to some claims, the requirement to turn over non-construction maintenance records pre-suit is another cost for the owner.[17]

Sec. 558.004(15), F.S., now also requires that, upon request, "documents related to the discovery, investigation, causation, and extent of the alleged defect" be produced. This is subject to the next change providing that a party may assert any privilege recognized under Florida law. This latter change may do away with the worst applications of the former. However, the existing language then provides that in subsequent litigation, a party's failure to provide requested materials shall subject that party to such sanctions as the court may impose for a discovery violation. The new change combined with the existing language suggests that in any subsequent litigation, any materials withheld, including those withheld based on claims of privilege, may lead to sanctions as a discovery violation. Practitioners should tread cautiously in this area.[18]

Sec. 558.002(4), F.S., revises the definition of "completion of a building or improvement" to include temporary certificates of occupancy, thus reflecting the actual practice of building departments in allowing occupancy of buildings in accordance with the issuance of a temporary certificate of occupancy.[19]

Conclusion

Given the number of changes to Chapter 558, it is likely that more amendments will be made in the next few years as some of the new changes may prove unworkable. It is ironic that Chapter 558, with a stated intent of resolving claims and preventing litigation, will likely generate a flood of disputes over its terms and conditions. Claimants will undoubtedly argue that this statutory framework whittles away at the rights of consumers in favor of contractors and that it is one-sided, heavy-handed, and even illusory. Contractors will argue that the whole process is pointless as the claimants are not required to accept any proposals to repair or payments to resolve the claims. This author has been told that some contractors who receive Notices of Claim are no longer investigating or responding despite the requirement in Chapter 558 that they "must serve a written response to the claimant."[20]

Before the Legislature makes any more changes, it is important to remember what Chapter 558 is supposed to be about. Resolution, not mini-litigation, is the intent. Continuing to add requirements to Notices of Claim or creating penalties for contractors for not responding will not lead to resolution. It leads to more complications and more positioning. As a final note, although the types of claims that generate the most "buzz" are the larger defect cases related to condominiums and other such properties, it is the smaller cases where the owners get trapped in this labyrinth that is being created. If more changes are made then, in this author's opinion, the focus should be on making Chapter 558 more simple and moving back to its stated purpose.

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Endnotes

1 Ch. 2015-165, § 6, Laws of Fla. (2015).
2 § 558.001, Fla. Stat. (2014).
3 *Id.*
4 *Id.;* Ch. 2006-281, § 2, Laws of Fla. (2006).
5 § 558.002(1) and (8), Fla. Stat. (2014).
6 § 558.003, Fla. Stat. (2014).
7 § 558.004(1), Fla. Stat. (2014).
8 § 558.004(2) and (5), Fla. Stat. (2014).
9 § 558.004(5)(a)-(e), Fla. Stat. (2014).
10 Ch. 2015-165, § 1, Laws of Fla. (2015).
11 *Id*.
12 Ch. 2015-165, § 3, Laws of Fla. (2015).
13 *Id*.
14 *Id*.
15 *Id*.
16 *Id*.
17 *Id*.
18 *Id*.
19 Ch. 2015-165, § 2, Laws of Fla. (2015).
20 §558.004(5), Fla. Stat. (2014).



E-Recording: The Next Step in Legal Technology

By Amber Ashton, Esq., Tampa, Florida

How does e-recording work? How does e-recording impact the ethical obligations of attorneys? What do you do with original documents after e-recording?



A. ASHTON

In a world where the telephone call has been replaced by the text message and the facsimile was retired by the e-mail, the legal community has had to adjust and adopt new technology in order to keep up with the speed of the emerging business landscape. New technology breeds new potential legal issues and it is important for practitioners to be aware of how best to utilize new technology while simultaneously insulating themselves and their clients from potential legal issues in an ever-changing marketplace.

It used to be that when a client came to you with a document to be recorded, the options available to them, and to you as their attorney, were limited to two choices: (1) walk down to the county clerk or comptroller's office with the original and hand deliver it to them for recording, or (2) mail the document to the clerk or comptroller for recording. In both instances, the county received the original document, recorded it in the official records, and then mailed the original back to you or your client. The attorney's role in recording was limited to making sure that the original documents were delivered in a timely manner to the clerk or comptroller for recording and returning the original documents to their clients or the appropriate parties when the recorded documents came back from the clerk.

An issue with this system that was exposed during the recent real estate crisis in Florida was that sometimes weeks or even months would pass between the execution of mortgages and the date on which they were recorded in the public records. This enabled fraudsters to obtain multiple purchase money mortgages for the same property, obtain multiple home equity mortgages on properties, or otherwise adversely impact mortgage lien priority through fraudulent recordings, which tied title companies up in litigation for years and cost countless businesses tens of millions of dollars.[1]

With the advent of e-recording services, every attorney from the solo practitioner to the large multi-state law firm, has the option to offer an additional service to their clients: the ability to instantaneously record deeds, mortgages, and liens in the public records of some counties.[2]

On November 30, 2007, the Florida Electronic Recording Advisory Committee[3] recommended that Florida join a multitude of other states in accepting e-recorded documents. The benefits of e-recording are easy to enumerate: (1) instantaneously securing an interest in property, (2) no potential loss of original documents in the mail or at the clerk's office, (3) cost savings in the form of postage or hourly costs associated with in-person recording, and (4) the ability to ensure that documents are recorded in the correct order, among many other benefits.

Some attorneys may be leery of allowing staff members and non-attorneys to e-record utilizing the lawyer's e-recording account due to the potential for liability. Florida law requires all documents recorded in this state (with limited exceptions) to be either an original or, under some circumstances, a certified copy.[4] Prior to the advent of e-recording, the clerk or comptroller physically held the document to be recorded in their hands and were thus able to determine whether it contained a "wet ink" signature and could be considered an "original" document for recording purposes. This task now falls to the e-recording "submitter," the person within the firm, title agency, or business office empowered to e-record.

Most of the e-recording service providers require the practitioner to sign agreements including strong indemnification and hold harmless provisions shifting virtually all of the liability for failing to comply with e-recording rules and laws to the submitter. Service providers do not have the opportunity to review and authenticate the documents submitters send in to be e-recorded. As such, some attorneys may question whether it makes sense to expose themselves to liability for recording fraudulent or unauthentic documents in the public records. While a valid concern, the potential for fraud in this arena is no greater than it always has been. In fact, it is likely easier to identify fraudfeasors since e-recorded documents are traceable to the individual submitter that recorded the document. As attorneys, we are tasked with the obligation to closely monitor our employees, staff, and business associates, including other attorneys within our firms, to ensure everyone's work is performed ethically and in conformity with the law.[5] The obligation of the attorney-submitter is the same — put into place procedures, policies and safeguards ensuring you comply with your legal obligations and ethical duties.

Once you have decided to offer e-recording services, the next decision you must make is which of the many e-recording providers you want to use. The service providers for e-recording services tout that, with a computer, scanner, and internet connection, anyone can start e-recording. Practitioners, however, need to keep in mind when choosing

an e-recording provider that not all providers are accepted in every county. E-recording providers also contract with the counties to create the secure portals required by Fla. Admin. Code R. 1B-31.002(2).[6] As such, it is incumbent upon the practitioner to ensure that the provider you use also has an agreement with each of the counties where you typically record documents.

Another concern of the newly indoctrinated e-recording submitter is what to do with the original documents once they have been recorded. E-recording really just removes one step from the recording process, i.e., the submission of the document to the county clerk or comptroller. Traditionally, when recordable documents were prepared, attorneys, title agents, and businesses included an address block in the upper left hand corner of the document directing the clerk or comptroller where to return the original document after recording. Upon receipt of an original mortgage, the attorney would seek direction from his or her client on where to send the mortgage. When an original deed was returned from being recorded, the title agent would mail it to the buyer in the real estate transaction. The fact that e-recording is instantaneous means that you no longer have to wait to deliver the recorded deed by mail. Original recorded documents will remain, as they always have been, the property of the client. You should seek their direction on whether they wish for you to retain the originals in your file or if the originals should be returned directly to the client.

Much like the years-long transition from paper filings in the courts to e-filing, the process to fully indoctrinate the legal community into the practice of e-recording is likely to take time and meet with skepticism at first. The potential benefits to your business, however, justify your careful consideration of whether to add e-recording to the list of services offered by your firm, title agency, or business. It is now possible to secure your client's loan by e-recording the mortgage simultaneously with the funds being wired. "Gap title searches" may become a thing of the past, gone the way of the typewriter, the rotary phone, and the VCR, meaning additional cost savings to your clients.

Time is money. Information moves at the speed of light. Can you afford to use the mail when your competitors are e-recording?

Endnotes

1 Lew Sichelman, '*Shotgunning:' Latest Fraud Ploy,* Realty Times (January 30, 2007), http://realtytimes.com/todaysheadlines1/item/7492-20070131_shotgunning.

2 Currently, there are 43 counties in Florida which allow for e-recording documents. Most counties require that filers utilize an e-recording service like Corporation Service Company's Erecording Solutions or Simplifile in order to e-record documents.

3 The Florida Electronic Recording Advisory Committee (the "Advisory Committee") was established to assist the Department of State in implementing the e-recording standards established by the Uniform Real Property Electronic Recording Act through the adoption of policies, procedures, and rules to conform Florida's standards and practices to those of other jurisdictions and appropriately amend and adopt new policies and procedures to reflect recent changes in the law, technology, or the like. See, § 695.27(5)(a), Fla. Stat.

4 See generally, Ch. 695, Fla. Stat.

5 See Rules Regulating Fla. Bar 4-5.

6 Pursuant to § 695.27(5)(a), Fla. Stat., the Florida Department of State is empowered to create standards and rules governing e-recording.

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Can I Have My Deposit Back?

By Arthur J. Menor, Esq. and Elizabeth M. Jones, Esq.,
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Liquidated damages for a breach of contract are meant to compensate the non-breaching party for its losses, but what if the non-breaching party benefits from the breach? Can it still keep the deposit? Is a contractual provision valid that permits the seller the option of retaining the deposit as liquidated damages or suing for specific performance?

These questions were addressed by the Florida Third District Court of Appeal in the case of *San Francisco Distribution Center, LLC v. Stonemason Partners, LP*,[2] which found that a seller of real property may retain the deposit as liquidated damages upon a buyer's breach even though the seller may have ultimately sold the property to a third party for more than the contract price.[3] In addition, the court held that the liquidated damages clause at issue was enforceable as it was not a "penalty clause" by affording a seller the option, upon buyer's breach, between enforcing the contract by specific performance or retaining the deposit as liquidated damages.[4] This case illustrates many of the legal principles underlying a seller's remedies for a buyer's breach of a contract for purchase and sale of real estate.

Generally, upon a buyer's material breach of a real estate purchase and sale contract, the seller has two alternative remedies: 1) the seller may sue to compel specific performance of the contract, or 2) the seller may retain the property and sue for breach of contract (i.e., damages, including consequential and incidental damages).[5] This premise is usually included within a purchase and sale contract, although the parties will typically agree that instead of damages, the seller may retain the buyer's deposit as liquidated damages in the event the buyer breaches the contract and in lieu of any other remedy including specific performance. If the parties do not stipulate to the amount of damages, the seller is able to sue for actual damages equal to the difference between the price the buyer agreed to pay for the property and the fair market value of the property as of the date of the breach.[6] In addition, the seller could sue for any incidental and consequential damages which were "contemplated by the parties and [were the] natural and proximate result of the [buyer's] breach," unless the parties specifically exclude these types of damages in the contract.[7] Because it is common for a buyer to deliver a deposit on the signing of a real estate contract, and because neither party wants the uncertainty of a damages remedy, it is typical to provide that the deposit may be retained by the seller as liquidated damages if the buyer defaults.

In *San Francisco Distribution*, Stonemason entered into an agreement to sell a commercial property located in Miami Beach to San Francisco Distribution for $5.25 million.[8] Under the remedies clause of the agreement, if San Francisco Distribution breached, Stonemason had the option of either (1) "retain[ing] all deposit(s) paid or agreed to be paid by Buyer as agreed upon liquidated damages," or (2) pursuing specific performance of the agreement.[9] San Francisco Distribution breached the agreement by failing to close on the property, and Stonemason sought to retain the $400,000 deposit.[10] Interestingly, in this case only $100,000 of the deposit had been paid, but if the agreement specifically provides that deposits "agreed to be made" may be recovered, a seller is entitled to recover the unpaid portion of the deposit as well.[11] Stonemason subsequently sold the property for $5.45 million to another buyer after San Francisco Distribution's breach.[12]

While San Francisco Distribution did not dispute its breach of the agreement, it argued that the liquidated damages clause was (1) unenforceable because it provided Stonemason with alternative remedies of liquidated damages or specific performance, and (2) was unconscionable in light of Stonemason subsequently selling the property for more than the contract price.[13]

In addressing the first argument, the court analyzed *Lefemine v. Baron*[14] and certain pre-*Lefemine* cases.[15] In *Lefemine*, the Supreme Court of Florida held that a liquidated damages clause was unenforceable where the contract gave the seller the option of exercising the liquidated damages provision or suing the defaulting buyer to recover actual damages.[16] In reaching this conclusion, the Court established a two-part test to determine if a liquidated damages provision is enforceable.[17] First, "damages consequent upon a breach must not be readily ascertainable."[18] Second, the agreed-upon amount to be forfeited must not be "grossly disproportionate to any damages that might reasonably be expected to follow from a breach as to show that the parties could have intended only to induce full performance, rather than to liquidate their damages."[19]

Prior to *Lefemine*, the Court held in *Hyman v. Cohen*[20] that where the parties actually intend to liquidate their damages, the provision is valid, but if the parties' real intentions are to induce performance under the contract, then the provision is unenforceable.[21] In *Pappas v. Deringer*,[22] the Third District Court of Appeal held that a liquidated damages clause in a lease agreement was an unenforceable "penalty clause" because it gave the landlord the option of retaining the security deposit as liquidated damages upon default by the tenant or suing for a greater amount of damages.[23] This was applied to a real estate contract in *Cortes v. Adair*,[24] where the Third District Court of Appeal found a liquidated damages clause to be unenforceable because the provision gave the seller the option of retaining the deposit or suing in law or equity to enforce its rights under the agreement.[25] The Court in *Lefemine* agreed with the underlying principles of both

Pappas and *Cortes*, in that a contract which gives the seller the option between liquidated damages and suing for actual damages "indicates an intent to penalize the defaulting buyer and negates the intent to liquidate damages in the event of a breach."[26] Most importantly, the Court expressly noted that it was not "imply[ing] that a liquidated damages clause which merely provided the option of pursuing equitable remedies would be unenforceable."[27]

San Francisco Distribution argued that specific performance is "the simple equivalent of a claim for damages" and, therefore, is unenforceable under *Lefemine*.[28] The court disagreed, finding that "a suit for specific performance seeks equitable relief that requires the breaching party to perform its obligations under the agreement."[29]

Consequently, the provision in the San Francisco Distribution agreement was in accordance with *Lefemine* and its implications because it provided for an *equitable* remedy alternative to liquidated damages.[30] Although the distinction is subtle, the court's result does appear to give a seller the option of pursuing specific performance if the contract price is higher than the market price or, as Stonemason did, retaining the deposit and selling at a higher market price. Typically, to provide certainty as to the amount of damages in the event of a buyer default, a buyer will try to negotiate away a seller's remedy of specific performance in the purchase and sale agreement in an attempt to limit a seller's remedy solely to the amount of the deposit.

Furthermore, San Francisco Distribution contended that damages were readily ascertainable at the time of breach.[31] In response, the court emphasized that the relevant inquiry is whether damages were ascertainable at the time of entering into the contract.[32] When addressing the relevant inquiry, Florida courts have held that the fluctuating nature of the real estate market makes it "generally impossible to say at the time a contract for sale is drawn what the vendor's loss (if any) will be should the contract be breached."[33]

As to the second part of the *Lefemine* test, the court analyzed whether San Francisco Distribution's forfeiture of the deposit, equaling 7.6% of the contract price, was grossly disproportionate to any damages that might be reasonably expected to flow from a breach.[34] The court found that it was not, observing that Florida courts routinely hold that a forfeiture amount of 10% or less is reasonable.[35]

Finally, as San Francisco Distribution's last argument, it contended that the amount of liquidated damages was unconscionable because Stonemason suffered no damages in light of it ultimately selling the property to a subsequent buyer for more than the original contract price.[36] Under the common law doctrine of unconscionability, courts may "prevent the enforcement of contractual provisions [wherein] one party seeks to gain an unjust and undeserved advantage which it would be inequitable to permit him to enforce."[37] The court disagreed with San Francisco Distribution, finding that the argument was not novel and had failed before.[38] In both *Hot Developers, Inc. v. Willow Lake Estates, Inc*. and *Bradley v. Sanchez*, a liquidated damages clause was enforced despite the fact that the sellers in both instances sold the property for more than the original contract price.[39] Essentially, the argument failed because it solely took into account the ultimate sales price while "ignoring the contractual provision itself and other aspects of potential damages consequent to a buyer's breach," such as brokers' commissions, title search fees, and survey costs.[40] In addition, the argument overlooked Stonemason's carrying costs during this time and that fifty percent of the forfeited deposit was to be distributed to the brokers involved in the transaction.[41]

The *San Francisco Distribution* case answers a question left partially open in *Lefemine*—a contract can validly provide a seller with the option of retaining the deposit as liquidated damages or sue for specific performance. It also provides a good summary of Florida law on a seller's remedies for default under a contract for purchase and sale of real estate. So, to answer the question posed in the first sentence of this article—no, you may not have your deposit back.

