

# BRING TO MEETING

---

REAL PROPERTY, PROBATE & TRUST LAW SECTION  
www.rpptl.org



## *Executive Council Meeting*

# AGENDA

The Ritz Carlton, Kapalua  
One Ritz Carlton Drive  
Kapalua, Hawaii 96761  
Phone: (808) 669-6200

Saturday, March 20, 2010  
9:00 a.m.

---

# BRING TO THE MEETING

Real Property, Probate and Trust Law Section  
Executive Council Meeting  
The Ritz Carlton – Kapalua, Hawaii

---

## AGENDA

- I. [Presiding](#) — *John B. Neukamm, Chair*
- II. [Attendance](#) — *Michael A. Dribin, Secretary*
- III. [Minutes of Previous Meeting](#) — *Michael A. Dribin, Secretary*
  1. Approval of September 26, 2009 Executive Council Meeting Minutes **pp. 10-58**
- IV. [Chair's Report](#) — *John B. Neukamm*
  1. 2009 – 2010 RPPTL Executive Council Schedule **pp. 59**
- V. [Chair-Elect's Report](#) — *Brian J. Felcoski*
  1. 2010 – 2011 RPPTL Executive Council Schedule **pp. 60**
- VI. [Liaison with Board of Governors Report](#) — *Daniel L. DeCubellis*
- VII. [Treasurer's Report](#) — *Margaret A. Rolando*
  1. 2009 – 2010 Monthly Report Summary **pp. 61-67**
- VIII. [Circuit Representative's Report](#) — *Andrew O'Malley, Director*
  1. First Circuit – W. Christopher Hart; Colleen Coffield Sachs
  2. Second Circuit – J. Breck Brannen; Sarah S. Butters; John T. Lajoie
  3. Third Circuit – John J. Kendron; Guy W. Norris; Michael S. Smith
  4. Fourth Circuit – William R. Blackard; Roger W. Cruce
  5. Fifth Circuit – Del G. Potter; Arlene C. Udick
  6. Sixth Circuit – Robert N. Altman; Gary L. Davis; Joseph W. Fleece, III; George W. Lange, Jr.; Sherri M. Stinson; Kenneth E. Thornton; Hugh C. Umstead; Richard Williams, Jr.
  7. Seventh Circuit – Sean W. Kelley; Michael A. Pyle; Richard W. Taylor; Jerry B. Wells
  8. Eighth Circuit – John Frederick Roscow, IV; Richard M. White Jr.
  9. Ninth Circuit – David J. Akins; Amber J. Johnson; Stacy A. Prince; Joel H. Sharp Jr.; Charles D. Wilder; G. Charles Wohlust
  10. Tenth Circuit – Sandra Graham Sheets; Robert S. Swaine; Craig A. Mundy
  11. Eleventh Circuit – Carlos A. Battle; Thomas M. Karr; Marsha G. Madorsky; William T. Muir; Adrienne Frischberg Promoff; Raul Ballaga
  12. Twelfth Circuit – Kimberly A. Bald; Michael L. Foreman; P. Allen Schofield
  13. Thirteenth Circuit – Lynwood F. Arnold, Jr.; Michael A. Bedke; Thomas N. Henderson; Wilhelmina F. Kightlinger; Christian F. O'Ryan; William R. Platt; R. James Robbins
  14. Fourteenth Circuit – Brian Leebrick
  15. Fifteenth Circuit – Elaine M. Bucher; David M. Garten; Glen M. Mednick; Robert M. Schwartz

16. Sixteenth Circuit – Julie A. Garber
17. Seventeenth Circuit – James R. George; Robert B. Judd; Shane Kelley; Alexandra V. Rieman
18. Eighteenth Circuit – Jerry W. Allender; Steven C. Allender; Stephen P. Heuston
19. Nineteenth Circuit – Jane L. Cornett
20. Twentieth Circuit – Sam W. Boone; Michael T. Hayes; Alan S. Kotler; Jon Scuderi; Dennis R. White; D. Keith Wickenden

**IX. Probate and Trust Law Division** — *W. Fletcher Belcher, Director*

**Information Item**

1. Estate & Trust Tax Planning Committee - *Richard R. Gans, Chair*

Subsequent to the St. Augustine Executive Council meeting, as a consequence of the uncertainties created in the estate planning process by the unanticipated suspension of the federal estate and generation-skipping taxes for 2010 only, the Executive Committee took emergency action on behalf of the Executive Council to support a legislative position creating §733.1051 (Limited judicial construction of will with federal tax provisions) and §736.04114 (Limited judicial construction of irrevocable trust with federal tax provisions) to give a court the broad power to contrue provisions in wills and trusts that relate to the federal estate and generation-skipping transfer taxes so as to give effect to the intent of the trust settlor or decedent. The text of the proposed legislation, as well as the Legislative Position Request Form and White Paper, are attached. **pp. 68-74**

**X. Real Property Division** - *George J. Meyer, Director*

**XI. General Standing Committee** — *Brian J. Felcoski, Director and Chair-Elect*

**XII. General Standing Committee Reports** – *Brian J. Felcoski, Director and Chair-Elect*

1. **Actionline** – Rich Caskey, Chair; Scott Pence and Rose LaFemina, Co-Vice Chairs
2. **Amicus Coordination** – Bob Goldman, John W. Little, and Kenneth Bell Co-Chairs
1. **Budget** – Margaret A. Rolando, Chair; Pamela O. Price, Vice Chair
4. **Bylaws** – W. Fletcher Belcher, Chair
5. **CLE Seminar Coordination** – Deborah P. Goodall, Chair; Sancha Whynot, Vice Chair; Laura Sundberg and Sylvia Rojas, Co-Vice Chairs
  - A. 2009 – 2010 CLE Schedule **pp. 75**
6. **2010 Convention Coordinator** – Marilyn Polson, Chair; Katherine Frazier and R. James Robins, Co-Vice Chairs
7. **Fellowship** – Tae Kelly Bronner and Phillip Baumann, Co-Chairs; Michael Bedke, Vice Chair

8. **Florida Bar Journal** – Richard R. Gans, Chair Probate Division; William Sklar, Chair Real Property Division
9. **Legislative Review** – Michael Gelfand, Chair; Debra Boje and Alan Fields, Co-Vice Chairs
10. **Legislative Update Coordinators** – Bob Swaine, Chair; Stuart Altman and Charlie Nash, Co-Vice Chairs
11. **Liaison Committees:**
  - A. **ABA:** Edward Koren; Julius J. Zschau
  - B. **American Resort Development Assoc. (ARDA):** Jerry Aron; Mike Andrew
  - C. **BLSE:** Michael Sasso, Ted Conner, David Silberstein, Anne Buzby
  - D. **Business Law Section:** Marsha Rydberg
  - E. **BOG:** Daniel L. DeCubellis, Board Liaison
  - F. **CLE Committee:** Deborah P. Goodall
  - G. **Clerks of the Circuit Court:** Thomas K. Topor
  - H. **Council of Sections:** John B. Neukamm, Brian J. Felcoski
  - I. **E-filing Agencies:** Judge Mel Grossman; Patricia Jones
  - J. **FLEA / FLSSI:** David Brennan; John Arthur Jones; Roland Chip Waller
  - K. **Florida Bankers:** Stewart Andrew Marshall; Mark T. Middlebrook
  - L. **Judiciary:** Judge Gerald B. Cope, Judge George W. Greer; Judge Melvin B. Grossman; Judge Hugh D. Hayes; Judge Maria M. Korvick; Judge Beth Krier, Judge Lauren Laughlin; Judge Celeste H. Muir; Judge Larry Martin; Judge Robert Pleus; Judge Susan G. Sexton; Judge Richard Suarez; Judge Winifred J. Sharp; Judge Morris Silberman; Judge Patricia V. Thomas; Judge Walter L. Schafer, Jr.
  - M. **Law Schools and Student RPPTL Committee:** Fred Dudley, Stacy Kalmanson, James Jay Brown
  - N. **Liaison to the OCCRC:** Joseph George
  - O. **Out of State:** Michael Stafford; John E. Fitzgerald, Gerard J. Flood
  - P. **Young Lawyers Division:** Leslie Stewart; Alan L. Raines
12. **Long Range Planning Committee** – Brian J. Felcoski, Chair
13. **Member Communications and Information Technology** – Alfred Colby, Chair; Dresden Brunner and Nicole Kibert, Co – Vice Chair
14. **Membership Development & Communication** – Phillip Baumann, Chair; Mary Karr, Vice Chair
15. **Membership Diversity Committee** – Lynwood Arnold and Fabienne Fahnestock, Co-Chairs; Karen Gabbadon, Vice-Chair
16. **Mentoring Program** – Guy Emerich, Chair; Jerry Aron and Keith Kromash, Co-Vice Chairs
17. **Model and Uniform Acts** – Bruce Stone and Katherine Frazier, Co-Chairs
18. **Professionalism & Ethics** – Paul Roman and Larry Miller, Co-Chairs
19. **Pro Bono** – Gwynne Young and Adele I. Stone, Co-Vice Chair

20. **Sponsor Coordinators** – Kristen Lynch, Chair; Wilhelmina Kightlinger, Jon Scuderi and Mike Swaine, Co-Vice Chairs
21. **Strategic Planning** – Brian J. Felcoski, Chair

**XIII. Probate and Trust Law Division Committee Reports** — *W. Fletcher Belcher, Director*

1. **Ad Hoc Committee on Creditors' Rights to Non-Exempt, Non-Probate Assets** – Angela Adams, Chair
2. **Ad Hoc Committee on Homestead Life Estates** – Shane Kelley, Chair
3. **Advance Directives** – Rex E. Moule, Chair; Marjorie Wolasky, Vice Chair
4. **Asset Preservation** – Jerome Wolf, Co-Chair; Brian Sparks, Co-Chair
5. **Charitable Organizations and Planning** – Thomas C. Lee, Jr., Chair, Michael Stafford and Jeffrey Baskies, Co-Vice Chairs
6. **Estate and Trust Tax Planning** – Richard Gans, Chair; Harris L. Bonette Jr. and Elaine M. Bucher, Co-Vice Chairs
7. **Florida Electronic Court Filing** – Rohan Kelley, Chair; Laird Lile, Vice Chair
8. **Guardianship Law and Procedure** – Debra Boje and Alexandra Rieman, Co-Chairs, Andrea L. Kessler and Sherri M. Stinson, Co-Vice Chairs
9. **Insurance for Estate Planning** – L. Howard Payne, Chair
10. **IRA's and Employee Benefits** – Kristen Lynch, Chair; Linda Griffin, Vice Chair
11. **Liaison with Corporate Fiduciaries** – Seth Marmor, Chair; Jack Falk and Robin King, Co-Vice Chairs; Mark Middlebrook, Corporate Fiduciary Chair
12. **Liaisons with Elder Law Section** – Charles F. Robinson, Chair; Marjorie Wolasky, Vice Chair
13. **Liaison with Statewide Public Guardianship Office** - Michelle Hollister, Chair
14. **Liaisons with Tax Section** – David Pratt; Brian C. Sparks; Donald R. Tescher, William R. Lane Jr.
15. **Power of Attorney** – Tami Conetta, Chair; David Carlisle, Vice Chair
16. **Principal and Income** – Edward F. Koren, Chair
17. **Probate and Trust Litigation** – William Hennessey, Chair; Thomas Karr and Jon Scuderi, Co-Vice Chairs
18. **Probate Law and Procedure** – Tae Kelley Bronner, Chair, Dresden Brunner, Anne Buzby and Jeffrey Goethe, Co-Vice Chairs
19. **Trust Law** – Barry Spivey, Chair; John Moran, Shane Kelley and Laura Stephenson, Co-Vice Chairs

20. **Wills, Trusts and Estates Certification Review Course** – Anne Buzby, Chair; Deborah Russell, Vice Chair

**XIV. Real Property Division Committee Reports — *George J. Meyer, Director***

1. **Condominium and Planned Development** – Robert S. Freedman, Chair; Steven Mezer, Vice-Chair
2. **Construction Law** – Brian Wolf, Chair; April Atkins and Arnold Tritt, Co Vice-Chairs
3. **Construction Law Institute** – Lee Weintraub, Chair; Wm. Cary Wright and Michelle Reddin, Co-Vice Chairs
4. **Construction Law Certification Review Course** – Kim Ashby, Chair; Bruce Alexander and Melinda Gentile, Co Vice-Chair
5. **Development and Governmental Regulation of Real Estate** – Eleanor Taft, Chair  
Nicole Kibert, Kristen Brundage and Frank L. Hearne, Co Vice-Chairs
6. **FAR/BAR Committee and Liaison to FAR** – William J. Haley, Chair; Frederick Jones, Vice Chair
7. **Land Trusts and REITS** – S. Katherine Frazier, Chair; Wilhelmena Kightlinger, Vice Chair
8. **Landlord and Tenant** – Neil Shoter, Chair; Scott Frank and Jo Claire Spear, Vice Chair
9. **Legal Opinions** – David R. Brittain and Roger A. Larson, Co Chairs; Burt Brutin, Vice Chair
10. **Liaison with Eminent Domain Committee** – Susan K. Spurgeon
11. **Liaisons with FLTA** – Norwood Gay and Alan McCall Co-Chairs; Barry Scholnik, John S. Elzeer, Joe Reinhardt, James C. Russick, Lee Huzagh, Co-Vice Chairs
12. **Mobiles Home and RV Parks** – Jonathan J. Damonte, Chair; David Eastman, Vice-Chair
13. **Mortgages and Other Encumbrances** – Salome Zikakis, Chair; Robert Stern, Co-Vice Chair
14. **Real Estate Certification Review Course** – Ted Conner, Chair; Arthur Menor and Guy Norris, Co-Vice Chairs
15. **Real Property Forms** – Barry B. Ansbacher, Chair; Jeffrey T. Sauer, Vice Chair
17. **Real Property Insurance** – Jay D. Mussman, Chair; Andrea Northrop and Wm. Cary Wright, Co-Vice Chair
18. **Real Property Litigation** – Mark A. Brown, Chair; Eugene E. Shuey and Martin Awerbach, Co-Vice Chairs
19. **Real Property Problems Study** – Wayne Sobien, Chair; Jeanne Murphy and Pat J. Hancock, Co-Vice Chair
20. **Title Insurance & Title Insurance Liaison** – Homer Duvall, Chair; Kristopher Fernandez and Steven Reynolds, Co-Vice Chairs

21. **Title Issues and Standards** – Patricia Jones, Chair; Robert Graham, Karla Gray and Christopher Smart, Co-Vice Chairs

**XV. Adjourn**



**The Florida Bar  
Real Property, Probate & Trust Law Section**

**Special Thanks to the**

**GENERAL SPONSORS**

**Attorneys' Title Fund Services, LLC**

**Chicago Title Insurance Company**

**Commonwealth Land Title Insurance Co. /Lawyers Title Insurance Corp.**

**Fidelity National Title Insurance Company**

**First American Title Insurance Company**

**Florida Bar Foundation**

**Gibraltar Bank**

**Howard Frazier Barker Elliott**

**Management Planning, Inc.**

**Old Republic National Title Insurance**

**Regions Bank**

**Stewart Title Company**

**SunTrust Bank**

**Wachovia, A Wells Fargo Company**

**U.S. Trust**





**The Florida Bar  
Real Property, Probate & Trust Law Section**

**Special Thanks to the**

**COMMITTEE SPONSORS**

**Ashar Group Life Settlement Specialists**  
Insurance for Estate Planning Committee

**Community Foundations of Florida**  
Charitable Organizations Committee

**Mellon Bank and Wealth Transfer Planning**  
Probate Law & Procedure Committee

**First American Title Insurance Company**  
Condominium & Planned Development Committee

**Management Planning, Inc.**  
Estate & Trust Tax Planning Committee

**Northern Trust Bank of Florida**  
Trust Law Committee

**Business Valuation Analysts**  
Probate and Trust Litigation

---

**Draft**

**Minutes, Real Property, Probate and Trust Law Section  
Executive Council Meeting**

**Saturday, January 16, 2010**

**The Casa Monica - St. Augustine**

**References in these minutes to specified pages of "agenda materials" are to the agenda of the  
January 16, 2010 meeting of the Executive Council posted at the RPPTL website.**

---

**AGENDA**

- I. **Call to Order** - John B. Neukamm, Chair, called the meeting to order at 10:30 a.m.
- II. **Attendance** - Michael A. Dribin, Secretary

The attendance roster was circulated to be initialed by Council members in attendance at the meeting. Attendance is shown cumulatively on circulated attendance rosters. Mike reminded the Council members that it is the responsibility of each to record his or her own attendance on the roster and to promptly bring any corrections to the attention of the Secretary.

