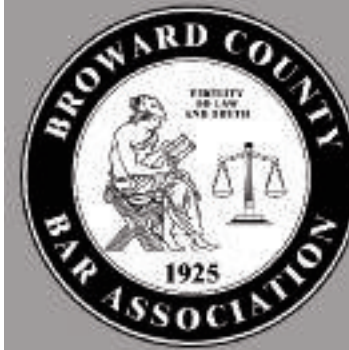




Broward County Bar Association
1051 SE Third Avenue
Fort Lauderdale, Florida 33316

PRSR STD
US POSTAGE
PAID
FT LAUD, FL
PERMIT 2998



Broward County Bar Association BARRISTER

January 2008 VISIT OUR WEBSITE AT WWW.BROWARDBAR.ORG VOLUME 37, ISSUE 1

Thursday, January 24
Young Lawyers' Section
Luncheon
Tower Club,
Chief Judge Victor Tobin
"State of the Circuit"
RSVP to BCBA at
(954) 764-8040

Hold The Date
Friday, February 15, 2008
Noon – 5:00 p.m.
Broward County Bar
Association Workers'
Compensation Seminar

Norma B. Howard Bar Center
Lunch provided.
RSVP to Art Goldberg at
(954) 764-8040
\$75 for members/ \$90 others
See page 8 for details

Friday
February 22
at Noon
BCBA Membership
Luncheon - West Area
Speakers: Judges from West
Satellite Courthouse
Jacaranda Country Club
Cost: \$25
RSVP to BCBA at
(954) 764-8040

ROBING CEREMONY

JANUARY 25th
Congratulations to Circuit Judges



The Honorable Matthew Destry



The Honorable Carlos Rebollo

Robing Ceremony
January 25, 2008
Main Courthouse
3rd Floor Jury Room
1:30 p.m.
RSVP to BCBA at (954) 764-8040



Also, congratulations to
The Honorable Dorian Damoorgian,
appointed by Governor Christ
to the 4th DCA

NOTICE OF REVOCATION OF LOCAL RULE 10A

You are hereby given notice that a majority of all of the Circuit and County Court judges voted for the 17th Judicial Circuit to rescind Local Rule 10A.

Notice is required by the Florida Rules of Judicial Administration. Written comments are requested on the contents of the proposed Administrative Orders as to motion calendar, special set hearings, and ex parte motions to compel.

Send comments to:
Chief Judge Victor Tobin, c/o Court Administration, Office of General Counsel, Room 880B, Broward County Courthouse, 201 S.E. Sixth Street, Fort Lauderdale, Florida 33301 or by email to arieman@17th.flcourts.org.

Upon receipt of your comments, the request for revocation of Local Rule 10A will be sent to The Florida Supreme Court. Until such time as The Florida Supreme Court approves the revocation of Local Rule 10A, the rule will remain in effect and govern motion calendar, special set hearings, and ex parte motions to compel.

Go the BCBA website to view proposed Administrative Orders at www.browardbar.org

RESOLUTIONS INC.SM

PROFESSIONALISM, INTEGRITY, OBJECTIVITY...

FINDING MORE EFFECTIVE AND COST EFFICIENT
WAYS FOR RESOLVING DISPUTES

PROFESSIONAL SERVICES:

MEDIATION
ARBITRATION
ARBITRATION/MEDIATION HYBRIDS
PRIVATE TRIAL JUDGES
SPECIAL MAGISTRATES

EDUCATIONAL SERVICES:

CLE CLASSES
CME CLASSES
ARBITRATION QUALIFICATION SEMINAR
CEU CLASSES

YOUR VIEW OF LEGAL SUPPORT... ...HAS NEVER BEEN BETTER.

Esquire has created expert service areas, each with specialists dedicated to providing the highest quality deposition and litigation solutions to you. Esquire's local support is backed by these expert service areas working together to create unparalleled efficiencies. From court reporting by Esquire Deposition Services to full litigation support services by Esquire Litigation Solutions, turn to us for a new view on legal support services.

ESQUIRE LITIGATION SOLUTIONS

- Full electronic discovery services
- Scanning and coding services
- Strategic trial consulting services
 - Online review and production repositories
 - White papers and CLEs



www.esquirelitigation.com

ESQUIRE DEPOSITION SERVICES

- Court reporting offices in over 50 cities
- Realtime reporting
- EsquireConnect: online scheduling and calendar
- Complete video services
- EsquireTranscripts: online transcript repository



www.esquiredeposition.com

DISPUTE RESOLUTION PROFESSIONALS
954.523.3888 WWW.RESOLUTIONSINC.NET



PRESIDENT'S MESSAGE *by Barbara K. Sunshine*

BUILDING UPDATE

Both the reception area and the conference room have been painted. It is really bright and clean looking. The flooring is a beautiful cherry. There is new furniture throughout. Please stop by and see for yourself!

GOING GREEN

We have a new refrigerator in the Administration Building—Energy Star with an icemaker (as requested by the staff). There are garbage disposals in both buildings to cut down on waste. Ft. Lauderdale Recycling Bins have been put in place—now to educate our members and other visitors to use them! Fluorescent bulbs have been installed in most of the fixtures. The spotlights outside are working and a new one has been installed which is directed towards our flags.

MORTGAGE PAYOFF

This has been a project of mine for many years. A few Board members have shared my desire to be free of debt. Ross Shulmister was one very vocal supporter. In July, 2005, President Tim Bailey asked me, as Treasurer, to propose a plan to the Board. In August, 2005, the Board approved the following Resolution:

The Mortgage shall be paid-off in increments of \$30,000 commencing September 15, 2005, and continuing March 15, 2006, September 15, 2006, March 15, 2007, September 15, 2007, with the final payment on March 15, 2008, or earlier at the Executive Committee's discretion.

At that time, the Mortgage principal was approximately \$178,000 with payments of \$1,577 per month. The interest on the Mortgage is 4.9%. We moved the reserves into higher interest-bearing Certificates of Deposit, and started the pay-off.

Our principal balance is now \$41,000. Whether we have a Mortgage-burning party in March remains to be seen....

CONTRIBUTIONS

As part of the plan, I added a line item to the Membership Application in 2005 asking members to voluntarily contribute to pay-off the Mortgage. I suggested \$100 for each member so that over three years the total contribution would be \$300. We have acknowledged every member who has contributed no matter what amount each year in the "Barrister."

Please dig into your pocket and send a check to the Broward County Bar Association, 1051 Southeast Third Avenue, Ft. Lauderdale, Florida 33316, to the attention of our new staff accounting person, "Tish." Maybe **WE** can still have that party!

If we get more than we need, we will use it to continue the capital improvements that the Building Committee recommended in October, starting with exterior painting of both buildings and landscaping (xeriscaping). Then on to the staff area with modular work stations and complete remodeling of the bathrooms and the administration

building kitchen.

PAST PRESIDENTS' LUNCHEON

Past President Peter Portley and Board member Alan Fishman coordinated a luncheon for our past presidents held at the Riverside Hotel on November 28. The following honored guests attended:

Bruno L. DiGiulian
Ray Ferrero, Jr.
Russell F. Carlisle
Hugh T. Maloney
Terrence Russell
Patrick L. Bailey
William S. Spencer
W. George Allen
Peter A. Portley
Dale R. Sanders
Jeffrey P. Wasserman
David D. Welch
Linda A. Conahan
Jesse H. Diner
Walter G. "Skip" Campbell, Jr.
Mark F. Butler
Frank C. Walker
Nancy W. Gregoire
Michael J. Carbo
Steve E. Moody
Timothy L. Bailey
Victor P. DeBianchi, Jr.

We will meet again at the Bar Center on Wednesday, February 20 for lunch and to see the Bar Center capital improvements!

CHARITY

In November we participated in a Habitat for Humanity project. It was rewarding, fun, messy, and hot, painting the exterior of the house. Board Members who joined me were Judge Stacy Ross and Roshawn Banks, and members Judge Sharon Zeller, Robin Moselle, and Antonio Recinos.

The day before Thanksgiving, Social/Sports/Goodwill Chair and Board member Diana Santa Maria and Board member Bruce Weihe met me at the Cooperative Feeding Program building on Broward Boulevard to hand out Publix Gift Certificates and tickets for a box of food to grateful recipients. Development Director Scott Woodburn gave us a tour of the buildings and introduced us to Executive Director Marti Forman. Several Board members donated monies at the November meeting to sponsor this event.

JUDICIAL ROBINING

Please join us to welcome our newest Judges Matthew Destry and Carlos Rebollo on Friday, January 25 in the Jury Room, Third Floor at the Courthouse. There will be a reception afterwards.

Congratulations to The Honorable Dorian Damoorgian on his appointment to the Fourth District Court of Appeal! We will miss you.

JANUARY 2008

CALENDAR OF EVENTS

Tuesday, January 8

North Broward Bar Association. Lunch Meeting. Steak and Ale Restaurant 6300 N. Andrews Ave, Fort Lauderdale. Speaker-Judge Ilona Holmes
For information: Call Alan Fishman, (954) 975-7800

Tuesday, January 8

BCBA Board of Directors Meeting, 5:15 p.m. Norma B. Howard Bar Center.

Tuesday, January 8

Broward Trial Lawyers meeting at the Tower Club at 6:00p.m. Speaker-TBA RSVP to (954) 522-1662 or bctla@att.net

Wednesday, January 9

UM Paralegal Open house from 7:00p.m.-9:00p.m. at the Norma B. Howard Center 1051 SE 3rd Avenue, Fort Lauderdale The class runs from February 5-May 2008. Tuesday/Thursday 6:00p.m.-9:00p.m. For information, please call the University of Miami(305) 284-5800

Wednesday, January 9

BCWLA Monthly luncheon at noon at the Tower Club. Topic will be the new complex litigation division. 1 CLE applied for. Tonja Haddad 954-467-1223 or email Haddadtb@aol.com

Wednesday, January 9

Association of South Florida Mediators and Arbitrators dinner meeting from 5:30PM-7:00PM, The Westin Hotel, 400 Corporate Drive, Ft. Lauderdale FL 33334. Topic: "Updates in Dispute Resolution." Speaker Dean Honggang Yang, RSVP to Jane Goldberg at (954)764-8040, ext 202, or email (www.asfma.org).

