



# PALM BEACH COUNTY BAR ASSOCIATION

# BULLE<sup>IN</sup>

[www.palmbeachbar.org](http://www.palmbeachbar.org)

December 2014



## Nominating petitions available for Board of Directors

The annual election of officers and directors for the Palm Beach County Bar will take place via online voting in April. Persons seeking to run for a position on the Board of Directors will need to obtain a nominating petition and must be a member in good standing of the Palm Beach County Bar Association. The nominating petition must be signed by no fewer than 20 members in good standing of the Association. Petitions for President-elect will be available on December 12 and are due back in the office by 5 p.m. on January 12. Petitions for director-at-large seats will be available on December 19 and are due back in the Bar office by 5 p.m. on January 20. Petitions may be obtained by calling the Bar office at 687-2800 or by sending an e-mail requesting it to [pburns@palmbeachbar.org](mailto:pburns@palmbeachbar.org). For any of the positions, it is the candidate's responsibility to verify ahead of time through the Bar office that the members that sign their petitions are members in good standing, otherwise, the petition will be deemed invalid.

## Mark your calendar for upcoming Membership Events

**January 9:** "Screen on the Green" Family Event Downtown West Palm Beach

**February 2:** Joint Luncheon with Forum Club with guest speaker U.S. Supreme Court Justice Sonia Sotomayor

**February 26:** Judicial Recognition Luncheon

**March 27:** Bench Bar Conference

**April 28:** Judicial Reception

**May 1:** Law Day Luncheon with guest speaker Mark Curriden, attorney and award-winning legal journalist. Senior writer for the ABA Journal

## New Family Event! Screen on the Green, plus dinner January 9

We're excited to host a new event for our members and their children! Join us on Friday, January 9 starting at 6:30 p.m. for dinner and a movie. We've rented The Lake Pavilion on South Flagler Drive where we'll eat dinner and then open the sliding glass doors to watch Willy Wonka and The Chocolate Factory.

Bring blankets or chairs so your kids can see the show from the private terrace.

The cost is just \$15.00 for adults; \$5.00 for children; and Judges are complimentary.

Please let us know you can attend by registering online @ [www.palmbeachbar.org](http://www.palmbeachbar.org)

A special thank you to our sponsors:

Deutsche Bank (Dinner Sponsor); Palm Beach Motorcars (Dessert Sponsor); Northwestern Mutual (Beer Sponsor); Pressly & Pressly (Wine Sponsor); Jones Foster Johnston & Stubbs, P.A. (Chocolate Sponsor) Complete Legal Investigations (Popcorn Sponsor); and Sabadell Bank (Parking Sponsor).

## Investitures Scheduled

Mark your calendars for the following investitures for the three newly elected judges. All ceremonies begin at 4:00 pm at the Palm Beach County Courthouse. All Bar members are invited to attend (RSVPs are not required).



**January 16**  
**The Honorable**  
**Jessica Tickton**



**January 30**  
**The Honorable**  
**Jamie Goodman**



**February 6**  
**The Honorable**  
**Samantha Schosberg Feuer**

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## Striking Pleadings

by Matt Triggs and Jonathan Galler

No litigant ever wants to hear the words “striking” and “your pleading” in the same sentence. (Unless, of course, the speaker is characterizing your complaint as flashy or attractive. As in, “My goodness, your pleading is quite striking!”)

Most often, where there is a pleading being stricken by a trial court, there is a litigant being sanctioned. The misconduct at issue might be a pattern of refusing to respond to discovery, or it might be a failure to amend a dismissed complaint in timely fashion. Our appellate courts, however, go to great lengths to protect a litigant from having his or her pleadings stricken where the dilatory behavior or other misconduct is due primarily to bad or neglectful lawyering.

To ensure such protection, the discretionary authority of the trial court to impose the “ultimate sanction” of striking pleadings may not be exercised without the express consideration of six enumerated factors known as the *Kozel* factors. See, e.g., *Gerbino v. Isel of Paradise B, Inc.*, 2014 WL 4083262, at \*2 (Fla. 4th DCA Aug. 20, 2014); *PNC Bank, N.A. v. Duque*, 137 So. 3d 476, 478 (Fla. 4th DCA 2014).

The *Kozel* factors are: (1) whether the attorney’s disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience; (2) whether the attorney has been previously sanctioned; (3) whether the client was personally involved in the act of disobedience; (4) whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion; (5) whether the attorney offered reasonable justification for noncompliance; and (6) whether the delay created significant problems of judicial administration. *Kozel v. Ostendorf*, 629 So. 2d 817, 818 (Fla. 1993).

“After considering these factors, if a sanction less severe than dismissal of the suit is a viable alternative, then the court should employ such

an alternative.” *Gerbino*, 2014 WL 4083262, at \*2.

It is insufficient for the trial court to merely indicate in its order that it considered the six *Kozel* factors. *Duque*, 137 So. 3d at 479. Instead, the trial court’s order must contain specific factual findings as to each factor. *Id.*

The appellate courts are not hesitant to reverse orders striking pleadings that do not comply strictly with *Kozel*. As the Fourth District wrote in *Duque*: “The law does not always provide a good roadmap for trial courts. In this area of sanctioning non-compliant parties, however, our supreme court has done just that. When the trial court fails to follow that roadmap, reversal is warranted.” *Id.* (citations omitted).

That said, another recent case, this one from the Third District, illustrates an important distinction in this area of the law. *Ledo v. Seavie Resources, LLC*, 2014 WL 4628549 (Fla. 3d DCA Sep. 7, 2014). There, a mortgage foreclosure defendant was sanctioned after numerous instances of noncompliance with court orders. The trial court ultimately struck his pleadings and entered a default judgment against him as to liability. The defendant in that case, however, was representing himself pro se. On review, the Third District noted that because the defendant “was sanctioned for his own failures to comply with court orders while he was acting *pro se*, *Kozel* has no application here.” *Ledo*, 2014 WL 4628549, at \*3.

In other words, because compliance with *Kozel* is intended to protect a litigant from being sanctioned for his or her attorney’s neglect, *Kozel* does not apply where the litigant is unrepresented. Instead, in such circumstances, the trial court must make a “finding that the conduct upon which the order is based was equivalent to willfulness or deliberate disregard.” *Ledo*, 2014 WL 4628549, at \*3. Moreover, where the record itself “demonstrably establishes” such deliberate disregard, the appellate court



will not find reversible error in the trial court’s failure to provide written findings of fact in the order striking the litigant’s pleadings. *Id.*

May all of your pleadings be striking; and may none of them be stricken.

*Matt Triggs is a partner in the litigation department of Proskauer Rose LLP and the head of the department in Boca Raton. Jonathan Galler is a senior counsel in the department. Both concentrate their practices in commercial and probate litigation.*

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