- III. **Minutes of Previous Meeting** - Michael A. Dribin, Secretary

The Minutes of the Executive Council Meeting held in Palm Beach on August 1, 2009, included at pages 11-49 of the agenda materials, were approved without change.

- IV. **Chair's Report** - John B. Neukamm

1. John thanked the sponsors of all the activities associated with the Executive Council meeting. The sponsors are listed on Pages 9 and 10 of the agenda materials. He also reviewed the schedule of the remaining meetings of the Executive Council for 2009-2010, to be found at Page 50 of the agenda materials.
2. John then yielded the floor to past Chair Rohan Kelly. Rohan informed the Council that Craig Shaw, from the Florida Bar, was retiring after 30 years of service. Rohan reviewed the long history of outstanding service rendered by Craig to the Section's CLE publication and to the committees dealing with the Rules and Probate Guardianship Procedure.

Rohan then made reference to a proposed resolution, distributed at the meeting, which reviewed Craig's long history of assistance to Section projects and committees and which expressed the Section's gratitude for those services.

Rohan then moved to waive the requirement of the by-laws concerning the time required for the Executive Council to consider a resolution. The motion was seconded and unanimously adopted.

Rohan then moved adoption of the resolution pertaining to Craig Shaw, which is attached as Exhibit "A" to these minutes. The motion was seconded and unanimously approved.

V. **Chair-Elect's Report** - Brian J. Felcoski

Brian reviewed the schedule of Executive Council meetings for 2010-2011, appearing on page 51 of the agenda materials.

VI. **Liaison with Board of Governors Report** - Daniel L. DeCubellis

1. BOG Summary – Dan informed the Council that its legislative positions presented to date had passed the Board of Governors without problem. He also informed the Council that the Council nominations to the Florida Realtor-Attorney Joint Committee had been approved by the Board. He made reference to his report on Pages 52-54 of the agenda materials for further information.
2. BOG Candidate Speeches – Dan yielded the floor to John Neukamm, who introduced Scott Hawkins, from West Palm Beach, one of the candidates for President-Elect of the Florida Bar. John also indicated that Ervin Gonzalez, another candidate, had been invited to appear but was unable to do so due to a scheduling conflict. Scott addressed the Council.
3. One Campaign Presentation – Adele Stone, President of the Florida Bar Foundation, introduced the Honorable William Vannortwick, First District Court of Appeal Judge, who made a presentation on behalf of the "one client, one attorney program", seeking the commitment of Florida attorneys to pro-bono representation.

On behalf of the Pro-Bono Committee, Adele also announced that the FASH Program currently had approximately 1,300 volunteers and that more were needed. She indicated that there were 600 potential clients on a waiting list and that over 1,000 cases had been assigned.

VII. **Treasurer's Report** - Margaret A. Rolando

Peggy referred the Council to the report appearing at Pages 55-61 of the agenda materials, reflecting the Section's financial summary from July 1, 2009-November 30, 2009. She reported that there had been a drop in revenue from dues and that John Neukamm was sending a letter to non-renewing members, urging them to reconsider. Peggy also indicated that sponsorship revenue continues strongly, that CLE revenues are satisfactory and that there were a number of great seminars coming up in the spring which promise to be very successful both from an educational and a financial point of view.

**VIII. Circuit Representative's Report - Andrew O'Malley, Director**

Drew reported on a good meeting of the circuit representatives which had been held on January 15, 2010. A more detailed summary of the meeting is attached to these minutes as Exhibit "B".

1. First Circuit – W. Christopher Hart; Colleen Coffield Sachs
2. Second Circuit – J. Breck Brannen; Sarah S. Butters; John T. Lajoie
3. Third Circuit – John J. Kendron; Guy W. Norris; Michael S. Smith
4. Fourth Circuit – William R. Blackard; Roger W. Cruce
5. Fifth Circuit – Del G. Potter; Arlene C. Udick
6. Sixth Circuit – Robert N. Altman; Gary L. Davis; Joseph W. Fleece, III; George W. Lange, Jr.; Sherri M. Stinson; Kenneth E. Thornton; Hugh C. Umstead; Richard Williams, Jr.
7. Seventh Circuit – Sean W. Kelley; Michael A. Pyle; Richard W. Taylor; Jerry B. Wells
8. Eighth Circuit – John Frederick Roscow, IV; Richard M. White Jr.
9. Ninth Circuit – David J. Akins; Amber J. Johnson; Stacy A. Prince; Joel H. Sharp Jr.; Charles D. Wilder; G. Charles Wohlust
10. Tenth Circuit – Sandra Graham Sheets; Robert S. Swaine; Craig A. Mundy
11. Eleventh Circuit – Carlos A. Batlle; Thomas M. Karr; Marsha G. Madorsky; William T. Muir; Adrienne Frischberg Promoff; Raul Ballaga
12. Twelfth Circuit – Kimberly A. Bald; Michael L. Foreman; P. Allen Schofield
13. Thirteenth Circuit – Lynwood F. Arnold, Jr.; Michael A. Bedke; Thomas N. Henderson; Wilhelmina F. Kightlinger; Christian F. O’Ryan; William R. Platt; R. James Robbins
14. Fourteenth Circuit – Brian Leebrick
15. Fifteenth Circuit – Elaine M. Bucher; David M. Garten; Glen M. Mednick; Robert M. Schwartz
16. Sixteenth Circuit – Julie A. Garber
17. Seventeenth Circuit – James R. George; Robert B. Judd; Shane Kelley; Alexandra V. Rieman
18. Eighteenth Circuit – Jerry W. Allender; Steven C. Allender; Stephen P. Heuston
19. Nineteenth Circuit – Jane L. Cornett
20. Twentieth Circuit – Sam W. Boone; Michael T. Hayes; Alan S. Kotler; Jon Scuderi; Dennis R. White; D. Keith Wickenden

**IX. Real Property Division - George J. Meyer, Director**

**Action Items**

1. Construction Law Committee - Brian Wolf, Chair

Reese J. Henderson, Jr., on behalf of the Committee, presented a proposed amendment to F.S. Section 718.203, to clarify the scope and content of certain statutory construction warranties, expand the three-year statutory warranty to include certain electrical elements and provide certain

general warranty cut-off dates. Reese indicated that, while the draft of the proposed amendment, together with the explanatory White Paper and a completed legislative position request form are attached to the agenda materials at pages 62-72, as a result of communications between the Construction Law Committee and the Condominium Law Committee, certain changes had been made to the proposal, which are attached to these minutes as Exhibit "C".

Reese then moved for the approval of the Committee motion. The motion was unanimously approved. The Committee's motions to find such action to be within the purview of the Section and to authorize the expenditure of Section funds in support of that position also were unanimously approved.

2. FAR/BAR Committee - William Haley, Chair

A. On behalf of the Committee, Bill announced that the condominium rider forms attached to the agenda materials were being pulled from consideration.

B. On behalf of the Committee, Bill then reviewed the proposed revised FAR/BAR Residential Contract for Sale and Purchase form and certain Comprehensive Riders, together with an Errata sheet, which were distributed prior to the start of the meeting and which are attached hereto as Exhibit "D".

The Committee's motion to approve the Contract for Sale and Purchase form and Comprehensive Riders, as modified by the Errata sheet was unanimously approved.

3. Legal Opinions Committee - David Brittain, Chair

On behalf of the Committee, Roger Larson, Co-Chair, reviewed a proposed final draft of the Joint Report on Standards for Third Party Legal Opinions, to be jointly issued by the RPPTL Section and Business Law Section of The Florida Bar for public comment. A blacklined copy of that final draft, dated January 7, 2010, was distributed right before the meeting electronically to all Executive Council members and posted on the Section's website, and is attached to these minutes as Exhibit "E".

Roger indicated that the final approval of the wording of the joint report would be subject to public comment and that the Business Law Section would be circulating the wording among its membership and various national organizations. He indicated that suggestions for changes might arise as a result of that public comment and that, to the extent such changes arose, the Committee would return the joint report to the Executive Council for further consideration.

On behalf of the Committee, Roger moved to approve the proposed joint report, subject to the possibility of further review and comment. The motion was unanimously approved.

4. Special Task Force on Non-Judicial Foreclosures – Jerry Aron, Chair

Jerry announced that the Florida Bankers Association was circulating proposed legislation on the subject of non-judicial foreclosures. Jerry, after discussing this matter with the other Task Force members and the Section's lobbyist, felt it was important for the Section to express its position

with respect to this proposed legislation.

Jerry moved to waive the provisions of the By-Laws requiring the submission of a proposed legislative position at least one week prior to the Executive Council meeting. That motion was seconded and unanimously approved.

Jerry then moved the adoption of the Committee motion as follows: “in furtherance of and as additional clarification of the Section’s long standing position relating to nonjudicial foreclosure, the Section supports preserving and protecting the property rights and due process rights of the holders of interests in or affecting Florida real property.”

The Committee motion was unanimously approved, with Kim Ashby abstaining. The Committee’s motions to find such action to be within the purview of the Section and to authorize the expenditure of Section funds in support of that position also were unanimously approved.

### **Information Item**

1. Title Issues and Standards Committee - Patricia Jones, Chair

On behalf of the Committee, Pat referred the Council to the current working draft of Chapter 5 (Decedents’ Estates) which appears at pages 181-202 of the agenda materials.

### **X. Probate and Trust Law Division - W. Fletcher Belcher, Director**

#### **Action Items**

1. Guardianship Law and Procedure Committee--Debra L. Boje & Alexandra V. Rieman, Co-Chairs

On behalf of the Committee, Alexandra informed the Council of concerns the Committee had concerning a proposal that Florida adopt the Uniform Adult Guardianship and Protective Jurisdiction Act, to the extent of inconsistencies with current Florida guardianship law.

On behalf of the Committee, Alexandra moved to waive the provisions of the By-Laws requiring the submission of a proposed legislative position at least one week prior to the Executive Council meeting. That motion was seconded and unanimously approved.

Alexandra then moved for the approval of a Committee motion to support a legislative position opposing the adoption of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act without the substantial modification of those provisions relating to jurisdiction, protective orders, registration of guardianship orders and transfer and acceptance of proceedings, to conform them to existing Florida law. The motion was unanimously approved. The Committee’s motions to find such action to be within the purview of the Section and to authorize the expenditure of Section funds in support of that position also were unanimously approved.

2. Advance Directives & HIPPA Committee - *Rex E. Moule, Jr., Chair*

On behalf of the Committee, Rex described a proposed legislative position amending §743.0645 (Other persons who may consent to medical care or treatment of a minor), amending §765.101 (Definitions as used in this chapter) by adding a new subsection (16), and amending the Florida Health Care Surrogate Act (Part II, Chapter 765) by adding new §§765.2035 (Designation of a health care surrogate for a minor) and 765.2038 (Suggested form of health care surrogate for a minor), to allow a parent, legal guardian or legal custodian of a minor child to designate a health care surrogate to make health care decisions for the minor if the parent, legal guardian or legal custodian is not reasonably available. The White Paper and Legislative Position Paper on the subject of the motion is included in the agenda package at pages 203-214.

Rex then moved for the approval of the Committee motion. The motion was unanimously approved. The Committee's motions to find such action to be within the purview of the Section and to authorize the expenditure of Section funds in support of that position also were unanimously approved.

3. Probate & Trust Litigation Committee - William T. Hennessey III, Chair

On behalf of the Committee, Bill described a proposed legislative position amending §733.107(1) of the Florida Probate Code (Burden of proof in contests) to provide that, in proceedings contesting the validity of a will, a self-proving affidavit executed in accordance with §732.503, or an oath of an attesting witness executed as required in §733.201(2), is admissible and establishes prima facie the formal execution and attestation of the will. The White Paper and Legislative Position Paper on the subject of the motion is included in the agenda package at pages 215-220.

Bill then moved for the approval of the Committee motion. The motion was unanimously approved. The Committee's motions to find such action to be within the purview of the Section and to authorize the expenditure of Section funds in support of that position also were unanimously approved.

### **Information Item**

Fletch reported on the activities of the Estate and Trust Tax Planning Committee the day before. The meeting had focused on the inapplicability of the estate and generation-skipping laws and other tax changes which came into effect January 1, 2010. The Committee heard a thorough presentation from Lauren Detzel on the situation. Ed Koren had also been actively involved in the presentation. Among the issues raised were concerns over the construction of wills and trusts containing various formula clauses that make reference to provisions of the Internal Revenue Code and which are no longer applicable in 2010. This discussion in the Committee was followed by a discussion of the appropriateness and nature of legislation which might be recommended to the Legislature to address the situation.

Fletch reported that the Committee had voted to approve in concept proposed legislation which would amend the Probate Code and the Trust Code to allow interested persons to seek construction of wills and trusts containing clauses making references to provisions of the Internal Revenue Code which are inapplicable to persons who die in 2010. The proceedings could be held even in circumstances where the precise meaning of the will or trust was unambiguous.

Fletch reported that it was likely that proposed legislation would be presented to the Executive Committee for consideration. Should the Executive Committee approve proposed legislation, an informational report would be provided to the Council.

**XI. General Standing Committee - Brian J. Felcoski, Director and Chair-Elect**

**Action Items**

1. Budget Committee – Margaret A. Rolando, Chair
  - A. On behalf of the Committee, Peggy reviewed proposed budget amendments to the 2009 – 2010 budget, appearing at page 222 of the agenda materials. The Committee motion to approve the proposed amendments was unanimously approved.
  - B. On behalf of Committee, Peggy reviewed the proposed Section budget for 2010 – 2011, which appears at pages 223-230 of the agenda materials. The Committee motion to approve the budget was unanimously approved.