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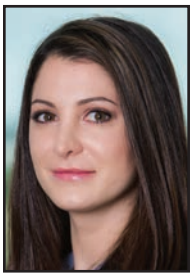

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Endnotes

1 *The authors would like to acknowledge the substantial assistance in the preparation of this article provided by Daniel Naydenov, a law student at the School of Law at Vanderbilt University.

2 No. 3D13–2320, 2014 WL 1491633, at *1 (Fla. 3d DCA Apr. 16, 2014), 39 Fla. L. Weekly D790a.

3 *Id.*

4 *Id.* at *2 .

5 *Frank Silvestri, Inc. v. Hilltop Developers, Inc.*, 418 So. 2d 1201, 1203 (Fla. 5th DCA 1982).

6 *Clements v. Leonard*, 70 So. 2d 840, 843 (Fla. 1954).

7 *Buschman v. Clark*, 583 So. 2d 799, 800 (Fla. 1st DCA 1991).

8 *San Francisco Distribution*, 2014 WL 1491633, at *1.

Can I Have My Deposit Back?, from page 19

9 *Id.*
10 *Id.*
11 *See Bradley v. Sanchez*, 943 So. 2d 218, 222 (Fla. 3d DCA 2006).
12 *San Francisco Distribution*, 2014 WL 1491633, at *3.
13 *Id.* at *2.
14 573 So. 2d 326, 328 (Fla. 1991).
15 *See generally San Francisco Distribution*, 2014 WL 1491633, at *2.
16 *Lefemine*, 573 So. 2d at 330.
17 *Id.* at 328.
18 *Id.*
19 *Id.*
20 73 So. 2d 393, 398 (Fla. 1954).
21 *Hyman*, 73 So. 2d at 398.
22 145 So. 2d 770 (Fla. 3d DCA 1962).
23 *Pappas v. Deringer*, 145 So. 2d 770, 773 (Fla. 3d DCA 1962).
24 494 So. 2d 523, 524 (Fla. 3d DCA 1986).
25 *See id.*
26 *Lefemine*, 573 So. 2d at 329.
27 *Id.* at 330 n.5.
28 *San Francisco Distribution*, 2014 WL 1491633, at *1.
29 *Id.* at *3 (citing *Mineo v. Lakeside Village of Davie, LLC*, 983 So. 2d 20, 22 (Fla. 4th DCA 2008)).
30 *See id.* at *3.
31 *See id.* at *3 n.6.
32 *See id.* at *2 n.5.
33 *Hutchison v. Tompkins*, 259 So. 2d 129, 132 (Fla. 1972); *see also Hot Developers, Inc. v. Willow Lake Estates, Inc.*, 950 So. 2d 537, 540 (Fla. 4th DCA 2007).
34 *San Francisco Distribution*, 2014 WL 1491633, at *3.
35 *See Kirkland v. Ocean Key Associates, Ltd.*, No. 07-10030-CIV, 2007 WL 3343083, at *3 (S.D. Fla. Nov. 8, 2007) (10% held reasonable); *Hot Developers, Inc. v. Willow Lake Estates, Inc.*, 950 So. 2d 537, 541-42 (Fla. 4th DCA 2007) (9.65% upheld, discussed ranges from 4.85% to 22% held to be reasonable); *Bloom v. Chandler*, 530 So. 2d 341, 342 (Fla. 4th DCA 1988) (upholding liquidated damages clause equal to 22% of the purchase price); *Hooper v. Breneman*, 417 So. 2d 315, 318 (Fla. 5th DCA 1982) (upholding liquidated damages provision calling for forfeiture of 13.3% of the purchase price); *Ivanov v. Sobel*, 654 So. 2d 991, 992 (Fla. 3d DCA 1995) (10% held not to be grossly disproportionate); *McGuinness v. Prospect Aragon, LLC*, 981 So. 2d 496, 499 (Fla. 3d DCA 2008) (holding 8% of the purchase price as neither a penalty or unconscionable).
36 *San Francisco Distribution*, 2014 WL 1491633, at *3.
37 *Basulto v. Hialeah Automotive*, 141 So. 3d 1145, 1157 (Fla. 2014) (internal quotation marks omitted).
38 *San Francisco Distribution*, 2014 WL 1491633, at *4.
39 *Id.* (*citing Hot Developers, Inc.* 950 So. 2d at 537; *Bradley,* 943 So. 2d at 218).
40 *Id.* at *3.
41 *Id.* at *3 n.7.



The Meaning of "Of Counsel": Do We Know It When We See It?

By Lawrence J. Miller

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Years after its initial acceptance at both the national and state bar levels (including the Florida Bar in 1961 and 1972), the "of counsel" attorney designation has become more than just a catch all name for non-partner, non-associate attorney affiliations with a law firm. The increase in multi-state law practice, the growth of differing attorney work relationships and the number of baby boom lawyers approaching retirement have all expanded and tested the limits of connections between lawyers and law firms. Along with such factors, the term "of counsel" has taken on additional meaning, import and analysis. This article briefly summarizes the present landscape of the "of counsel" designation in Florida using its original and evolving meaning.

Of Counsel Explained—Relevant ABA Ethics Opinions

In its Formal Opinion 330 (1972), the American Bar Association Ethics Committee established several bedrock concepts for using the "of counsel" designation. Specifically, attorneys who had worked for one firm for a number of years and who were looking to remain affiliated with that firm after retirement should be permitted to do so without being either an associate or a partner. The client's understanding of the "of counsel" relationship was the lynchpin in defining the term's meaning. However, the ABA's definitional parameters as set forth in this early approach limited the number of firms with which such affiliation could be undertaken (two firms), as well as the compensation for such a designee. Payment by the law firm to "of counsel" could not be as an employee, but rather based only on an equitable division of fees in certain cases or as "consultation fees." After its Model Rules were subsequently changed in 1983 and 1989, the ABA Ethics Committee reconsidered its 1972 opinion and in 1990 issued Formal Opinion 90-357. In part based on ". . . a proliferation of variants of the term 'of counsel' which have not all been addressed by prior opinions," as well as the Committee's view that the 1972 opinion may have been "unjustifiably restrictive," the 1990 opinion was issued. The new opinion focused on four fundamental uses of the "of counsel" designation. These included the part time practitioner practicing in association with a firm, the retired partner who remained associated with and working for his/her firm, the probationary partner-to-be and the designation used for the experienced attorney with no expectation of becoming a partner.

At the core of the new opinion was the idea that the "of counsel" attorney had to have a close and continuing relationship with the affiliated firm. The new opinion further clarified that instead of a predetermined and limited number of firms with which an attorney could affiliate as "of counsel," the relationship between such an attorney and a law firm was more one of quality than quantity. Specifically, "a lawyer could be "of counsel" to multiple law firms, without limit, provided that the association with each is close, regular and personal."[1] The ABA Opinion further cautioned, however, that even in the absence of a specific numerical limitation, "there is to be sure, some point at which the number of relationships would be too great for any of them to have the necessary qualities of closeness and regularity. . ."[2] In more clearly defining the "of counsel" relationship, the ABA's Ethics Committee reasoned that client confusion as to the role of such an attorney would be avoided. By insisting on closeness of the relationship, there would be less debate as to the source and extent of the "of counsel" attorney's duty or responsibility to the client. As a result, relationships involving an individual case, occasional collaborative efforts among otherwise unrelated lawyers or firms and the use of outside consulting services could not be the basis of an "of counsel" designation. The distinctions raised in ABA Formal Opinion 90-357, with some modification, became the guidelines for acceptable use of the "of counsel" title.

Defining the "of Counsel" Concept in Florida

Florida's Ethics Opinion 00-1 dated April 30, 2000, mirrored the language, meaning and objectives of ABA Formal Opinion 90-357 and tracked the more relevant prior Florida ethics opinions regarding the "of counsel" appellation. The Florida opinion (though somewhat confined by its limited facts) stated that historically, "of counsel" designated a retired or semi-retired former partner who continued to be available to the subject law firm. Citing ABA Formal Opinion 90- 357, the Florida opinion found that the definition of "of counsel" had been broadened to include "an attorney who maintains a close, continuing relationship with a firm, but is neither a partner, an associate, nor a shareholder." Client confusion as to the nature or meaning of the "of counsel" designation, was to be avoided.

Concerns regarding fee splitting among attorneys designated as "of counsel" were also addressed in the Florida Opinion. Specifically, an attorney working exclusively with a given firm would be able to share fees in matters, provided that such "of counsel" attorney practiced "exclusively through the firm in the

traditional sense of the word."[3] If such was not the case, sharing or splitting of fees was subject to "normal" fee splitting rules for attorneys in different firms. Florida Bar's Ethics Opinion 00-1 also permitted retaining in the firm name the name of a retiring attorney who continued to practice "in the traditional sense" with the law firm in an "of counsel" capacity. To continue use of the attorney's name in the former firm, the "of counsel" retiring partner would need to work exclusively for and with the former firm. Without the requisite exclusivity, the attorney could otherwise be designated as "of counsel," but the name could no longer be part of the firm's name. The concepts of fee sharing regulation and name inclusion in a firm were deemed to travel along the same paths - close and continuing relationships. For the most part, these core concepts (mirroring and citing those in ABA 90-357) continue to be applied when defining the implications of the Florida "of counsel" designation. Some of the areas of concern are summarized below.

Florida "Of Counsel" Conflicts of Interest

ABA Formal Opinion 90-357, coupled with Florida Bar Rule 4-4.11, provides a reasonable roadmap of conflicts of interest analysis in the "of counsel" context. As ABA 90-357 states, "the effect of two or more firms sharing an "of counsel" lawyer is to make them all effectively a single firm, for purposes of attribution of disqualifications." Simply stated, conflicts of the "of counsel" are imputed to the affiliated firm and vice versa, at least when there is the "regular and close relationship" between the firm and the "of counsel" attorney. That imputation extends to all firms with which counsel or his firm may be affiliated. In Florida Bar Ethics Opinion 75-41, the Bar analyzed the conflicts existing for a former prosecutor whose new private law firm would be precluded from defending a client with whom the attorney had been involved while at the prosecutor's office. In Opinion 75-41, the Bar's Ethics Committee stated that conflicts in the "of counsel" setting are measured by the same rules and restrictions as those applicable to all other attorneys, be they associates, partners or otherwise.

Concerns regarding conflicts in the "of counsel" setting become even more pronounced in situations when client conflict review is required. The new client of a firm in which one is "of counsel" may have to be vetted in each firm in which that lawyer may serve in that capacity. So, lawyer A, serving as "of counsel" to both Firm One and Firm Two, may receive conflict information about Firm One's new client and may have to share that information with Firm Two and its attorneys, as well. Such disclosure or conflicts screening may present problems of disclosure of confidential information to Firm Two. New ABA Model Rule 1.6(b)(7) addresses some parts of this specific dilemma, but more guidance may be needed. Limited disclosure of necessary information sufficient to determine if a conflict exists in both Firm One and Firm Two should be permitted so as to avoid placing the subject lawyer and law firms in an untenable situation which may also serve to deny a given client the right to choose counsel. Privilege issues should also be reviewed so that the information set forth in conflict disclosure in all applicable firms is not available for any purpose other than the determination of a conflict of interest. In situations which do not involve the regular and close relationship between "of counsel" and an affiliated firm, concerns regarding imputation of conflicts would probably be lessened or not exist.[4] But, otherwise, for conflict imputation purposes, care dictates that one serving as "of counsel" should be considered as serving as a member of the firm or firms with which affiliated.

Florida "Of Counsel" Fee Division

Florida's Opinion 94-7 states that fees may be shared between "of counsel" and the firm for which the attorney exclusively works without looking to the fee division rules set forth in Florida Bar Rule 4-1.5. However, working both as "of counsel" as well as in one's own independent practice would suggest required compliance with the fee division rules. It appears to meet the "exclusivity" requirement that dictates the result. In essence, a fee divided between firms must comport with the fee division rules whereas fees paid to one firm, which would include the "of counsel" with exclusive affiliation, would not. Such fees would be deemed shared in and among one firm according to its prevailing compensation arrangements. But, this analysis leaves cold the answer to the question of the "of counsel" attorney serving more than one firm. Can such attorney be deemed to be exclusively acting for all firms? Or, should the mere fact that "of counsel" serves more than one firm require the application of the fee division rules, including client disclosure and consent? Complete Florida clarity does not yet appear in this setting. Until it does, obtaining client consent should be considered when fees are to be shared between one firm and its "of counsel" attorney who also serves in such capacity in another firm or who is "independent." It has been suggested that the need for client consent and other disclosure as to the "of counsel" designation should be set out in the initial engagement letter or documents including a statement that fees will be divided between firms based on the proportion of their services.[5]

Malpractice Liability in the Florida "Of Counsel" Setting

The prevailing rule appears to be that "of counsel" is responsible for the attorney's own malpractice. Under this same prevailing or basic approach, "of counsel" attorneys are not liable for the malpractice of the affiliated firm's other attorneys. In summary, the affiliated firm is liable for its malpractice through its partners, and the partners and firm are liable for the malpractice of the "of counsel" to the extent "of counsel's" actions are taken on behalf of the firm and within the scope "of counsel's" practice within the affiliated firm. Again, the closeness of the relationship appears instructive.

According to liability carriers, the scope "test" is "pragmatic, viewed from the objective perspective of a client's reasonable expectations."[6] The question begged is whether the traditional retired former partner, now serving in an "of counsel" role, can reasonably be believed by a client to still be a principal of the firm and, therefore, vicariously liable for the malpractice of other firm members. Firm name inclusion for such a former partner strengthens the argument favoring such vicarious liability. Regardless, it appears that in all "of counsel" situations, liability analysis and clarity are important before commitment by or to the "of counsel" is made. Again, note that an "of counsel" attorney practicing exclusively for a firm should in almost all instances be covered by the firm and included on the attorney schedule for the firm's malpractice policy. In "of counsel" situations, discussion among the firms and lawyers is advisable and there may be a prioritization of multiple policy coverages in such settings.

In all "of counsel" situations, liability analysis and clarity are important before commitment by or to the "of counsel" is made.

Florida Space Sharing by or with "Of Counsel"

There should be care taken to avoid contradictory conduct for "of counsel." Counsel who does not practice exclusively with the firm with which he is "of counsel" but who maintains an office within that firm's office space, may risk appearing to be a de facto partner in that firm if proper precautions are not taken. Specifically, maintaining proper entrance designations, building directory and signage as well as clear client communications as to the relationship, will assist in preventing the "of counsel" from unwittingly being deemed part of the firm with which he/she shares space. The objective is to avoid misleading the client into mistaken beliefs about the relationship, the resources available to assist the client, the nature of the practice and the like.

Of Counsel Advertising

As with space sharing, the parties in the "of counsel" relationship should take steps to avoid misleading clients by publicity, advertising or even stationery, into thinking that the "of counsel" lawyer and the law firm are more closely aligned than they are. Public releases, statements or print or electronic media can all be misleading. Additionally, and at the risk of restating the obvious, use of letterhead or even business cards for clients regarding the role "of counsel" should be limited to "of counsel's" own stationery or cards, whereas those clients shared by the firm and exclusive "of counsel" can be furnished firm cards with the "of counsel" designation for the applicable lawyer.

