



PALM BEACH COUNTY BAR ASSOCIATION

BULLETIN

www.palmbeachbar.org

March 2012

Contributions sought for 2012 law week judicial reception

The Law Week Committee is beginning its efforts to request contributions from law firms to assist in underwriting the cost of the annual judicial reception honoring the local judiciary and judicial assistants to be held on May 1, 2012. Sponsors will be recognized on the email notices, on a sign at the reception and in the Bar Bulletin.

Those interested in making contributions should send a check no later than April 1 to the Palm Beach County Bar Association, ATT: Patience Burns, 1507 Belvedere Road, WPB, FL 33406. Sponsorship amount are as follows:

- \$575 for law firms of 11 or more attorneys
- \$375 for law firms with 3-10 attorneys
- \$225 for law firms with 1-2 attorneys

Thank you for your consideration!



Members of the Young Lawyers Section volunteered their time to work on a Habitat for Humanity project in Delray Beach. They assisted the owners by putting the roof on their new home.

We've Moved!

The Palm Beach County Bar Association is very excited to announce that we have moved in to our new, permanent headquarters.

Our new address is:

**1507 Belvedere Road
West Palm Beach, FL 33406**

Thanks to all of our members to date who have supported this new facility. Please see page 5 of this issue to see who has contributed and to learn more about buying a brick in our new entranceway.

Bar elections will be online

This year's election for the Board of Directors will once again be conducted electronically. An email will be sent to all members in good standing. **Please be sure to set your spam filters to preapprove anything from ballotboxonline.com** For those members that we do not have an email address, a paper ballot will be sent. Voting will take place beginning on March 29 and ending on April 9 at 5 p.m. Winners will be announced via e-mail and will be posted on the Bar's website.

A contested election will take place for the position of director. There are seven members running for five seats: Jessica Callow, Ettie Feistmann, Greg Huber, Theo Kypreos, Maureen Martinez, Ned Reagan and John Whittles.

Mark your calendar for upcoming Membership Events

Bench Bar Conference

March 9
Palm Beach County Convention Center

Annual Judicial Reception

May 1
The Harriet at City Place

Law Day Luncheon

May 4
West Palm Beach Marriott
Guest Speaker: Elizabeth Smart

Annual Installation Banquet

June 2
The Breakers Hotel, Palm Beach

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Rule 1.140: Defenses

By Matt Triggs and Jonathan Galler

Ever been told that the best defense is a good offense? Anyone ever instruct you to hit first and hit hard?

That may be decent advice when it comes to football, boxing and political debates. But if you are trying to challenge a court's exercise of personal jurisdiction, the best defense is to stay on defense. If you take an early swing at your opponent, you just might find yourself stuck in the fight for the long haul.

The governing principles can be found in Rule 1.140.

First, under Rule 1.140, a defendant or non-party seeking to challenge personal jurisdiction must assert the defense in the first responsive motion or pleading or that defense is waived. *See Chancellor v. BWC Investments*, 57 So. 3d 969, 971 (Fla. 4th DCA 2011). The Rule provides that “[a] party waives all defenses and objections that the party does not present either by motion... or, if the party has made no motion, in a responsive pleading...” Rule 1.140(h)(1).

Second, under Rule 1.140, a defendant or non-party may join a timely asserted jurisdictional challenge with other defenses or objections but may not join the jurisdictional challenge with a claim for affirmative relief without waiving the challenge. *See Klem v. Espejo-Norton*, 983 So. 2d 1235, 1237 (Fla. 3d DCA 2008); *see* Rule 1.140(b) (“No defense or objection is waived by being joined with other defenses or objections in a responsive pleading or motion.”).

As the Florida Supreme Court has held, “a defendant waives a challenge to personal jurisdiction by seeking affirmative relief – such requests are logically inconsistent with an initial defense of lack of jurisdiction.” *Babcock v. Whatmore*, 707 So. 2d 702, 704 (Fla. 1998).

In cases discussing this well-settled principle, the issue that typically arises is whether the relief sought by the defendant or non-party qualifies as “affirmative relief” or is merely “defensive.”