**XII. General Standing Committee Reports – Brian J. Felcoski, Director and Chair-Elect**

1. **Actionline** – Rich Caskey, Chair; Scott Pence and Rose LaFemina, Co-Vice Chairs. On behalf of the Committee, Rich expressed his gratitude to Craig Shaw for his invaluable assistance over the years. He reported that the Winter issue of Actionline would be available online within the next week and he urged those interested in submitting articles to utilize the submission cover sheet appearing at the Section website.
2. **Amicus Coordination** – Bob Goldman, John W. Little, and Kenneth Bell Co-Chairs—on behalf of the Committee, Bob reported on two cases in which the Section had been asked to offer *amicus* briefs.
3. **Budget** – Margaret A. Rolando, Chair; Pamela O. Price, Vice Chair—no further report
4. **Bylaws** – W. Fletcher Belcher, Chair—On behalf of the Committee, Fletch reported that progress was being made. He reported that, as part of the Strategic Plan adopted by the Section, the Executive Committee was expected to offer comments on a number of issues by the upcoming Officer’s Meeting in March and that a written report would be offered at the Section Convention in May, 2010.
5. **CLE Seminar Coordination** – Deborah P. Goodall, Chair; Sancha Whynot, Vice Chair;



Laura Sundberg and Sylvia Rojas, Co-Vice Chairs—on behalf of the Committee, Deborah reported that a telephonic seminar on the status of the estate tax law was being considered and that a meeting had been conducted with all seminar chairs on January 15, 2010. Deborah also reviewed the remaining portion of the 2009-2010 CLE Schedule, appearing on page 231 of the agenda materials.

6. **2010 Convention Coordinator** – Marilyn Polson, Chair; Katherine Frazier and R. James Robins, Co-Vice Chairs—on behalf of the Committee, Katherine reported on substantial progress being made planning the Convention to be held in Tampa, in May, 2010.
7. **Fellowship** – Tae Kelly Bronner and Phillip Baumann, Co-Chairs; Michael Bedke, Vice Chair—while there was no report from the Committee, Brian Felcoski reminded the Council that the Section was now in the application process for the next program of Fellows and that the first program had been highly successful.
8. **Florida Bar Journal** – Richard R. Gans, Chair Probate Division; William Sklar, Chair Real Property Division—on behalf of the Committee, Rick reported that it was looking for more articles on probate and trust subjects.
9. **Legislative Review** – Michael Gelfand, Chair; Debra Boje and Alan Fields, Co-Vice Chairs—on behalf of the Committee, Michael reported that it was critical to the effectiveness of the Section’s legislative positions for Committee chair’s co-chairs and vice-chairs be “on-call” leading up to and during the Legislative session.
10. **Legislative Update Coordinators** – Bob Swaine, Chair; Stuart Altman and Charlie Nash, Co-Vice Chairs—no report
11. **Liaison Committees:**
  - A. **ABA:** Edward Koren; Julius J. Zschau—on behalf of the Committee, Jay reported on a real property CLE program scheduled for May 6-May 8, 2010.
  - B. **American Resort Development Assoc. (ARDA):** Jerry Aron; Mike Andrew-no report.
  - C. **BLSE:** Michael Sasso, Ted Conner, David Silberstein, Anne Buzby—on behalf of the Committee, Michael reported on a campaign to get more attorneys certified.
  - D. **Business Law Section:** Marsha Rydberg—no report
  - E. **BOG:** Daniel L. DeCubellis, Board Liaison—no further report
  - F. **CLE Committee:** Deborah P. Goodall—no further report
  - G. **Clerks of the Circuit Court:** Thomas K. Topor—no report
  - H. **Council of Sections:** John B. Neukamm, Brian J. Felcoski—On behalf of the Committee, Brian reported that the next meeting of the Council of Sections was scheduled for June, 2010 at the Florida Bar meeting.
  - I. **E-filing Agencies:** Judge Mel Grossman; Patricia Jones—on behalf of the Committee, Pat referred the Council to the report appearing at page 232 of the agenda materials.
  - J. **FLEA / FLSSI:** David Brennan; John Arthur Jones; Roland Chip Waller—on behalf of the Committee, Dave reviewed the variety of services offered by FLEA/FLSSI.

- K. **Florida Bankers:** Stewart Andrew Marshall; Mark T. Middlebrook—no report
  - L. **Judiciary:** Judge Gerald B. Cope, Judge George W. Greer; Judge Melvin B. Grossman; Judge Hugh D. Hayes; Judge Maria M. Korvick; Judge Beth Krier, Judge Lauren Laughlin; Judge Celeste H. Muir; Judge Larry Martin; Judge Robert Pleus; Judge Susan G. Sexton; Judge Richard Suarez; Judge Winifred J. Sharp; Judge Morris Silberman; Judge Patricia V. Thomas; Judge Walter L. Schafer, Jr.—Brian thanked our judges for participation in Council activities.
  - M. **Law Schools and Student RPPTL Committee:** Fred Dudley, Stacy Kalmanson, James Jay Brown –on behalf of the Committee, Stacy reported that plans were being made to again have presentations at law schools around the state about the Section and its activities.
  - N. **Liaison to the OCCRC:** Joseph George—no report
  - O. **Out of State:** Michael Stafford; John E. Fitzgerald, Gerard J. Flood—no report
  - P. **Young Lawyers Division:** Leslie Stewart; Alan L. Raines—no report
12. **Long Range Planning Committee** – Brian J. Felcoski, Chair—Brian informed the Council that a meeting was going to be held of the Committee immediately following the Executive Council meeting.
  13. **Member Communications and Information Technology** –Alfred Colby, Chair; Dresden Brunner and Nicole Kibert, Co – Vice Chair. On behalf of the Committee, Dresden reported that efforts were being made to seek the input of Section members concerning the content and format of the Section website. Section committee leadership was also being encouraged to post committee agenda and minutes at the website.
  14. **Membership Development & Communication** – Phillip Baumann, Chair; Mary Karr, Vice Chair—On behalf of the Committee, Phil reported that 90% of Section members renewed membership in the most recent survey. This is the largest percentage renewal of and Section. A major objective of the Committee and of the Section Chair was to seek an increased renewal rate.
  15. **Membership Diversity Committee** –Lynwood Arnold and Fabienne Fahnstock, Co-Chairs; Karen Gabbadon, Vice-Chair-- On behalf of the Committee, Lynwood reported that the Committee had met on Thursday and reported on programs involving a “View From the Bench”, involving the Miami-Dade probate court judiciary; an “Eat and Educate” Real Property program in Palm Beach and the Minority Picnic in Hialeah.
  16. **Mentoring Program** – Guy Emerich, Chair; Jerry Aron and Keith Kromash, Co- Vice Chairs—On behalf of the Committee, Guy reported that he had made presentations to both Roundtables concerning the Section’s program to have members, particularly Executive Council members, participate as mentors.
  17. **Model and Uniform Acts** – Bruce Stone and Katherine Frazier, Co-Chairs—no report
  18. **Professionalism & Ethics** – Paul Roman and Larry Miller, Co-Chairs—on behalf of the Committee, Paul reported that the Committee had met during the St. Augustine meeting and

that it was looking to provide ethics credits for Committee meetings of the Section.

19. **Pro Bono** – Gwynne Young and Adele I. Stone, Co-Vice Chair—no further report
20. **Sponsor Coordinators** – Kristen Lynch, Chair; Wilhelmina Kightlinger, Jon Scuderi and Mike Swaine, Co-Vice Chairs—On behalf of the Committee, Kristen reported that it was looking for a new sponsor for the Estate and Trust Planning Committee. She also reported that the Committee was asking for and receiving important feedback from sponsors and that the Committee had considerable success in retaining sponsors, in spite of the economy.
21. **Strategic Planning** – Brian J. Felcoski, Chair—On behalf of the Committee, Brian reported that the Committee had met during the St. Augustine meeting and that the Committee was working on prioritizing and implementing the strategic plan which had been approved in 2009. As part of that process, the bylaws were being reviewed and the concept of an “at large” Executive Council status was being considered.

**XIII. Probate and Trust Law Division Committee Reports - W. Fletcher Belcher, Director**

1. **Ad Hoc Committee on Creditors’ Rights to Non-Exempt, Non-Probate Assets** – Angela Adams, Chair
2. **Ad Hoc Committee on Homestead Life Estates** – Shane Kelley, Chair
3. **Advance Directives** – Rex E. Moule, Chair; Marjorie Wolasky, Vice Chair
4. **Asset Preservation** – Jerome Wolf, Co-Chair; Brian Sparks, Co-Chair
5. **Charitable Organizations and Planning** – Thomas C. Lee, Jr., Chair, Michael Stafford and Jeffrey Baskies, Co-Vice Chairs
6. **Estate and Trust Tax Planning** – Richard Gans, Chair; Harris L. Bonette Jr. and Elaine M. Bucher, Co-Vice Chairs
7. **Florida Electronic Court Filing** – Rohan Kelley, Chair; Laird Lile, Vice Chair

On behalf of the Committee, Rohan made reference to the Data Elements Subcommittee Report appearing at pages 233-238 of the agenda materials.

The full report can be found on the Sections Website:

<http://www.rpptl.org/Private/DrawCommittees.aspx>

8. **Guardianship Law and Procedure** – Debra Boje and Alexandra Rieman, Co-Chairs, Andrea L. Kessler and Sherri M. Stinson, Co-Vice Chairs
9. **Insurance for Estate Planning** – L. Howard Payne, Chair

10. **IRA's and Employee Benefits** – Kristen Lynch, Chair; Linda Griffin, Vice Chair
11. **Liaison with Corporate Fiduciaries** – Seth Marmor, Chair; Jack Falk and Robin King, Co-Vice Chairs; Mark Middlebrook, Corporate Fiduciary Chair
12. **Liaisons with Elder Law Section** – Charles F. Robinson, Chair; Marjorie Wolasky, Vice Chair
13. **Liaison with Statewide Public Guardianship Office** - Michelle Hollister, Chair
14. **Liaisons with Tax Section** – David Pratt; Brian C. Sparks; Donald R. Tescher, William R. Lane Jr.
15. **Power of Attorney** – Tami Conetta, Chair; David Carlisle, Vice Chair
16. **Principal and Income** – Edward F. Koren, Chair
17. **Probate and Trust Litigation** – William Hennessey, Chair; Thomas Karr and Jon Scuderi, Co-Vice Chairs
18. **Probate Law and Procedure** – Tae Kelley Bronner, Chair, Dresden Brunner, Anne Buzby and Jeffrey Goethe, Co-Vice Chairs
19. **Trust Law** – Barry Spivey, Chair; John Moran, Shane Kelley and Laura Stephenson, Co-Vice Chairs
20. **Wills, Trusts and Estates Certification Review Course** – Anne Buzby, Chair; Deborah Russell, Vice Chair

**XIV. Real Property Division Committee Reports** — George J. Meyer, Director

1. **Condominium and Planned Development** – Robert S. Freedman, Chair; Steven Mezer, Vice-Chair
2. **Construction Law** – Brian Wolf, Chair; April Atkins and Arnold Tritt, Co Vice-Chairs
3. **Construction Law Institute** – Lee Weintraub, Chair; Wm. Cary Wright and Michelle Reddin, Co-Vice Chairs
4. **Construction Law Certification Review Course** – Kim Ashby, Chair; Bruce Alexander and Melinda Gentile, Co Vice-Chair
5. **Development and Governmental Regulation of Real Estate** – Eleanor Taft, Chair Nicole Kibert, Kristen Brundage and Frank L. Hearne, Co Vice-Chairs
6. **FAR/BAR Committee and Liaison to FAR** – William J. Haley, Chair; Frederick Jones, Vice Chair

7. **Land Trusts and REITS** – S. Katherine Frazier, Chair; Wilhelmena Kightlinger, Vice Chair
8. **Landlord and Tenant** – Neil Shoter, Chair; Scott Frank and Jo Claire Spear, Vice Chair
9. **Legal Opinions** – David R. Brittain and Roger A. Larson, Co Chairs; Burt Brutin, Vice Chair
10. **Liaison with Eminent Domain Committee** – Susan K. Spurgeon
11. **Liaisons with FLTA** – Norwood Gay and Alan McCall Co-Chairs; Barry Scholnik, John S. Elzeer, Joe Reinhardt, James C. Russick, Lee Huzagh, Co-Vice Chairs
12. **Mobiles Home and RV Parks** – Jonathan J. Damonte, Chair; David Eastman, Vice-Chair
13. **Mortgages and Other Encumbrances** – Salome Zikakis, Chair; Robert Stern, Co-Vice Chair
14. **Real Estate Certification Review Course** – Ted Conner, Chair; Arthur Menor and Guy Norris, Co-Vice Chairs
15. **Real Property Forms** – Barry B. Ansbacher, Chair; Jeffrey T. Sauer, Vice Chair
17. **Real Property Insurance** – Jay D. Mussman, Chair; Andrea Northrop and Wm. Cary Wright, Co-Vice Chair
18. **Real Property Litigation** – Mark A. Brown, Chair; Eugene E. Shuey and Martin Awerbach, Co-Vice Chairs
19. **Real Property Problems Study** – Wayne Sobien, Chair; Jeanne Murphy and Pat J. Hancock, Co-Vice Chair
20. **Title Insurance & Title Insurance Liaison** – Homer Duvall, Chair; Kristopher Fernandez and Steven Reynolds, Co-Vice Chairs
21. **Title Issues and Standards** – Patricia Jones, Chair; Robert Graham, Karla Gray and Christopher Smart, Co-Vice Chairs

## **XV. Adjourn**

There being no further business to come before the Executive Council, the meeting was adjourned.