Tuesday, January 15

17H Florida Grievance Committee Meeting at the Broward Bar Association 1051 SE 3rd Avenue, Fort Lauderdale

Tuesday, January 15

BCBA Bench and Bar Committee. Noon. Norma B. Howard Bar Center
RSVP to BCBA at (954) 764-8040

Wednesday, January 16

Solo/Small Law Firm Networking Group at the Fort Lauderdale Airport Hilton(formerly Wyndham) at 6:00p.m.
1870 Griffin Road at I-95. \$35.00 for members and \$40.00 non-members
Great way to get referrals!!!

Wednesday, January 23

YLS Board Meeting, 5:30 p.m. Bar Offices.

Thursday, January 24

Young Lawyers Section Luncheon. Noon, Tower Club. Chief Judge Victor Tobin"State of the Circuit"
Cost: \$25. RSVP to BCBA at (954) 764-8040

Friday, January 25

Judicial Robing Ceremony:The Honorable Matthew Destry, The Honorable Carlos Rebollo. Main Courthouse, 3rd Floor Jury Room
1:30 p.m. RSVP to BCBA at (954) 764-8040

February

Saturday, February 2

Young Lawyers' Section Holiday in January Party Museum of Discovery & Science (MODS) in Fort Lauderdale. To benefit Broward County foster care children. Contact Chris D. Connally at CDCConnally@hotmail.com.

Friday, February 8

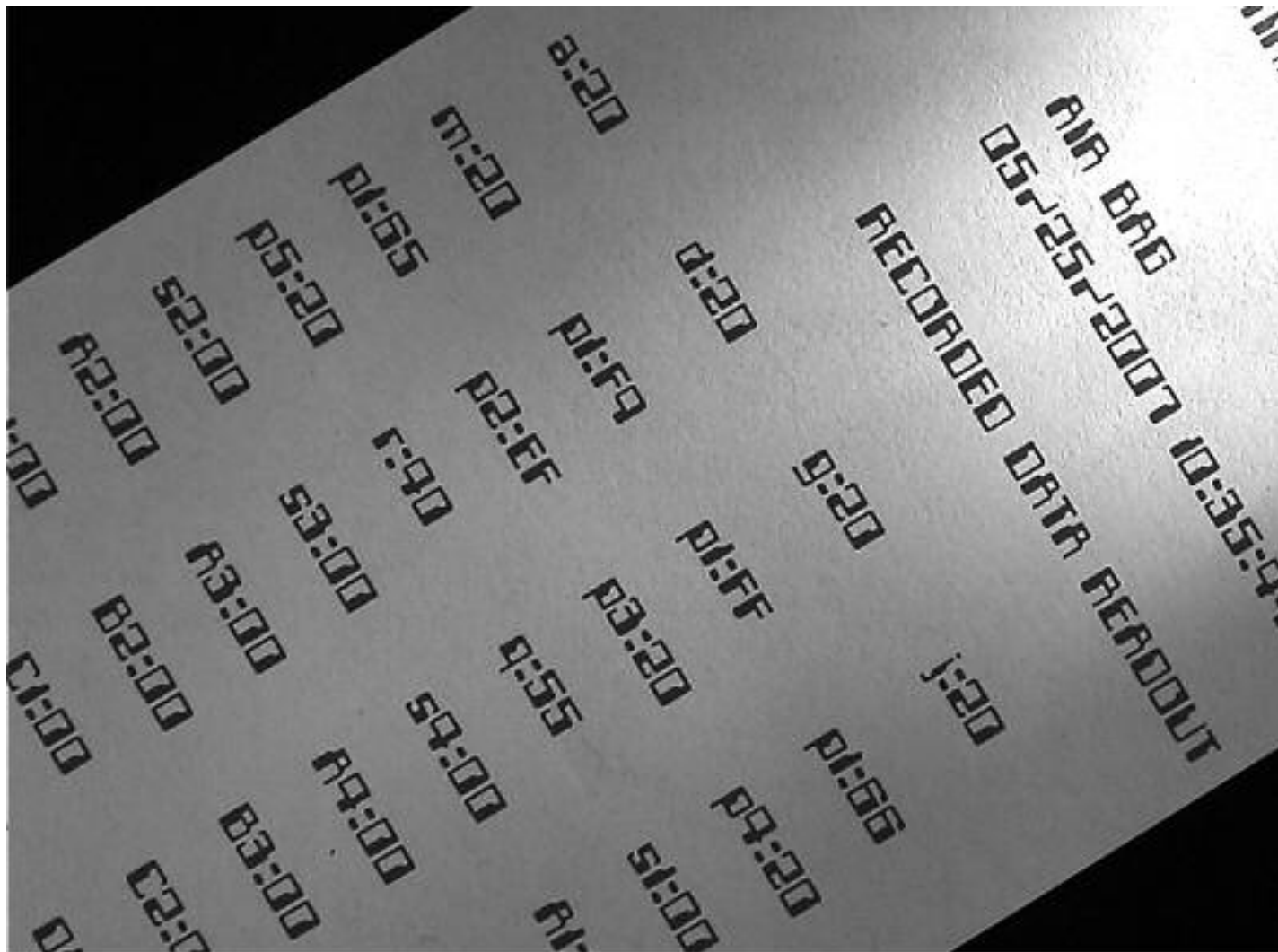
The 2008 Haitian Lawyers Association Scholarship and Awards Gala will be held on February 9, 2008 at the Westin Diplomat Hotel. The theme for this year's Gala is Journey to "La Perle Des Antilles. A Celebration a Haiti's Past, Present and Future." For more information or sponsorship opportunities please contact HLA President, Jeff P. H. Cazeau, (305) 854-0800 or jcazeau@wsh-law.com.

FOR SALE

Solid wood conference table (20'x58")
\$200

Conference chairs; chrome on casters
\$100/each

CALL: BCBA at 954-764-8040



Defective Airbag?
Can you convert hexadecimal to binary?

We Can.
(or at least we think we can!)

www.justiceforall.com

Kelley Uustal

TRIAL ATTORNEYS Fort Lauderdale, Florida 888-522-6601

Catastrophic Injury | Wrongful Death | Defective Products | Medical Malpractice | Consumer Fraud | Business Litigation

A Special Thank You...

At press time, these are the individuals who have made contributions this current fiscal year to our Mortgage Reduction program that was created to help BCBA pay down the mortgage on the Norma B. Howard Bar Center. Each individual received a blue and gold BCBA lapel pin.

2005 Contributors

W. George Allen
Michael J. Alman
Elizabeth Athanasakos
Jay E. Auerbach
The Honorable Marcia Beach
Carl D. Berry
Alan C. (Peter) Brandt, Jr.
James H. Carroll
E. Hugh Chappell, Jr.
Aaron R. Cohen
Victor P. DeBianchi, Jr.
James P. Durkin
Gary M. Farmer, Jr.
The Honorable Jane D. Fishman
Yolanda L. Fox
Robert J. Friedman
Melinda S. Gentile
Kelly Gibson
Ellen Gilbert-Rose
Jorge E. Hurtado
Barry M. Kaufman
Khila L. Khani
Thomas L. LaSalle
Willie Lawson
Jody Leslie
Bernard J. Levy
Robin Sobo Moselle
Christopher M. Neilson
Charles E. Paoli, Jr.
Samuel A. Price
Kimberly A. Register
The Honorable Ronald J. Rothschild
Arlene J. Simon Campione
Arnold M. Straus, Jr.
Barbara K. Sunshine
Tami R. Wolfe
Alicia Zachman

2006 Contributors

W. George Allen
Roger Ally
Michael J. Alman
Jay E. Auerbach
The Honorable Paul L. Backman
Frederick C. Bamman, III
The Honorable Marcia Beach
Anthony J. Beisler, III
The Honorable Martin J. Bidwill
Samara Bober
David Wm. Boone
Alan C. (Peter) Brandt, Jr.
Steven D. Braverman
James H. Carroll
The Honorable Patricia Cocalis
George C. Cohen
The Honorable James I. Cohn
Michael J. Costantino
David W. Crane
Elizabeth G. Daugherty
Brenda Di Ioia
Michael S. Elstein
Ben I. Farbstain
Gary M. Farmer, Jr.
Michael A. Fischler
The Honorable Jane D. Fishman
RoseAnn Flynn
Yolanda L. Fox
Kelly Gibson
Steve Ginestra
Nathaniel E. Green
Dan Davis Hallenberg
Vene M. Hamilton
R. Michael Hursey
Gordon James, III
Barry M. Kaufman
Khila L. Khani
Arlene H. Lakin
Thomas D. Lardin
Thomas L. LaSalle
Jody Leslie
Margery Lexa
Kim T. Mollica
Sean L. Moore
Robin Sobo Moselle
Karen Myatt
Michael B. Nipon
Bennett Oppenheimer
Thomas F. Panza
The Honorable Carol-Lisa Phillips
The Honorable Gisele Pollack
Lisa M. Porter
John C. Primeau
H. Mark Purdy
Raleigh R. Rawls
Gene F. Reibman
Terry M. Rosenblum
Gary J. Rotella
Diana Santa Maria
The Honorable Barry S. Seltzer
Jason E. Slatkin
Martin J. Sperry
Barbara K. Sunshine
Meah Rothman Tell
Megan D. Widmeyer
William Wong
Ghenete Wright Muir
Alicia Zachman