Coverage Attorneys and the Of Counsel Designation

Most recently, attorneys seeking per diem work and firms looking for economic efficiencies have found common ground for coverage of motion hearings and practice (coverage counsel or attorneys limited to specific tasks and courtroom appearances). The foreclosure avalanche in Florida and elsewhere, have magnified the possibilities for use of coverage counsel and have shown such is economically feasible and desirable. But, the economic need does not change the underlying "of counsel" analysis or pitfalls which might be applied to such a relationship. The closeness and ongoing nature of the relationship would, in Florida, still govern the nature, liability, risk and compensation of attorneys taking on coverage type arrangements by using an "of counsel" designation for such a relationship. The lawyer contracting with a firm, as well the firm with which he/she contracts (e.g., for coverage at hearings for the firm's bank clients in a foreclosure setting) would still be advised to carefully and completely analyze the nature of the relationship, including the possible understanding of that relationship by the client and by the applicable court. Most recently, and anecdotally, some Florida judges have voiced concern as to responsibility and supervision of coverage attorneys at motion hearings and have questioned who is to be held accountable to the tribunal for concerns, issues and breaches of conduct.

Conclusion

While evolution of the "of counsel" designation continues, using "of counsel" agreements and supervising the content and disclosure of the relationship to both clients and among the parties engaged in the relationship will go a very long way toward addressing the above concerns and others. Contact with Bar resources is suggested, including the Florida Bar Ethics Hotline, as is familiarity with ABA Of Counsel resources. In the end, evolution does not have to breed surprise. Keep your "of counsel" close, but your "of counsel" information resources even closer.

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Endnotes

1 ABA Formal Opinion 90-357 at p. 3.

2 *Id*.

3 *See also*, Florida Bar Opinion 94-7 (April 30, 1995).

4 *See* Oregon Ethics Opinion 2005-155 (2005).

5 *See* ABA Model Rule 1.5(e) and Florida Bar Rule 4-1.5.

6 Lawyers Mutual of Kentucky, Bench & Bar, January 1999, Del O'Roark, "If It Looks Like a Parrot, Walks Like a Penguin, And Quacks Like a Duck It May Be An…"(*citing* Mallen & Smith, Legal Malpractice, 4th ed., § 5.7 "Of Counsel").

RPPTL Section Travels to Berlin

Julia L. Jennison, Partner – Lewis, Longman & Walker, P.A.
West Palm Beach, Florida

Real Property, Probate and Trust Law Section of the Florida Bar, and their family and friends, convened in Berlin, Germany, for the annual out-of-state meeting of the Section. Michael Gelfand, Chair of the Section, selected Berlin, the capital of Germany and one of its 16 states, for its historical significance. Berlin, a city full of contrasts, is certainly a city that begs you never to forget.

As Michael Gelfand noted in his introduction letter for the trip, "Berlin reveals the roots of events that shook the world for generations, and still haunts us today." As such, Michael organized a fascinating and enlightening trip focused on WWII and Cold War history - a period of time of formative significance for the entire world. Berlin was the capital of the Third Reich from 1933 – 1945, home to Adolph Hitler, the Nazis, and the location of all of the Nazi Ministries. Berlin was also one of the most predominant examples of the Cold War – not only because it has been featured in almost every Cold War spy novel and movie, but because it was the site of one of the most obvious demonstrations of the division between East and West, the Berlin Wall.

Berlin seems to stand for the atrocious things that men are capable of – and at the same time the strength of individuals and society to overcome those things. One message that seemed to come across in every tour was the fact that Berlin struggles with acceptance of and how best to address its dark past. On the other hand, modern Berlin is a city bursting with art, culture, architecture, history, politics, media and science, with a modern-day economy based on high-tech firms, IT, pharmaceuticals, biomedical engineering, clean tech, biotechnology, construction, electronics and media.

Arrival in Berlin – and tales of luggage lost . . .

Attendees arrived Tuesday night and Wednesday morning, travelling many different routes. We choose to spend a few days in London first and arrived in Berlin late Tuesday night. Others spent time in Italy, Denmark, and other locales before heading to Berlin. Unfortunately, some luggage was left on the tarmac in Atlanta and some decided to stay in Italy - for those unfortunate individuals, a bit of shopping was first on the agenda!

We all convened at The Ritz-Carlton Berlin, our headquarters for the next several days. My first stop at The Ritz was the "Curtain Club" bar which is apparently known for its exotic and creative cocktails. We had arrived late and I was hungry, so I choose to sample the local Berlin specialty, "Currywurst", or a German wurst in a spicy seemingly ketchup-based sauce. It was a delicious introduction to Berlin.

The Berlin Wall

The Ritz-Carlton, Berlin is a relatively new hotel, located in Potsdamer Platz and literally straddles the former line created by the Berlin Wall. It is situated in what was once the "no man's land" between opposing armies of the East and West (Soviets and the western allies England, United States and France).

In 1945, at the end of WWII, all of Germany was divided by the victors of the war into four sectors (United States, Great Britain, and France to the West and the Soviet Union, i.e. the German Democratic Republic ("GDR") to the east). Berlin was surrounded on all sides by the GDR. In early 1961 it was noted that large numbers of citizens were "fleeing" from the GDR via West Berlin, and a large number of East Berlin citizens worked in West Berlin. In August 1961, the boundary between East and West Berlin was cordoned off and later that year, construction of the Berlin Wall was complete, leaving only 8 access points between East and West Berlin.

Directly outside the front door of our hotel was part of the Berlin Wall Historical Mile – a photographic documentation of the evolution of Potsdamer Platz in the divided Berlin and a constant reminder that Berlin was once divided between East and West and two completely divergent political ideologies. The Wall became one of the constant themes of the tour. The other theme was the events surrounding the Third Reich reign of the Nazis.

Bus Tour to Sachsenhausen-Oranienburg

For those who had arrived early, a tour of Sachsenhausen-Oranienburg was offered for Wednesday morning. Sachsenhausen-Oranienburg is located only 22 miles north of Berlin and Sachsenhausen was believed to be the first concentration camp established by the Nazi's in 1936. This concentration camp was used primarily for "political prisoners" – a euphemism for socialists, members of the labor party, the press, and basically anyone who opposed the Nazis or who acted differently. Additionally, Oranienburg was the administrative center of all concentration camps during the Third Reich, and Sachsenhausen became a training center for SS officers. After WWII it was used as a soviet "special camp" until 1950. It is currently open to the public as a museum and a memorial, and features artwork created by some of its former inmates. This was for many of the tour participants the first "live" exposure to the horrors of WWII and Nazi atrocities.

Walking Tours of Berlin

After the bus tour to Sachsenhausen-Oranienburg, we participated in a walking tour of the area surrounding The Ritz. The weather was unseasonably warm, with bright blue skies so walking was a welcome change of pace. Our guide, Agnes,

was a wonderful resource for historical and local information. She was originally from the Black Forest region of Germany, trained in wine-making! However, she also has a love of history and provided a great deal of historical background and insight during the tour. We started out walking from our hotel and headed towards the Brandenburg Gate. During our walk Agnes pointed out to us the double row of bricks embedded in the pavement. She explained that these bricks are seen throughout the city and depict the former location of the Berlin Wall. It was during this conversation that the first reference was made to some of the difficulties faced by Berlin in dealing with the City's troubling 20th century history. Apparently there are some who would like to forget and simply build over certain elements and others who believe that there is value in remembering. It appears a great deal of thought has gone into how best to handle the issue and Berlin has found a good balance.Our first stop was at the "Field of Stelae" which is the Memorial to the Murdered Jews of Europe. Our guide explained the thought process behind the design of the memorial as well as the significance of and debate over the memorial. The Field of Stelae originated in a citizens' initiative and consists of 2711 concrete blocks of varying heights covering about a square block. The pathways between the blocks slope down and many of the blocks are 10 or 20 feet in height. The effect of the memorial is that one can get lost quite easily – and that was the designer's intent. Our guide also explained that the memorial is one "without a manual", meaning that it is open to interpretation and to utilization as the visitors desire.



Beneath the "Field of Stelae" is an extremely moving exhibition about the persecution of the European Jews. One room of this exhibition focuses on diary entries, letters and last notes that were written during the Holocaust and is almost impossible to get through without tears. Another depicts various Jewish lifestyles using the examples of 15 families; and another features an audio reading of the names and brief biographies of murdered and missing Jews from all over Europe. It was noted that to present all of the names of the victims would take six years, seven months and 27 days.

The current U.S. Embassy is located at the edge of the "Field of Stelae". From the "Field of Stelae" we continued on to the Brandenburg Gate, an 18th century neoclassical triumphal arch, and one of the best-known landmarks in Berlin, famously marking the boundary between East and West and the entry to Unter den Linden street. On the East side of the gate is the



Hotel Adlon (site of numerous Nazi events as well as where Michael Jackson dangled his infant son from the balcony). On the West side of the gate is the current governmental district and Reichstag (parliament) as well as the Tiergarten (former location of the U.S. Embassy). During the time we were in Berlin, the city was preparing for a festival to celebrate the 25th Anniversary of German Reunification and much of the city was cordoned off for those celebrations. Regardless, we still had a great tour. We continued down Linden tree-lined Unter den Linden Street passing many Soviet Era looking buildings, including the Russian Embassy. During WWII about half of all the buildings in Berlin had been destroyed by bombings. Our tour concluded at Checkpoint Charlie – known as the last outpost of the free world and scene of Cold War espionage and intrigue. Checkpoint Charlie was one of only 8 checkpoints between East and West Berlin. We learned that Checkpoint Charlie was third in a series of specific checkpoints that could only be used by members of the Diplomatic Corps, the Western Occupation forces and foreigners. The other checkpoints in the series being Alpha (at the boundary between West and East Germany) and Bravo (at the boundary between East Germany and West Berlin – due to the fact that the entirety of Berlin was located in East Germany).

We proceeded back to the hotel past another part of the Berlin Wall and the WWII Memorial and Photo Exhibit located where Hitler's headquarters had stood. The location of Hitler's most famous sites are not specifically marked. The purpose of this is two-fold, first to prevent destruction or defacement of the sites and second to prevent Neo-Nazi's or others who might idealize Hitler from turning the areas into shrines. There

is also apparently disagreement as to what can or should be built on these sites. For example, the specific location of Hitler's bunker – where he and Eve Braun committed suicide – is not marked and the entire site is covered by a parking lot.



Welcome Reception and Dinner at the Ritz

After our walking tour there was just enough time for a brief but welcome break before the welcome reception and dinner. The reception provided a selection of German hors d'ouvres, beers and wines and a great opportunity to see who was there and make some new acquaintances – and learn about lost luggage.

At the dinner, Chair Michael Gelfand, opened his welcome speech with the following quote:

> "In Germany they came first for the Communists, and I didn't speak up because I wasn't a Communist. Then they came for the Jews, and I didn't speak up because I wasn't a Jew. Then they came for the trade unionists, and I didn't speak up because I wasn't a trade unionist. Then they came for the Catholics, and I didn't speak up because I was a Protestant. Then they came for me, and by that time no one was left to speak up."
>
> (Pastor Martin Niemöller, 1945)

In his comments, Michael noted that Germany was the first country to accept the Syrian immigrants that are currently seeking protection and encouraged everyone to embrace tolerance and acceptance and return home with a renewed dedication to helping people.

We were then treated to a dinner buffet in the style of a German hunting lodge feast. We sampled goose, rouladen, schnitzel, venison stew, fish spätzle, pickled fish, caviar, potato salad, sausages and pretzels. After dinner many continued networking and socializing in the Hospitality Suite.

A Selection of Tours (Bauhaus; Jewish Quarter; Museum Island)

Since there was so much to see and do and learn in Berlin, the trip consisted of numerous optional tours. Unfortunately it just wasn't possible to take them all! We opted for the Bauhaus tour. This was a tour of the small, but very interesting Bauhaus Art Museum and "Bauhaus 101 – an introduction". We learned that the Bauhaus style originated in Germany in the 1920 and was essentially the epitome of form following function. Students of the Bauhaus style were challenged with recreating everyday items using a stream-lined and functional approach as well as utilizing recycled items. Bauhaus was also the forerunner to Frank Lloyd Wright's mid-century modern style. The most recognized name associated with Bauhaus style is that of designer and architect, Mies van der Rohe.

A walking tour of the Jewish Quarter was also offered, which provided a preview to the presentation made by Irene Schmid the following day on items confiscated from the Jews in the 1930's by the Nazis, and a visit to the re-built and re-consecrated Jewish Synagogue.



A third optional tour focused on Berlin's Museum Island and included brief tours of the *Alte Nationalgalerie*, The *Neues Museum*, and *The Pergamon*. The *Neues Museum* contains Germany's collection of 20th century art in a Mies van der Rohe structure – an icon to modernism. *The Pergamon* named after the ancient Greek city, displays the Pergamon altar and the market gate of Miletus. The people that went on this tour were exposed to a huge amount of art in a small amount of time, but commented that it was eye-opening that Germany had such a huge collection of Greek art and architectural features.

Executive Council Meeting – Speakers Irene Schmid and Rosemary Barkett

At the Executive Council meeting, after conclusion of the regular business, we were treated to two excellent speakers. The first was Irene Schmid, Michael Bedke's partner at DLA Piper LLP in Berlin. The second speaker was Rosemary Barkett, former Justice of the Florida Supreme Court, retired Judge of the United States 11th Circuit Court of Appeal, and now a member of the International Tribunal for Iranian US claims.

Irene Schmid

Ms. Schmid spoke about the role of the "notary" in real estate transactions in Germany and on the impact of the German unification for the German real estate market. Ms. Schmid's

current practice focuses on providing advice to investors and lenders in real estate transactions in Germany. In the aftermath of the German unification, Ms. Schmid previously advised numerous national and international clients in pursuing their restitution or compensation claims regarding properties unjustly deprived by the Nazi regime.



Ms. Schmid's presentation, for those on the "dirt" side of RPPTL, was quite eye-opening. In Germany a Civil Law Notary is the only one who can conduct real estate transactions. This notary, however, is nothing like a Florida Notary. In Germany, the term "Advocate Notary" specifically designates a lawyer with specialized training who is qualified to participate in real estate transactions and only one-third of German lawyers have achieved this designation. The German Notary is responsible for drafting and recording of deeds, certification of signatures, processing of notarial deeds with the German land register, and handling of escrow accounts and fiduciary orders. All parties must appear before the Notary in person, the Notary reads the entire deed out loud and explains the content of the deed and resulting obligations. Unlike Florida real estate transactions, there is no title insurance! Instead, all title is guaranteed and defended by the German government once all appropriate registration processes have been followed. The German land register addresses encumbrances and restrictions, title, charges, and property description and title to property can only be acquired via this registration process. Additionally, fees for real estate transactions are statutory and non-negotiable and are determined by the value of the transaction.

The second part of Ms. Schmid's presentation focused on the difficulties associated with restitution and compensation of properties seized by the Nazi's as well as during the Soviet occupation of East German territories. The German government had to deal with three different expropriation time frames: confiscation of Jewish property and other persecuted parties between 1933 and 1945; land reform during Soviet occupation of East German territories between 1945 and 1949; and activities of the GDR under Soviet regime between 1949 and 1990. This was further complicated by the fact that restitution was not limited to individuals suffering the original persecution, but also extended to their legal successors, who in many instances were nearly impossible to locate. Restitution and compensation occurred under different regimes, including systems initiated by the Allies, one by the German Federal Restitution Law, and in East Germany prior to reunification, by Communist traditions. There are several instances in which restitution was deemed not appropriate, including where restitution is impossible in fact, where the property was acquired in good faith by a private person, where the use of the property was changed considerably, and housing estates that spanned numerous properties. Depending on which expropriation time frame is being considered, between 84% and 99% of all claims have now been settled. It was interesting to note that on our walking tours we came across several seemingly deserted properties that were fenced off and our guide told us those could be properties that are still being sorted out for restitution.

Judge Rosemary Barkett

Judge Barkett spoke about working on an International Tribunal, International Arbitration, and Global Efforts to Expand the Rule of Law. She joined the Iran-United States Claims Tribunal in The Hague in October 2013. This tribunal was originally established in 1981, and at the time it was thought it would only be functioning for at most a couple of years. However, they are still arguing claims over 30 years later. The tribunal was established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States. While most of the claims appear to have been settled, there is still dispute over the extent of claims and specifically what constitutes Iranian assets in the United States.

WWII and Cold War Experience Bus Tour

Following the CLE presentations, we took the WWII and Cold War Experience Bus Tour. This tour took us to SA Prison Papestrasse, Airport Tempelhof, and the East Side Gallery. SA Prison Papestrasse was another example of where "political prisoners" were held early on in the Nazi regime. This was a basement prison, set up within Berlin which is thought to have imprisoned around 2,000 individuals during its operation. These 2,000 individuals were mostly opponents of the regime. The prison was only discovered in the mid-1990s and was at that time used as storage rooms for apartments above. Because it was only used for storage after the war, it was essentially left in its original state and drawings, words and dates can still be seen on the walls – written by prisoners or guards. Upon leaving the prison, the bus toured around Airport Tempelhof – which was designed to showcase the Third Reich. This airport is massive and its airstrips are currently being used as a park. The terminals are not being used and there is discussion of turning them into apartments or another museum.