Respectfully submitted,

Michael A. Dribin, Secretary

## ATTENDANCE ROSTER

### REAL PROPERTY PROBATE & TRUST LAW SECTION EXECUTIVE COUNCIL MEETINGS 2009 – 2010

Executive Committee	Aug. 1 Palm Beach	Sept. 26 Naples	Jan. 16 St. Augustine	March 13 Hawaii	May 29 Tampa
Belcher, Wm. Fletcher, Probate & Trust Law Div. Director	X	X	X		
Diamond, Sandra F., Immediate Past Chair	X	X	X		
Dribin, Michael A., Secretary	X	X	X		
Felcoski, Brian J., Chair-Elect	X	X	X		
Gelfand, Michael J., Legislation Chair	X	X	X		
Goodall, Deborah, Seminar Coordinator	X	X	X		
Meyer, George J., Real Property Law Div. Director	X	X	X		
Neukamm, John B., Chair	X	X	X		
O'Malley, Andrew M., Director of Circuit Representatives	X	X	X		
Rolando, Margaret A., Treasurer	X	X	X		

Executive Council Members	Aug. 1 Palm Beach	Sept. 26 Naples	Jan. 16 St. Augustine	March 13 Hawaii	May 29 Tampa
Adams, Angela M.	X		X		
Adcock, Jr., Louie N., Past Chair					
Akins, David James	X	X	X		
Alexander, Bruce					
Allender, Jerry W.	X	X			
Allender, Steven C.	X	X			
Altman, Robert N.	X		X		
Altman, Stuart H.	X	X			

Executive Council Members	Aug. 1 Palm Beach	Sept. 26 Naples	Jan. 16 St. Augustine	March 13 Hawaii	May 29 Tampa
Ansbacher, Barry Barnett	X		X		
Arnold, Jr. , Lynwood F.			X		
Aron, Jerry E., <b>Past Chair</b>	X	X	X		
Ashby, Kimberly	X	X	X		
Atkins, April	X				
Awerbach, Martin		X	X		
Bald, Kimberly		X	X		
Banister, John R. (appointed after P.B.)		X	X		
Baskies, Jeffrey	X	X			
Battle, Carlos Alberto	X		X		
Baumann, Phillip A.	X	X	X		
Beales III, Walter Randolph, <b>Past Chair</b>	X				
Bedke, Michael	X	X	X		
Bell, Honorable Kenneth	X				
Blackard, Jr., William Raymond	X	X	X		
Boje, Debra Lynn	X	X	X		
Bonnette, Jr., Harris L.	X	X	X		
Bookman, Alan Bart					
Boone, Jr., Sam Wood	X	X	X		
Brannen, J. Brecken					
Brennan, David Clark, <b>Past Chair</b>	X		X		
Brittain, David Ross	X				
Bronner, Tae Kelley	X	X	X		
Brown, J.J.					
Brown, Mark A.	X	X	X		
Brundage, Kristy Parker	X		X		
Brunner, S. Dresden	X	X	X		
Bruton, Jr., Burt	X	X			
Bucher, Elaine M.	X	X			

Executive Council Members	Aug. 1 Palm Beach	Sept. 26 Naples	Jan. 16 St. Augustine	March 13 Hawaii	May 29 Tampa
Butters, Sarah		X	X		
Buzby, Anne K.	X		X		
Carlisle, David Russell	X	X			
Carter, David	X				
Caskey, J. Richard	X	X	X		
Christiansen, Pat, <b>Past Chair</b>	X	X			
Colby, Alfred	X	X			
Conetta, Tami Foley	X	X	X		
Conner, William Theodore	X	X	X		
Cope, Honorable Gerald B., Jr.	X				
Cornett, Jane L.	X	X			
Cruce, Roger W.		X	X		
Damonte, Jonathan James	X		X		
Davis, Gary	X				
DeCubellis, Dan L.	X	X	X		
Dudley, Frederick Raymond	X	X	X		
Duvall III, Homer		X	X		
Eastman, David Deane	X		X		
Elzeer, John S.					
Emerich, Guy Storms	X	X	X		
Falk, Jack A.	X	X	X		
Fahnestock, Fabienne E.					
Fernandez, Kristopher	X	X	X		
Fields, Alan Beaumont	X	X	X		
Fisher, Michael	X				
Fitzgerald, Jr., John Edward		X	X		
Fleece III, Joseph W.	X	X			
Flood, Gerard J.	X	X			
Foreman, Michael Loren	X	X	X		



Executive Council Members	Aug. 1 Palm Beach	Sept. 26 Naples	Jan. 16 St. Augustine	March 13 Hawaii	May 29 Tampa
Frank, Scott	X	X	X		
Frazier, Susan Katherine	X	X	X		
Freedman, Robert Scott	X	X	X		
Gabbadon, Karen					
Gans, Richard Roy	X	X	X		
Garber, Julie Ann	X	X			
Garten, David Michael			X		
Gay III, Robert Norwood	X		X		
Gentile, Melinda					
George, James R.	X				
George, Joseph P.	X	X			
Goethe, Jeffrey	X	X	X		
Goldman, Robert W., <b>Past Chair</b>		X	X		
Graham, Robert Manuel		X	X		
Gray, Karla S.	X	X	X		
Greer, Honorable George W.					
Griffin, Linda S.	X	X	X		
Grimsley, John Gall, <b>Past Chair</b>			X		
Grossman, Honorable Melvin B.	X	X	X		
Guttmann III, Louis B., <b>Past Chair</b>		X	X		
Haley, William James	X	X	X		
Hancock, Patricia J.	X	X	X		
Hart, W. Christopher	X				
Hayes, Honorable Hugh D.	X				
Hayes, M. Travis	X		X		
Hearn, Steven Lee, <b>Past Chair</b>	X		X		
Hearne, Frank L.	X		X		
Henderson, Thomas	X	X			
Hennessey III, William Thomas	X	X	X		

Executive Council Members	Aug. 1 Palm Beach	Sept. 26 Naples	Jan. 16 St. Augustine	March 13 Hawaii	May 29 Tampa
Heuston, Stephen Paul	X	X	X		
Hollister, Michelle Rachel	X	X			
Huszagh, Victor Lee					
Isphording, Roger O., <b>Past Chair</b>	X	X	X		
Johnson, Amber Jade F.		X			
Jones, Frederick Wayne	X	X	X		
Jones, John Arthur, <b>Past Chair</b>					
Jones, Patricia P. Hendricks	X	X	X		
Judd, Robert Brian	X	X			
Kalmanson, Stacy O.	X	X	X		
Karr, Mary		X			
Karr, Thomas M.		X	X		
Kayser, Joan Bradbury, <b>Past Chair</b>		X			
Kelley, Rohan, <b>Past Chair</b>	X		X		
Kelley, Sean		X	X		
Kelley, Shane	X	X	X		
Kendon, John	X	X	X		
Kessler, Andrea	X	X	X		
Kibert, Nicole C.	X	X	X		
Kightlinger, Wilhelmina F.	X	X	X		
King, Robin	X	X	X		
Kinsolving, Laurence E.					
Kinsolving, Ruth Barnes			X		
Koren, Edward F., <b>Past Chair</b>			X		
Korvick, Honorable Maria Marinello		X			
Kotler, A. Stephen	X	X	X		
Krier, Honorable Beth	X		X		
Kromash, Keith Stuart	X		X		
LaFemina, Rose	X		X		

Executive Council Members	Aug. 1 Palm Beach	Sept. 26 Naples	Jan. 16 St. Augustine	March 13 Hawaii	May 29 Tampa
Lajoie, John Thomas					
Lane, William		X	X		
Lange, Jr., George W.	X	X	X		
Larson, Roger Allen	X	X	X		
Laughlin, Honorable Lauren					
Lee, Thomas C.	X				
Leebrick, Brian	X	X	X		
Lile, Laird, <b>Past Chair</b>	X	X			
Little III, John Wesley	X				
Lynch, Kristen M.	X	X	X		
Madorsky, Marsha G.	X	X	X		
Marger, Bruce, <b>Past Chair</b>	X	X			
Marmor, Seth	X	X	X		
Marshall III, Stewart Andrew	X				
Martin, Honorable Larry					
McCall, Alan K.	X	X			
Mednick, Glenn M.	X	X			
Menor, Arthur James		X			
Mezer, Steven H.	X		X		
Middlebrook, Mark Thomas	X	X	X		
Miller, Lawrence Jay	X	X	X		
Moran, John	X	X	X		
Moule, Rex E.	X	X	X		
Muir, Honorable Celeste		X	X		
Muir, William T.	X		X		
Murphy, Melissa, <b>Past Chair</b>	X	X			
Murphy, Jeanne	X		X		
Mussman, Jay D.	X	X	X		
Nash, Charles Ian	X	X	X		

<b>Executive Council Members</b>	<b>Aug. 1 Palm Beach</b>	<b>Sept. 26 Naples</b>	<b>Jan. 16 St. Augustine</b>	<b>March 13 Hawaii</b>	<b>May 29 Tampa</b>
Norris, Guy W.		X	X		
Northrop, Andrea		X			
Norris, John E., <b>Past Chair</b>					
O'Ryan, Christian Felix	X		X		
Payne, L. Howard	X	X	X		
Pence, Scott	X		X		
Platt, William R.	X	X			
Pleus, Jr., Honorable Robert James					
Polson, Marilyn Mewha	X	X	X		
Potter, Del G.	X	X			
Pratt, David		X			
Promoff, Adrienne F.					
Price, Pamela O.	X	X	X		
Prince, Stacy			X		
Pyle, Michael A.	X	X	X		
Reddin, Michelle A.			X		
Reinhardt, Joe					
Reynolds, Stephen H.	X		X		
Rieman, Alexandra V.	X	X	X		
Robbins, James, Jr.	X	X	X		
Robinson, Charles F.	X		X		
Rojas, Silvia B.	X	X	X		
Roman, Paul	X	X	X		
Roscow IV, John Frederick	X	X			
Russell, Deborah L.	X	X			
Russick, James C.	X	X	X		
Rydberg, Marsha G.	X	X	X		
Sachs, Colleen Coffield			X		
Sasso, Michael Cornelius			X		

Executive Council Members	Aug. 1 Palm Beach	Sept. 26 Naples	Jan. 16 St. Augustine	March 13 Hawaii	May 29 Tampa
Sauer, Jeffrey Thomas	X	X	X		
Schaefer, Jr. , Honorable Walter L.					
Schnitker, Clay			X		
Schofield, Percy Allen	X	X	X		
Scholnik, Barry	X	X			
Schwartz, Robert M.	X		X		
Scuderi, Jon	X	X			
Sexton, Honorable Susan G.					
Sharp, Honorable Winifred J.		X			
Sharp, Jr., Joel Herbert		X			
Sheets, Sandra Graham	X	X			
Sherman, William E., <b>Past Chair</b>					
Shoter, Neil	X	X	X		
Shuey, Eugene Earl		X	X		
Silberman, Honorable Morris					
Silberstein, David Mark	X	X	X		
Sklar, William Paul					
Smart, Christopher	X		X		
Smith, G. Thomas, <b>Past Chair</b>	X		X		
Smith, Michael S.	X				
Smith, Wilson, <b>Past Chair</b>	X				
Sobien, Wayne	X	X			
Sparks, Brian Curtis	X	X	X		
Spivey, Barry F.	X	X	X		
Spurgeon, Susan K.	X		X		
St. Arnold, Honorable Jack					
Stafford, Michael P.	X	X	X		
Stephenson, Laura P.	X	X	X		
Stern, Robert Gary	X		X		

Executive Council Members	Aug. 1 Palm Beach	Sept. 26 Naples	Jan. 16 St. Augustine	March 13 Hawaii	May 29 Tampa
Stinson, Sherri M.	X	X	X		
Stone, Adele Ilene			X		
Stone, Bruce M., <b>Past Chair</b>			X		
Stroman, Rhonda C. Decambre					
Suarez, Honorable Richard					
Sundberg, Laura K.	X	X	X		
Sutherland, John Holt					
Swaine, Jack Michael, <b>Past Chair</b>	X		X		
Swaine, Robert S.	X				
Taft, Eleanor W.		X	X		
Taylor, Richard W.	X		X		
Tescher, Donald Robert					
Thomas, Honorable Patricia Vitter	X				
Thornton, Kenneth E.	X	X	X		
Topor, Thomas Karl	X	X			
Tritt, Arnold		X	X		
Udick, Arlene	X	X	X		
Umsted, Hugh Charles	X		X		
Waller, Roland D., <b>Past Chair</b>	X	X	X		
Walton, Kenneth	X				
Weintraub, Lee A.	X	X	X		
Wells, Jerry	X	X	X		
White, Dennis R.	X	X			
White, Jr.; Richard M.	X	X	X		
Whynot, Sancha Brennan	X		X		
Wickenden, D. Keith	X	X	X		
Wilder, Charles D.	X	X			
Williams, Jr., Richard	X	X	X		
Williamson, Julie Ann Stulce, <b>Past Chair</b>	X				

<b>Executive Council Members</b>	<b>Aug. 1 Palm Beach</b>	<b>Sept. 26 Naples</b>	<b>Jan. 16 St. Augustine</b>	<b>March 13 Hawaii</b>	<b>May 29 Tampa</b>
Wohlust, G. Charles	X	X	X		
Wolasky, Marjorie Ellen	X				
Wolf, Brian	X				
Wolf, Jerome Lee			X		
Wright, Wm. Cary		X	X		
Young, Gwynne Alice	X	X	X		
Zikakis, Salome	X	X	X		
Zschau, Julius Jay	X	X			
<b>Legislative Consultants</b>					
Adams, Gene	X	X			
Aubuchon, Joshua D.			X		
Dunbar, Peter M.		X	X		
Edenfield, Martha	X		X		
<b>Guests and Fellows</b>					
Stephanie Harriett		X			
Ballaga, Raul (11 <sup>th</sup> Circuit Rep.)		X	X		
Stuart, Pamela	X	X			
Hale, Russ	X	X			
Mundy, Craig		X			
Stewart, Leslie S.		X			
Nguyen, Hung	X	X			
Cardillo, John T.	X	X	X		
Nelson, Barry		X			
Ezel, Brenda B.	X	X	X		
Gonzalez, Aniella	X	X			
Hamrick, Alex		X	X		
Malex, Brian			X		

Executive Council Members	Aug. 1 Palm Beach	Sept. 26 Naples	Jan. 16 St. Augustine	March 13 Hawaii	May 29 Tampa
Rountree, Shannon			X		



THE EXECUTIVE COUNCIL OF THE REAL PROPERTY, PROBATE & TRUST LAW SECTION  
OF THE FLORIDA BAR

# Resolution

## RECOGNIZING OUTSTANDING SERVICE AND CONTRIBUTIONS OF

*J. Craig Shaw*

Whereas, J. Craig Shaw, of Tallahassee, Florida, Director of CLE Publications, is retiring after more than 30 years of service to The Florida Bar and in that capacity, to its **Real Property, Probate and Trust Law Section**; and

Whereas, after Craig received his bachelor's degree from Cornell University in 1970 and a J.D. from the State University of New York at Buffalo School of Law in 1973, he initially practiced law in New York and was admitted to The Florida Bar in 1978; and

Whereas, for the past 30 years in his various positions with CLE Publications, Craig has provided a direct benefit to the **Real Property, Probate & Trust Law Section**, its members, other practicing lawyers in Florida, and the public whom they serve, including:

- Serving as editor of the following CLE publications related to the Section:
  - The Florida Bar Probate System* – editions two through four
  - Practice Under Florida Probate Code* – all five consecutive editions
  - Administration of Trusts in Florida* – all six consecutive editions
  - Litigation Under Florida Probate Code* – all seven consecutive editions
  - Asset Protection in Florida* – 2008 edition
  - Florida Guardianship Practice* – editions two through five
  - Basic Estate Planning in Florida* – editions one through five
- Serving as staff attorney/editor to the Probate Rules Committee of The Florida Bar since 1986, and using that service as a model, founding the program whereby CLE Publications provides staff attorney/editors to meet with and assist each of The Florida Bar rules committees
- Providing editorial services to various committees of the Real Property, Probate and Trust Law Section regarding legislation sponsored by the Section.

In these capacities and for numerous other bar publications, through leadership by example, Craig has set the high standard that lawyers have come to expect from publications of The Florida Bar, legislation from the **Real Property, Probate & Trust Law Section** and its other work product.

Whereas, much of the work done by Craig throughout the years is behind the scenes work that does not produce recognition or notice – the kind that people simply assume gets done by someone without understanding how or who accomplishes the task.