The Fourth District Court of Appeal addressed this issue just a few months ago in *Garfinkel v. Katzman*, 2011 WL 6057977 (Fla. 4th DCA Dec. 7, 2011). In that case, Garfinkel, a non-party witness, filed a motion for protective order to quash a deposition subpoena for lack of service. Garfinkel also sought to limit the scope of any deposition permitted on grounds of spousal and attorney-client privilege.

The trial court found that the motion for protective order waived Garfinkel’s right to challenge the court’s exercise of personal jurisdiction. But the Fourth District reversed, holding that (i) Garfinkel’s motion timely raised her objection to personal jurisdiction and (ii) the accompanying request to limit the scope of the deposition was purely defensive in nature. *Garfinkel*, 2011 WL 6057977, *1. The Court was not persuaded by the appellee’s argument that Garfinkel’s objection for lack of service constituted just a few, short sentences in her motion and that the main thrust of the motion had been to limit the scope of the deposition.

In other words, Garfinkel’s challenge to the court’s exercise of personal jurisdiction was not waived when Garfinkel simultaneously asserted, and even emphasized in her motion papers, an additional request; that request constituted a defense, not a prayer for affirmative relief.

The Fourth District employed similar reasoning years earlier in *Ginsberg v. Lamour*, 711 So. 2d 182 (Fla. 4th DCA 1998). In

that case, the Court held that the defendant had not waived his challenge to personal jurisdiction where he filed a response to plaintiff’s motion for entry of

default alongside a motion to quash service of process. The Court characterized the response to the motion for default as “purely defensive” and cited Rule 1.140(b) for the proposition that the assertion of that defense at the same time as the motion to quash service did not waive the defendant’s objection to personal jurisdiction. *Ginsberg*, 711 So. 2d at 183.

The contours of this principle were discussed by the Second District Court of Appeal last year in *Faller v. Faller*, 51 So. 2d 1235 (Fla. 2d DCA 2011). There, the defendant filed a motion to dismiss for lack of personal jurisdiction and also moved to stay the action. The trial court ruled that the defendant had waived his objection to personal jurisdiction by joining the request for a stay. The trial court reasoned that a request for a stay is not a specifically enumerated Rule 1.140(b) defense and, therefore, cannot be joined with a jurisdictional challenge without waiving the challenge.

The Second District, however, reversed, holding that the motion to stay was defensive in that the defendant had simply sought a “time out” and had not sought to enforce any contractual or statutory right. *Faller*, 51 So. 2d at 1237. The Court also explained that Rule 1.140(b) is not an exhaustive list of possible defenses, the implication being that even a defense that is not specifically enumerated in Rule 1.140(b) may be joined with an objection to personal jurisdiction without waiving that objection. As the Court stated, “Florida courts have recognized various defenses that when raised, do not waive personal jurisdiction.” *Id.* The dispositive question is whether the argument accompanying the jurisdictional challenge is merely defensive or rises to the level of a claim for affirmative relief.

Notably, at least one type of claim for affirmative relief will not waive a challenge to personal jurisdiction. In *Arch Aluminum & Glass Co., Inc. v. Haney*, 964 So. 2d 228, 235 (Fla. 4th DCA 2007), the Court held that “[a] compulsory counterclaim does not waive a personal jurisdiction defense because a compulsory counterclaim is waived if not asserted in answer.” The filing of a *permissive* counterclaim, however, does waive a challenge to personal jurisdiction. *Id.* For this reason, a defendant wishing to preserve an objection to personal jurisdiction and also wishing to assert a counterclaim better be certain that the counterclaim is indeed compulsory.

In sum, when challenging personal jurisdiction, litigants should probably take their cues from baseball instead of football. After all, baseball is one of the few sports in which the *defense* controls the ball.

Matt Triggs is the head of the litigation department of Proskauer Rose LLP in Boca Raton and finds baseball painfully boring. Jonathan Galler is a senior associate in the department and thinks baseball is the only sport worth watching. Both concentrate their practices in commercial and probate litigation.