The last part of this tour took us to visit the East Side Gallery which is the longest remaining stretch of the Berlin Wall (more than 1km). This section is located along the Spree River and contained the former "Protokollstrecke" checkpoint where state officials and their guests had their road between Berlin Schonefeld Airport and the downtown area. The creation and significance of the Gallery was explained to us by one of its artists, Kani Alavi. Mr. Alavi is a Persian artist who had a studio in the area in 1989. From his studio he observed the wall and the people every day. And on November 9th, 1989, shortly before midnight when the border was opened and thousands of people were gathered there, Mr. Alavi sketched what he saw – focusing on the faces of those who gathered at the border. He explained to us all of the emotions he saw there – ranging from hope and joy to fear – and he attempted to capture these emotions in his sketch. These images became the inspiration for his painting on the wall and he helped to organize the 143 artists from 20 countries who painted the original artwork on the wall. Today there is controversy on whether to allow the East Side Gallery Wall to remain. Recent construction of an upscale condominium resulted in a portion of the wall being incorporated into the condominium, but there are many who would have the entire wall removed in the name of progress. Mr. Alavi is now ironically fighting to save the wall from being torn down.

Potsdam

Bright and early Saturday morning we headed out of town for our tour of Potsdam. Potsdam was home to many of the Prussian kings and the German Kaiser. It was the site of the Potsdam Conference held by the Allies at the end of WWII at Cecilienhof Palace, and it was the site of Cold War exchanges of spies at the Glienicke Bridge (literally translated as the "bridge of spies" and made even more famous now by the recent release of a movie by the same name).

Potsdam is located north-west of Berlin (in what is formerly East Germany) and contains numerous parks and palaces and is surrounded by a series of interconnected lakes. On the way we drove along Kurfurstendamm Strasse which is called the Champs Elysees of Berlin and is Berlin's most famous shopping street. Our guide then directed the bus driver to take the former AVUS racetrack for part of the drive. This was a testing track for the motor industry and racetrack for the motor racing circuit originally built in 1921. After that we drove through dense green forests headed towards the Wannsee – which is a large lake upon which are many marinas, a beach, and many large weekend and vacation homes. During the Cold War, this forest was a popular destination for West Berliners, as it was the only natural area they could access without going through East Germany. During WWII and the Cold War many of the large weekend homes along the Wannsee were confiscated by the Nazis or Soviets. Many of the beautiful old buildings were not maintained and allowed to deteriorate. We stopped at the West Berlin side of the bridge of spies so that we could walk across into the former East German occupied portion.

At the Cecilienhot Palace, we toured through the rooms that had hosted the members of the Potsdam Conference, where Truman, Churchill and Stalin redrew the boundaries of Germany postwar. Next, we visited Sanssouci Palace where we walked through the exquisite gardens, but did not tour the Palace. We walked from the gardens up the 122 steps to our lunch destination at the historic windmill and Movenpick restaurant. Our next stop was the Neues Palais, which was constructed in the 1700's by King Friedrich II and which exhibited Baroque and Rococo elements. One of the more interesting rooms in this palace was one that was decorated entirely, floor to ceiling, with seashells, coral, and semi-precious gems. Our last day ended back in Berlin with dinner in a former bank that was constructed in the 1800's.



Tschuss Berlin (Goodbye Berlin)

As noted earlier, our trip to Berlin coincided with the 25th Anniversary of the German Reunification. To cap off the trip, some of the group wanted to experience this historic celebration and went to the festival. A huge stage had been erected at Brandenburg Gate, vendors and carnival rides were set up along the Tiergarten and the revelers partied like it was 1989 with 80's style rock music! Beer and brats were ubiquitous and it was the perfect end to our Berlin adventure and all that was left to say was "danke schoen" to Michael Gelfand for planning such an amazing trip, and "tschuss Berlin".

RPPTL Section Executive Council Meeting
The Breakers, Palm Beach
July 30 – August 1, 2015

By Erin H. Christy, Esq., Sarasota, Florida



The RPPTL Section of the Florida Bar has made a tradition of attending The Breakers Palm Beach for its July Executive Council Meeting and is building its own history alongside the storied history of the legendary oceanfront resort.

This year the Florida Bar Young Lawyers Division established a Health and Wellness initiative to bring awareness to the mental and physical stress often associated to the practice of law. The RPPTLs continue to do their part to promote the health and wellness of its members by kicking of Thursday, Friday, and Saturday mornings with a RPPTL Run/Walk Club. The group continues to expand each meeting and we welcome you all to join the movement at the next one! The Breakers provided another alternative with a 7:00 a.m. yoga class on the Ocean Front lawn, which was as beautiful as it sounds.

Meetings kicked off at 7:30 a.m. Thursday morning. Over thirty committees convened to get their work accomplished Friday in order to leave plenty of opportunity to attend the 35th Annual Legislative & Case Law Update Thursday morning and afternoon. Following a busy day of meetings, we found ourselves in the glow of elegant chandeliers and lively conversation during the welcome reception held in the Venetian Ballroom overlooking the Atlantic Ocean. JP Morgan and Old Republic National Title Insurance Company sponsored the event and gave their time to discuss the many ways our members and their organizations work together to accomplish goals for our clients.

Lawyers from around the state were up bright and early Friday morning to attend the Annual Legislative & Case Law Update sponsored by Attorney's Title Fund Services, LLC. Seminar attendees enjoyed eighteen different topics ranging from legislative updates, to landlord tenant issues, and health care surrogates. During breaks, attendees had the opportunity to meet with exhibitors that support our practices and the RPPTL Section.

Friday evening returned us to the stately Venetian Ballroom for a reception sponsored by Wells Fargo Private Bank and dinner sponsored by First American Title Insurance Company and Regions Private Wealth Management. Both the reception and dinner highlighted the irresistible charm of The Breakers in ambiance and service.

Post-RPPTL Run, members came together for the Probate Roundtable and Real Property Roundtable to prepare for the Executive Council Meeting held from 10:00 a.m. to 2:00 p.m. Thank you to The Florida Bar Foundation for sponsoring and reminding us that access to justice is a constant struggle for many throughout our state, and for encouraging us to become Fellows of the Foundation.

Saturday evening we broke out our bowling shoes and hit the lanes for good old-fashioned family fun at Revolutions bowling alley.

There is a meeting of the Executive Council scheduled for February 2016 at the Marriott Tampa Waterside. We encourage our Section members to join us. As always, the committee meetings schedule will be posted on the RPPTL website.

RPPTL Section Executive Council Meeting
The Breakers, Palm Beach, Florida
July 30 –August 1, 2015

CLE on Trust Protectors by Jamie Schwinghamer during the Probate & Trust Litigation Committee meeting



View of Executive Council meeting attendees from the podium



Real Property Case Updates with Michael Gelfand



Executive Council members and Florida Bar staff assisting with Legislative Update registration





Gerard and Nancy Flood celebrating their 50th Wedding Anniversary at The Breakers



Chair Michael Gelfand surrounded by mom and spouse and his firm's attorneys and staff at the Thursday evening reception



Bill Hennessey and Rob Freedman Ethics discussion at the Legislative Update Seminar



Thomas Karr, Past Chair, Michael Dribin and Lanse Scriven, visiting member from the Board of Governors of the Florida Bar, during the Thursday evening reception



Three of our illustrious past Section Chairs: Louis Guttmann (2003-04); Roger Isphording (1990-91) and David Brennan (1987-88)

Photos by: Michael Gelfand, John Neukamm, Robert Freedman, Silvia Rojas, and Brenda Ezell

RPPTL Section Executive Council Meeting
The Ritz Carlton, Berlin, Germany
September 30 – October 4, 2015

To see more photos, log into **www.rpptl.org**



Richard Taylor, Brenda Ezell and Judge Rosemary Barkett at the Wednesday Welcome Reception



George and Joan Lange at the East Side Gallery in Berlin with artist Kavi Alavi



Enjoying Saturday dinner at Gendarmerie Restaurant in Berlin



The RPPTL Section members and families at the Grand Staircase, Ritz Carlton in Berlin



Group photo at the Bauhaus Museum



Jim Russick checking out the grapes at the Sanssouci Palace



Michael Gelfand with Mary Arpe, Sarah Gelfand and William Traylor at Gleinicke Bridge (Bridge of Spies) outside Potsdam



Bill Parady and Salome Zikakis in traditional German garb at Wednesday evening welcome reception

Roundtables

Saturday, August 1, 2015
The Breakers
Palm Beach, Florida

Prepared by Jennifer Jones Bloodworth., Esq., Winter Park, Florida, and Jeffrey A. Baskies, Esq., Boca Raton, Florida

The following briefly identifies for future reference some notable presentations at the Division Roundtables.

Highlights of the Meeting of the RPPTL Section
PROBATE AND TRUST DIVISION
Roundtable

Thank you to the Roundtable Sponsor:
Stout Risius Ross, Inc.

The Director of the Probate and Trust Law Division of the Real Property, Probate and Trust Law ("RPPTL") Section of the Florida Bar, Debra Boje, called the meeting to order at 8:00 am.

Sponsor Announcement. The Division Director acknowledged the sponsor of the Roundtable meeting, Stout Risius Ross, Inc., which has been a sponsor of the Section for many years. Stout Risius is one of the largest business valuation companies in the nation.

Recognition and Introductions. The Division Director extended her welcome to guests present at the Roundtable, Judges present, Section Fellows, and new Council members.

Standing Committee Reports

Homestead Issues Study Committee - Shane Kelley, Chair with Patricia Jones: Shane Kelley reported spending a great deal of time in front of the Section's Real Estate Division members to ensure everyone is comfortable with how the proposed new homestead statute impacts homestead property.

The issues addressed by the proposed changes are: whether the exemption from forced sale under Article X, Section 4 of the Florida Constitution inures to homestead heirs who either receive the homestead property outright, as a beneficiary under decedent's revocable trust, or as beneficiaries of ongoing or continuing trusts created under the decedent's revocable trust; and secondly, the timing and method of passage of title to the homestead property. Also covered as between a trustee or the beneficiaries, who has the right to sell the property and who is responsible for paying the expenses associated with the homestead property during the initial trust administration. The proposed legislation recognizes the homestead heirs' exemption from forced sale, protects the trustee who expends

See "Probate & Trust Division," next page

Highlights of the Meeting of the RPPTL Section
REAL PROPERTY DIVISION
Roundtable

Thank you to the Roundtable Sponsor:
Fidelity National Title Group

The meeting was called to order by Division Director, Drew O'Malley, shortly after 8:00 a.m. on August 1, 2015.

Sponsor Announcement. The Division Director thanked the sponsor, Fidelity National Title Group.

Introduction of Guests. Past Chair, Melissa Murphy, introduced some underwriting counsels of The Fund who were in attendance.

Action Items

Real Property Litigation Committee - Susan K. Spurgeon, Chair: Susan discussed three different legislative proposals and asked the Division to approve motions to support such legislative proposals. The first proposal related to a glitch bill involving certified copies and e-filing with the courts. The bill would simplify the process of authenticating items that are readily available to the judiciary. The Division unanimously approved the motion in support of this proposed legislation. The second proposal related to clarifying that Sec. 95.281, F.S., is a statute of repose and other related items. The only change since the previous meeting at which this proposal was already approved, was to change the effective date to be "upon becoming law." The Division unanimously approved the motion in support of this proposed legislation. The third proposal related to changes to Sec. 57.011, F.S. (repeal the non-resident cost bond) and Sec. 559.715, F.S. (amend assignment of consumer debt notice). The only changes since the previous meeting at which this proposal was already approved were to broaden the application to all debt collections and change the effective date to be "upon becoming law." The Division unanimously approved the motion in support of this proposed legislation.

See "Real Property Division," next page

PROBATE & TRUST DIVISION

trust assets to conserve the homestead real property, and provides for specific rules regarding the passage of title to homestead property devised by the terms of a revocable trust upon the death of the settlor of the trust.

The new provisions in the statute also aim to address conflicting case law on the inurement of homestead protections when property is inherited by heirs via trusts. The case law resulting in conflicts of law concerning title of homestead in a revocable trust are: *Elmowitz v. Estate of Zimmerman*, 647 So. 2d 1064 (Fla. 3d DCA 1994); *HCA Gulf Coast Hospital v. Estate of Downing*, 594 So. 2d 774 (Fla. 1st DCA 1992); and *Engelke v. Estate of Engelke*, 921 So. 2d 693 (Fla. 4th DCA 2006). The key issue was whether the exemption would inure or not and the proposed statute will clarify that it will inure to the extent the trust beneficiaries are "heirs."

The proposed statutory changes clarify that a power to sell the property, as opposed to a direction to sell the property, does not cause the homestead to lose its creditor protection. Lastly, the new proposed statute provides a method for the trustee to obtain a determination of homestead and to lien the property (if necessary). The proposed statute should be effective July 2016 if it passes. The Executive Council subsequently approved the proposed legislation with an effective date of October 1, 2016. It would apply prospectively only.

The Division Director asked for a show of hands as to support for the proposed legislation and an overwhelming majority supported the proposal .

NOTE: the Executive Council subsequently approved unanimously the proposed legislation.

Committee Reports

Estate & Trust Tax Planning Committee – David Akins, Chair: Rick Gans reported on the tenancy by entirety ("TBE") legislation. The proposed statute (likely to be Sec. 689.151, F.S.) is intended to eliminate the need for the unities of time and title in transferring title to personal property to the TBE. The statute provides numerous exceptions wherein the statute does not apply, such as when the banking statutes apply. Also, common law still controls to the extent an issue is not addressed by the statute. The statute will probably be prospective in application only and effective July 1, 2016.

Probate & Trust Litigation Committee - Jon Scuderi Chair: Jon Scuderi reported on revisions to Sec. 736.0802(10), F.S. This statute relates to when and how a trustee can use trust assets to pay for his defense in a breach of trust claim. The revisions to the statute intend to clarify various aspects of the process already codified under Sec. 736.0802, F.S. Specifically, the revisions aim to clarify the circumstances under which the statute applies and the notice requirements that the trustee

See "Probate & Trust Division," next page

REAL PROPERTY DIVISION

Ad Hoc Community Association Estoppel Committee - Melissa Murphy, Chair: Melissa explained that the Committee was formed to determine if there were revisions to Sec. 718.116, F.S., to which the RPPTL Section could agree to support in light of the failure of SB 736 to pass last year (given the short (sine die) end of the legislative session). The Committee focused on addressing concerns with the form and terms of community association estoppel letters and whether to re-submit the same bill or work to improve it. After working with FLTA, the Committee determined that the Section should take this opportunity to modify the prior bill.

The Committee proposed to submit legislation that will: (1) clarify the process of requesting and providing estoppel certificates; (2) set forth the content of and template for estoppel certificates; (3) provide that estoppel fees will be paid at closing and shall be a condition for delivery; (4) establish a 30-day effective period for certificates; (5) provide the ability to correct certificates when additional information arises; (6) set a cap on fees for preparation and delivery of certificates, but said cap will apply only when the seller is current on its account; and (7) establish a 10 business-day deadline for certificates to be provided and substantive consequences if not provided within 15 days.

The Committee sought the Division's approval of these concepts and moved for approval to work directly with the Executive Committee in order to finalize legislation in time to submit for the 2016 legislative session. The concepts were approved and the motion was unanimously approved.

Homestead Issues Study Committee - Shane Kelley, Co-chair with Patricia Jones: Shane reported on the Committee's Motion to amend Sec. 736.0103 and Sec. 736.0201, F.S., regarding homestead property held in revocable trusts and proposed an amendment to the motion.

Shane summarized the history of the issues on which the Committee has been working for the past four years. He detailed how homestead issues are issues in the probate setting, how estate and trust lawyers try to handle the issues through drafting trust agreements, and some of the inconsistent court rulings that have left estate and trust lawyers with little direction on how to protect the homestead while placing it in a revocable trust. The goal of the proposed legislation drafted by the Committee is to align how homestead is treated when placed in a revocable trust with how it is treated through the probate process. The legislation would also give trustees standing to appear in probate court to obtain homestead determination orders. The effective date would be July 2016. The Committee feels that this legislation is in line with the strong public policy of upholding the Florida Constitution's

See "Real Property Division," next page

PROBATE & TRUST DIVISION

is required to follow. The revisions do not change the public policy or substance of the existing statute.