Whereas, Craig was the recipient of the Robert C. Scott Memorial Award from the **Real Property, Probate & Trust Law Section** in 2007; and

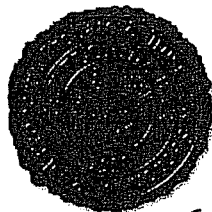
Whereas, the Executive Council of the **Real Property, Probate & Trust Law Section** of The Florida Bar recognizes the extraordinary dedication and service that Craig has provided during his career to The Florida Bar, particularly its **Real Property, Probate & Trust Law Section**, and acknowledges that he will be sorely missed.

Now, Therefore, be it resolved by the Executive Council of the **Real Property, Probate & Trust Law Section** of The Florida Bar, that the retirement of J. Craig Shaw, Esq. is noted, and that his distinguished service and extensive contributions to the practice of law are respected, appreciated and acknowledged.

Unanimously Adopted by the Executive Council of the **Real Property, Probate & Trust Law Section** of The Florida Bar at St. Augustine, Florida on January 16, 2010.

/s/

John B. Neukamm, Chairman



/s/

Michael A. Dribin, Secretary

Minutes of the  
Circuit Representatives Meeting/St. Augustine, FL  
January 15, 2010

1. For the "Spotlight on a Section Sponsor," representatives of Gibraltar Bank described the bank's services. They emphasized that they are making commercial loans.
2. Adele Stone, Chair of the RPPTL Pro Bono Committee and current Florida Bar Foundation Chair, announced the creation of a FASH speaker's bureau to respond to requests by the CFO's office, community groups and local bar mortgage relief projects for persons knowledgeable about the FASH project to describe its objectives and eligibility criteria. There is no group more knowledgeable than the Circuit Representatives, as you have been critical in recruiting attorney volunteers. A "talking points" memo will be provided and you will have the opportunity to accept or decline any speaking engagement if you have a schedule conflict. Volunteers are especially needed in Tallahassee, Jacksonville, Orlando and the Panhandle.
3. Tae Bronner, Chair of the Fellowship Committee, described the Committee's activities with the RPPTL Fellows and asked for interested Circuit Representatives, particularly on the real estate side, to become Committee members.
4. The mentoring program was discussed and needs more volunteers. So far, 17 of the 72 Circuit Representatives have volunteered.
5. Michael Gelfand asked, on behalf of the Real Property Litigation Committee, that the Circuit Representatives assist in assembling, and then updating as needed, a circuit by circuit list of all administrative orders adopted in response to the Supreme Court Statement Task Force's Report. A partial list of orders can be found on Florida Legal Services website: [floridaprobono.org/Foreclosures Administrative Orders](http://floridaprobono.org/ForeclosuresAdministrativeOrders) but it is not comprehensive nor in some Circuit instances is it current. Each Lead Circuit Representative will appoint a Circuit Representative to assemble that information and provide same to the RPPTL Sections Webmaster, William Crawford at [wlcrawford@gmail.com](mailto:wlcrawford@gmail.com). Mr. Crawford will create a page on the RPPTL Section website where all the orders can be assessed.
6. The Circuit Representatives are receiving more requests to publicize local Bar seminars. A policy dealing with such requests will be prepared and presented for adoption at the Circuit Representatives meeting in May 2010 in Tampa.
7. The Circuit Representatives will be emailing a letter to all new Bar members advising them of the complimentary one year free Section Membership and the services provided by RPPTL. A form letter and a circuit by circuit list of new Bar members were distributed with the meeting agenda.

ST. AUGUSTINE MINUTES-EXH. "B"

**718.203 Warranties.--**

(1) The developer shall be deemed to have granted to the purchaser of each unit an implied warranty of fitness and merchantability for the purposes or uses intended as follows:

(a) As to each unit, a warranty for 3 years commencing with the completion of the construction of the building containing the unit.

(b) As to the personal property that is transferred with, or appurtenant to, each unit, a warranty which is for the same period as that provided by the manufacturer of the personal property, commencing with the date of closing of the purchase or the date of possession of the unit, whichever is earlier.

(c) As to all other improvements for the use of unit owners, a 3-year warranty commencing with the date of completion of the construction of the improvements.

(d) As to all other personal property for the use of unit owners, a warranty which shall be the same as that provided by the manufacturer of the personal property.

(e) As to the roof and structural components of a building or other improvements and as to mechanical, electrical, and plumbing elements serving improvements or a building, except mechanical elements serving only one unit, a warranty for a period beginning with the completion of construction of each building or improvement and continuing for 3 years thereafter or 1 year after owners other than the developer obtain control of the association, whichever occurs last, but in no event more than 5 years from completion of construction of the building or improvement.

(f) As to all other property which is conveyed with a unit, a warranty to the initial purchaser of each unit for a period of 1 year from the date of closing of the purchase or the date of possession, whichever occurs first.

(2) The contractor, and all subcontractors and suppliers, grant to the developer and to the purchaser of each unit, and all subcontractors and suppliers grant to the contractor, implied warranties of fitness as to the work performed or materials supplied by them as follows:

(a) For a period of 3 years from the date of completion of construction of a building or improvement, a warranty as to the roof and structural components of the building or improvement and mechanical, electrical, and plumbing elements serving a building or an improvement, except mechanical elements serving only one unit.

(b) For a period of 1 year after completion of all construction, a warranty as to all other improvements and materials.

(3) "Completion" of the construction of a building or improvement" means issuance of a certificate of occupancy for the entire building or improvement, or the equivalent authorization issued by the governmental body having jurisdiction, and in jurisdictions where no certificate of occupancy or equivalent authorization is issued, it means substantial completion of construction, finishing, and equipping of the building or improvement according to the plans and specifications.

(4) These warranties are conditioned upon routine maintenance being performed, unless the maintenance is an obligation of the developer or a developer-controlled association.

(5) The warranties provided by this section shall inure to the benefit of each owner and his or her successor owners and to the benefit of the developer.

~~(6) Nothing in this section affects a condominium as to which rights are established by contracts for sale of 10 percent or more of the units in the condominium by the developer to prospective unit owners prior to July 1, 1974, or as to condominium buildings on which construction has been commenced prior to July 1, 1974.~~

~~(67)~~ Residential condominiums may be covered by an insured warranty program underwritten by a licensed insurance company registered in this state, provided that such warranty program meets the minimum requirements of this chapter; to the degree that such warranty program does not meet the minimum requirements of this chapter, such requirements shall apply.

ST. AUGUSTINE MINUTES-EXH. "C" (p. 2)

**NEW FAR/BAR FORM  
ERRATA SHEET FOR JANUARY 16, 2010 RPPTL MEETING**

**Page 73 – PARAGRAPH 2 (PURCHASE PRICE), LINE 38**

(e) Balance to close by ~~cash or wire transfer or LOCALLY DRAWN cashier's or official bank check(s)~~  
(not including Buyer's Closing Costs, prepaid items and prorations) by wire transfer or other COLLECTED funds  
\$ \_\_\_\_\_

**Page 73 – PARAGRAPH 3 (FINANCING), LINE 46:**

(b) This Contract is contingent upon Buyer obtaining a written loan commitment for a  conventional  FHA  VA loan on the following terms within \_\_\_\_\_ days (if blank, then 30 days) after Effective Date ("Loan Commitment Date") for  a fixed,  an adjustable,  a fixed or adjustable, rate loan in the principal amount of \$ \_\_\_\_\_ or \_\_\_\_\_% of the Purchase Price, at an initial interest rate not to exceed \_\_\_\_\_% (if blank, then prevailing rate based upon Buyer's credit worthiness), and for a term of \_\_\_\_\_ years ("Financing").

**Page 74 – PARAGRAPH 8 (CLOSING COSTS,ETC), LINE 90:**

If, prior to Closing, Seller is unable to complete one or more of the following: the Maintenance Requirement as required by STANDARD M; or the repairs, treatments or permitting as required by sub-Paragraphs 12(b)(ii), (d)(ii), or (c)(ii), then, sums equal to 125% of the estimated cost to complete the Maintenance Requirement and each of the repairs, treatments, or permitting (but, not in excess of applicable General Repair, WDO Repair, and Permit Limits set forth above, if any), shall be escrowed at Closing. If the actual cost of repairs, treatment or permitting exceed the applicable escrowed amounts, Seller shall pay such actual costs (but, not in excess of applicable General Repair, WDO Repair, and Permit Limits set forth above). Any unused portion of the escrowed amount(s) shall be returned to Seller.

**Page 74 – PARAGRAPH 8 (CLOSING COSTS,ETC), LINE 92:**

(c) **TITLE EVIDENCE AND INSURANCE:** At least \_\_\_ days (if blank, then 5 days) prior to Closing a title insurance commitment issued by a Florida licensed title insurer, with legible copies of instruments listed as exceptions attached thereto ("Title Commitment") and, after Closing, an owner's policy of title insurance (see STANDARD 18 A. for terms) shall be obtained and delivered to Buyer. If Seller has an owner's policy of title insurance covering the Real Property, a copy shall be furnished to Buyer and Closing Agent within 5 days after Effective Date. The costs of the owner's title policy and charges for title search and closing fees and services (collectively, "Policy and Title Charges") shall be paid, as set forth below (CHECK ONLY ONE):

(i) Seller will select designate Closing Agent and pay for the Policy and Title Charges (but not including charges for closing services related to the mortgagee policy or Buyer's loan closing, which amounts shall be paid by Buyer to Closing Agent or such other provider(s) as Buyer may select); or

(ii) Buyer will select designate Closing Agent and pay for the Policy and Title Charges; or

(iii) **[MIAMI-DADE/BROWARD REGIONAL PROVISION]:** Seller will furnish a copy of a prior owner's policy of title insurance or other evidence of title and pay for a continuation or update of such title evidence which is acceptable to Buyer's title insurance underwriter for reissue of coverage and tax search and municipal lien search fees. Buyer shall obtain and pay for post-Closing continuation and the premium for Buyer's owner's policy, and if applicable, mortgagee's policy. Seller shall not be obligated to pay more than \$ \_\_\_\_\_ (if blank, \$200.00) for the abstract continuation or title search ordered or performed by Closing Agent.

**Page 75 – PARAGRAPH 9 (EXTENSION OF CLOSING DATE ), LINE 126:**

(a) If Closing proceeds from Buyer's lender(s) are not available at time of Closing due to Truth In Lending Act (TILA) notice requirements, Closing shall be extended for such period necessary to satisfy TILA notice requirements, not to exceed 7 days (not including Sundays and legal holidays).

AGENDA ITEM -

TX - 2 → 1.16.10

ST. AUGUSTINE MINUTES - EXH. "D" (p.1)

**Page 75 – PARAGRAPH 10 (OCCUPANCY AND POSSESSION), LINE 135:**

Unless otherwise stated herein Seller will shall, at Closing: (i) have removed all personal items and trash from the Property and (ii) deliver occupancy and possession, along with all keys, garage door openers, access devices and codes, as applicable, to Buyer. If Property is intended to be rented or occupied beyond Closing, the fact and terms thereof and the tenant(s) or occupants shall be disclosed pursuant to STANDARD 18 D. If occupancy is to be delivered before Closing, Buyer assumes all risks of loss to Property caused by Buyer from date of occupancy, shall be responsible and liable for maintenance from that date, and shall be deemed to have accepted Property in its existing condition as of time of taking occupancy, except with respect to any items identified by Buyer prior to taking occupancy which require repair, treatment or remedy as described in Paragraph 12 44.

**Page 75 – PARAGRAPH 12 (PROPERTY INSPECTION AND REPAIR), LINE 172:**

**12. GENERAL PROPERTY INSPECTION AND REPAIR:**

(a) **INSPECTION PERIOD:** By the earlier of 15 days after the Effective Date or 5 days prior to Closing Date ("Inspection Period"), Buyer may, at Buyer's expense, conduct the General Inspection, WDO Inspection, and Permit Inspection described below. If Buyer fails to timely deliver a written notice required by Paragraphs 12(b), (c) or (d), then Buyer waives Seller's respective obligation to repair, replace, or close open or expired permits, and accepts the applicable items in their "as is" conditions, except that Seller must continue to meet the Maintenance Requirement until Closing. If the transaction contemplated by this Contract does not close, Buyer will repair all damage to the Property resulting from Buyer's inspections, return the Property to its pre-inspection condition and provide Seller with paid receipts for all work done on Property upon its completion.

**Page 76 – PARAGRAPH 12 (b)(ii) (GENERAL PROPERTY INSPECTION AND REPAIR), LINE 188:**

(ii) **General Property Repairs:** Seller is only obligated to make such repairs as are necessary to bring the General Repair Items into the condition specified in Standard N. Seller will have such required repairs made in accordance with Paragraph 12(f) below up to the General Repair Limit. Seller will within 5 days from receipt of Buyer's General Inspection report, have reported repairs to General Repair Items estimated by an appropriately licensed person and report such repair estimates to Buyer. Seller may, within said 5 days, have a second inspection made by a Professional Inspector and provide such report and estimates of repair to Buyer. If Buyer's and Seller's inspection reports differ and the parties cannot resolve the differences, Buyer and Seller together will choose, and equally split the cost of, a third Professional Inspector, whose written report will be binding on the parties. If the cost to repair General Repair Items equals or is less than the General Repair Limit, Seller will have the repairs made in accordance with Standard. If the cost to repair General Repair Items exceeds the General Repair Limit, then either party may terminate this Contract and Buyer shall be refunded the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract, unless within 5 days of receiving the last report: (A) either party Seller agrees to pay the excess; or (B) Buyer designates which repairs of General Repair Items Seller shall make, at a total cost to Seller not exceeding the General Repair Limit, and accepts the balance of the General Repair Items in their "as is" condition, subject to the Maintenance Requirement.

**Page 76 – PARAGRAPH 12 (d) (INSPECTION AND CLOSE-OUT OF BUILDING PERMITS), LINE 217:**

(i) **Permit Inspection:** Buyer may have an inspection and examination of records and documents made to determine whether there exist any open or expired building permits or unpermitted improvements to the Property ("Permit Inspection"). Buyer shall, within the Inspection Period, deliver written notice to Seller of the existence of any open or expired building permits or unpermitted improvements to the Property.

1. (ii) **Close-Out of Building Permits:** No later than 5 days prior to Closing Date, Seller shall, up to the Permit Limit: (A) have open and expired building permits identified by Buyer or known to Seller closed by the applicable governmental entity, and (B) obtain and close any required building permits for improvements to the Property. No later than Closing Date, Seller will provide Buyer with any written documentation that all open and expired building permits known to Seller, including those identified by Buyer's Permit Inspection,

ST. AUGUSTINE MINUTES - EXH. "J" (p. 2)

have been closed out and that Seller has obtained required building permits for improvements to the Property. If final permit inspections cannot be performed due to delays by the governmental entity, Closing Date shall be extended for up to 10 days to complete such final inspections, failing which, either party may terminate this Contract and Buyer shall be refunded the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract. If the cost to close out open or expired building permits or to remedy any permit violation of any governmental entity exceeds the Permit Limit, then either party may terminate this Contract by written notice to the other and Buyer shall be refunded the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract, unless within 5 days of receiving Buyer's report: (1) either party Seller agrees to pay the excess; or (2) Buyer accepts the Property in its "as is" condition with regard to the status of building permits and receives a credit from Seller at Closing in the amount of the Permit Limit.