2007 Contributors

Jeffrey A. Adelman
W. George Allen
Mark Allsworth
Jay E. Auerbach
The Honorable Paul L. Backman
Anthony J. Beisler, III
The Honorable Martin J. Bidwill
Sandra Bonfiglio
Alan C. (Peter) Brandt, Jr.
Warren Brown
Gordon C. Brydger
Robert Bulfin
Scott C. Burgess
James H. Carroll
Michele Cavallaro
The Honorable James I. Cohn
Richard DeNapoli
Martin S. Fein
Michael Fischler
The Honorable Jane D. Fishman
Deborah P. FitzGerald
Ted P. Galatis, Jr.
Kelly Gibson
Steve Ginestra
Melinda S. Gentile
The Honorable Renee Goldenberg
Vene M. Hamilton
The Honorable Patti E. Henning
Catherine F. Hoffman
Stuart N. House
R. Michael Hursey
Jorge Hurtado
The Honorable Cynthia Imperato
The Honorable Kathleen Ireland
Neal R. Kalis
Barry M. Kaufman
Khila Khani
Arlene H. Lakin
Thomas L. LaSalle
Toni Latino
Bernard J. Levy
Margery J. Lexa
Carlos M. Llorente
Jeffrey R. Miner
Kim Mollica
Robin Moselle
Ghenette Wright Muir
Joseph P. Mullen
Karen Myatt
Bennett Oppenheimer
Thomas F. Panza
Charles E. Paoli, Jr.
Roger Pickles
Hope L. Plevy
Peter Portley
Brandan J. Pratt
Charles Radice
The Honorable Stacy Ross
The Honorable Ronald J. Rothschild
Diana Santa Maria
Martin J. Sperry
Barbara K. Sunshine
Meah Rothman Tell
Lachezar Vanchev
Laura M. Watson
William Wong
Alicia Zachman



Message From Broward County Bar Association's Young Lawyers' Section President by Chris D. Connally

Now that Thanksgiving is behind us, it's time to get in the winter holiday mode! 'Tis the season for spreading joy, which means giving, receiving and, of course, more eating! Many had the opportunity to

enjoy the magical voices of the Dilliard High School Choir on December 13th at the Tower Club. The December luncheon is always a special treat and the YLS would like to thank Brenda Brown and her group of talented students for their memorable presentation!

The YLS is putting on its annual Holiday in January event at the Museum of Discovery & Science (MODS) in Fort Lauderdale on February 2nd to extend the holiday season and bring holiday cheer to nearly 100 Broward County foster care children that may not have had a memorable holiday season. Although a few days past the month of January, this year's Holiday in January figures to live up to that of years past! The children will be treated to a day of fun at the MODS, where tables will be filled with a countless number of toys and each child will receive a gift on his or her wish list of up to \$20. Each child will also receive a backpack to use for school and in order to bring all of the toys back to their foster home. Lunch and punch will be served and each child and his or her foster parents will

have access to the museum for the rest of the day!

This program is funded strictly through donations from people in the Broward County area. All financial donations are tax deductible if checks are made payable to Florida Attorneys' Charitable Trust. In order to make this event a success, we encourage people to make a financial donation or drop off a gift at the BCBA. Thanks to all of you who did bring gifts to the BCBA Holiday Party. If you choose to drop off a gift the BCBA, please make sure that it is new and please do not wrap it. The YLS and the foster care children attendees thank you in advance for your support!

This January 24, 2008, the YLS will be hosting a most intriguing luncheon, as Chief Judge Victor Tobin will be discussing the State of the Circuit. The luncheon will be co-hosted by a number of other voluntary bar associations and will most certainly fill up quickly! The cost for attendance is also \$25.00 per person and R.S.V.P.'s can be made to the BCBA after the start of the 2008 New Year at 954-764-8040.

Remember, you do not have to be young or a lawyer to attend our events! As always, should you have any questions, please do not hesitate to contact Chris D. Connally at CDConnally@hotmail.com.

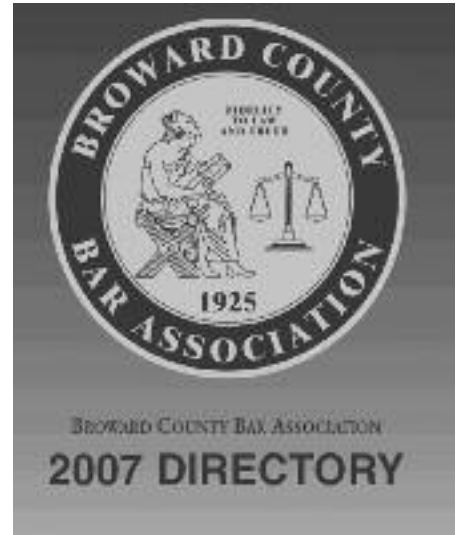


LATERAL ASSOCIATES NEEDED MIAMI-DADE & BROWARD

With year-end around the corner, many top **boutiques, regional and national law firms** throughout Miami-Dade and Broward are in the process of ramping up for Q1 2008. **"Star quality"** associates with 2-5 years experience in general corporate, M&A, Finance, Real Estate, Tax, Trust & Estate, and Commercial Litigation (state & federal) with stable work histories, and superior law school academic achievements are in high demand.

Are you are at a point in your career that now might be great time to explore other opportunities?

Antoinette Guy 877-223-1110
aguy@americanlegalsearch.com
www.americanlegalsearch.com



2007 Broward County Bar Association Pictorial Directory

\$21.20 + \$2.80 Postage

Total \$24.00

Contact: Broward County Bar Association
954-764-8040



Does your Evidence Storage Break the Chain of Custody?

A key piece of evidence can make or break your case.
The Evidence Storage Company (TESCO) offers you secure, independent third party evidence storage for large or small items.

You get convenient pick-up and delivery, as well as 24/7 access for evidence examination.
TESCO is licensed, bonded, and available to serve Monroe, Miami-Dade, Broward, Palm Beach, Martin and Collier counties. Call for details.



561-302-0756
www.tescoevidence.com



Robert D. Moody, J.D., CISA, CISM
Partner,
Forensic Technology Group

Available to serve you at:
954-370-2727
rmoody@bsss-cpa.com

Berenfeld, Spritzer, Shechter & Sheer CERTIFIED PUBLIC ACCOUNTANTS & CONSULTANTS

Computer Forensics and Electronic Discovery

The Forensic Technology Group at Berenfeld Spritzer regularly assists law firms, companies and government in conducting technology investigations on issues ranging from human resource violations to embezzlement and fraud.

Our forensic technology and e-discovery practice includes:

- Pre-discovery planning
- Evidence preservation
- Forensic analysis
- Data mining
- Expert testimony

Call Rob Moody at 954-370-2727 for more details.

Three convenient locations: Coral Gables ~ Fort Lauderdale ~ Sunrise
Visit us at: www.bsss-cpa.com

Michael G. Powell - 1st Equity Appraisals, LLC

State Certified Residential Real Estate Appraiser
St. Cert. Res. REA # RD 5615

Real Estate Appraisals in Broward, Dade
& Palm Beach Counties

Specializing in Estate and Divorce Settlement Valuation
Date of Death Appraisals

Phone (954) 770-7597
Fax (954) 306-2602

Email: mgp@1stequityappraisals.com
Website: www.1stequityappraisals.com

Discount For BCBA Members

Tropical Acres
2500 Griffin road

Discount Coupon is 25 percent off entire check

Sunday through Friday.

Max discount up to \$25.

Must show Barrister or clipped advertisement.

Expires June 2008.

Per Joe Studiale and Jack Studiale 12-11-07



RECENT DEVELOPMENTS IN THE LAW

by Nancy Little Hoffmann

1. Attorney's Fees/Proposal for Settlement Saenz v. Campos, 32 Fla. L. Weekly D2701 (Fla. 4th DCA November 14, 2007).

The Fourth District affirmed the striking of an insured's section 768.79 proposal for settlement in an action against her UM carrier. In a 2-1 decision, the court found the proposal ambiguous because it stated in one paragraph that it was meant "to resolve all claims by the plaintiff against the defendant" and stated in

another paragraph that payment would be made "in full settlement of the claims raised in the suit" against the defendant. The court held that it was unclear whether the proposal addressed a bad faith claim that the insured had also noticed under the civil remedies statute during the litigation.

2. Attorney's Fees/Specificity of Motion Parrot Cove Marina v. Duncan Seawall, Dock & Boatlift, Inc., 32 Fla. L. Weekly D2733 (Fla. 2nd DCA November 16, 2007).

In a construction lien foreclosure case, the Second District reversed an award of attorney's fees and costs to the prevailing plaintiff because no motion was filed within 30 days of the judgment as required by rule 1.525. The court held that even though the final judgment had awarded attorney's fees, leaving only the amount for determination, a notice of hearing which merely referenced the final judgment did not satisfy the requirements of the rule. According to the Second DCA, the filing was required to "at a minimum" include the amount of fees sought, supporting affidavits, copies of bills, and identities of witnesses. [Note: this restrictive interpretation of the rule does not apply in the Third or Fourth Districts. See Silver Springs Properties v. ERA Murray Realities, Inc., 874 So. 2d 712 (Fla. 4th DCA 2004) ("bare bones" motion filed within 30 days is sufficient; supporting documentation need not be filed within 30 days); P&R Smith Corp. v. Goyarrola, 864 So. 2d 584 (Fla. 3rd DCA 2004) (same).]

3. Evidence/Application of Frye to Expert Testimony Marsh v. Valyou, 32 Fla. L. Weekly S750 (Fla. November 21, 2007).

In a split opinion, the supreme court held that an expert's testimony causally linking trauma from an automobile accident to the onset of fibromyalgia was pure opinion, based on the expert's experience and training, and was admissible without having to satisfy Frye v. United States. The majority also held that even if Frye did apply, the testimony in the case satisfied that test. Justice Anstead, joined by Justice Pariente, wrote an extensive concurring opinion expressing the view that the 1923 Frye standard did not survive the adoption of Florida's Evidence Code and should not be applied at all. The dissenters (Justices Cantero, Wells and Bell), opined that the expert testimony was subject to, and failed, the Frye test.

4. Medical Malpractice/Good Samaritan Act Christensen v. Cooper, 32 Fla. L. Weekly D2729 (Fla. 5th DCA November 16, 2007).