Probate Law & Procedure Committee - John Moran, Chair: John Moran asked Patrick Mize to review the changes to Sec. 731.106, F.S., having to do with the disposition of Florida real property owned by a non-domiciliary. Patrick explained that the revised statute will take effect July 1, 2016. The revisions aim to clarify that Florida law applies to Florida real property (even when it is owned by a non-domiciliary) whether or not the decedent dies testate or intestate.

Trust Law Committee - Angela Adams, Chair: Angela Adams reported on changes to Sec. 736.0708(1), F.S., clarifying the law on trustee fees when multiple trustees are serving. Under the proposed new statute each trustee is entitled to reasonable compensation and the total amount charged as between multiple trustees can be more than what is considered reasonable for just one trustee. Under the *West Coast Hospital* case multiple trustees were required to share one fee, unless special circumstances existed. The proposed amendment to the statute would clarify that multiple trustees may receive more than a single fee.

Digital Assets and Information Study Committee - Eric Virgil, Chair: Eric Virgil reported on the Committee's work in drafting a Florida Digital Assets Act. The Committee amended the proposed Florida Act to reconcile it with the revised Uniform Act. Consequently, the new proposed Act will permit the principal to designate a person to access electronic information and will be required to specify the designated person with the provider or web/internet source. The designated person noted with the provider or web/internet source will control over any specification in the principal's estate planning documents or power of attorney.

Eric confirmed that the Executive Council approved the proposed Florida Act last year with regard to the overall concept. Now the Committee needs to align it with the revised Uniform Act (as it determines appropriate) and then it will present it as an information item and have the Executive Committee review the revised proposed Florida Act, and have it voted on at one of the next Executive Council meetings.

Elective Share Review Committee - Lauren Detzel and Jack Falk, Co-Chairs: Lauren Detzel reported that the Committee started drafting the legislation. There are some final issues that the Committee would like input on: 1) homestead changes that Shane Kelley and his Committee have been working on; 2) attorneys' fees awards in elective share proceedings; and 3) how to deal with income that is part of the estate and various asset valuation issues (i.e. whether the elective share should consider income received by the estate during the administration period and/or increases in the value of assets

See "Probate & Trust Division," next page

REAL PROPERTY DIVISION

goals of protecting families and homestead property.

An objection was raised and a motion was made to remove the provision vesting property in the protected homestead heirs immediately at the moment of death when the trust calls for outright distribution to them. Concerns with the effective date were also raised.

A lengthy discussion followed about the proposed legislation and the proposed amendment to the proposed legislation. The motion to amend the proposed legislation failed. The motion to approve the proposed legislation passed. The Executive Council subsequently approved the proposed legislation with an effective date of October 1, 2016.

Information Items

Condominium & Planned Development Committee – William P. Sklar Chair: Bill reported on possible amendments to Sec. 48.23, F.S., regarding the question of a limited super priority lien for condominium association assessments.

Bill noted that this is in reaction to a history of associations suffering because of lenders' failure to foreclose quickly, resulting in associations not receiving assessments timely, and, in turn, not being able to maintain common elements. Some members of the Committee feel that the safe harbor provisions are not sufficient to offset association losses, because the association has the right to get paid only after the lender completes a foreclosure and takes title. The proposal discussed by Bill would, in part, provide the association with a "super lien priority" for up to nine (9) months' worth of assessments so long as the association complies with certain requirements. Bill acknowledged there was no consensus in the Committee, so the subcommittee working on this issue is reviewing other alternatives to resolve association concerns, while still protecting lenders. The Committee wants the Section to take an innovative leadership role in addressing this problem and was looking for general feedback as to whether the Division would be receptive to a super lien priority statute.

Discussion was had about various alternatives and concerns (such as how to handle homestead properties, lender reactions, and federal agency approvals of the super lien priority status). The Real Property Finance & Lending Committee shared that it was not in support because they felt now was not the time, given that the foreclosure crisis is winding down. Several members disagreed, looking to this legislation to help avoid problems that may arise in future crises. This issue, along with the input from the discussion at the Division Roundtable, will continue to be analyzed by the Committee.

Title Issues & Standards Committee - Christopher Smart, Chair: Chris presented some concerns raised by the court in *Hess v. Patrick*, 164 So.3d 19 (Fla. 2d DCA 2015), which addressed

See "Real Property Division," next page

PROBATE & TRUST DIVISION

during the probate, or whether the elective share amount should carry interest, particularly if a proceeding is unduly prolonged). On the issue of adding income to the elective share, there was concern regarding jeopardizing the marital deduction. Shane Kelley then raised some concerns regarding homestead issues with elective share. Based on different factual scenarios, there could be significant disparity when it comes to satisfying the elective share depending on how the homestead is titled: when spouse either has a life estate interest, or, alternatively, elected to take the half interest in the homestead as a tenant in common; or when the homestead is titled as TBE. Depending on the overall size of the estate and the proportionate value of the homestead, satisfaction of the elective share can result in significant disparities.

Information Items

Ad Hoc Florida Leadership Academy - Brian Sparks, Chair: Brian informed the Roundtable attendees that the Leadership Academy is intended primarily for lawyers who are about two to three years into their practice (really up to five years out from school, but primarily for new attorneys). It was designed to enhance leadership skills in new lawyers; to nurture and inspire leadership in the community and within the Florida Bar. In support of this effort, the Executive Committee passed a motion several years ago to provide for a stipend to fund the ability of two lawyers from the RPPTL membership to attend the Leadership Academy (the stipend is for $3,500 for each lawyer).

Estoppels Relating to Condominiums and Title Insurance (Action item from the Real Estate Section): Special Guests, Steve Mezer and daughter Amanda from the Real Estate Division presented information regarding SB 736 which was put together by condominium interest groups. It sets forth a standard procedure for requesting an estoppel from a condominium prior to a real estate closing, as well as a standard form for title agents to utilize in connection with estoppel letters.

Adjournment

The next Probate and Trust Law Division Roundtable meeting will be held at 3:00 p.m. on Friday, November 13, 2015 at the Boca Resort, Boca Raton, Florida. There being no further business to be discussed, The Division Director adjourned the Roundtable meeting at 10:00 am.

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REAL PROPERTY DIVISION

the statute of limitations for foreign judgments. The opinion is concerning for two reasons. First, the court held that out-of-state judgments were subject to Florida's 20-year statute of limitations instead of the home state's five-year statute of limitations. The current Title Standards provide that the controlling statute of limitations is the shorter of Florida's *or* the home state's statute of limitations. The second concern is that the court appears to indicate that not only the judgment, but also the validity of the lien, was valid for 20 years without reference to the recording requirements set forth in Sec. 55.10, F.S.

Chris requested that the Division support a motion to file an *amicus* brief. The *amicus* would argue that: (1) the shorter of Florida or the home state's statute of limitations would apply to foreign judgments; and (2) the foreign judgment is subject to the requirements and limitations set forth in Sec. 55.10, F.S.

With respect to the Title Standards, Chris asked the Division to approve the following: (1) the revisions to Title Standards 1.1 (POA for Deed) and 1.3 (Authority to Convey); and (2) new Title Standards 1.4 (using POAs for Homestead Mortgage), 1.5 (POA Non-Homestead Mortgage), 3.7 (After Acquired Title); 3.8 (Conveyance Without Consideration), and 3.9 (Certain Defects Cured).

A Committee motion was made for the Division to approve the revisions to the existing standards and to approve the new standards and, then, to present them for approval at the next Executive Council meeting. The motion passed.

Committee Reports: None

Meeting adjourned: 9:48 a.m.

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"What Is Your Authority?" -- The Answer Is Found In the Revisions to Section 49.31, Florida Statutes

By Roland D. Waller, Esq., Waller & Mitchell, New Port Richey, Florida
Michael A. Bedke, Esq., DLA Piper LLP, Tampa, Florida

"Counsel, please cite what authority the Court has to appoint a guardian ad litem for unknown heirs? Unless you can provide the Court with statutory authority to appoint a guardian ad litem for unknown heirs, your motion is denied." The foregoing ruling by a judge in Pasco County was the genesis of House Bill No. 775 ("HB 775") which revised Sec. 49.31, Florida Statutes.

Until the enactment of HB 775, there was no statute that specifically authorized a court to appoint an ad litem to protect the rights of persons who have been constructively served. As a result of the lack of such specific authority, there was inconsistency among the courts. Some courts appointed ad litems, while other courts refused to do so. The inability to obtain the appointment of an ad litem affected the sufficiency of certain legal proceedings, particularly those involving real property, such as quiet title actions and foreclosures. Accordingly, the lack of an ad litem could impair the marketability of real estate titles at the conclusion of such litigation.[1]

Good public policy ensures that litigants be afforded due process -- the opportunity to be heard and that the process be fundamentally fair. If a court proceeding doesn't meet those standards, the ultimate ruling can be challenged.

Especially in real property and probate matters, such as a quiet title action or when determining heirs and creditors in probate, a court's ruling may bind people who are unknown and therefore cannot be personally served in the case. As a result, such persons are served constructively by publication, rather than personally. Some of the unknown parties may be minors, incompetent, or under some other legal disability. Often, an attorney will evaluate the situation and the risks of subsequent challenge and ask the court to appoint an administrator ad litem, a guardian ad litem and/or an attorney ad litem to protect the interests of military service members, minors, incompetent or unknown parties. In other instances, a court, on its own motion, might appoint ad litems. Such appointments have historically been viewed by some as being within the inherent authority of the court. However, certain trial courts have reached the opposite conclusion.

In light of various Florida statutes expressly mandating or permitting the appointment of ad litems in some contexts/cases, some courts have concluded that absent express statutory authority to appoint an ad litem, the court lacks inherent authority to appoint ad litems — even in cases where the court thought it otherwise appropriate to do so.

This resulted in a lack of clarity and consistency, often resulting in judicial challenges to cure title defects or remove a cloud on title. HB 775 was intended to reduce the cost of litigation and reduce judicial delays arising from the confusion as to whether a court may appoint an ad litem to protect the rights of persons not served personally.

Due to the lack of existing statutory authority for the appointment of ad litems, the proposed legislation seeks to eliminate any question as to the sufficiency of prior legal proceedings in which courts have nevertheless appointed ad litems.

The new legislation will provide much needed by granting the court specific authority to appoint an ad litem. This statutory change is important to protect the rights of people who may otherwise have their rights extinguished without having been personally served with notice in connection with proceeding. The revision to the statute's title reflects the addition of the ad litem authorization provisions in order to ensure due process, reduce delays, decrease litigation costs and otherwise support judicial efficiencies.

The authority for the appointment of an ad litem is now expressly provided for in Sec. 49.31, Florida Statutes, which authorizes the appointment of an ad litem if there is no personal representative, guardian of the property, or trustee serving for the party. The statute sets forth the duties of the ad litem to report if there is a personal representative, guardian, or trustee serving to represent the party. The law requires the ad litem to make reasonable attempts to locate the spouse, heir, devisee, or beneficiary of the decedent, and report to the court the name and address of any such person whom the ad litem locates. Furthermore, it requires the ad litem to petition for discharge as to any interest of the person located. The ad litem should be discharged in the final judgment or as otherwise ordered by the court. The fees for the ad litem are to be paid by the party requesting appointment of the ad litem. The ad litem is not required to post a bond. The statute also has a saving provision for any previous ad litem appointed without express statutory authority.

Endnotes

1 *Shada v. Title & Trust Co. of Fla.*, 457 So. 2d 553 (Fla 4th DCA 1984).

Spotlight on the Fellows

By E. Ashley McRae, Chair; Benjamin Diamond, Co-Chair; Joshua Rosenberg, Co-Chair

We are happy to report our 2015 Fellows, after only one Executive Council meeting, are well on their way to becoming active and contributing members of the Section. Here is just a summary of their activities. They are looking for more opportunities to get involved, so we would encourage you to reach out to them and assign some committee projects.

2015 Fellows

Stacy Rubel

Stacy is involved in the Section's Probate and Trust Law Division. She has joined multiple committees, including, Probate & Trust Litigation, Probate Law & Procedure, and Guardianship, Power of Attorney & Advance Directives. Stacy presented a case law update at the last Guardianship, Power of Attorney & Advance Directives Committee meeting at the Breakers. Additionally, she is involved in two subcommittees in Guardianship: (i) one on a possible conflict in the statutes relating to reports from the examining committee and mandatory dismissal of guardianship proceedings and (ii) the other on whether or not to raise the amount of net proceeds received by a minor necessitating a guardianship. As to special projects, she is working with Hung Nguyen on a guardianship article for The Florida Bar Journal on the changes in guardianship law.

Jennifer Grosso

Jennifer is involved in the Section's Probate and Trust Law Division. She will be working on a presentation for the Trust and Estate Symposium to be held in the spring, which is put on by the Probate and Trust Litigation Committee. She will also be preparing the case summaries for ActionLine in the spring.



Chris Sajdera

Chris is involved in the Section's Real Property Division. Chris has volunteered to participate in a newly formed subcommittee of the Membership & Inclusion Committee, with the goal of implementing a mentorship program for young lawyers. He is also seeking to get involved in a special project for the Condominium & Planned Development Committee and has already reached out to start that assignment. Chris will be preparing case summaries and a practice tip for the spring edition of ActionLine.

Bridget Friedman

Bridget is involved in the Section's Real Property Division vision. She is a member of the Real Property Litigation Committee and Title Insurance & Title Insurance Liaison Committee. Bridget is also on a subcommittee of the Real Property Litigation Committee which has been charged with revising the statute of repose. She has also volunteered to help in a subcommittee of the Membership & Inclusion Committee to evaluate the 4 videos that are posted to the website and to make recommendations as to their existence and placement on the website.

2014 Fellows

Our 2014 Fellows also continue to get more involved in the Section as they wrap up their final year of the Fellowship.

Melissa VanSickle

Melissa is involved in the Section's Real Property Division. She has been appointed as Vice Chair of the Legislation & Government Regulation of Lending Subcommittee, is a member of the Real Property Finance & Lending Committee and is working to develop a reporting form and spreadsheet for tracking the status of all proposed legislation. She is also spearheading the tracking of all reports due from subcommittee members to integrate into a master spreadsheet. Melissa is also involved with the Membership Communication Subcommittee of the Membership & Inclusion Committee, which is in the process of developing a marketing and communications action plan pending consideration by the Executive Council. She has also volunteered to assist with the Mentoring Subcommittee of the Membership & Inclusion Committee, which was just recently formed.

Julia Jennison

Julia is involved in the Section's Real Property Division. She is a member of the Development and Land Use Planning Committee and is co-chairing with Anne Pollack to assemble a series of CLEs on the impact of rising sea levels on real property law. Julia has also prepared a summary of the Executive Council meeting in Berlin for ActionLine.

Michael Sneeringer

Michael is involved in the Section's Probate and Trust Law Division. Michael is part of a subcommittee making changes to Florida's fraudulent transfer statute. He is also reaching out to law students as part of his work with the Membership & Inclusion Committee and is currently serving as the liaison to St. Thomas University School of Law. Michael has assisted the Estate & Trust Tax Planning Committee by taking minutes.

John Costello, Jr.

John is involved in the Section's Probate and Trust Law Division. He is a member of the Guardianship, Power of Attorney & Advance Directives Committee and a member of the Subcommittee on Attorneys' Fees for Court Appointed Attorney for the Ward. John is scheduled to present to the Guardianship, Power of Attorney & Advance Directives Committee information regarding the formation of a new subcommittee. Recently, he was an "App-Champion" at the Attorney/Trust Officer Liaison Conference at the Breakers.

In Conclusion

We would like to remind everyone that the Fellowship Program is accepting applications starting on January 1, 2016. We would greatly appreciate if all members would encourage those who are eligible to apply. Feel free to reach out to the Fellows Chair (E. Ashley McRae, amcrae@foley.com or 813-225-4143) and Co-Chairs (Benjamin Diamond, bdiamond@wdclaw.com or 727-398-3600 and Joshua Rosenberg, jrosenberg@mrthlaw.com or 305-670-5000) if you have any questions.

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Reptiles Strike Again! Report on the RPPTL Section's Law School Outreach Program

By Annabella Barboza, Esq.,
Phelan Hallinan Diamond & Jones, PLLC, Fort Lauderdale, Florida

The Membership & Inclusion Committee of the Real Property, Probate and Trust Law Section continues to work energetically towards its initiative of promoting student affiliate membership and affirming its commitment towards diversity and inclusion through its Law School Outreach Program.

During the Fall 2015 semester, many events and activities sponsored by the RPPTL Section took place at several law schools throughout the State of Florida:

North Florida

On September 16, 2015, the **Jacksonville Bar Association** presented an Environmental and Real Property Law CLE Seminar (Title Issues and Brownfield Sites: Key Tools for Developers and Lenders; Working with the City). The Section was represented at this event by Christene M. Ertl who gladly volunteered her time to promote the RPPTL membership benefits and materials among students and attorneys who attended the event.