**Page 77 – PARAGRAPH 15 (a) (BUYER DEFAULT), LINE 287:**

(a) **BUYER DEFAULT:** If Buyer fails, neglects or refuses to perform Buyer's obligations under this Contract, including payment of the Deposit, within the time specified, Seller may elect to recover and retain the Deposit, for the account of Seller, as agreed upon liquidated damages, consideration for the execution of this Contract and in full settlement of any claims, whereupon Buyer and Seller shall be relieved from all further obligations under this Contract, or Seller, at Seller's option, may, pursuant to Paragraph 16, proceed in equity to enforce Seller's rights under this Contract. ~~Upon demand Broker shall be paid 50% of the Deposit recovered and retained by Seller, but not more than the full amount of the brokerage commission.~~ The portion of the Deposit, if any, paid to Listing Broker upon default by Buyer, shall be split equally between Listing Broker and Cooperating Broker ~~in the same proportion as the Listing Broker's offer of compensation bears to the full commission Seller was obligated to pay,~~ provided however, the Cooperating Broker's share shall not be greater than the commission amount Listing Broker had agreed to pay to Cooperating Broker.

**Page 77 – PARAGRAPH 18 (U) (STANDARDS), LINE 473:**

U. **COLLECTION or COLLECTED.** "COLLECTION" or "COLLECTED" means any checks tendered or received, including Deposits, have become actually and finally collected and deposited in the account of the Escrow Agent or Closing Agent. Closing and disbursement of funds and delivery of Closing documents may be delayed by Closing Agent until such amounts have been collected in Closing Agent's accounts.

ST. AUGUSTINE MINUTES- EXH. "D" (p. 3)

**AS IS CONTRACT FORM:**

**Page 89 – PARAGRAPH 18 (D) (STANDARDS), LINE 388:**

**D. LEASES:** Seller shall, during the General Inspection Period, furnish to Buyer copies of all written leases and estoppel letters from each tenant specifying the nature and duration of the tenant's occupancy, rental rates, advanced rent and security deposits paid by tenant. If Seller is unable to obtain such letter from each tenant, the same information shall be furnished by Seller to Buyer within that time period in the form of a Seller's affidavit, and Buyer may thereafter contact tenant to confirm such information. If the terms of the leases differ materially from Seller's representations, Buyer may deliver written notice to Seller at least 5 days prior to Closing terminating this Contract and receive a refund of the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract. Seller shall, at Closing, deliver and assign all original leases to Buyer who shall assume Seller's obligation thereunder.

**Page 91 – PARAGRAPH 18 (NEW X) (STANDARDS), LINE 516:**

**X. BUYER WAIVER OF CLAIMS:** *Buyer waives any claims against Seller and, to the extent permitted by law, against any real estate licensee involved in the negotiation of the Contract, for any defects or other damage that may exist at Closing of the Contract and be subsequently discovered by the Buyer or anyone claiming by, through, under or against the Buyer.*

SOLICITORS, 009900, 000010, 103165893.1, FAR-BAR RPPTL ERRATTA SHEET 1-16-10  
1/14/10

ST. AUGUSTINE MINUTES - EXH. "D" - (p.4)





**PRELIMINARY DRAFT —  
 FOR DISCUSSION PURPOSES  
 ONLY — SUBJECT TO CHANGE**  
  
**DRAFT DATED JANUARY 7, 2010**

**REPORT ON STANDARDS FOR THIRD-PARTY  
 LEGAL OPINIONS OF FLORIDA COUNSEL<sup>®</sup>**

**BY THE**

**LEGAL OPINION STANDARDS COMMITTEE OF THE  
 FLORIDA BAR BUSINESS LAW SECTION**

**AND THE**

**LEGAL OPINIONS COMMITTEE OF THE REAL  
 PROPERTY, PROBATE AND TRUST LAW SECTION OF  
 THE FLORIDA BAR**

**EXPOSURE DRAFT DATED JANUARY \_\_, 2010**

*AGENDA  
 IX - 3 - 1.16.10*

*ST. AUGUSTINE MINUTES - EXH. "E"*



**FOREWORD**

We are pleased to present this "Report on Standards for Third-Party Legal Opinions of Florida Counsel." This Report, which reflects customary third-party legal opinion practices of Florida counsel in a myriad of commercial transactions, is a joint effort of the Legal Opinion Standards Committee of The Florida Bar Business Law Section and the Legal Opinions Committee of The Florida Bar Real Property, Probate and Trust Law Section. This Report has been prepared to provide guidance to Florida attorneys who render third-party legal opinions, and to both Florida and out-of-state attorneys who, on behalf of their clients, receive third-party legal opinions from Florida attorneys, as to the nature and meaning of the content of legal opinions and to articulate the diligence required to render such opinions.

This Report, which took more than three years to complete, was the collective effort of an extremely dedicated group of experienced lawyers from around the State of Florida. Our respective Committee members shared their ideas, insight, drafts and edits, and we want to thank each of them for their efforts. We particularly want to acknowledge the diligent work of the members of the Steering Committee. It was the Steering Committee that took on the critical role of drafting the various sections of this Report and synthesizing these sections into a cohesive whole. We also want to acknowledge the hard work of the members of the Editorial Committee. The members of the Editorial Committee were responsible for much of the critical thinking and editing of this Report. Their extraordinary efforts, particularly in the preparation of the illustrative forms that accompany this Report, were a key difference between an acceptable report and a great report.

We would additionally like to thank the law firms of the Committee members who participated in this project. While this project took Committee members away from their efforts on behalf of firm clients, the foresight of the law firms in understanding that the time invested in this project was for the collective good of our profession is to be saluted. We also appreciated the willingness of several of these firms to house and feed our respective Committees and the Steering Committee during our many meetings, which are real costs that are hidden contributions to this project.

Further, we want to thank the leadership of the Business Law Section and the Real Property, Probate and Trust Law Section. Our respective Section leadership recognized the need for our Sections to revisit the topic of third-party legal opinion standards and supported our collective efforts though the long gestation of this Report.

We would also like to thank RR Donnelley & Sons Company. RR Donnelly graciously agreed last spring to typeset this Report without cost to either of our respective Sections. Their able assistance allowed us to focus all of our attention on the content of this Report without having to worry about typesetting and formatting issues, and we very much appreciate their important contribution to this Report.

Finally, we want to thank our respective families and the families of each of our Committee members for their unsung efforts with respect to this project. We recognize that finding a way to balance our desire to be with our families with our commitment to our profession is sometimes difficult. Late nights, early mornings and the simple reality of what it means to spend hundreds of hours on a Bar related project imposed real burdens on many of our Committee members, and thereby on their families. On the off chance that one of our loved ones or the loved one of any of the members of our respective Committees reads this Report, we hope you will know that we are appreciative of your sacrifice.

Business Law Section Legal Opinion  
Standards Committee

Philip B. Schwartz, Chair  
Robert W. Barron, Vice Chair  
J. C. Ferrer, Vice Chair

Real Property, Probate and Trust Law  
Section Legal Opinions Committee

David R. Brittain, Co-Chair  
Roger A. Larson, Co-Chair



On a related matter, the Committees believe that there is presently no consensus under Florida customary practice as to whether it is necessary or appropriate for Opining Counsel to disclose in an opinion any relationships (other than an attorney-client relationship) between Opining Counsel (or members of Opining Counsel's law firm) and the Client. For example, a member of the Opining Counsel's law firm may be a member of the Client's Board of Directors, or have a significant financial interest in the Client or even, through the Client, in the Transaction to which the opinion relates. This Report takes no position on this issue, other than to suggest that Opining Counsel consider such disclosure whenever it may appear that the existence of such relationship (i) is reasonably likely to be considered material by the Opinion Recipient, or (ii) is reasonably likely to impair Opining Counsel's independent judgment or otherwise violate Opining Counsel's obligations as a lawyer under the RPC (and in which case it would probably be appropriate for Opining Counsel to refuse to render the opinion). In certain instances, the Opinion Recipient may request that Opining Counsel include an affirmative statement in the opinion to the effect that Opining Counsel has no conflict of interest relating to the Client. However, the Committees believe that such request is inappropriate. Notwithstanding, the foregoing, if Opining Counsel agrees to provide the requested confirmation, which is in the nature of a factual confirmation, Opining Counsel should take such steps as are reasonable under the circumstances to confirm that its response to such request is truthful and accurate. Further, if such confirmation is included in the opinion, Opining Counsel may wish to qualify the statement to its "knowledge."

Further, in certain limited situations, Opining Counsel may agree to render opinions with respect to non-client individuals or legal entities involved in the same Transaction as the Client. For instance, when Opining Counsel is representing the borrower in a loan transaction, the lender may also request opinions regarding the guarantors, the guaranty and other guarantor related documents signed by the guarantors in the opinion letter, and Opining Counsel may agree to render such opinions even though Opining Counsel is not otherwise representing the guarantors. Under Florida customary practice, if Opining Counsel agrees to render such opinions, the opinion letter should state that Opining Counsel is representing the non-Client individuals or legal entities involved in the same Transaction as the Client for the limited purpose of rendering the opinions on behalf of such non-Client individuals or legal entities, but not for any other purpose. In such limited circumstances, Florida customary practice applies to the opinions rendered by Opining Counsel on behalf of non-Client individuals or legal entities.

**D. Brief Description of Transaction and Request for Opinion Letter**

The opinion should include a brief description of the Transaction to establish the context in which the opinion is being delivered. Opining Counsel should always obtain the Client's consent prior to the issuance of the opinion to a third party and should include a statement in the opinion to the effect that the Client has consented to the issuance of the opinion. See "Introductory Matters – Ethical and Professional Issues" for a discussion regarding Client consent. The foregoing is typically accomplished with a statement similar to the following:

**This opinion letter is furnished to you pursuant to Section \_\_\_\_\_ of the [Transaction Documents] at the request and with the consent of the Client.**

If the Transaction Documents do not specifically refer to the delivery of the opinion, but such delivery is nonetheless required to close the subject Transaction or to otherwise effect the Client's wishes, language similar to the following can be substituted:

**This opinion letter is delivered to you at the request and with the consent of the Client.**

If consent is not obtained through the inclusion of the required consent language in the Transaction Documents, it is prudent for Opining Counsel to obtain the Client's consent to the issuance of the opinion in writing, and the certificate to counsel that accompanies this Report includes an express statement from the Client to this effect.



- ~~(f)~~ *there have been no undisclosed modifications of any provision of any document reviewed by Opining Counsel in connection with the rendering of the opinion and no undisclosed prior waiver of any right or remedy contained in any of the Transaction Documents;*
- ~~(g)~~ *the genuineness of each signature, the completeness of each document submitted to Opining Counsel, the authenticity of each document reviewed by Opining Counsel as an original, the conformity to the original of each document reviewed by Opining Counsel as a copy and the authenticity of the original of each document received by Opining Counsel as a copy;*
- ~~(h)~~ *the truthfulness of each statement as to all factual matters otherwise not known to Opining Counsel to be untruthful contained in any document encompassed within the diligence review undertaken by Opining Counsel;*
- ~~(i)~~ *each certificate or other document issued by a public authority is accurate, complete and authentic as of the date of the opinion, and all official public records (including their proper indexing and filing) are accurate and complete;*
- ~~(j)~~ *the Opinion Recipient has acted in good faith, without notice of any defense against enforcement of rights created by, or adverse claim to any property or security interest transferred or created as part of, the subject transaction, and has complied with all laws applicable to it that affect the Transaction;*
- ~~(k)~~ *the Transaction and the conduct of the parties to the Transaction comply with any requirement of good faith, fair dealing and conscionability;*
- ~~(l)~~ *routine procedural matters such as service of process or qualification to do business in the relevant jurisdiction(s) will be satisfied by the parties seeking to enforce the Transaction Documents;*
- ~~(m)~~ *agreements (other than the Transaction Documents as to which opinions are being given) and judgments, decrees and orders reviewed in connection with rendering the opinions will be enforced as written;*
- ~~(n)~~ *no action, discretionary or otherwise, will be taken by or on behalf of the Client in the future that might result in a violation of law or otherwise constitute a breach or default under any of the Transaction Documents (or any other document related thereto) or under any applicable court order;*
- ~~(o)~~ *there are no agreements or understandings among the parties, written or oral, and there is no usage of trade or course of prior dealing among the parties that would, in either case, define, supplement, modify or qualify the terms of the Transaction Documents or the rights of the parties thereunder;*
- ~~(p)~~ *the payment of all required documentary stamp taxes, intangible taxes and other taxes and fees imposed upon the execution, filing or recording of documents, [except to the extent expressly covered in the opinion letter]; and*
- ~~(q)~~ *with respect to the Transaction and the Transaction Documents, including the inducement of the parties to enter into and perform their respective obligations thereunder, there has been no mutual mistake of fact or undue influence and there exists no fraud or duress.*

Additionally, Opining Counsel may elect to exclude additional matters from the scope of the opinion through the addition in the opinion letter of additional assumptions. Examples of assumptions that are sometimes



added to opinion letters (but are not considered assumptions implicitly included in all opinions of Florida lawyers under Florida customary practice) include the following:

- *All statutes, judicial and administrative decisions, and rules and regulations of governmental agencies constituting the law for which Opining Counsel is assuming responsibility are published (e.g., reported court decisions and the specialized reporting services such as BNA, CCH, and Prentice-Hall) or otherwise generally accessible (e.g., Lexis or Westlaw) in each case in a manner generally available (i.e., in terms of access and distribution following publication) to lawyers practicing in Opining Counsel's judicial circuit within Florida;*
- *The constitutionality and validity of all relevant laws, regulations and agency actions, irrespective of whether a reported case has otherwise held or concern has been expressed by commentators as reflected in materials which lawyers routinely consult; and*
- *The Client will obtain all permits and governmental approvals required in the future, and take all actions similarly required, relevant to the performance of the Transaction Documents.*

The Committees believe that Florida lawyers should include in their opinion letters the entire list of assumptions that are implicitly included in opinions rendered by Florida law under Florida customary practice, and the forms of illustrative opinion letters that accompany the Report expressly include all such implicitly included assumptions. However, the Committees recognize that some Florida Opining Counsel may include some but not all of the implicitly included assumptions in their opinion letters. The Committees believe that in such situations, all of the remaining assumptions that are implicitly included in opinions of Florida counsel under Florida customary practice will nevertheless be implied into the opinion letter. Notwithstanding the view of the Committees in that regard, the Committees urge Florida counsel to include the entire list of implied assumptions in their opinion letter out of a concern that judges who are called upon to interpret an opinion rendered by a Florida counsel may determine inappropriately not to follow Florida customary practice (as articulated by this Report) and may instead decide that only those assumptions that are expressly set forth in the opinion letter constitute a part of the opinion letter.

Further, Opining Counsel should recognize that problems can arise if, in the course of negotiating the final form of the opinion letter to be delivered at the closing of the Transaction, Opining Counsel includes an express list of assumptions in a draft opinion letter tendered to an Opinion Recipient for review, such list expressly includes the assumptions implicitly included in opinions of Florida lawyers under Florida customary practice, and, thereafter, Opining Counsel agrees to remove one or more of the implicitly stated assumptions from the opinion letter. Under such circumstances, Opining Counsel may no longer have the benefit of the implicit inclusion in the opinion letter of such removed assumptions.