A directed verdict in favor of an emergency room physician based on the Good Samaritan Act was reversed, because of expert testimony that the doctor should have recognized that an accident victim was bleeding internally and needed immediate surgical intervention. Accordingly, a jury question was presented as to whether the physician acted "with reckless disregard" in failing to recognize the need for surgery and to call for surgical evaluation in a timely manner, thus falling within the statutory exception to nonliability.

5. Negligence/Property Owner's Duty of Care to Motorists Williams v. Davis, 32 Fla. L. Weekly S745 (Fla. November 21, 2007).

Answering a certified question from the Fifth District, the supreme court held that the McCain v. FPL foreseeable zone of risk analysis does apply to private owners of residential property containing foliage that blocks motorists' view of an adjacent intersection, but only if the foliage extends into the public right-of-way. There is no duty to motorists where the foliage is located wholly within the bounds of the property.

6. Remittitur/New Trial Option Olivas v. Peterson, 32 Fla. L. Weekly D2708 (Fla. 4th DCA November 14, 2007).

After a \$5 million verdict was awarded in an automobile accident case, the defendants moved for a new trial or remittitur, claiming that the verdict was grossly excessive. The court denied the motion for new trial but remitted

the judgment to \$2.25 million. Although the plaintiff filed a notice accepting the remittitur, and the court entered an amended final judgment in that amount, defendants appealed the amended final judgment. The Fourth District rejected plaintiff's argument that the issue was not preserved, since the defendants had made it clear that they did not consent to the amount of the remittitur. Defendants, "adversely affected" by the remittitur, were thus entitled to a new trial on damages.

7. Rule Amendments In re Petition of the Alt. Dispute Resolution Rules & Policy Committee, 32 Fla. L. Weekly S726 (Fla. November 15, 2007).

The supreme court has amended the mediation rules, removing the requirement that in order to be certified, a circuit court mediator must be a member of the Florida Bar.

In re Amendments to Florida Rules of Appellate Procedure, 32 Fla. L. Weekly S711 (Fla. November 15, 2007).

The court has also amended the appellate rules regarding post-conviction procedures.

In re Amendments to the Rules Regulating the Florida Bar, 32 Fla. L. Weekly S712 (Fla. November 15, 2007).

The supreme court has also adopted rules establishing a registered paralegal program.

8. Sovereign Immunity/Cap on Damages Zamora v. Florida Atlantic University Board of Trustees, 32 Fla. L. Weekly D2628 (Fla. 4th DCA November 7, 2007).

Where the plaintiff obtained a judgment against his employer which covered two claims, one for age discrimination and the other for retaliation, the Fourth District held that he was entitled to recover the statutory sovereign immunity cap of \$100,000.00 for each of the two claims since they arose from separate incidents, and each claim required proof of different facts. The court also held, however, that the plaintiff could not recover attorney's fees beyond the statutory cap.

The Broward Barrister is published by the Broward County Bar Association as a part of our commitment to provide membership with information relating to issues and concerns on the local level. Opinions and positions expressed in the signed materials are those of the author and may not necessarily reflect the views of this publication or the Broward County Bar Association.

1051 SE Third Avenue, Ft. Lauderdale, FL 33316

BROWARD COUNTY BAR ASSOCIATION

OFFICERS AND DIRECTORS JULY 1 2007- JUNE 30, 2008

OFFICERS		
President	Barbara K. Sunshine	587-9539
President-Elect	Christopher M. "Chris" Neilson	920-4529
Secretary/Treasurer	Carlos M. Llorente	485-4470
Past President	Victor P. DeBianchi, Jr.	929-6666

BOARD OF DIRECTORS		
Southeast	Central	
Michele A. Cavallaro	Allison K. Bethel	712-4605
Morrie I. Levine	Deborah Pore. FitzGerald	463-8456
John C. Primeau	Ted P. Galatis, Jr.	522-6700
Southwest	John G. Jordan	772-8222
Diana Santa Maria	Todd R. McPharlin	522-6601
West	Angel Petri Rosenberg	463-9077
Roshawn J. Banks	Bruce A. Weihe	568-7000
Jordana L. Goldstein	Northwest	
Marie P. Montefusco	Jorge E. Hurtado	777-4711
	Northeast	
	Alan S. Fishman	975-7800
	Patrick B. Gunta	928-0100
	Julie F. Klahr	771-4500

JUDICIAL REPRESENTATIVE

The Honorable Stacy Ross

EXECUTIVE DIRECTOR

Art Goldberg 764-8040 Fax: 764-8060

YOUNG LAWYERS SECTION OFFICERS

President	Chris D. Connolly	626-0000
President-Elect	Scott P. Chitoff	522-2200
Secretary/Treasurer	Michael B. Gilden	924-0300

FLORIDA BAR BOARD OF GOVERNORS-17TH JUDICIAL CIRCUIT

Allison Bethel	712-4605	Eugene Petris	523-9922
Jesse H. Diner	925-5501	Frank C. Walker	764-7676
Nancy W. Gregoire	761-8600		

17TH CIRCUIT BOARD OF GOVERNORS, YOUNG LAWYERS DIVISION
Scott Chitoff Felicia Jordan Adam Rabinowitz Ghnette Wright Muir



JUDGE GUNTHER RETIRES

After over twenty dedicated years, the Honorable Judge Bobby W. Gunther leaves the bench.

A native Floridian, Bobby Gunther was born in Melbourne, Florida. She attended the University of Florida, where she received her B.A. and J.D. degrees in 1963 and 1965, respectively. After receiving her law degree, she entered into private practice in 1966 and began her career as a civil litigation attorney where she continued to excel until 1973, when she joined the Broward County Court. She became Administrative Judge of the Broward County Court in 1975 and after serving for four years in that capacity, Judge Gunther was elevated to the Circuit Court bench in the 17th Judicial Circuit in 1981. She then was appointed to replace Judge Barkett and joined the Fourth District Court of Appeal in January of 1986. She served as Chief Judge for the Fourth District from July 1, 1995 to June 30, 1997. Known for advising advocates to spend their oral argument time on the stronger issues of law involved in their case, she constantly stressed the importance of focusing on key issues rather than arguing points that are insubstantial by comparison.

During her time as Judge in both county and circuit courts, she was extremely active with Bar committees. She served as a member of the Family Law Committee in 1967, as Chair of the Legal Aid Committee in 1975, on the Judicial Poll Committee in 1977, on the Bench-Bar Liaison Committee from 1978 to 1981, on the Courts Committee from 1984 to 1985, and on the Judicial Selection and Tenure Committee in 1985. Judge Gunther's Florida Bar activities include service as Vice Chair of the Summary Procedure Rules Committee in 1977, as member of the Judicial Evaluation Committee (formerly known as the Judicial Polls Committee) from 1977 to 1994, Vice Chair in 1981, 1990, 1991, and Chair from 1993 to 1994. She served on the Judicial Nominating Commission in 1981 and also from 1993 to 2003. Additionally, she performed and participated in many civic activities including service as an instructor for Nova Southeastern University's College Accelerated Program for Police Officers (CAPP), service as member and Secretary of the Broward Commission on the Status of Women, service as a Faculty Advisor for the general selection of the National Judicial College, Instructor at the Florida College for New Judges, member of the

Judicial Coordinating Counsel appointed by Chief Justice Sundberg, and member of the Governor's Task force on Criminal Justice System Reform appointed by Governor Graham, member of the Gender Bias Steering Committee and member of the Gender Bias Commission appointed by Justice McDonald. She also served the ABA Council of Chief Judges of Courts of Appeal on the Education Committee from 1995 to 1996.

Her friends and colleagues among the members of the bar, as well as those who have practiced before her, have expressed their great appreciation of her career as Judge.

At all times from the bench, Judge Gunther was courteous and kind. She listened with attention and interest, and she was always well prepared. The members of the Broward County Bar Association would like to extend their appreciation for many years of dedicated service and for the contributions Judge Gunther has made to our legal system. Best wishes for the future!

North Broward Bar Association
January 8, 2008
 Speaker
Circuit Judge Ilona Holmes

STEAK & ALE RESTAURANT
 6300 N. Andrews Avenue
 Fort Lauderdale

February 12, 2008
 Speaker
Chief Judge Victor Tobin

NORTH SATELLITE COURTHOUSE
 1600 W. Hillsboro Blvd.
 Deerfield Beach

All luncheons will be held 12:00p.m.
 Mark Your Calendar
 For information and to RSVP:
 Call Alan Fishman (954) 975-7800

OFFICE SPACE

CORAL SPRINGS

Office Space. Coral Springs. Great location on Univ. Dr. across from "the Walk." 1 vacant office (10 x 14); shared receipt, kitchen, conf. room., etc... Sec. space avail. Call Mark Abzug, Esq. at (954) 753-1003.

CYPRESS CREEK

Share referrals. Available private office with or without secretary area. All furniture, fixtures, services, telephone, Copier, fax, DSL, etc. Email info99@pobox.com subject: share office space. (954) 566-1793

DOWNTOWN

888 SE Third Ave. Luxurious office shared with six accomplished attorneys in very prestigious downtown environment. Full service/assistant. Virtual tour: www.immigrationflorida.com; Larry Behar: 954 524 8888.

DOWNTOWN

East Las Olas impressive suite for four attorneys. Two offices are available with secretarial stations, conference room, receptionist, mail room and kitchen. Call 954.838.8880.

DOWNTOWN

Close to Port, hospital and Courthouse. Up to 2500 square feet available mid-February 2008 in new office building. Ample parking, secured access, 9 foot ceilings, high impact glass. Email eri@itzler.com (954) 764-8225

DOWNTOWN

Class A downtown law offices with nine other attorneys. Close to state and federal courthouses and Governmental Center. Receptionist, secretarial stations, internet, copiers and faxes. Free parking. Call 954 764 0005.