On September 21, 2015, Lynwood Arnold and Sarah Butters hosted an Eat-N-Educate event at **Florida State University College of Law**. The event was co-sponsored by the FSU Estate Planning and Elder Law Society and the FSU Real Estate Law Society. It was enthusiastically attended by law students who had an opportunity to learn how the Section can be a helpful resource to law students soon transitioning into the practice of law.



Lynwood Arnold, law student Cassandra De Coste, her daughter (and future Section Member!) Aurora, law student Michael Hoffman, and Melissa VanSickle, at the Fish Fry

On October 6, 2015, the Section sponsored the 4th Annual Fish Fry CLE event presented by the **Tallahassee Bar Association** and **FSU**. Melissa VanSickle and Lynwood Arnold represented the Section at this event, which was held at FSU with a very good attendance of law students.

Central Florida

On May 26, 2015, Kathrine Lupo hosted a Roundtable event at the **Thomas M. Cooley Law School,** Tampa Bay Campus, which was very-well attended. Anne Pollack, Phillip Baumann, Tara Rao and Robert Walton participated in the event and engaged in one-on-one discussions with law students about their practice experiences and the Section's membership benefits.

On September 14, 2015, Roger Larson hosted an Eat-N-Educate event at **Stetson University College of Law**, which was attended by about 40 law students. After a brief presentation on the Section's benefits and organization, the law students had an opportunity to ask numerous questions about the Section meetings, student membership, and the practice of law.

On November 3, 2015, John B. Grandoff, III made a presentation on Land Use and Development at the Eat-N-Educate event at **Stetson University College of Law**, Gulfport campus. Jason Ellison coordinated the event which was co-sponsored by the Stetson Real Property, Probate and Trust Law Student Association. The 35 attending law students had an opportunity to discuss current topics and trends in land use cases.

South Florida

Kymberlee Curry Smith, former RPPTL fellow, and Annabella Barboza organized the Eat-N-Educate events for the South Florida law schools. Members of the Executive Council, both Real Property and Probate Divisions, were invited to share with law students information about their practice areas, their experience working in the Section, and to provide career advice for students transitioning into the practice of law. The law schools' career services departments and minority law student organizations welcomed and co-sponsored the RPPTL's initiative.

On August 27, 2015, the RPPTL Eat-N-Educate event took place at the **Florida International University College of Law**. The Honorable Richard J. Suarez - Chief Judge of the Third DCA, Silvia B. Rojas, and Hung Nguyen participated in this event that was attended by 32 law students. The event was co-sponsored



Kymberlee Curry Smith, Silvia B. Rojas, Hung Nguyen, Honorable Richard J. Suarez, and Annabella Barboza

by the FIU Hispanic Law Student Association, the H.T. Smith Black Student Association, the FIU Caribbean Student Bar Association, and the FIU Real Property & Trust Law Society.

On September 24, 2015, the RPPTL Eat-N-Educate event arrived to the **University of Miami School of Law** just in time for the students' lunch break. The Honorable Celeste H. Muir, Marjorie E. Wolasky, and Ann B. Spalding were the guest speakers addressing an audience of 25 law students. This event was co-sponsored by the UM Association of Caribbean Law Students, UM Asian Pacific American Law Students Association, UM Black Law Students Association, UM Hispanic Law Students Association, and UM Real Property Probate & Trust Law Society. The event was also promoted through UM School of Law's social media (Facebook and Twitter).



Back row: Asst. Dean of UM Law School Marcy Cox, Kymberlee Curry Smith, Annabella Barboza Sitting: Honorable Celeste H. Muir, Ann B. Spalding and Marjorie E. Wolasky



UM Law Students

On October 22, 2015, the RPPTL Eat-N-Educate event returned this year to **St. Thomas University School of Law**. The panel of speakers was led again by the Honorable Norma S. Lindsey, this time joined by Jonathan A. Galler and Sean M. Lebowitz. The event was very well attended by 57 law students. The event was co-sponsored by the STU Hispanic American Law Students Association, STU Black Law Students Association, STU Caribbean Law Students Association, and STU Real Property Probate & Trust Law Student Association.



Honorable Norma S. Lindsey at St. Thomas University School of law

On November 19, 2015, the RPPTL Eat-N-Educate was welcomed back this year to **Nova Southeastern University Shepard Broad College of Law.** The 22 attending law students were inspired by the Section's work and the invaluable career advice they received from Margaret A. "Peggy" Rolando, Manuel Farach, and Tattiana Brenes-Stahl, the guest speakers. This event was co-sponsored by NSU Real Property Probate & Trust Law Society, NSU Tort Law Society, and NSU Caribbean Law Student Association whose representatives made warm welcoming remarks at the beginning of the event. The students had an opportunity to learn more about the Section's organization and website and engaged in discussions about the current real estate and probate practice.



Tattiana Brenes-Stahl, Manuel Farach and Margaret A. "Peggy" Rolando at NSU



NSU law students

The feedback received from law students who attended these RPPTL events has been overwhelmingly positive. Many of them became Section affiliate members at the event and started attending the Section's meetings and networking with local Section members in the areas of practice of their interest; a couple of them even obtained internships right after the RPPTL event!

The Section's events organized through its Law School Outreach Program continue to capture law students' interest as it proves to provide invaluable career advice to law students throughout the State of Florida. These events promote a conversational atmosphere for students to network with local members and discover the many benefits the Section's activities may provide to their future practice of law.

Career Coaching Program

Committee members Phil Baumann and Guy Emerich lead the Career Coaching Program which combines mock job interviews and resume critique sessions for law students. On October 27, 2015, Jennifer Bloodworth joined Phil and Guy for mock interviews that took place at **Barry University School of Law**. Approximately 30 students participated. Some were 1Ls just beginning to learn how to prepare for a law job interview. Some were 2Ls preparing to interview for summer associate positions, and some were 3Ls hoping to polish their already practiced interviewing and resume creating techniques for their first job as a lawyer after graduation. Each interview was followed by a critique session between the interviewer and interviewee. The students unanimously expressed their gratitude for such remarkable experience.

The Membership & Inclusion Committee recognizes the significant contribution given by those members who volunteered their time to inspire the future generations of Section attorneys. Also, special thanks to Shane Kelley, ALM Director, for providing a great pool of speakers for the events, and to Bill Parady, Member Communications & Information Technology Committee Chair, for promoting the law school events in the Section's social media (Facebook & Twitter).

For additional information about the upcoming events and activities of the Law School Outreach Program, please contact Lynwood Arnold or Jason Ellison, Co-Chairs of the Membership & Inclusion Committee.

The following is an email from a law student who participated in past mock interviews:

Dear Mr. Emerich,

I was lucky enough to have met you back in November 2013 at a Real Property, Probate, and Trust Law meeting in Sarasota. You had conducted a mock interview with me, which I found to be very helpful. I have graduated from the Ave Maria School of Law and am working on my LL.M. at the University of Miami in estate planning.

I wanted to reach out to you and ask if RPPTL will be conducting mock interviews again. I have talked to other students in the LL.M. program and have expressed to them how helpful the mock interview process was. They would be interested in participating in any future mock interviews with RPPTL if they are holding any. I also highly recommended they attend a meeting and become involved in RPPTL too.

Hope you have an enjoyable weekend and I look forward to hearing from you soon!

Kind regards,
Tina Marie Soriano

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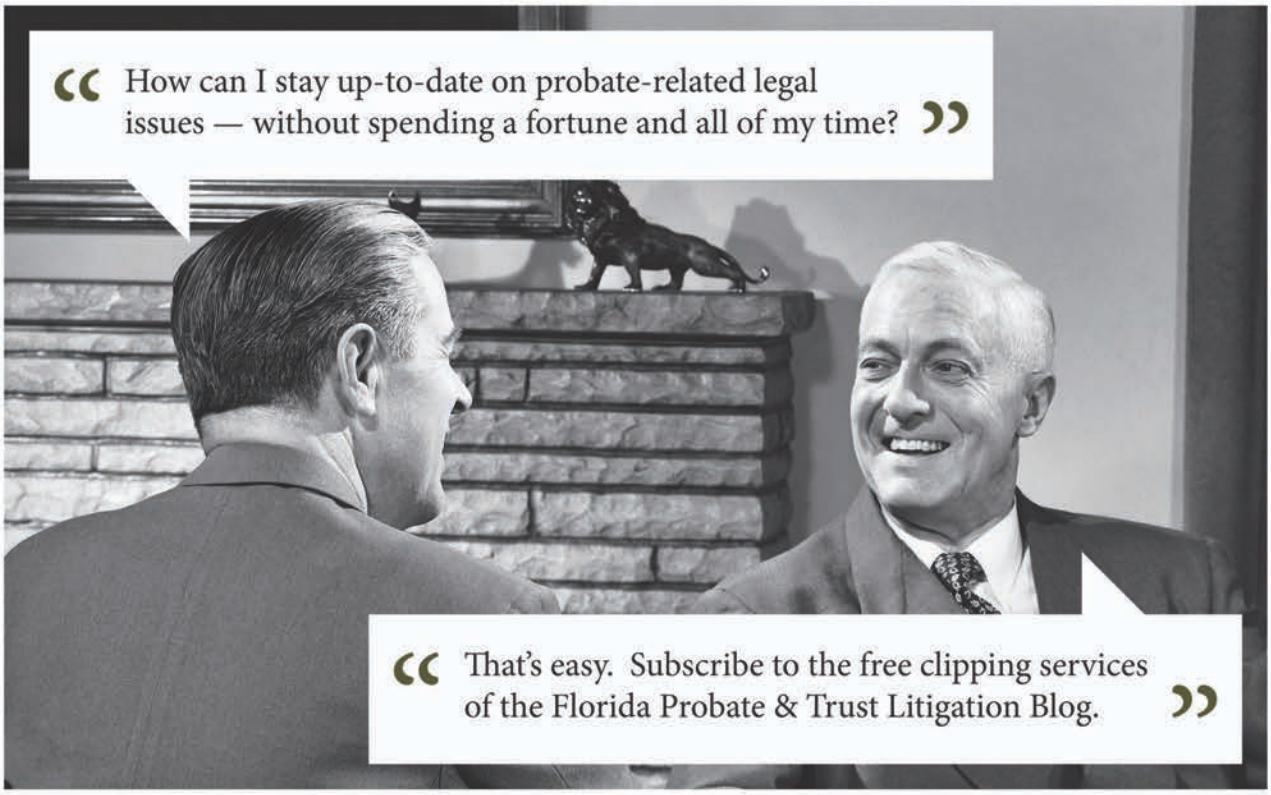

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By
Juan C. Antúnez
ATTORNEY AT LAW

Juan C. Antúnez is a partner with Stokes McMillan Antúnez P.A., a boutique trusts and estates law firm located in Miami, Florida. Trusts and estates litigation, probate administration and estate planning is all he does as a lawyer. He is a 1996 graduate of the New York University School of Law (J.D.), and a 2003 graduate of the University of Miami School of Law (LL.M. in Estate Planning). Prior to law school Mr. Antúnez volunteered for service with the United States Marine Corps Reserve from 1987 to 1993 (4th ANGLICO, West Palm Beach, Florida), including combat duty during the first Gulf War.

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2015 Kozyak Minority Mentoring Picnic

The Kozyak Minority Mentoring Foundation ("KMMF"), focusing on inclusion and diversity in the legal profession, hosted its 12th Annual Picnic on October 31 at Amelia Earhart Park in Hialeah.

This year, the theme of the KMMF Picnic was "Diversity Doesn't Have to Be Scary" as it happened to fall on Halloween. As in past years, the KMMF Picnic was a huge event that brought law students from all over Florida to meet judges and attorneys willing to share what they know about the practice of law and for the opportunity to establish a mentor-mentee relationship.

The Real Property Probate and Trust Law Section of the Florida Bar was one of the many sponsors of the KMMF Picnic. Hung Nguyen and Jesse Friedman did a great job organizing and coordinating with the group of volunteers at the Section's tent. Section's Chair-Elect Deborah P. Goodall, Silvia Rojas, Kymberlee C. Smith, David Carlisle, Annabella Barboza, Judge Celeste H. Muir, Liz Hughes and Chair Michael Gelfand were all able to speak with many law students and new attorneys about the great work the Section does. The Section's tent experienced a significant number of visitors and an overwhelming positive response from law students in South Florida (University of Miami, St. Thomas University, Florida International University, Nova Southeastern University), law students from North Florida (University of Florida and Florida Coastal University), and Central Florida (Florida A&M University) as well. No doubt that Lo Mein Takeout Box (Hung), Harry Potter (Jesse), Peace-Loving Hippie (Annabella) attracted more students to the tent than the Halloween treats!



Jesse Friedman (Harry Potter), Debbie Goodall and a couple of law students



Halloween fun with Michael Gelfand, Annabella Barboza and Hung Nguyen with a couple of FIU law students

Special thanks to Hung and Jesse for their hard work and to all who volunteered at this fantastic and fun event!

Ninth Annual Construction Law Institute Set for March 10-12, 2016

On March 10-12, 2016, the **Ninth Annual Construction Law Institute** will be held at the **JW Marriott, Orlando, Florida.** In addition to advanced level seminars, the event will include a golf tournament on Thursday, March 9th, and evening receptions on March 10th and March 11th. Over 350 Construction Lawyers and Industry Professionals attended the 2015 Institute and we expect more in 2016. The Friday luncheon speaker will be Kim Hurtado. Ms. Hurtado will give a presentation on 3-D printing technology and the impact of 3-D printing on the construction industry. This is sure to be an interesting presentation you will not want to miss!

We thank the sponsors listed below for their commitment to the Ninth Annual Construction Law Institute.

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For more information regarding sponsorship opportunities or attendance, please contact Mary Ann Obos at the Florida Bar at (850) 561-5626.

PRACTICE CORNER

Practice Corner is a new column in Actionline dedicated to short practice pointers for Section members. Each edition will include one article covering real estate law and one article covering probate law. The entries are typically submitted by the Section's Fellows.

Reasonably Ascertainable Creditors in Probate

By Stacy B. Rubel, Esq., North Miami, Florida

Personal representatives want to know their duties and responsibilities to creditors. This article focuses solely on the personal representative's duty to properly notice creditors. Of particular significance is a recent Florida Supreme Court opinion, *Jones v. Golden*, 2015 WL 5727788, where the Court held that reasonably ascertainable creditors ("RAC") who do not receive notice to creditors have two years to file a claim against the estate without the need to file for an extension of time to file a claim.

The personal representative has the obligation under § 733.2121(3)(a), F.S., to "make a diligent search to determine the names and addresses of creditors of the decedent who are reasonably ascertainable, even if the claims are unmatured, contingent, or unliquidated[.]" Attorneys for the personal representative should discuss any known creditors with the personal representative before opening the estate so the attorney can make an initial assessment of the potential assets and liabilities of the estate and the estate's ability to pay anticipated creditors. Once appointed, the personal representative must serve a notice to creditors on any RAC.

While there is no clear direction on what the personal representative must do to locate creditors, some of the best ways to ascertain possible creditors are to review the decedent's incoming mail, bank and credit card statements, brokerage accounts, online records kept by the Clerk of the Court wherever the decedent owned real property, online records kept by the Florida Secretary of State such as corporate and financing records, tax records which may reflect assets and liabilities, and documentation saved by the decedent in their home or safe deposit box.

In addition to known creditors, the personal representative must publish proper notice to creditors in a local newspaper, which shall be published once a week for two weeks. Sections 733.2121(2) and 733.702(1), F.S., provides creditors the later of three months from the date of first publication or thirty days from being specifically served with the Notice to Creditors to file a claim against the estate. Any claims not made within this period are barred, unless the claim is settled by the personal representative with the approval of the interested persons or the creditor is deemed to be a RAC and did not receive notice to creditors. See § 733.702(3), F.S. Prior to the *Jones* decision, it was a lot more difficult in certain jurisdictions for creditors who were entitled to notice, but did not receive notice, to preserve claims filed after the expiration of the creditor period. With the *Jones* decision, it is important for practitioners and their clients to understand the significance of ascertaining and noticing potential creditors as soon as possible to avoid the implications associated with a late, but valid claim. The personal representative must be made aware of the possible repercussions if, for example, a distribution of estate assets to beneficiaries is made, only to later have a creditor's claim issue arise.