One of the assumptions included in the list of assumptions impliedly included in all opinions of Florida counsel is the legal capacity of each natural person to take all actions required of such person in connection with the Transaction. Confirmation that a natural person is sui juris (has the legal capacity to manage their own affairs) is a factual matter that is generally not confirmed by Opining Counsel in a third-party legal opinion. Nevertheless, if Opining Counsel has knowledge that an individual who is a party to a Transaction Document is not legally competent, then such Opining Counsel cannot ignore that fact. In that regard, some Opining Counsel, whether or not they assume in the opinion letter the legal capacity of a natural person who is a party to the Transaction and the Transaction Documents, obtain a certificate from their natural person Clients confirming that they are sui juris and/or they obtain identification from such natural person Client to confirm that they are an adult (in order to avoid any question as to whether contracts that the Client is entering into are voidable).

As used above and elsewhere in this Report, unless otherwise stated, the phrase "without investigation" means those matters within the knowledge of Opining Counsel without any inquiry or investigation. The phrase "without inquiry" is synonymous with, and may be used in lieu of, the phrase "without investigation." See "Common Elements of Opinions – Knowledge" below for a discussion of the meaning of "knowledge" in the context of a third-party legal opinion.

Specific assumptions that go beyond or modify assumptions that are generally accepted in practice or otherwise deemed implicit (for example, additional assumptions related to the perfection of a security interest



The Committees believe that Florida lawyers should expressly include in their opinion letters the entire list of the laws implicitly excluded from coverage in all opinions of Florida counsel under Florida customary practice, and the forms of illustrative opinion letters that accompany the Report include a list of all such implicitly Excluded Laws. However, the Committees recognize that some Florida Opining Counsel may choose to include a list of some, but not all, of the implicitly Excluded Laws in their opinion letters. The Committees also believe that in such situations, all of the remaining Excluded Laws that implicitly limit the scope of opinions of Florida counsel under Florida customary practice will nevertheless be implied into the opinion letter. Notwithstanding the view of the Committees in that regard, the Committees urge Florida counsel to include the entire list of implicitly Excluded Laws in their opinion letter out of a concern that judges who are called upon to interpret an opinion rendered by Florida counsel may determine inappropriately not to follow Florida customary practice (as articulated in this Report) and may instead decide that only those Excluded Laws that are expressly set forth in the opinion letter limit the scope of the opinion letter.

Further, if Opining Counsel includes an express list of excluded laws in a draft of the opinion letter that is tendered to the Opinion Recipient for review and such draft opinion letter includes a list of those laws implicitly excluded from opinions of Florida lawyers under Florida customary practice, then Opining Counsel must recognize that if, in the course of negotiating the final form of the opinion letter to be delivered in the Transaction, Opining Counsel agrees to remove one or more of the stated Excluded Laws from the opinion letter, that Opining Counsel may no longer have the benefit of implicit inclusion in the opinion letter of such removed Excluded Laws.

It is generally not beneficial to the Opinion Recipient to receive an opinion from Florida counsel which assumes that Florida law will apply to a contract when the contract expressly provides that another jurisdiction's laws will govern it. However, it is permissible for Florida counsel to give an opinion that hypothesizes that Florida substantive law governs the contract (sometimes called an "as if" opinion), notwithstanding the governing law provision in the contract to the contrary.

Further, although it is not recommended (and its use is discouraged), some Florida counsel will render an opinion that hypothesizes that Florida law is identical to the law of another jurisdiction (even if that hypothesis is known or believed by Opining Counsel not to be correct, provided Opining Counsel advises the Opinion Recipient that the hypothesis is not or may not be correct). This opinion is often rendered in the following form:

**We note that the [Agreement] provides that it is governed by the substantive law of the State of \_\_\_\_\_ (the law stipulated by the [Transaction Documents] to be the law governing its interpretation and enforcement). We have assumed, with your permission, that the substantive law of the State of \_\_\_\_\_ is identical to the substantive law of the State of Florida in all respects material to our opinion.**

Instead, the Committees recommend the following form of the "as-if" opinion:

**We note that Section \_\_\_\_\_ of the [Agreement] provides that the [Agreement], and all issues arising thereunder, shall be governed by the laws of the State of \_\_\_\_\_, without regard to principles of conflicts of laws. We express no opinion herein as to whether the provisions of such Section \_\_\_\_\_ are enforceable or as to the law that is applicable to the [Agreement] or the [Transactions] contemplated thereby, and we express no opinion regarding the laws of the State of \_\_\_\_\_. Rather, with your permission, our opinions are given based on what would be the case if a court were to refuse to apply the substantive law of the State of \_\_\_\_\_ that is set forth in the [Agreement] and instead were to apply the substantive law of the State of Florida to the [Agreement] and the [Transactions] contemplated thereby.**

See "Choice of Law" for a discussion of the impact of the governing law provision on the remedies opinion. If a "choice of law" opinion is rendered, the "as-if" opinion should be modified to clearly state that the issue of the enforceability of the "choice of law" provision contained in the Transaction Document is excluded from the general enforceability opinion, but rather is addressed separately in the opinion letter.



**N. Knowledge**

Opining Counsel is required to take all of the steps and make all of the legal and factual investigations that are necessary under customary practice to support each of the opinions in the opinion letter. However, factual investigations are often limited by reference to Opining Counsel's knowledge. In determining whether or not to limit factual investigations to the Opining Counsel's knowledge, the costs of the wider investigation must be weighed against the benefits that the Opinion Recipient will obtain from an opinion based on a broader investigation. These limitations take many different forms, although typical phrases usually include the following: "to our knowledge," "to our current actual knowledge," "to the best of our knowledge," "known to us," "we are not aware of," or "nothing has come to our attention that." In order to avoid confusion and to promote consistency among opinions, it is recommended that Opining Counsel include the following standard formulation of the knowledge qualification in its opinion:

The phrases "to our knowledge," "known to us," or the like mean the conscious awareness of the lawyers in the "primary lawyer group" of factual matters such lawyers recognize as being relevant to the opinion or confirmation so qualified, and do not imply that we have undertaken any independent investigation within the firm, with the Client or with any third-party to determine the existence or absence of any facts or circumstances, and no inference should be drawn merely from our past or current representation of the Client. Where any opinion or confirmation contained herein is qualified by the phrase "to our knowledge," "known to us," or the like, it means that the lawyers in the "primary lawyer group" are without any actual knowledge or conscious awareness that the opinion or confirmation is untrue in any respect material to the opinion or confirmation. For purposes of this opinion letter, "primary lawyer group" means: (i) the lawyer who signs his or her name or the name of the firm to the opinion letter, (ii) the lawyers currently in the firm who are actively involved in preparing or negotiating the opinion letter, and (iii) the lawyers currently in the firm who are actively involved in negotiating or documenting the Transaction or the Transaction Documents.

This standard formulation adopts the concepts of "conscious awareness" and "primary lawyer group" as the basis for the qualification. By limiting the scope of the knowledge qualification to the "primary lawyer group," no additional inquiry should be required beyond the members of that group unless Opining Counsel is requested, and undertakes, to conduct an inquiry of other lawyers in Opining Counsel's firm. By incorporating the knowledge qualification into the opinion, it will not be necessary for Opining Counsel to undertake an investigation of all other lawyers in the firm or to review all of the firm's files, nor will it be necessary for Opining Counsel to undertake an investigation with the Client or with any third parties (e.g., searches of governmental databases). The opinion is limited to matters that are within the conscious awareness of the person or persons who fall within the definition of the "primary lawyer group." This Report recognizes, and the "conscious awareness" concept contemplates, that what is "known" at one time may not be in the mind or may be forgotten altogether at another time.

The use of the phrases "to our knowledge," "known to us" or the like should be interpreted as having the meaning set forth above, regardless of whether or not Opining Counsel includes the recommended standard formulation of the meaning of same in the body of the opinion letter. Notwithstanding the foregoing, it is recommended that Opining Counsel include the standard formulation of the meaning of these phrases within the body of the opinion in order to avoid having these phrases interpreted as having a broader meaning, and each of the illustrative forms of opinion letters that accompany this Report includes such a formulation.

Further, as a matter of prudent practice Opining Counsel should consider inquiring with the attorneys within Opining Counsel's firm who serve as the principal relationship managers for the Client (regardless of whether or not such attorney otherwise fall within the purview of the "primary lawyer group") in order to avoid any claims in the future regarding the diligence undertaken in rendering the subject opinion. It may also be prudent in certain circumstances to list in the opinion the identity of the members of the "primary lawyer group" so there is no ambiguity as to who was involved in the rendering of the opinion. Further, even if the opinion is signed in the name of the firm, it does not modify the "primary lawyer group." Finally, Opining Counsel should recognize that



the “primary lawyer group” may have more or less knowledge about issues that relate to the opinion depending on the role of Opining Counsel in connection with the Client or the Transaction. For example, if Opining Counsel is actively assisting the Client in the preparation of disclosure schedules to one or more of the Transaction Documents, or has actively represented the Client over an extended period, it is likely that Opining Counsel will know more than in a situation where Opining Counsel’s role with the Client or the Transaction is more limited. Opining Counsel would be prudent to consider what it knows based on the particularities of the situation.

The phrases “to our knowledge” or “known to us” are recommended over the other common phrases described above in order to avoid confusion and promote consistency. Regardless of the terminology used by Opining Counsel, however, all these phrases are to be construed to have the same meaning under Florida customary practice.

The phrase “independent investigation” should be construed to have the same meaning as “investigation.” When Opining Counsel qualifies an opinion or statement with the phrase “without investigation,” or “without inquiry,” such qualification means that Opining Counsel has not undertaken any investigation with the Client or with any third party with respect to the matter so qualified; however, the use of the phrase “without investigation” or “without inquiry” does not obviate Opining Counsel’s duty to consult with the “primary lawyer group” as described above.

The recommended phrases; “to our knowledge” and “known to us” have been interpreted by one court as an affirmative representation that Opining Counsel has knowledge of the matters recited (as opposed to these words being a limitation on the scope of the Opinion). See, *Nat’l Bank of Canada v. Hale & Dorr, LLP*, 17 Mass.L.Rptr. 681, 2004 WL 1049072 (Mass. Super. 2004). This Report rejects this interpretation, as the Committees believe that this language is understood under customary practice in Florida to limit the opinion to matters of which the Opining Counsel has “knowledge.”

#### **O. Opinions of Florida Counsel Are To Be Interpreted Under Florida Customary Practice**

The Customary Practice Statement provides that bar reports (such as this Report) are valuable sources of guidance on customary third-party legal opinion practices, and the Committees believe that this Report reflects third-party legal opinion customary practice in Florida. Accordingly, the Committees believe that all opinion letters of Florida counsel are to be interpreted under Florida customary practice (as articulated in the Report), regardless of whether or not this Report is expressly incorporated by reference into the opinion letter itself and regardless of where the Opinion Recipient is located. Further, the Committees believe that the implicit assumptions, limitations, qualifications and exceptions that are described in this Report are implicitly included in all opinions of Florida counsel under Florida customary practice and need not be expressly set forth in an opinion letter of Florida counsel.

The Customary Practice Statement also provides that customary practice applies to opinion letters whether or not such opinion letters expressly refer to the application of customary practice. The Prior Florida Reports, as was typical of normative opinion standards, contemplated the express incorporation of the Prior Florida Reports into all opinion letters. See “Background of the Report-History of The Florida Bar’s Efforts to Create Opinion Standards for Use by Florida Counsel.” Although this Report recommends the express incorporation of the Report into opinion letters of Florida counsel, such express incorporation is not required for customary practice (as articulated in this Report) to apply to the interpretation of all opinions of Florida counsel.

#### **P. Express Incorporation of the Report into Opinion Letters**

Notwithstanding that Florida customary practice (as articulated in this Report) applies to all opinion letters of Florida counsel whether or not this Report is expressly referred to in the opinion letter, the Committees recommend that Florida counsel consider expressly incorporating this Report into their opinion letters. The express incorporation by reference of the Report into a legal opinion has two key benefits: (i) it allows Opining Counsel to expressly incorporate lists of assumptions, limitations, qualifications and exceptions into the opinion





letter by explicit reference, thus shortening the opinion letter, and (ii) it greatly reduces confusion and/or later arguments by both the Opining Counsel and the Opinion Recipient as to the application and effect of Florida customary practice (as articulated in this Report) with respect to the opinion letter.

If the Report is expressly incorporated into the opinion letter, the following language is recommended:

**This opinion letter has been prepared and is to be construed in accordance with the Report on Standards for Third-Party Legal Opinions of Florida Counsel, dated \_\_\_\_\_, 2010 (the "Report"). The Report is incorporated by reference into this opinion letter**

Further, whether or not the Report is expressly incorporated into an opinion letter, Florida counsel may wish to provide a copy of the Report to Opinion Recipients represented by non-Florida counsel (such as by e-mailing the link where the Report is posted) to avoid any confusion on the part of the Opinion Recipient regarding customary third-party legal opinion practices in Florida.

It is expected that the final Report will be issued in late 2010 after completion of the comment period. Despite the fact that this is an exposure draft of the Report, some Florida counsel may elect to begin using the new Report immediately. While the Committees do not endorse the use of this Report until it is finalized, and while the Committees recognize that some changes may be made to the Report following the comment period, since the Committees believe that the exposure draft of the Report reflects current customary third party legal opinion practices in Florida its immediate use is not at all discouraged.

**Q. Signatures**

If Opining Counsel practices as a solo practitioner, Opining Counsel should sign an opinion in Opining Counsel's own name. If Opining Counsel practices through a professional association or signs an opinion on behalf of a firm (including a firm that is a professional association), any one of the following is acceptable: "Name of attorney/On behalf of Firm," "Firm/By name of attorney," "Firm/Name of Attorney," "Firm/Name of attorney, a Partner or Officer, as appropriate," or the signed name of the firm only (provided the firm maintains an internal mechanism to identify the attorney(s) rendering the opinion). For multi-state firms with offices in Florida, the attorney who signs an opinion on matters of Florida law should be a member of The Florida Bar. Opinions given by inside counsel may be signed in the individual's name or in counsel's official capacity. In either case, inside counsel may be held liable for counsel's own negligence, and the corporation generally will be liable for the authorized act of its agent. See "Introductory Matters – What is Customary Practice and Why it is Important" and "Introductory Matters – Ethical and Professional Issues" above for a discussion of Opining Counsel's liability for opinions and the standard of care applicable to Florida attorneys who render opinions.