DOWNTOWN

One to three offices and secretarial areas available. Additional services available. 625 N.E. 3rd Avenue, Ft. Laud. (954) 524-0505 Ext. 200

FORT LAUDERDALE

E. OAKLAND PARK BLVD. Suites from 460 sq. ft. to 1250 sq. ft. Can be combined for larger space. First and Second Floor available. 954/564-7545 or e-mail jokojo999@bellsouth.net

HOLLYWOOD

On Sheridan St. W. of I-95, office with sec. station, receptionist, voice mail, kitchen, etc. Contact Jeffrey Solomon, 954-967-9800.

HOLLYWOOD

Half mile west of I-95 on Stirling Road. Beautifully decorated executive offices. Great location 10 minutes from downtown Ft. Lauderdale and downtown Hollywood. Email nydia@menendezlawfirm.com. (954) 963-7220.

HOLLYWOOD

Space for Lease (Immediate Availability) Perfect for Solo Professional-First Class, lakeview office space, in suite. Emerald Lake Corporate Park, 3111 Stirling Road, Hollywood/Ft. Lauderdale. w/wo secretarial space, beautiful conference room, parking, security, maintenance, 1 or 2 offices in suite, all amenities available including: Internet, Westlaw, telephone, etc. Call Diane (954) 962-5900

OAKLAND PARK

Atty office for rent @ only \$550/month. On Oakland Park Boulevard, 2 blocks west of I-95. Office space includes high speed internet, use of conference room and reception area for clients. Contact 954-494-4102.

POMPANO

Law Office for Rent- On East Atlantic Blvd., Pompano Beach
1180 Square Feet All New Interior 954-946-0360

WESTON

One office available. 10 x 10 with window. Located in Weston near Royal Palm Blvd. Private entrance, shared Reception, conference rooms and kitchen. Internet included. 954 349-7988.

WESTON

EXTRAORDINARY OFFICE SHARING OPPORTUNITY, with a very established "AV" rated small firm - luxurious law office suite with southern mansion interiors, in Class "A" building. Great location on Weston Road just off exit at I-75. Excellent opportunity for referrals; all amenities. Sarah 954-349-3300

PARALEGAL

Johnson, Leiter & Belsky seeks litigation paralegal for Insurance Defense Firm salary depends on experience. Excellent benefits. Email resume to: pmorrison@jlblaw.com or Fax: (954) 761 8990

Why You?

In a competitive field with thousands of attorneys
(7500 in Broward County), how does a client choose you?

Visit www.bardmarketing.com to find out.



Delray Beach, Florida 561.637.2576 info@bardmarketing.com

BROWARD COUNTY BAR ASSOCIATION INVITES YOU TO BENEFIT FROM PARTICIPATION IN THE SOLO / SMALL LAW FIRM NETWORKING GROUP

6:00 PM, WEDNESDAY
JANUARY 16, 2008

* For Attorneys in Firms with Four or fewer Lawyers

WHAT WE OFFER:

- Functions Foster Interactive Networking
- Promote Your Law Firm / Enhance Visibility
- Development of Referral Relationships

WHY WE'RE DIFFERENT:

- No Outside Speakers
- You and other Participants of the Solo / Small Law Firm Networking Group are our "Guest Speakers"
- Pre-meal Business Card Exchange Session
- Choice of Chicken, Fish or Fruit Platter.

Ft. Lauderdale Airport Hilton Hotel, 1870 Griffin Rd. at I-95
When reserving at least 48 hours in advance: \$35 for Broward County Bar Association members and \$40 for non-members. At door, \$5 more on a space available basis. Credit card and check payments accepted. For further information, contact Broward County Bar Association (954) 764-8040.

Upchurch Watson White & Max MEDIATION GROUP

~ Serving South Florida ~

RODNEY A. MAX
STEPHEN G. FISCHER
GARY F. CANNER
RICHARD B. LORD
WAYNE T. GILL

Select from our distinguished panel of twenty five

· Supreme Court Certified Circuit Civil Mediators

· Qualified Arbitrators · Special Masters

~ Available for nationwide travel ~

For Upchurch Watson White & Max,

the road to resolution is well traveled.

For scheduling and coordination
of your mediation call

Toll Free: 800-863-1462



www.uww-adr.com

YOU ARE MY SUNSHINE - By Julie Klahr

As a local government lawyer other attorneys are always asking me what is involved in representing government clients. "What areas of law do you actually practice in?" they ask. Over the years, I have tried different ways to explain it. I think I have finally found a way to explain what many of us do.

In their law practice, many lawyers represent private business clients and draft contracts, negotiate transactions and financing, navigate through complicated real estate deals or possibly unravel the complexities of intricate federal regulations which may apply to their client's business. As government lawyers, we do that too. All of it. Other lawyers focus on labor issues or personal injury matters. Or perhaps they concentrate on land use, construction or development matters. As government lawyers, we do that too. Pensions, HIPAA, probate, housing, education, environmental matters, poverty issues. Yep, we do them too.

You see, a government lawyer representing a governmental agency, no matter how large or small the agency, practices in each of these areas to some degree. A government lawyer may focus on any one or a few of these areas more so than others, but it is necessary to have a basic understanding of broad areas of law in order to adequately represent and counsel public clients. Government lawyers may practice in many of these areas in any given day, let alone within a given hour. However, there is one difference in how government lawyers practice law in any one of these areas from how other lawyers practice: government lawyers have to practice in the sunshine.

No, I do not mean that we practice out of doors, or that we get the corner office with a window. I am also not referring to the fact that we are in the Sunshine State...or am I?

Florida has one of the broadest open government laws in the country and it is known as the Sunshine Law. In fact, Florida values this right so highly that the right to open government is included within the declaration of rights expressed in the Florida Constitution.ⁱ It is the right of all persons to have access to governmental proceedings at the state and local level. It requires that any communication between two or more members of any public body on any matter that may foreseeably come before that body for action be conducted in a meeting open to the public, with reasonable notice of such meeting having been given and with minutes of the meeting being taken.ⁱⁱ

It is this prohibition that makes representing numerous members of the same government body more of a tightrope walk than it would be representing other types of clients. Since the Sunshine Law precludes two members of the same board from communicating in any fashion about matters they will vote on, they cannot talk, email or send smoke signals about matters they will vote on unless the smoke signals are sent across the public meeting room in the presence of the public. This also means that they cannot communicate through third parties, including their lawyer. Advising a public client must frequently occur in public during a public meeting. It is a common occurrence that the party with whom the public client is negotiating or litigating against is present during the public meeting. This premise runs contrary to most lawyers' impulse to protect their client's privilege of confidentiality and confer with the client out of the presence and earshot of others, especially the other side.

The open government requirement also affords the public the right to have access to the records of the governmental agency. Outside of the governmental arena, it is a rarity when a client is required to turn over its records to others outside of discovery. Governmental clients, however, are required to do this routinely

under Florida's Public Records Lawⁱⁱⁱ which requires a state or local agency to make available to open inspection and copying all records made or received in the transaction of official business of the agency which are used to perpetuate, communicate or formalize knowledge.^{iv}

As Florida's priority is towards the openness of government, a public necessity is required in order to overcome this priority in order to compel the enactment of any statutory exemption. Although certain exemptions to both the Sunshine Law and the Public Records Law have been enacted, they are limited in nature and scope.

One such exemption provides that a public entity may meet in the shade or outside of the presence of the public, when litigation has been filed.^v Although lawyers generally consult with their clients in private when trying to determine whether to file a law suit, a government lawyer must conduct such consultation in public. A shade session may only occur when litigation is already pending and then only to develop strategy or discuss settlement negotiations related to the pending litigation. Even though the meeting may occur outside the presence of the public, it must be on the record and a transcript of the consultation between the government lawyer and its client must be made public upon the conclusion of the litigation.

Unlike representing private clients, these limitations imposed on public agencies severely hamper the government lawyer's ability to represent their public client, but government lawyers must practice within these guidelines. We even spend a good deal of time counseling our clients on issues pertaining to compliance with these regulations. There are some lawyers whose entire practice is focused on the enforcement and interpretation of these laws.

Despite the restrictions imposed on public business by the Sunshine and Public Records Laws, each of us in the State of Florida is impacted everyday by their existence. Never was the right to open government in the State of Florida revealed more clearly than during the 2000 U.S. Presidential election. Our law firm represented the Broward County Supervisor of Elections for approximately thirty years, including that election cycle. Throughout the election recount, we were privileged to be directly involved in the process. However, due to the Sunshine and Public Records Laws so were you. Without the existence of either or both of these laws, the entire world would not have had the front row seat and first hand, contemporaneous view of the proceedings that we all experienced, courtesy of the resulting press coverage during the recount and throughout the court proceedings within Florida. Once the legal process was elevated to the federal level, however, the courtroom doors were closed and cameras were excluded. I recall sitting with a friend waiting for the broadcast of an audio replay of the proceedings that had already occurred before the U.S. Supreme Court to be released to the public. Throughout the recount and the ensuing court battles, commentators from all over the world marveled at the different levels of access that were available within the State of Florida as opposed to the federal system. It is no wonder that Florida is held up as the model for open government all over the world.

So, what kind of law does a government lawyer practice? It's the same as you. We just have to find different and more creative ways to represent our clients within the restrictions and regulations that apply to such public clients.

i Art. I, §24, Fla. Const.

ii §286.011, Fla. Stat.

iii §119.07, Fla. Stat.

iv *Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

v §286.011(8), Fla. Stat.

The Broward County Bar Association Workers' Compensation Section

Presents:

Stayin' Alive In Workers' Comp. Today

Friday February 15, 2008

12:00 P.M. – **Lunch***

1:00 P.M. – 1:45 P.M. – *Current Trends From the Judges' Perspective.*

Hon. Geraldine B. Hogan; Hon. Daniel A. Lewis; Hon. Kathryn S. Pecko

1:45 P.M. – 2:45 P.M. – *Effectively Navigating Through Today's*

Workers' Comp System

Warren Brown, Esq.; Howard Scheiner, Esq.

Victor Marrero – Director of Risk Management – BSO

2:45 P.M. – 3:00 P.M. – Break

3:00 P.M. – 3:45 P.M. – *Litigating Claims Under Today's PTD Law*

Ray Malca, Esq.