In sum, when representing a personal representative, it is essential for the attorney to be familiar with the duties and responsibilities of the personal representative. It is also significant to note that the attorney owes a fiduciary duty not only to the personal representative, but also to the estate's creditors and beneficiaries. See *In re Estate of Gory*, 570 So.2d 1381 (Fla. 4th DCA 1990). Therefore, the proper handling of creditor issues in estate administrations impacts not only the personal representatives, but their attorneys as well.

Forum Selection Clauses

By Bridget M. Friedman, Esq.,
Friedman & Friedman, P.A.

In Florida, contracting parties are permitted to agree that any litigation stemming from their contract be heard in a specific forum. See *Weisser v. PNC Bank, N.A.*, 967 So. 2d 327 (Fla. 3d DCA 2007). Forum selection clauses are generally mandatory or permissive. *Id.* The general test for determining whether a clause is mandatory or permissive is language indicating "exclusivity." See *Golden Palm Hospitality v. Stearns Bank Nat'l Ass'n*, 874 So. 2d 1231, 1236 (Fla. 5th DCA 2004). "Absent such language, the clause will be considered permissive." *Id*. If the forum selection clause "state[s] or clearly indicate[s] that any litigation must or shall be initiated in a specified forum," then it is mandatory. See *Shoppes L.P. v. Conn*, 829 So. 2d 356, 358 (Fla. 5th DCA 2002). If, on the other hand, a venue clause is determined to be permissive, then it is "nothing more than a consent to jurisdiction and venue in the named forum and do[es] not exclude jurisdiction or venue in any other forum." See *Regal Kitchens, Inc. v. O'Connor & Taylor Condo. Constr., Inc*, 894 So. 2d 288, 289 (Fla. 3d DCA 2005); and *Garcia Granados Quinones v. Swiss Bank Corp. (Overseas), S.A.*, 509 So. 2d 273, 274-75 (Fla. 1987).

If a particular forum is desirable, counsel should consider these cases when drafting a forum selection clause. For example, language such as "any litigation must be initiated in Orange County, Florida" would indicate a mandatory forum of Orange County, Florida. However, language such as "any litigation arising out of this contract *may* be brought in Orange County, FL" indicates that Orange County is a permissive forum, and if litigation were to arise, it could be brought in a forum other than one named in the contract.

Even if a mandatory forum selection clause is incorporated into an agreement, counsel should be aware that "[i]t is generally appropriate for a court in Florida, as a procedural issue, to determine the validity and enforceability of a forum selection clause despite a choice of law provision in the agreement." See *Golden Palm Hospitality, Inc. v. Stearns Bank Nat. Ass'n,* 874 So. 2d 1231, 1234-35 (Fla. 5th DCA 2004). A trial court must enforce a mandatory forum selection clause in a contract so long as there is not a showing that the clause is unreasonable or unjust. See *Travel Exp. Inv. Inc. v. AT&T Corp.,* 14 So 3d 1224, 1226 (Fla. 5th DCA 2009).

Courts look at three factors to determine if a provision is unreasonable or unjust: whether the forum was chosen because of overwhelming bargaining power which would constitute overreaching; whether the enforcement would contravene strong public policy enunciated by statute or judicial fiat, either in the forum where the suit would be brought, or the forum from which the suit has been excluded; and whether the purpose was to transfer an essentially local dispute to a remote and alien forum in order to seriously inconvenience one or both of the parties. See *Ware Else, Inc. v. Ofstein*, 856 So. 2d 1079, 1081 (Fla. 5th DCA 2003).

Judicial performance feedback sought from Bar members



The Judicial Administration & Evaluation Committee is encouraging all Bar members to participate in the Confidential Judicial Feedback Program developed by the committee and approved by the Florida Bar Board of Governors.

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There are separate forms for trial court judges and appellate court judges. Feedback may be provided two ways" by competing the forms online at www.floridabar.org/JudicialFeedback or by downloading the forms at www.floridabar.org/JAEC and following the instructions.

Real Estate Case Summaries

Prepared by Julia L. Jennison, Partner – Lewis, Longman & Walker, P.A.

West Palm Beach, Florida

In determining the amount of attorney's fees awardable in an eminent domain proceeding under "benefits achieved standard," trial court properly found that offer made under Florida Department of Transportation's "Early Acquisition Program" was an attempt to acquire the property in an arm's length transaction, rather than a pre-suit offer and therefore not to be used as the basis for calculating the difference between the final judgment amount and the first written offer.

General Commercial Properties, Inc. v. State of Florida Department of Transportation, 40 Fla. L. Weekly D2323a (Fla. 4th DCA, October 14, 2015)

In this case, Florida Department of Transportation ("DOT") obtained property previously owned by General Commercial Properties, Inc. ("General Commercial") through eminent domain, under provisions set out in Chapter 73, Florida Statutes. General Commercial sought an award of attorney's fees. DOT and General Commercial disagreed on the amount of attorney's fees to be awarded. Agreeing with DOT's arguments, the Fourth District Court of Appeal ("4th DCA"), upheld the lower court's decision regarding calculation of attorney's fees in an eminent domain proceeding.

In 2005, DOT approached General Commercial with an offer to purchase a parcel of land owned by General Commercial. This offer was made under an Early Acquisition Program ("EAP"), which was developed to allow DOT to acquire properties it anticipated it might need, before a project was fully funded and before any eminent domain proceedings were contemplated. This program operated through arms-length negotiations. An offer of $400,000 was made to General Commercial based on an appraisal of the parcels. DOT and General Commercial negotiated over the purchase price, but no agreement was reached.

Subsequently, DOT offered to purchase the parcel in 2012 for $699,000 using its regular acquisition process ("RAP") for acquiring property, which offer was rejected. In 2013, DOT initiated eminent domain proceedings to acquire the same parcel and ultimately a final judgment awarded General Commercial $800,000 for the parcel.

General Commercial sought attorney's fees based on the difference between DOT's initial 2005 offer of $400,000 for the property and the final judgment award of $800,000, rather than using DOT's 2012 offer of $699,000 as the basis for the calculation. The trial court ruling in DOT's favor, found that the appropriate basis for the calculation was the 2012 offer of $699,000, which was offered under DOT's eminent domain RAP as opposed to the $400,000 offer, which was made in accordance with DOT's EAP.

The issue presented was what constitutes the appropriate basis for calculation of attorney's fees in an eminent domain case. This case distinguishes between two different processes by which DOT may acquire property and the appropriate standard for determining "benefits achieved" under Sec. 73.092, F.S.

Sec. 73.091, F.S., requires the condemning authority to pay attorney's fees. Sec. 73.092, F.S., sets out the method for calculation of fees, based on the "benefits achieved for the client." Sec. 73.092, F.S., further defines "benefits" as the difference, exclusive of interest, between the final judgment or settlement and the last written offer made by the condemning authority before the defendant hires an attorney.

General Commercial contended that it had an attorney in 2005, and therefore the 2005 offer should be used as the basis. However, the DOT expressly cited to its EAP in DOT's communications with General Commercial's attorney regarding the 2005 offer and conditioned the offer on the understanding that "any offer made in the Early Acquisition Program will NOT be considered as a basis for an attorney fee to be paid in the 'regular acquisition process.'"

The 4th DCA, relying on *JEA v. Williams*, 978 So. 2d 842 (Fla. 3d DCA 2008), noted that a public entity with eminent domain powers has the authority to purchase property in an ordinary arm's length transaction, and in such instances, there is no entitlement to attorney's fees. Based on this, the appeals court held that the trial court properly found the 2005 offer was made under the EAP in an attempt to acquire the property in an arm's length transaction, and the 2005 offer was conditioned on the offer not being used in the calculation of attorney's fees in any subsequent eminent domain proceeding. Therefore, the 2005 offer was not to be used as the basis for calculation of attorney's fees. Rather, the 2012 offer of $699,000, which was clearly made under the RAP, was the appropriate basis for calculation of attorney's fees.

A constitutional taking does not occur when the government makes an official, publicly-announced declaration of its intent to condemn property and engages in some post-announcement "unreasonable" conduct, and the property suffers impairment of value or the property



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owner's use and enjoyment of property is disrupted. "Condemnation blight" is not an independent cause of action for a constitutional taking under Florida law.

Teitelbaum v. South Florida Water Management District, 40 Fla. L. Weekly D2234 (Fla. 3d DCA, September 30, 2015)

Plaintiffs' own property in the Bird Drive Basin area of western Miami-Dade County, along the eastern edge of the Florida Everglades. The land has been zoned agricultural since 1965 and is subject to various county zoning requirements restricting use. The record indicated that Plaintiffs acquired their property between 1971 and 2003, hoping the land would eventually be rezoned to a higher use. In 1994, the South Florida Water Management District ("District") designated the area as part of the "East Coast Buffer" to the Florida Everglades, as it was determined to be necessary to prevent massive flooding throughout Miami-Dade County and to prevent saltwater intrusion into the freshwater wellfields in the vicinity. The District also began to acquire property in the East Coast Buffer area, including within the Bird Drive Basin, from willing sellers, and then passed a resolution to acquire land through eminent domain. This included land owned by Plaintiffs. The District never went forward with the eminent domain acquisitions. Plaintiffs filed suit alleging the District's actions "artificially depressed their property values . . . as part of its plan to acquire the Plaintiffs' land on the cheap." Four years after Plaintiffs' filed suit, the District officially abandoned its plan to acquire their properties through eminent domain. This decision was based on various studies that showed the District's restoration plan was no longer feasible. Plaintiffs then amended their suit to claim the District's "voluntary acquisitions" left the area "checkered with largely unusable, undevelopable, and unsellable property." The Plaintiffs claims are largely premised on the theory of "condemnation blight."

A constitutional taking may occur when the state exercises domain over private property without going through the proper eminent domain proceedings in a manner that deprives the rightful owner of the use and enjoyment of the owner's property. The United States Supreme Court has held that a "per se" taking occurs "where government requires an owner to suffer a permanent physical invasion of property" or "where the government passes and applies regulations that completely deprive an owner of 'all economically beneficial use' of property." See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005) and *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003 (1992). Additionally, if a governmental regulation has "substantially devalued the property in question without creating a physical invasion or depriving the owner of all economically beneficial use," a taking may be found. *See Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

Instead of attempting to argue any of these three established causes of action, Plaintiffs attempted to argue a new, fourth cause of action, "condemnation blight." According to Plaintiffs, "condemnation blight" occurs when "(1) the government makes an official, publicly-announced declaration of its intent to condemn the property that goes beyond mere planning; (2) the government engages in some post-announcement unreasonable conduct, such as protracted delay in actual condemnation proceedings or interference with the property owner's rights; and (3) the property suffers impairment of value or the property owner's use and enjoyment of the property is disrupted."

"Condemnation blight" has typically been argued in relation to a diminution of property value when condemnation of the property has actually occurred and is a theory used to recover the difference between the lower value of the property caused by the "condemnation blight" versus the value of the property if it had not been subject to such blight. There are no Florida cases which have found "condemnation blight" itself to be a cause of action.

The Third District Court of Appeal ("3d DCA") found that, had Plaintiffs attempted to tie their "condemnation blight" argument to one of the three causes of action established by the Supreme Court, and prove their property values were substantially diminished or that their rights were altered by any of the District's actions, the 3d DCA might have considered the argument. However, in this case, Plaintiffs presented no evidence that their property values were substantially diminished or that their rights were altered by any of the District's actions. Therefore, the 3d DCA held that "condemnation blight" itself is not a separate stand-alone cause of action in a takings claim, and Plaintiffs were not entitled to any remuneration.

To establish an adverse possession claim under "color of title," a written instrument describing property is not always required to establish color of title. Such determination requires a detailed analysis of the facts and timeframes involved in the claim. An adverse possession claim going back to 1976 was determined based on an earlier version of statute and case law interpreting same.

Dadd v. Houde, 40 Fla. L. Weekly D2109a (Fla. 3d DCA, September 9, 2015)

This case involved a real property dispute over a strip of land between two parcels, owned by Dadd and Houde. Dadd's fence enclosed a contiguous strip of land, which was not included on her legal description. Houde contended the property was his, as it was within his legal description. The fence had been in existence since at least 1976. Dadd acquired her property from Wood, the previous owner, in 1989. Houde acquired his property in 2001. The dispute came to a head when, in 2010, Dadd undertook to replace her fence. Houde contested the placement of the fence in the same position. Dadd filed suit to quiet title by adverse possession, pursuant to a 1974 version of Sec. 95.16, F.S. Houde counterclaimed to eject Dadd, based on

the deed conveying the property to him in 2001. The trial court found for Houde based on the strength of his long-standing title, and entered an order of ejectment of Dadd.

For the following reasons, the Third District court of Appeal ("3d DCA") found the trial court misapplied the statute. The 3d DCA found that Sec. 95.16, F.S., as it appears today, would compel affirmance of the trial court's holding. However, Dadd contends that under the 1974 version of Sec. 95.16, F.S., title vested in Wood, the prior owner, and subsequently passed to her. Due to the specific facts and timeframes involved in this case, the 3d DCA agreed with Dadd. Unrebutted evidence showed that at least since 1976 the fence enclosed the disputed strip of property and continued in place after Dadd acquired title in 1989. Sec. 95.16, F,S., did not require a written instrument describing the disputed property to establish color of title until 1987. In fact, the Florida Supreme Court construed the 1974 version of the statute to mean "one does not have to have paper title correctly describing the disputed property as long as that area is contiguous to the described land and 'protected by a substantial enclosure.'" See *Seddon v. Harpster*, 403 So. 2d 409 (Fla. 1981). The prior owner had met these requirements by 1983 (having "possessed" the strip of property by virtue of his fence, since 1976). Title had therefore vested in Wood in 1983 and in Wood's successor, Dadd, upon her purchase of the property in 1989. See *Birtley v. Fernandez Co.*, 392 So. 3d 29 (Fla. 1980). The 3d DCA found this would be so even if Dadd knew at the time she purchased the property that Wood did not have "paper title" to the strip or that she attempted to "cure" the paper title deficiency by a series of corrective quitclaim deeds from Wood.

Factual dispute existed regarding Sellers' failure to disclose known defects in residence and fraudulent misrepresentation of condition of residence and precluded entry of summary judgment despite fact that residence was being sold "as is."

Bowman v. Barker, et al., 172 So. 3d 1013 (Fla. 1st DCA 2015)

Thomas Bowman purchased property from Barker and Bryan. The property was purchased "as is." Bowman discovered numerous unresolved defects in the house after living in it and sued Barker and Bryan for failure to disclose known defects in the house contrary to their obligation to do so. Barker and Bryan moved for summary judgment based on identical conclusory affidavits denying awareness of any defects in the property. They relied on evidence that they argued supported their position on the merits. The court, however, noted that the test "is not whether there is evidence to support the position of the summary judgment movant. The test is whether there is *any* evidence or reasonable inference supporting the non-movant's position." Further, the court restated the necessary elements for a summary judgment, which include: allegations of the complaint must be accepted as true, the party seeking summary judgment must demonstrate conclusively that no genuine issue exists as to any material fact, and the court must draw every possible inference in favor of the party opposing summary judgment.

In this case, Bowman demonstrated the existence of numerous genuine issues of material fact, and summary judgment was denied. Barker and Bryan's affidavits actually highlighted the existence of a genuine issue of material fact—in their affidavits they denied awareness of any defects, yet the record itself contained evidence to the contrary. Further, Barker and Bryan argued that because the property was sold "as is" there were no genuine issues of material fact. The court found no merit in this argument, citing to *Johnson v. Davis,* 480 So. 2d 625 (Fla. 1985), for the proposition that the duty to disclose known defects continues to exist for a home sold "as is." Therefore, since there were numerous issues of genuine material fact in dispute, including what the sellers knew, what work they instructed their contractors to perform on the house, and the extent of information they disclosed, the court found summary judgment was not appropriate.

Principle of ratification of mortgage by non-signatory is not applicable where non-signatory owner did not receive benefit of mortgage loan proceeds, did not authorize an attorney-in-fact to execute mortgage on behalf of the owner, or simply expressed a general intention to help a family member secure a loan. This case was notably a result of a lack of "regard to normal underwriting or title examination procedures" in 2005.

Wells Fargo Bank v. Clavero, 40 Fla. L. Weekly D2056b (Fla. 3d DCA, September 2, 2015)

Based on the legal doctrine of ratification, Wells Fargo attempted to foreclose a residential mortgage executed by only one of the four owners of the home when the loan was closed. The Third District Court of Appeal ("3d DCA"), noting that the record in this case is "extraordinary" and in "deference to the veteran trial judge's findings of fact and conscientious efforts to bring some order to a loan closed without regard to normal underwriting or title examination procedures," affirmed in part, reversed in part, and remanded for modification of the final judgment.

