



PALM BEACH COUNTY BAR ASSOCIATION

BULLETIN

www.palmbeachbar.org

July/August 2011

New Members of the Board Let Loose!



Seated (L-R): Immediate Past President Michael Napoleone; Retired Judge Edward Rodgers; President John Howe and President-elect Adam Rabin.

Standing (L-R) John Whittles, director; Ron Ponzoli, North County Section President; Grier Pressly, Director; Robin Bresky, Director; Wade Bowden, Director; Jill Weiss, Director; Jason Guari, Director; Theo Kypreas, Director; Jason Lazarus, Young Lawyers Section President and Sia Baker-Barnes, Director.

More pictures from the banquet can be found on page 9.

**Celebrate the end of a long hot summer
Join us for a cold beverage & plenty of networking!**

Cocktail Reception and Spelling Bee

presented by the Lawyers for Literacy Committee

Thursday, September 1

5:30 p.m. to 7:30 p.m.

Bear Lakes Country Club

1901 Village Blvd., West Palm Beach

Cost: \$25.00 for members; complimentary for judges; spouses are welcome for \$40.00

Sponsored by:

Complete Legal Investigation
Gunster
Mark A. Greenberg
MetLife

**Searcy Denney Scarola
Barnhart & Shipley**
Signature Court Reporting
Visual Evidence

Williams, Leininger & Cosby
Powers, McNalis,
Torres & Teebagay
The Stafford Firm

**Proceeds benefit local literacy programs
RSVP online @ www.palmbeachbar.org**

Mark your calendar for upcoming Membership Events

Annual Spelling Bee/Membership Reception

September 1, 5:30 - 7 p.m.
Bear Lakes Country Club

Lawyers Have Heart Run

October 1

Diversity Luncheon

October 14, 12 noon
Marriott West Palm Beach

Family Picnic

October 22
Dreher Park, West Palm Beach

Annual Holiday Party & Silent Auction

December 1, 5:30 p.m.
Frenchman's Reserve, Palm Beach Gardens

Third Annual Lawyer Variety Show

January 21, 2012
Eissey Theatre, Palm Beach State College

Bench Bar Conference

March 9
Palm Beach County Convention Center

Annual Judicial Reception

May 1, 5:30 - 7:00 p.m.
The Harriet at City Place

Annual Installation Banquet

June 2
The Breakers Hotel, Palm Beach

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Michael J. Napoleone, a shareholder at Richman Greer, P.A., has been appointed Vice-Chair of The Florida Bar's Committee on Judicial Independence.



Rutherford Mulhall, P.A. is pleased to announce that **V. Julia Luyster** has been appointed to the Board of Directors for UN Women East Florida Chapter.



Nancy La Vista, a partner at the law firm of Clark, Fountain, La Vista, Prather, Keen & Littky-Rubin, has been named treasurer of the Florida chapter of the American Board of Trial Advocates.



L.A. Perkins, a partner in the Litigation Department in Fox Rothschild's West Palm Beach office, was installed as a member of the Board of Directors of the South Palm Beach County Bar Association.

The law firm of Domnick & Shevin, P.L. proudly welcomes trial attorney **Michael J. Brevda** as their newest associate. He will represent the firm's clients in personal injury, wrongful death and general civil litigation matters.



The Pankauski Law Firm, P.L.L.C. has announced that **Duane L. Pinnock, J.D., LL.M.** has joined the firm. Mr. Pinnock is Florida Bar board certified in wills, trusts and estates and will handle

probate litigation.

Williams, Leininger & Cosby, P.A. is pleased to announce that **Richard Gaunt** has joined the firm as Of Counsel. He brings to the firm more than thirty years of expertise in trying over 100 jury trials. He is a Board Certified Trial Lawyer since 1985. Mr. Gaunt can be reached at (561) 615-5666 or rgaunt@wlcclaw.com.

Rutherford Mulhall, P.A. is pleased to announce that **Kenneth N. Johnson** was re-elected Treasurer of the Palm Beach Association of Criminal Defense Lawyers for 2011-12.

Michael J. Pike, a partner in the law firm of Burman, Critton, Luttier & Coleman was appointed by the Palm Beach County Justice Association to serve on the Board of Directors of the Florida Justice Association.