Susan Lazarus – Vocational Rehab. Counselor/Consultant

3:45 P.M. – 4:15 P.M. – *Recent Decisions From the DCA & Supreme*

Court/Attorney Fees Update

Barbara Wagner, Esq.; Cheryl Wilke, Esq.

* Lunch included in program cost: \$75.00 for members, \$90.00 for non-members.

Please register with BCBA by calling 954-764-8040

Committee:

Richard Wagenheim – Chair

Seth Abrams • Tom Conroy • Jim Price • Mal Steinberg • Deborah Fitzgerald – BCBA board liaison

Location: BCBA Offices,

1051 SE 3rd Avenue, Fort Lauderdale, FL 33316

THE LAW OFFICES OF RALPH BEHR SUPPORTS THE BARRISTER AND THE BROWARD BAR ASSOCIATION



RALPH BEHR

ATTORNEY AT LAW

BOARD CERTIFIED IN CRIMINAL TRIAL LAW

A/V MARTINDALE-HUBBELL RATING

954-761-3444

888 S.E. 3RD AVENUE

SUITE 400

FORT LAUDERDALE, FL 33316

CRIMINAL DEFENSE

STATE AND FEDERAL COURT



CO-COUNSEL PARTICIPATION IN CRIMINAL MATTERS AS PROVIDED BY THE RULES AND REGULATIONS OF THE FLORIDA BAR

WALK TO COURTHOUSE

3 offices available in office sharing arrangement.

*Remodeled, Wood floors

*Large secretarial areas, copy/fax/scanner, kitchen, conference room

*Filing cabinets, phone system, Fast Speed Access, parking

\$725+/mo.

Dan (954) 527-0101

“YOU’VE BEEN SERVED” SAVE THE DATE!

You must attend the legal event of the year! Legal Aid Service of Broward County's 7th Annual

“FOR THE PUBLIC GOOD”

is scheduled for Friday, April 25th at the “NEW” Fort Lauderdale Grande Hotel and Yacht Club located on 17th St. Causeway and the Intracoastal Waterway.

HONORARY CHAIRS: WALTER G. “SKIP” AND LYNN CAMPBELL

For information on sponsorship opportunities for this event, contact Kathy Thomsen at 954-736-2429 or kthomsen@legalaid.org.

v. Site Developers, Inc., 584 So. 2d 1064, 1065 (Fla. 5th DCA 1991). Whether there is willful exaggeration or gross negligence is an issue of fact. *Id.* Liens filed with gross negligence or constitute a willful exaggeration are fraudulent under Florida Statute Section 713.31(2)(a). In *Hobbs Construction and Development Inc. v. Presbyterian Homes of the Synod of Florida*, the court held a lien fraudulent which included amounts unauthorized by contract or change orders. 440 So. 2d 673, 674 (Fla. 1st DCA 1983).

The Second District in *Sharrard v. Ligon*, 29 Fla. L. Weekly D1518 (Fla. 2d DCA 2004), determined that a lien was fraudulent because the contractor included the costs of insurance that the contractor never purchased. Sharrard contracted with Ligon to construct a new home. The parties agreed that Sharrard would be paid its costs plus an agreed markup for profit. After a dispute arose regarding the amount of payment due, Sharrard recorded a lien that included the cost of required workers' compensation insurance. Unfortunately, Sharrard did not have workers' compensation insurance and had not paid any premiums.

Initially, the trial court determined that the lien was not fraudulent. However, the Second District reversed. It determined that Sharrard "either willfully exaggerated the amount of the amended claim of lien or compiled the lien with such willful and gross negligence as to amount to a willful exaggeration." Thus, the Court concluded that the lien was fraudulent and unenforceable.

D. Damages for Fraudulent Lien

1. Statutory Damages

The Florida Legislature specified the damages that a claimant may recover as a matter of law as damages occasioned by the filing of a fraudulent lien. Section 713.31(2)(c), Florida Statutes, states that a "lienor who files a fraudulent lien shall be liable to the owner or the defrauded party in damages, which shall include court costs, clerk's fees, a reasonable attorney's fee for services in securing the discharge of the lien, the amount of any premium for a bond given to obtain the discharge of the lien, interest on any money deposited for the purpose of discharging the lien, and punitive damages in an amount not exceeding the difference between the amount claimed by the lienor to be due or to become due and the amount actually due or to become due." Where a lienor has placed a fraudulent lien on the claimant's property, the claimant is statutorily entitled to seek any of these damages.

2. Punitive Damages

According to Section 713.31(2)(c), Florida Statutes, punitive damages are an appropriate remedy for fraudulent liens. In *Vinci Development Co. v. Connell*, the trial court ruled that Vinci filed a fraudulent lien, and awarded the owner punitive damages in an amount equal to the difference between the amount claimed and the amount found due, as a matter of law. 509 So. 2d 1128, 1130 (Fla. 2d DCA 1987). On appeal the Second District Court reversed, reasoning that the fraudulent lien statute does not mandate punitive damages, and the facts did not justify an award of punitive damages.

The court concluded that the statute regarding punitive damages is "directory" rather than "mandatory." The court further held that the statute allows punitive damages in an amount *not exceeding* the difference between the amount claimed by the lienor and the amount actually due. This provision caps the amount of punitive damages, but there is no provision setting the minimum amount of the award. The court must determine whether the nature of the conduct or wrong supports such an award, such as malicious motive, wrongful intention, or outrageous conduct. *Id.* Therefore, in certain circumstances, the court will award punitive damages against a lienor who files a fraudulent lien.

3. Pleading Punitive Damages

In asserting a claim for punitive damages for a fraudulent lien, a party must comply with Section 768.72, Florida Statutes. Florida courts have determined that compliance with Section 768.72 is mandatory in seeking punitive damages. A plaintiff must show by reasonable evidence, a reasonable basis for recovery of punitive damages. In *Levin v. Palm Coast Builders and Construction, Inc.*, the trial court held that Palm Coast filed a fraudulent lien, and did not award punitive damages. 840 So. 2d 316, 317 (Fla. 4th DCA 2003). On appeal, the Fourth District Court affirmed the decision regarding punitive damages, reasoning that Levin did not claim punitive damages in any pleading or stipulation and did not comply with Section 768.72, Florida Statutes, which provides the procedure for asserting punitive damage claims. Therefore, a claimant must comply with Section 768.72 to successfully assert a claim for punitive damages.

4. Other Damages

Any person who willfully files a fraudulent lien commits a third degree felony. The statute requires prosecutors and state attorneys, upon the filing of any indictment or information against a contractor, subcontractor, or sub-subcontractor charging them with a violation of this section, to forward a copy of the indictment or information to the Department of Business and Professional Regulation ("DBPR").

The statute requires the DBPR to promptly open an investigation into the charges. If the DBPR finds probable cause for the charges, then it must furnish a copy of the DBPR investigative report to the state attorney or prosecutor and to the owner of the property.

E. Conclusion

The decision to file a construction lien must be taken very seriously. The lienor should strongly consider what items to include in the calculation of its lien as well as the effect of change orders and disputed claims. Lienors should take the time to consult with legal counsel regarding the preparation and filing of a construction lien. Too often, lienors sacrifice prudence and sound legal advice in order to save a few dollars or for expediency.

**ADMINISTRATIVE
OFFICE FOR RENT
WITHIN BROWARD
COUNTY
BAR ASSOCIATION'S
NORMA B. HOWARD
BAR CENTER**

- Kitchen Facilities
- Meeting Space
- Free Parking
- Private Entrance
- Walk to Courthouse

Rent \$750 per month

Contact: Broward County Bar
Association

954-764-8040

How your law firm
can save 30% in
malpractice insurance
premiums, improve
coverage, while using
"A" rated carriers.



Eric Yankwitz, Capacity Insurance

Call 954/763-3302 and get the
best deal for you.

We also handle property & casualty
coverage, comprehensive & workers'
compensation, health care & life insurance
products.
Capacity Insurance, 500 S.E. 17th Street, #220



LiveNote has a new home



But the benefits to you are the same as ever.

LiveNote® connects your laptop directly to the court reporter's machine and the videographer's camera during a deposition. So you can annotate, sort and organize the testimony as it's given, save video clips and later embed them in PowerPoint® for presentation at trial. Even better, you can send a live, realtime feed of the deposition – both video and transcript – to remote attorneys.

For more information, call **1-800-762-5272** or visit **livenote.com**.

© 2007 West, a Thomson business L-331311/6-07



FRAUDULENT LIENS

Brian A. Wolf, Esq.

Partner Smith Currie & Hancock LLP.

A. Introduction.

A construction lien is an interest or encumbrance upon real property for labor, services and materials used to improve the property. The construction lien law provides security to contractors, subcontractors, material men, laborers and design professionals, commonly referred to as lienors, by allowing them to sell real property that they have improved, and use the proceeds to pay for their work if the owner fails or refuses to pay. The same laws protect the owner by limiting the amount of money an owner can be forced to pay for a project to the agreed contract price, and by providing penalties for fraudulent liens.

This article provides an overview of Florida laws regarding fraudulent liens. First, the article provides a general description of goods and services that are lienable. Next, this article discusses what makes a lien fraudulent including filing a lien for work that was not performed, and willfully exaggerating the amount of a lien. Finally, this article discusses the monetary damages that are recoverable as a result of a fraudulent lien.

B. What is Lienable?

The agreement between owner and contractor, commonly referred to as the prime contract, provides the primary basis for what is lienable. In order to protect the owner, lienors are only permitted to pursue a lien for improvements that the owner contracted for. Thus, a lienor that performs work, or provides materials or fixtures that the owner did not specify, cannot pursue a lien for the nonconforming work.

Only labor, services and materials that are used or consumed to permanently improve real property are lienable. Such items include building materials, finishes, fixtures, construction labor, and the costs of rental equipment, fixtures and permanently affixed equipment. Items such as food, temporary lodging and other incidentals may also be lienable if required to perform the prime contract.