In 2005, Elvio and Gliceria Clavero (collectively, "Parents") owned the small home at issue, having purchased it over 30 years earlier. In October 2005, they signed and recorded a quitclaim deed conveying their interests to "Maria Clavero and Hubert Clavero, Husband and Wife, and Elvio Clavero and Gliceria Clavero, Husband and Wife, joint tenants with rights of survivorship." Subsequently, Maria Clavero signed for a $201,500.00 mortgage on the property. She was identified only as "Borrower" and "married woman." The other three owners of record did not sign the note or mortgage. The parents made no payments on the loan, received none of the loan proceeds,

and none of the loan proceeds was used for any purpose related to the property. In 2009, Wells Fargo filed a foreclosure complaint, and in 2010 Maria and Hubert were divorced and conveyed their interests in the property back to the Parents via quit claim deed.

At trial, it was found that the Parents conveyed the interest in their home to Maria and Hubert so that Maria could collateralize a loan for another property that she was going to use as a daycare business, that Maria was the only one of the four who had good credit, that the Parents held no interest in the daycare business, and the Parents received no financial benefit from the other property. There was no testimony regarding the lax closing procedures. However, the trial court observed that "everybody was hoodwinking everybody."

Since the Parents did not expressly subject their homestead to the mortgage by virtue of executing the mortgage or other closing documents, the bank must establish ratification of the mortgage or establish that the Parents or Hubert authorized an attorney-in-fact to mortgage their interest in the property in order to foreclose on the property. Failure to sign the mortgage may be cured by proof that the Parents or Hubert received any of the mortgage loan proceeds or benefitted from the application of those proceeds or otherwise ratified the loan such as by making monthly payments. See *Palm Beach Sav. & Loan Ass'n v. Fishbein, 619 So. 2d 267 (Fla. 1993) and Fleet Fin. & Mortg., Inc. v. Carey*, 707 So. 2d 949 (Fla. 4th DCA 1998). There was no proof of any in this case. Nor was there any proof of recordation of a Power of Attorney authorizing Maria to encumber the property on behalf of the Parents or Hubert.

The trial court entered a judgment of foreclosure against all four owners on the basis of an equitable lien; however, the court stayed enforcement against the Parents on the basis of Article X, Section 4(c), Florida Constitution, for as long as the property remained their homestead and required the Parents to provide an update on the homestead status of the property every 6 months. The 3d DCA affirmed the trial court's findings that Maria signed the promissory note, obtained the loan proceeds, and remained liable under the terms of the promissory note. The 3d DCA also affirmed the trial court's finding that the defective note and mortgage did not subject the Parents' homestead property to the lien of the mortgage and sale. The 3d DCA reversed the trial court's final judgment imposing and foreclosing an equitable lien with respect to the ownership interest of the Parents and remanded with direction to the trial court to clarify that the Parents and Hubert were not personally liable for unpaid principal and interest.

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Probate Case Summaries

Prepared by T. John Costello, Jr. – Wollman, Gehrke & Solomon, P.A., Naples, Florida

If a known or reasonably ascertainable creditor is not served with a copy of the Notice to Creditors, its claim is not barred by the three-month claim period if filed within two years of the decedent's death.

Jones v. Golden, 40 Fla. L. Weekly S517 (Fla. 2015)

The creditor, Jones, who was the decedent's ex-wife, was never served with the Notice to Creditors. Just prior to two years after the decedent's death, Jones's guardian filed a statement of claim with the probate court. The claim asserted that the decedent owed Jones money based on their marital settlement agreement. After a hearing to determine whether the claim was timely, the probate court entered an order striking the claim as untimely under §§ 733.702 and 733.710, Fla. Stats., based on the First and Second DCA decisions of *Morgenthau v. Andzel*, 26 So. 3d 628 (Fla. 1st DCA 2009) and *Lubee v. Adams*, 77 So. 3d 882 (Fla. 2d DCA 2012). Both *Morganthau* and *Lubee* held that even a reasonably ascertainable creditor who was not served with a copy of the notice to creditors is required to file a claim within three months after the first publication of the notice to creditors, unless the creditor files a motion for an extension of time under § 733.702(3), Fla. Stat., within the two-year period of repose set forth in § 733.710, Fla. Stat.

On appeal to the Fourth DCA, the creditor argued that because the Notice to Creditors was not properly served on her, the three month limitations period set forth in § 733.702(1), Fla. Stat,. never began to run, and therefore she could only be barred by the two year statute of repose set forth in § 733.710, Fla. Stat. The Fourth DCA agreed, and because it was in direct conflict with *Morganthau* and *Lubee*, the Florida Supreme Court accepted jurisdiction and affirmed.

The Florida Supreme Court held that where a known or reasonably ascertainable creditor is never served with the notice to creditors, the applicable limitations period of § 733.702(1), Fla. Stat., never begins to run and cannot bar that creditor's claim. The Florida Supreme Court stated as follows: "A known or reasonable ascertainable creditor is absolved from the limitations of § 733.702(1) by virtue of the fact that the personal representative failed to serve the creditor with the required notice.""Instead, the claims of such a creditor are only barred if not filed within the two-year period of repose set forth in § 733.710." The Florida Supreme Court further held that because §733.702, Fla. Stat., is inapplicable to an unserved known or reasonably ascertainable creditor, "it is not necessary for the creditor to seek an extension of time under § 733.702(3) since that section applies only to claims that are untimely under § 733.702."

The Florida Supreme Court cited to the case of *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988) to support the conclusion that personal representatives are obligated to provide actual notice to known or reasonably ascertainable creditors, and if the personal representative fails to provide such notice, those creditors cannot be barred except under the two year period of repose under § 733.710, Fla. Stat.

Because Argentine testator's notarial Will was not signed by the testator, it was deemed nuncupative and therefore prohibited by § 733.502(2), Fla. Stat.

Malleiro v. Mori, 40 Fla. L. Weekly D2226 (Fla. 3d DCA 2015)

Five years prior to her death, the Testator executed a Will in New York that complied with the requirements of New York law, including her signature at the end and attestations by three witnesses who subscribed in the presence of each other and the presence of the Testator. Several months later, the Testator executed a second Will in Argentina. The terms of the Argentine Will were orally pronounced by the Testator to a notary who transcribed them. It set forth that the Testator made her attestations before the notary in the presence of three witnesses who were identified by name, address, and national identity card number. The Will was read back to the Testator and the notary signed and stamped the Will. Importantly, the Testator and witnesses did not sign it.

The beneficiaries under the New York Will were different from the beneficiaries under the Argentine Will. The beneficiaries of the Argentine Will objected to the petition for administration of the New York Will and filed their own competing petition for administration of the Argentine Will. The probate court admitted the Argentine Will and held that it had revoked the New York Will.

The Third DCA reversed the probate court and held that although notarial Wills are admissible to probate under § 733.205, Fla. Stat., the Argentine Will is a prohibited nuncupative Will under § 732.502(2), Fla. Stat., because it was not signed by the testator. The appellate court pronounced that "[e]ven if the Testator was a nonresident of Florida at the time she executed the Argentine Will, the claim of the beneficiaries of the Argentine Will cannot prevail." As a result, the Argentine Will did not operate to revoke the New York Will.

At the end of its decision, the Third DCA called for the Legislature to clarify the Probate Code by defining important

terms, including "notarial," "nuncupative," "holographic," and "nonresident."

If no guardian is appointed at the conclusion of an incapacity proceeding, the circuit court loses jurisdiction and has no authority to reopen the case.

Adelman v. Elfenbein, 174 So. 3d 516 (Fla. 4th DCA 2015)

The Ward's grand-niece initiated a guardianship proceeding to determine the Ward's capacity. After the Ward was deemed to be totally incapacitated by the general magistrate, the magistrate found that the Ward's advanced directive and power of attorney documents provided a less restrictive alternative to guardianship. The trial court adopted and ratified the general magistrate's report and then dismissed the grand-niece's petition for appointment of a plenary guardian.

Several months after dismissal of the petition for appointment of a plenary guardian, the grand-niece filed a "petition to reopen the guardianship," in which she again sought the appointment of a plenary guardian and alleged that the Ward's attorney-in-fact and health care surrogate (the Ward's ex-spouse) was not providing "consistent adequate care." Over objections by both the Ward and the ex-spouse, the trial court heard the petition and ultimately appointed a professional plenary guardian for the Ward.

In finding that the trial court lacked jurisdiction to hear the petition to reopen the guardianship, the Fourth DCA reversed and instructed the trial court to vacate its order appointing the plenary guardian and to dismiss the case. The Fourth DCA held that under § 744.331(6)(b), Fla. Stat., if there is an alternative to guardianship, the court is prohibited from appointing a guardian, and specifically held that "[u]pon a finding of incapacity, the court is required to *either* appoint a guardian or find that there is an alternative to guardianship."

After the trial court issued its order ratifying the magistrate's report and dismissing the case, the parties had ten days to file a motion for rehearing. *See* Fla. Prob. R. 5.020(d). "Once the ten days for rehearing expired, the trial court lost jurisdiction to do anything other than enforce the orders previously entered." *See Hunt v. Forbes*, 65 So. 3d 133, 134 (Fla. 4th DCA 2011). Further, because no appeal was taken, the orders became final and absolute, and the court lost jurisdiction to alter, modify, or amend them. The Fourth DCA further held that there is no statutory authority to reopen an incapacity proceeding where no guardianship was ordered and that the "ongoing jurisdiction of the circuit court in an incapacity proceeding does not exist *unless a guardian is appointed*."

When property is titled in a decedent's name but another claims a colorable right to possess that property, the question of who should temporarily possess the property is a factual question that should be resolved by a preliminary evidentiary hearing, pending final resolution of the claim of entitlement.

Delbrouck v. Eberling, 2015 WL 5948724 (Fla. 4th DCA 2015)

The decedent's Will left all of his property equally to his three sons. One of the sons, Georges Delbrouck, occupied several parcels of real property that were titled in the decedent's name, including a residence and an automotive repair and sales business. Georges filed a statement of claim in the estate in which he alleged that he and the decedent had operated a business together and he continued to operate it after the decedent's death. When the personal representative denied the claim, Georges filed an independent action to impose a constructive trust over the property. That action remained pending at the time of the court's opinion.

The personal representative then moved the probate court to compel Georges to surrender the property because it was titled in the decedent's name. Relying on § 733.607(1), Fla. Stat., Georges then asked the court to authorize occupancy of the property by the beneficiaries. After two non-evidentiary hearings, the probate court directed Georges to immediately surrender possession of the property to the personal representative and enjoined him from transferring any of the decedent's personal or business assets.

The Fourth DCA reversed and concluded that the probate court erred in ousting Georges from the property without first hearing any evidence. The court held that although § 733.607(1), Fla. Stat., states that the personal representative's request for property is conclusive evidence of the personal representative's *need* for the property, it does not mean that a personal representative's right to possession of the property cannot be contested. Because the statute speaks of "conclusive evidence," it implies that an evidentiary hearing may be required when the right to possession of a decedent's property is genuinely disputed. The court concluded that when property is titled in a decedent, but another claims a right to possess it, the question of who should temporarily possess it is a factual question that should be resolved by a preliminary evidentiary hearing.

Personal representatives need only make reasonably diligent efforts to uncover the identities of creditors and not everyone who may conceivably have a claim is properly considered a creditor entitled to actual notice. It is reasonable to dispense with actual notice to those with mere conjectural claims.

Soriano v. Estate of Manes, 2015 WL 5965203 (Fla. 3d DCA 2015)

Ms. Soriano filed a statement of claim in the decedent's estate four months after the first publication of the notice to creditors. Prior to the decedent's death, he was charged with misdemeanor battery against Ms. Soriano but after his death, the State *nolle prossed* the criminal case. Contemporaneous with her statement of claim, Ms. Soriano filed a petition for an

order declaring her statement of claim timely filed, or in the alternative, for an extension of time to file her claim. Ms. Soriano asserted that she was a "reasonably ascertainable creditor" and therefore entitled to be personally served with the notice.

In response, the Personal Representative filed an affidavit in which she alleged that she had conducted a diligent search and inquiry to determine the identities of the decedent's creditors, had served all those creditors she identified, and had never heard of Ms. Soriano until she was informed by her own attorney that the claim had been filed. The Personal Representative further alleged that she searched the decedent's personal and business records, extensively reviewed documents in preparation to sell the decedent's business and home, and never discovered any documents regarding Ms. Soriano. Furthermore, the Personal Representative had spoken with the decedent once a week on average prior to his death and the decedent never mentioned Ms. Soriano. Ms. Soriano replied by filing affidavits by the prosecutor, the decedent's criminal attorney, and her own personal attorney. None of the affidavits, however, averred "that Ms. Soriano or her attorney placed *anyone* on notice that she was pursuing, or intended to pursue, a civil claim against [the decedent] or his estate." As a result, the trial court denied Ms. Soriano's petition, found that she was not an ascertainable creditor, and struck her claim as untimely.

The Third DCA affirmed the trial court and stated that although a personal representative has a duty to make a diligent search to determine the names and addresses of creditors of the decedent, § 733.2121(3)(a), Fla. Stat., clearly states that "impracticable and extended searches are not required." Further, the court held that "all the [personal representative] need do is make 'reasonably diligent efforts' to uncover the identities of creditors, and not everyone who may conceivably have a claim is property considered a creditor entitled to actual notice." As a mere conjectural creditor, Ms. Soriano was not required to be served with the notice to creditors.

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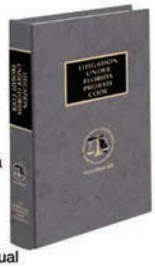

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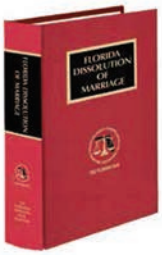

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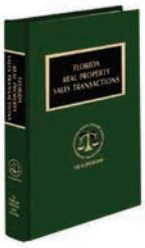



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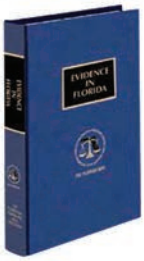

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What's Happening Within the Section...

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 listservs that discuss issues and current hot topics available to committee members.

SCHEDULE

2016 EXECUTIVE COUNCIL MEETINGS

FEBRUARY 25 - 28, 2016
Executive Council Meeting
Marriott Tampa Waterside • Tampa, Florida
Room Rate: $224
Cut-off Date: January 13, 2016
Reservation Phone: 1-813-221-4900
Reservation Ref. Code: The Florida Bar Real Property Executive Council Meeting
Reservation Link:
https://resweb.passkey.com/go/FloridaBarRealProperty

JUNE 1 - 5, 2016
Executive Council Meeting I RPPTL Convention
Loews Portofino Bay Hotel • Orlando, Florida
Room Rate $219
Cut-off Date: May 2, 2016
Reservation Link*: http://uo.loewshotels.com/en/Portofino-Bay-Hotel/GroupPages/FLBar2016

*Note: Wednesday, Thursday, and Friday nights in the room block are CURRENTLY SOLD OUT. Please email Mary Ann Obos @ mobos@flabar.org to be added to the room block waitlist. Current reservations can be modified by dialing 1-866-360-7395.

JULY 28, 2016 – JULY 31, 2016
Executive Council Meeting & Legislative Update
The Breakers • Palm Beach, Florida
Reservation Link: https://resweb.passkey.com/go/FLABR16
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OCTOBER 5 – OCTOBER 9, 2016
Executive Council Meeting
The Walt Disney World BoardWalk Inn • Lake Buena Vista, FL
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DECEMBER 7 – DECEMBER 11, 2016
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2015 CLE SCHEDULE:

Check the RPPTL Section website www.rpptl.org under the CLE tab's dropdown menu for topics, dates and locations for upcoming CLE seminars. Check The Florida Bar website www.floridabar.org/CLE for detailed information as it becomes available.

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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Closing statement and disbursement certifications as set forth in Form DFS-H1-2146 are required for all real estate closings where escrow funds are disbursed related to the issuance of a title insurance policy as of Oct. 28, 2015. See Rule 69B-186.008, F.A.C.

SAVE THE DATE:

Construction Law Institute set for March 10-12, 2016

CERTIFICATION IS REQUIRED:

All pleadings must be read by the attorney filing them. See Fla. R. Jud. Admin. 2.515.

"OF COUNSEL":

What does it mean?

See page 21

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A lienor who files a fraudulent lien in violation of Sec. 713.31, F.S., can be liable for punitive damages in an amount not exceeding the amount by which the lien value is overstated. See Sec. 713.31(2)(c), F.S.

If you are working on an interesting case or legal issue that you'd like 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.)