MISCELLANEOUS

TWO NICE APARTMENTS DOWNTOWN WPB AVAILABLE:

Starting at \$650/mo. One 1 BR/1 BA, one 2BR/1BA w/ wood floors & fireplace in a historic Florida house. 1/2 block to Intracoastal, 1/2 mile to courthouse, Clematis, Good Sam. Walk to beach. Also zoned for office. (561) 315-3024 or email palmbeachsax@hotmail.com

Rules of Civil Procedure Corner

By Matt Triggs and Jonathan Galler

Rule 1.285: Inadvertent Disclosure of Privileged Materials

Ever wake up in a cold sweat over the sudden fear that you may have inadvertently produced a privileged document?

Ever object during deposition to the use of a document that you believe to be privileged, only to realize -- in horror -- that the document bears your own client's Bates-stamp?

Fortunately for the mere mortals among us, "Florida courts do not apply a strict rule that counsel's inadvertent production alone waives the attorney-client privilege." Instead, most courts, including the Fourth District Court of Appeal, have adopted a "relevant circumstances test." The test employs a five-factor analysis to determine whether or not the privilege has been waived by an inadvertent disclosure. And Florida's new Rule 1.285, which became effective on January 1, 2011, now provides the procedure for presenting that analysis to the court.

The Relevant Circumstances Test

Courts consider the following five factors to determine claims of privilege where there has been an inadvertent disclosure: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) any delay and measures taken to rectify the disclosures; and (5) whether the overriding interests of justice would be served by relieving a party of its error. This test has been applied to disclosures made in a variety of contexts, including formal discovery, informal exchanges of documents, and even an unintentional interception of privileged material by an opposing party.

Fla. R. Civ. P. 1.285

Florida Rule of Civil Procedure 1.285 seems to have been adopted with relatively little fanfare. Its journey began shortly after the 2006 adoption of its counterpart in the Federal Rules of Civil Procedure, Rule 26(b)(5)(B). In 2007, the Florida Bar Attorney-Client Privilege Task Force, prompted by a recommendation from the ABA and the National Conference of Chief Justices, asked the Civil Procedure Rules Committee of The Florida Bar to consider drafting a rule of procedure to address inadvertent disclosures. Practitioners who have already become familiar with the 2006 federal rule should note that Florida's Rule 1.285 is far more lengthy and detailed than its federal counterpart. Thus, it provides more guidance than the federal rule, but it also creates pitfalls for the unwary.

The rule provides that any recognized privilege may be asserted after an inadvertent disclosure. Significantly, "to assert the privilege, the party, person, or entity shall, within 10 days of actually discovering the inadvertent disclosure, serve written notice of the assertion of the privilege on the party to whom the materials were disclosed." By contrast, the federal rule provides no specific deadline for serving notice of an inadvertent disclosure and does not require that the notice be in writing. (The Comments to the federal rule, however, state that notice should be in writing unless the circumstances, such as the assertion of the claim during a deposition, preclude it.) Also, unlike the federal rule, Rule 1.285 provides that the notice "shall specify with particularity the materials as to which the privilege is asserted, the nature of the privilege asserted, and the date on which the inadvertent disclosure was actually discovered."

Both the federal rule and Rule 1.285 also provide that the receiving party may challenge the assertion of privilege and present the materials to the court for a determination of privilege (which, in Florida courts, is when the "relevant circumstance" test will be applied). However, in contrast to the federal rule, Florida's Rule 1.285 again provides a specific deadline and procedure for challenging the assertion of privilege. Notice of the challenge must be made within 20 days of service of the notice of inadvertent disclosure and must specify the grounds for the challenge. Critically, the "[f]ailure to serve timely notice of challenge is a waiver of the right to challenge."

Unlike the federal rule, Rule 1.285 also specifically identifies several nonexclusive grounds for asserting such a challenge. Interestingly, though, one such ground for a challenge is the untimely service of the original notice of inadvertent disclosure. This strongly suggests that the prudent lawyer who receives even an untimely notice (i.e., a notice served more than 10 days after discovery of the inadvertent disclosure) should, nevertheless, serve a "notice of challenge" within 20 days or else risk having waived the right to make that challenge.

One notable similarity between the federal rule and Rule 1.285 is that both rules impose obligations upon the party who receives notice of an inadvertent disclosure. In particular, both rules require that such party "return, sequester, or destroy" the subject materials and, further, take "reasonable steps" to retrieve the materials from those to whom the materials may have been provided prior to service of the notice of inadvertent disclosure.