Items that do not permanently improve the property typically are not lienable. Such items include building materials that are not incorporated into the property, hand tools, equipment and fixtures that have not been installed. An exception is made for specially fabricated materials defined as materials or equipment that are designed and manufactured to fit the peculiar needs of a project and cannot be easily used for another project. Lienors who provide a specially fabricated item are entitled to claim a lien for such item even when the specially fabricated item has not been installed.

C. What Makes A Lien Fraudulent?

Construction liens were created and defined by the Florida Legislature. Likewise, Florida's Legislature has defined what makes a lien fraudulent. Section 713.31(2)(a), Florida Statutes, defines a fraudulent lien as follows:

Any lien asserted under this part in which the lienor

has willfully exaggerated the amount for which such lien is claimed or in which the lienor has willfully included a claim for work not performed upon or materials not furnished for the property upon which he or she seeks to impress such lien or in which the lienor has compiled his or her claim with such willful and gross negligence as to amount to a willful exaggeration shall be deemed a fraudulent lien.

Of course, courts have the responsibility to interpret the statutory language consistent with the plain language of the statute and the intent of the lien laws. A discussion of court decisions interpreting the definition of fraudulent liens follows.

1. *Liening for Work Not Performed or Not Properly Lienable*

Under most circumstances, Florida courts have determined that a lien is fraudulent if it includes monetary amounts for work not performed or not properly lienable. For example, a lien may be fraudulent if it includes the value of unauthorized change orders. In Delta Painting, Inc. v. Baumann, 710 So. 2d 663, 664 (Fla. 3d DCA 1998), the Baumanns hired Delta to repair storm damage to their home. The contract required all change orders to be in writing and signed by both parties. A dispute arose between parties and Delta filed a claim of lien that included the value of unapproved change orders.

Delta filed a lawsuit to foreclose on its lien and the Baumanns filed a counterclaim alleging that Delta's lien was fraudulent. The trial court ruled that Delta's lien was fraudulent because Delta included in its lien the value of unapproved change orders. On appeal, the Third District affirmed. The District Court reasoned that Delta could not file a lien for the value of unapproved change orders because such change orders were not part of the contract between the parties. As a result, the Court held that Delta's lien was fraudulent.

In Hobbs Construction and Development, Inc. v. Presbyterian Homes of the Synod of Florida, 440 So. 2d 673 (Fla. 1st DCA 1983), Hobbs agreed to perform its work for a guaranteed maximum price. Thereafter, Hobbs recorded a lien that included amounts that were clearly above guaranteed maximum price. The trial court determined that the lien was fraudulent because it was for amounts that were not contemplated by the contract with the owner. The District Court affirmed the trial court's decision. It reasoned that the contractor was only permitted to file a lien for amounts contemplated by the contract with the owner. Since the amount that Hobbs included in its lien was not in accordance with the contract, the Court determined that Hobb's lien was unenforceable.

Florida courts have also found a lien to be fraudulent when a contractor files a lien for the entire contract price even

Today's Banking in Yesterday's Tradition

Attorney focused services include:

Escrow Analysis, Lockbox
Processing, Bankruptcy
Trustee Accounts and
Real Estate 1031 Exchange.

Free courier service to
pick up and deliver non-cash
transactions and documents.

Deposit accounts with no
monthly fees for you, your family
and your employees.

Internet access with low cost
wire transactions and cash
management services.

**Regent
Bank**
Today's Banking in Yesterday's Tradition
Established 1986

Fort Lauderdale	1100 SE Third Avenue	954-765-5500
Davie/Plantation	2205 South University Drive	954-474-5000
Pompano Beach	1299 South Federal Highway, Suite B	954-545-7700
Boca Raton	5255 North Federal Highway	561-999-5100
Palm Beach	44 Cocoonut Row, Suite L-102	561-832-6200
West Palm Beach	1572 Palm Beach Lakes Blvd.	561-242-3400

www.regentbank.com



One of these charts contains a misdiagnosis.

Can you tell which one?

Don't worry. That's our job. With more than 20 years of medical malpractice experience – including diagnostic errors – we've honed our craft.

When you have a tough medical malpractice case, call us...800-654-2024.



TRIAL ATTORNEYS

A History of Helping the Injured and the Community

(800) 654-2024 • www.lytalreiter.com

Main Office: West Palm Beach, FL

Experience • Resources • History

though the contractor did not complete the contract. In Viyella Co. v. Gomes, 657 So. 2d 83, 84-85 (Fla. 3d DCA 1995), Viyella contracted with Gomes to construct improvements to Gomes property. When Gomes terminated Viyella, Viyella recorded a lien for the entire unpaid balance of the contract, which was \$57,675.00, even though Viyella had not completed certain work that Viyella estimated had a value of \$27,740.00. The trial court determined that the lien was fraudulent because it included the value of work that Viyella clearly did not perform. The District Court affirmed. It reasoned that Viyella had clearly filed a lien for work that it did not perform; thus, the Court affirmed partial summary judgment in favor of Gomes.

Likewise, Florida courts have determined that a lien is fraudulent if it includes the value of labor, services or materials that are not lienable. In Levin v. Palm Coast Builders and Construction, Inc., 840 So. 2d 316, 317 (Fla. 4th DCA 2003), the Levins hired Palm Coast to build their home and Palm Coast filed a lien claiming that they had not been paid in full. When Palm Coast calculated the amount of its lien, it included the costs of swimming pool maintenance, lawn maintenance, and other carrying costs it was contractually required to pay such as homeowner's association fees and utility charges.

The trial court ruled that Palm Coast's lien was fraudulent because the lien included the value of work that was not nonlienable. On appeal, the Fourth District affirmed. It held that Palm Coast could not properly lien for the costs of swimming pool maintenance, lawn maintenance, homeowner's association fees and utility charges because such items do not permanently improve the property. The Court reasoned that Palm Coast could only file a lien for improvements performed for the permanent benefit of the land. Thus, the Court concluded that Palm Coast's lien was fraudulent because the lien included the value of items that were not lienable.

2. Liening for Overhead and Profit

Several Florida courts have decided that including breach of contract damages will render a lien fraudulent. The most common contract damages that lienors incorrectly file a lien for are overhead and profit. In Onionskin, Inc. v. DeCiccio, 720 So. 2d 257, 258 (Fla. 5th DCA 1998), the contractor recorded a lien that included damages for an alleged breach of contract. The contractor, Onionskin included lost profits and delay damages in its lien. The Fifth District Court of Appeal held that the lien was fraudulent because a lien can only properly include amounts due for labor, services and materials contemplated by the contract with the owner. The Court reasoned, "[t]he statute does not make any provision for increasing the amount of the lien based on an alleged breach of the contract by the property owner."

Similarly, in Ponce Investments, Inc. v. Financial Capital of America, Ponce filed a lien against Financial Capital that included amounts for attorney's fees, overhead, and items previously paid for. 718 So. 2d 280, 282 (Fla. 3d

DCA 1998). Financial Capital brought a claim for fraudulent lien that the trial court denied. On appeal, the Third District Court reversed. It determined that Ponce's lien was a fraudulent lien because Ponce improperly included attorney's fees, overhead, and items previously paid for, in its lien.

It is important to distinguish between recording a lien for the unpaid contract value of work and recording a lien for lost profits that are separate from the contract price. Construction liens that include overhead and profit that are separate from the agreed price of the work performed or materials supplied may be deemed fraudulent by the courts. For example, in Martin v. Jack Yanks Construction Co., the parties entered into an alleged agreement for repairs to Martin's home after Hurricane Andrew, which included a 20% profit to Yanks. 650 So. 2d 120, 121 (Fla. 3d DCA 1995). The insurance payout was to determine the value of the contract.

Prior to starting work, Martin decided not to repair the house, Yanks claimed that Martin breached, and filed a lien for the entire insurance proceeds, \$107,208.60. The trial court held the lien fraudulent, reasoning that Yanks could not hold Martin responsible for the full amount of the insurance proceeds. On appeal, the Third District Court affirmed, reasoning that "[r]ecover for overhead and profit as separate items are not within the purview of the lien law." In this case the lien included these nonlienable items in an amount far beyond anything owed to Yanks, therefore the lien was fraudulent.

In contrast, Florida courts will not find a lien fraudulent if the claimed overhead and profit are part of the agreed cost of the labor, services or materials. For instance, in Haney Chevrolet, Inc. v. Poli Bros., Inc., 262 So. 2d 230, 231 (Fla. 4th DCA 1972), the Court distinguished between filing a lien for profit as part of the agreed contract price and filing an unenforceable lien for profit as a separate and distinct item of damages. The court reasoned that a lien may properly include "the actual cost of work done and materials supplied, including the overhead and profit, wages paid to employees performing the labor supervision and rentals of equipment furnished in the improvement." Such items are lienable when they are included in a contract price or reflected in the reasonable value of labor or materials furnished; however, these same items, as separate items, are nonlienable. *Id.*

Therefore, if the lien filed includes profit and overhead as part of the contract price, the lien is not fraudulent. However, if profit and overhead are separate from the contract but are included in a lien, then the lien may be a fraudulent lien.

3. Willful Exaggerations or Gross Negligence

A lien is fraudulent if the lienor willfully exaggerates the amount or files the claim of lien with willful or gross negligence. "A willful exaggerated amount is an amount known and intended to be in excess of that allowed by the law under the circumstances and claimed, not in ignorant good faith, but for bad reasons, motives or purposes." See, Stevens

Continued on page 20



Copyright Infringement Made Easy, File Sharing

© Assouline & Berlowe, P.A. 2007

On October 17, 2007, a jury in a federal district court in Minnesota found Jammie Thomas liable for willful copyright infringement and reached a verdict of \$222,000 in damages. Sony BMG Music Entertainment was among the seven record labels who brought this lawsuit against Thomas for sharing music online and infringing on their copyrights. The plaintiffs in that case were able to show Thomas had twenty-four songs on her computer that she made available in the Kazaa file-sharing network. This verdict is a first of its kind and should have a chilling effect on those who share music files with others.

Under the Copyright Act, one who distributes copies of copyrighted work without proper authorization from its owner may be liable for copyright infringement.

The Thomas case helps clarify the ambiguity in what constitutes “distributes” with respect to file-sharing cases. The judge in the Thomas case instructed the jury that they could find infringement regardless of whether or not anyone copied the twenty-four music files in her computer. The court interpreted the term “distribution” in the Copyright Act to simply mean *making* the file accessible to others and not a question of whether someone actually copied it.

It is important to note that the Copyright Act allows for statutory damages of up to \$150,000 for *each* willful infringement. Thomas had thousands of music files on her computer, however, the record labels sought to hold her accountable for only twenty-four. As a result, Thomas could have been liable for up to \$3,600,000 in damages. Luckily, the jury found Thomas liable for only \$9,250 in statutory damages per infringement.

Although there were thousands of cases like the Thomas case filed by the record companies, this is the first of its kind to actually go to trial. In an effort to stop file sharing and copyright infringement, the record labels and the Recording Industry Association of America (“RIAA”) may choose to make examples out of further un-suspecting individuals who share files. As a result, the threat of more similar trials is on the horizon.

With CD sales on a tremendous decline over the years and online music piracy taking over, the music industry is using other tactics to try to re-capture some of its market share. On October 19, 2007, the RIAA reported that it sent out 411 pre-litigation settlement

letters to 19 universities nationwide in an attempt to thwart music theft on the internet. These letters are subsequently forwarded to the individual student users, who are given an opportunity to settle the copyright infringement claim with the RIAA at a discounted rate. Otherwise, the record companies have threatened to sue.

The RIAA is determined to take a proactive stance with music piracy as, according to the RIAA website, its record label members are losing over \$300 million dollars per year to street piracy alone (this figure does not take into account the difficult task of calculating online piracy). Record companies, musicians, record stores, and others in the music industry have lost jobs and millions of dollars and have been forced to shut down. It seems as if filing lawsuits against unsuspecting online copyright infringers is the RIAA’s strongest ammunition in the war against music piracy.

Now that threshold of proof has been lowered with respect to what constitutes “distributes”, the record labels and RIAA are more likely to prevail in these types of lawsuits. Now, anyone who copies or distributes files, uploads files, or who makes files available for sharing without authorization, may be a target in a civil suit by record companies. This means that a person may expose themselves to liability simply by joining a peer-to-peer filing sharing network (such as Kazaa) and making files available for download. Although the record labels and the RIAA are targeting unauthorized use of music files, the same rules apply to copyrighted movies, pictures, text, and software. In addition, a judgment of willful copyright infringement against an individual may be non-dischargeable if they were forced to file for bankruptcy protection.

***This article was written by: Lorri Lomnitzer, Esq. and Eric N. Assouline, Esq.

Lorri Lomnitzer is an intellectual property attorney and Eric N. Assouline is a partner at Assouline & Berlowe, P.A., a commercial litigation law firm with offices in Dade and Broward counties. Lorri Lomnitzer can be reached at LL@assoulineberlowe.com, and Eric N. Assouline can be reached at ENA@assoulineberlowe.com.



Lawyers in the LIMELIGHT



Carly Cappello, an associate with the labor and employment law firm of Fisher & Phillips, is heading up the Hope for Elizabeth Foundation, a non-profit organization whose mission is to generate proceeds to educate the public about Reflex

Sympathetic Dystrophy/Complex Regional Pain Syndrome, a neurological disorder that affects the sympathetic nervous system. The disorder causes severe burning chronic pain, pathological changes in bone and skin, tissue swelling and extreme

sensitivity to touch.

The law firm of Gunster, Yoakley & Stewart, P.A. announced that attorney **Luna Phillips** has joined the firm as of counsel in its Fort Lauderdale office. Her practice areas include environmental and land use law, and administrative and governmental law.

The Association of South Florida Mediators and Arbitrators (ASFMA)
will host their

ANNUAL SPRING SEMINAR

at

THE TOWER CLUB
100 SE THIRD AVENUE
FORT LAUDERDALE, FLORIDA

SATURDAY, FEBRUARY 9, 2008
8:30 AM – 5:00PM

“THE MEDIATION TOOLBOX: ENHANCE YOUR SKILLS IN ADR”

MEMBERS: \$ 110
STUDENTS: \$ 90
NON-MEMBERS: \$ 125

(PAY ANNUAL DUES AT THE DOOR AND RECEIVE MEMBER’S PRICE)

RSVP on or before February 1, 2008

TO JANE GOLDBERG (954) 764-8040, EXT 210 OR

EMAIL (WWW.ASFMA.ORG) IF YOU PLAN TO ATTEND.
(FREE PARKING AVAILABLE IN THE GARAGE)

8 CME’s - includes 2 in Ethics; 2 in Domestic Violence; 1 in Diversity. CLE’s have been applied for.

Speakers will include:

David Berkowitz, Immigration Law

Erica Herman, Women in Distress and Ann Rufiange: Domestic Violence

Panel Discussion with Dr. Naomi Parker, Commissioner Shahrukh Dhanji and others regarding
conflict resolution and diversity

Albert Orosa: Online Dispute Resolution

Doug Greenbaum: Alternative Lifestyle

Meah Tell: Taxes

David Kaufman, Esq.: Humor in Mediation

HIGH SPEED COPYING PRICE LIST

Number of Copies	Number of Flat 8 1/2 x 11 Originals							
	1-4	5-15	16-25	26-50	51-100	101-200	201-300	301-500
1-49	.054	.046	.044	.040	.037	.035	.033	.031
50-74	.046	.044	.040	.037	.035	.033	.031	.028
75-99	.044	.040	.037	.035	.033	.031	.028	.026
100-199	.040	.037	.035	.033	.031	.028	.026	.024
200-299	.037	.035	.033	.031	.028	.026	.024	.023
300-499	.035	.033	.031	.028	.026	.024	.023	.023
500-749	.033	.031	.028	.026	.024	.023	.023	.023
750-999	.031	.028	.026	.024	.023	.023	.023	.023
1000-2499	.028	.026	.024	.023	.023	.023	.023	.023
2500-4999	.026	.024	.023	.023	.023	.023	.023	.023
5000 & Up	Call For Quote							

Call For Quote

Chart Prices are based on 8 1/2 x 11 20lb White Bond copied single-sided.
For double-sided copies deduct .0042 per copy. For all other sizes, please call.)

SUBSTITUTE PAPERS

(ADD ON PER 1000 SHEETS)

- 8 1/2 x 11 20# ColorAdd \$3.20/M
- 8 1/2 x 11 24/60# WhiteAdd \$2.00/M
- 8 1/2 x 11 24/60# ColorAdd \$5.10/M
- 8 1/2 x 11 24/60# Brite Hues.....Add \$14.50/M
- 8 1/2 x 11 28/70# WhiteAdd \$3.70/M
- 8 1/2 x 11 67# VB WhiteAdd \$13.20/M
- 8 1/2 x 11 67# VB ColorAdd \$16.40/M

(Call for any other paper upgrades)

BLANK COVERS

- Clear Plastic10¢ ea.
- Black Linen (80#Cover)10¢ ea.
- All other stocks..... Call

Now Available:
High Speed Index Tabs
Call for details.



Park Row Printing

Call Today
Toll Free: 1-800-966-5556
Fax: (954) 584-6664

Visit us on the Web at:
www.parkrowprinting.com

FREE PICK-UP AND DELIVERY

PhotoGallery: BCBA Annual Holiday Party

Photos by Nadeen Barnett



Lawyers Helping the Community Photos by Mickey Kay

Cooperative Feeding Program



BCBA Sponsored Thanksgiving Baskets at Cooperative Feeding Program.
Barbara Sunshine, with Cooperative Feeding Program Development Director Scott Woodburn, Diana Santa Mari and Maureen Meyer.

Habitat for Humanity



County Judges Stacy Ross and Sharon Zeller at the November 16 Law Week Committee Habitat for Humanity House event, spearheaded by the Jewish Federation and co-sponsored by B'nai B'rith Justice Unit and participating local bars, including Broward County Bar Association, T.J. Reddick Bar Association, Puerto Rican Bar Association, Broward County Hispanic Bar Association, Broward County Women Lawyers Association, Caribbean Bar Association, and the Broward County Trial Lawyers Association.



Barbara K. Sunshine, 2007-2008;
Skip Campbell, 1996-97.



From left, standing: Hugh Maloney 1982-83; Dale Sanders, 1990-91; Christopher M. 'Chris' Neilson, 2007 President Elect; Art Goldberg, BCBA Executive Director;
From left, seated: Frank Walker, 2000-01; Nancy Gregoire, 2002-03; Barbara K. Sunshine, current BCBA President; Jorge Hurtado, current BCBA Board Member.

Past Presidents' Luncheon

Past President Peter Portley and Board member Alan Fishman coordinated a luncheon for our past presidents held at the Riverside Hotel on November 28.



From Left: Russell Carlisle, 1991-92; Michael Carbo, 2004-2005; Ray Ferrero, Jr., 1976-77; William Spencer, 1987-88; Patrick Bailey, 1985-86.



Terrence Russell, 1984-85; Steve Moody, 2004-2005.



From left, standing: Morrie Levine, current BCBA Board Member. Alan Fishman, current BCBA Board Member; Jesse Diner, 1995-96; Terrence Russell; David Welch, 1993-94.
From left, seated: Allison Bethel, current BCBA Board Member; Jane Katterhenry, Regent Bank; Linda Conahan, 1994-95.



Allison Bethel, current BCBA Board Member. George Allen, 1988-89.



Jeffrey Wasserman, 1992-1992.



From left, standing: Peter Portley, 1989-90; Bruce Weihe, current BCBA Board Member; John Primeau, current BCBA Board Member; Mark Butler, 1999-2000;
From left, seated: Bruno DiGiulian, 1971-1972; Victor DeBianchi, 2006-2007; William Spenser.