**R. Opinion**

The operative opinions in an opinion are customarily presented as separately enumerated paragraphs, with a "lead-in" indicating that they are the opinions of Opining Counsel. The "lead-in" customarily refers to the qualifications and limitations contained in the opinion letter, both before and after the operative opinions. The following is a recommended form of "lead-in" to the opinion:

**Based upon and subject to the foregoing, and to the assumptions, limitations and qualifications contained herein, I/we am/are of the opinion that:**

Some Opining Counsel provide in their opinion letter that their opinions are based expressly on their review of listed Transaction Documents and other documents that are expressly referenced in the opinion letter as having been reviewed. The scope of such alternative language expressly limits the Transaction Documents that are considered to be within the scope of and covered by the opinion. However, such language, by itself, is not likely to



1CSP0419QRR-VJW

**E. The Bankruptcy Exception and the Equitable Principles Limitation**

Two uniformly accepted Qualifications to the remedies opinion are the bankruptcy exception and the equitable principles limitation. They are usually stated together. In many cases, these Qualifications are placed within or immediately following the remedies opinion in the opinion letter. In other cases, the Qualifications are placed in a separate Qualifications section or portion of the opinion letter. In some cases, the separate Qualification states by way of specific reference that it applies only to the remedies opinion. In other cases, no such express reference to the remedies opinion is included. In either case, the bankruptcy exception and equitable principles limitation only qualifies the remedies opinion. The recommended form of this Qualification is as follows:

. . . except as may be limited by bankruptcy, insolvency, reorganization, moratorium, fraudulent conveyance or transfer, or other similar laws affecting the rights and remedies of creditors generally and general principles of equity, regardless of whether such enforceability is considered in a proceeding at law or in equity.

or

The opinion contained in [paragraph \_\_\_] of this opinion letter is limited by bankruptcy, insolvency, reorganization, moratorium, fraudulent conveyance and transfer, and similar laws affecting the rights and remedies of creditors generally and general principles of equity, regardless of whether such enforceability is considered in a proceeding at law or in equity.

The bankruptcy exception and the equitable principles limitation are implicit qualifications to every remedies opinion rendered by Florida counsel. However, Opining Counsel should recognize that it is customary practice in Florida and elsewhere to expressly include the bankruptcy and equitable principles Qualifications in an opinion letter in which a remedies opinion is given, and each of the illustrative forms of opinion letters that accompany this Report expressly includes such Qualifications.

The bankruptcy exception and the equitable principles limitation also implicitly qualify any opinions contained in the opinion letter that relate to security interests granted under the Florida UCC (as defined below). See "Opinions with Respect to Collateral Under the Uniform Commercial Code – Scope of UCC Opinions: Limitations – Bankruptcy and Equitable Principles Not Included." Nevertheless, if Opining Counsel expressly includes the bankruptcy exception and the equitable principles limitation in the opinion letter relating to the remedies opinion, Opinions Counsel should add similar express qualifications in the security interest opinions or in the qualifications to the security interest opinions.

The following describes the scope of the bankruptcy exception and the equitable principles limitation.

1. *The Bankruptcy Exception*

The bankruptcy exception (which is sometimes referred to as the insolvency exception) excludes from the scope of the remedies opinion the effect of bankruptcy and similar creditors rights laws, as well as their effect on matters such as non-consolidation of entities, fraudulent conveyances and transfers, true sale matters, and preferences, which items do not address the enforceability of a Transaction Document and instead address the applicability of particular principles of bankruptcy and similar creditor rights law. As a consequence, the effects of these items are excluded from the scope of the remedies opinion by the "bankruptcy" exception. Although the use of the word "similar" in the language provided above is intended to denote that the bankruptcy exception does not operate to exclude from the scope of the opinion those laws affecting creditors' rights generally that are unrelated to laws grounded in insolvency, such as usury laws, the omission of the word "similar" does not broaden the scope of the exception.

Sometimes the recommended bankruptcy Qualification language is preceded by the words "except as enforcement may be limited by bankruptcy, insolvency..." However, use of the word "enforcement" is not intended, and should not be construed, to restrict the bankruptcy exception to matters relating to enforcement of contract provisions. Any narrowing of the bankruptcy exception requires unambiguous language rather than reliance on a single word.



The Committees believe that the scope of a "generic" Qualification included in a remedies opinion covers all Transaction Documents, as opposed to only the security documents contained within the Transaction Documents.

Like the remedies opinion itself, a reference to the "practical realization" Qualification or "material breach" Qualification should always be understood to be subject to the bankruptcy exception and the equitable principles limitation and to any other specifically stated exceptions and Qualifications contained in the opinion letter. For the avoidance of doubt, Opining Counsel may wish to state expressly in the opinion letter that the exception is in addition to and not intended to limit the scope of the standard bankruptcy exception, equitable principles limitation, and any other specifically stated Qualifications, and the recommend "generic" qualified language described below, makes this clear. In that regard, it is inappropriate to request that the "practical realization" Qualification or a "material breach" Qualification override the bankruptcy exception and/or the equitable principles limitation, and such an overriding opinion should never be requested or given.

2. *The "Practical Realization" Qualification*

The "practical realization" Qualification is often expressed as follows:

**In addition, certain of the provisions in the [Transaction Documents] might not be enforceable; nevertheless, subject to the bankruptcy exception and the equitable principles limitation, such unenforceability: (i) will not render the [Transaction Documents] invalid as a whole, or (ii) substantially interfere with the practical realization of the principal benefits (or security) purported to be provided by the [Transaction Documents].**

The "practical realization" Qualification is sometimes criticized for being overly broad, inasmuch as the parties may have conflicting understandings of the meanings of the words "practical realization" and "principal benefits." Under Florida customary practice, these words are interpreted under a commercially reasonable standard (i.e., what would a reasonable Opinion Recipient, who is acting in a reasonably commercial manner, expect).

3. *The "Material Breach" Qualification*

In negotiating real estate loan transactions, it has become widely accepted customary practice in Florida (and elsewhere) to further limit the remedies opinion so that it covers only enumerated essential remedies; that is, repayment of the loan, acceleration of the maturity of the loan, and foreclosure upon the real and personal property subject to the foreclosure provisions of the Transaction Documents. To this end, most real estate practitioners throughout the United States favor the approach taken in the Real Estate Report and the ACREL "All Inclusive Opinion," which recommends the use of a "material breach" Qualification; that is, that certain provisions of the loan documents may be unenforceable, but that such unenforceability will not render the Transaction Documents "invalid as a whole" nor preclude judicial enforcement of repayment, acceleration of the note or foreclosure of collateral in the event of a material breach of a payment obligation or other material provision of the Transaction Documents. The following is the suggested language for using this approach in a real estate financing transaction:

**In addition, certain remedies, waivers and other provisions of the Transaction Documents might not be enforceable; nevertheless, subject to the bankruptcy exception and the equitable principles limitation, such unenforceability will not render the Transaction Documents invalid as a whole or preclude (i) the judicial enforcement of the obligation of the Client to repay the principal, together with interest thereon (to the extent not deemed a penalty), as provided in the [Transaction Documents/Note], (ii) the acceleration of the obligation of the Client to repay such principal, together with such interest, upon a material default by the Client in the payment of such principal or interest [or upon a material default in any other material provision of the Transaction Documents,] or (iii) the foreclosure in accordance with Applicable Law of the lien on and security interest in the [collateral] created by the Security Documents upon maturity or upon acceleration pursuant to (ii) above.**



Florida UCC. the centrally filed security interest in fixtures would be junior to a filing recorded in the local real property records. See Sections 679.3171(6) and 679.334(4) of the Florida UCC. If the Opinion Recipient requests an opinion regarding perfection of a security interest in "fixtures" under the UCC (in contrast or in addition to the opinion regarding the mortgage lien), Opining Counsel should consider the matters discussed in "Opinions with Respect to Collateral under the Uniform Commercial Code," which deals with opinions under the Florida UCC. Florida counsel may wish to file the financing statement with respect to "fixtures" in both the local filing office and the Florida Secured Transactions Registry to avoid any question regarding the perfection of the security interest with respect to "fixtures."

Further, with respect to "fixtures," Opining Counsel should be aware that under a non-uniform provision of the Florida UCC (Section 679.334(3) of the Florida UCC), a security interest in goods which are or become fixtures is invalid against any person with an interest in the real property at the time the security interest in the goods is perfected or at the time the goods are affixed to the real property, whichever occurs later, unless such person has consented to the security interest or disclaimed an interest in the goods as fixtures. In circumstances where such consent is not obtained, Opining Counsel should consider adding an exception to the opinion that refers the Opinion Recipient to Section 679.334(3) of the Florida UCC.

In addition, Opining Counsel should decline to give an opinion that any particular property constitutes a "fixture" for the reason that, under Florida law, the classification of any particular property as a "fixture" depends primarily on the intention of the parties.

An opinion that recordation of a mortgage will provide constructive notice as to the lien against the real property is not an opinion regarding the priority of that lien. See "Title and Priority" above.

#### D. Florida Taxes

1. Documentary Stamp Taxes and Intangible Taxes – Loan Transactions. The Opinion Recipient sometimes request an opinion that the correct amount of documentary stamp tax under Chapter 201 of the Florida Statutes and intangible personal property tax under Chapter 199 of the Florida Statutes have been paid.

Determination of the amount of documentary stamp and intangible taxes due in connection with a loan transaction generally does not involve a legal interpretation of state tax laws; instead, determination of those taxes normally is made on the basis of a relatively simple calculation. However, failure to pay the proper amount of documentary stamp taxes and intangible taxes that are due would impact the ability of Opining Counsel to render opinions concerning enforceability of the Transaction Documents, no violation of laws and no required governmental consents or approvals. For these reasons, the assumptions that are implicitly included in all opinions of Florida counsel include an assumption that all documentary stamp taxes, intangible taxes and other taxes and fees imposed upon the execution, filing or recording of the Transaction Documents have been paid. See "Common Elements of Opinions – Assumptions." However, in cases where the Opinion Recipient is not familiar with these Florida taxes, the Opinion Recipient might request an opinion regarding the correct amount of taxes required to be paid.

2. Documentary Stamp Taxes and Intangible Taxes on Mortgages. In the case of a new mortgage that only involves Florida real estate, the calculation of documentary stamp taxes and intangible taxes is quite simple and the lawyer in a Florida real estate transaction generally makes these calculations. Although this opinion is rarely requested where both lawyers involved in the Transaction are licensed in Florida, this opinion is sometimes requested by out-of-state counsel.

In many cases where such an opinion is requested, Opining Counsel will be willing to opine regarding the amount of documentary stamp and intangible taxes due because the tax is a straight-forward application of the tax rate to the loan amount. The documentary stamp tax is imposed at a rate of a certain dollar amount per \$100 (or fraction thereof) of the tax base applicable for documentary stamp tax purposes (currently a rate of \$0.35/\$100.00 or fraction thereof) and the nonrecurring intangible tax



1CSP042Y168KTBM

is imposed at the rate of a certain dollar amount per \$100 of the tax base applicable for nonrecurring intangible tax purposes (currently a rate of \$0.20/\$100.00). In the case of a new mortgage that only involves Florida real estate, the applicable tax base, which is the same for both taxes in such cases, is equal to the loan amount.

In this limited factual context, the following recommended language can be used:

**Based on the \$ \_\_\_\_\_ principal amount of the [loan], the correct amount of Florida documentary stamp tax payable upon recordation of the Mortgage is \$ \_\_\_\_\_ and the correct amount of Florida intangible personal property tax payable upon recordation of the Mortgage is \$ \_\_\_\_\_.**

Sometimes, however, in real estate loan transactions, the documentary stamp and intangible taxes due will not be based solely on the particular loan amount. For example, in some cases the intangible tax may be apportioned based upon the value of Florida real property in relation to the value of all collateral, or both taxes might be apportioned to account for real property or other collateral located in other states. In other cases, there may be a limitation of recovery under the mortgage which could limit the applicability of taxes. In addition, the documentary stamp tax might or might not be payable in a real estate loan transaction involving a renewal, extension or modification of an existing loan.

In cases where there is a limitation on recovery in a mortgage that is set at an amount less than the loan amount, the applicable tax base for both documentary stamp and intangible taxes is the limitation amount (with such amount rounded up to the nearest \$100 for purposes of computing the documentary stamp tax) or, in the case of a mortgage that secures a promissory note executed in Florida, the greater of the limitation amount or the amount of the note (not to exceed \$700,000).

In cases where apportionment is permitted, the computations are fairly complex and often utilize different methodologies for documentary stamp taxes versus nonrecurring intangible taxes. Issues such as the extent of real property security in the State of Florida, the extent of personal property security in the State of Florida, the extent of real and personal property collateral located outside the State of Florida and the relative values of these different categories of collateral come into play in calculating the proper tax amounts. The rules that are germane to calculating the applicable apportioned taxes are set forth in rules and regulations of the DOR, and are often interpreted through formal and informal interpretive written guidance from the DOR. Application of the specific rules and the methodologies are beyond the scope of this Report and because of the complexities involved, opinions on Florida documentary stamp taxes and intangible taxes should only be given by lawyers who reasonably believe themselves competent to render such opinions.

In these more complex cases where the taxes are not based solely on the particular real estate loan amount, it is customary (and indeed it is required by regulation for multi-state apportionment transactions) to set forth the tax calculation in the recorded mortgage, usually in a notice to the county recorder on the first page of the mortgage. For those lawyers who believe themselves competent to render the tax opinions in these complex cases, the recommended opinion language set forth below can be used in connection with such transactions. This opinion language presumes that Opining Counsel has reviewed (or in many cases, created) the notice clause and that the notice clause recites any facts necessary for the calculation of the taxes, such as the values of collateral, any relevant previous tax payments, and whether any relevant previously taxed documents were made by the same obligors.

**With respect to Florida documentary stamp taxes and Florida intangible personal property taxes ("Mortgage Taxes"), it is our opinion that the "Notice to Recorder" clause on the first page of the Mortgage sets forth the correct amount of Mortgage Taxes (if any) due and payable with respect to the execution, delivery and recordation of the Mortgage, assuming that the clause correctly sets forth the respective collateral values, loan amounts and prior Mortgage Tax payments.**



TCSPO4190R8CFXW

This language assumes that the items necessary to compute the correct amount of Florida documentary stamp taxes and intangible taxes are set forth in the "Notice to Recorder" clause in the mortgage and are correct. Whenever, in an effort to reduce taxes, there is any kind of multistate apportionment or recovery limitation or any assignment of an existing mortgage (rather than the making of a new loan), the Opinion Recipient will often ask for an opinion that the taxes have been correctly computed. Some Opining Counsel actually provide the computation details of the tax paid in their opinion letters. Others, because the collateral values and loan amounts attributable to Florida property may change during the discussions leading up to the opinion letter, address the computation opinion by reflecting in the opinion letter that the correct calculations are in the "Notice to Recorder" clause on the first page of the mortgage.

Sometimes, an Opinion Recipient will also request advice as to the consequences of nonpayment or underpayment of Florida documentary stamp taxes and intangible taxes. In such cases, the following language is often included in the opinion letter:

**We note for your information that failure to pay any applicable Florida documentary stamp tax or any applicable intangible tax with respect to any document upon which such tax is required will render the document unenforceable until such time as the proper amount of tax (and any relevant interest, late fees and penalties) is paid, but will not affect the validity of the lien of the Mortgage or the constructive notice given by the recording of the Mortgage.**

In order to give any of the opinions above, Opining Counsel should: (i) review the appropriate statutes, (ii) review all applicable rules promulgated by the DOR, and (iii) review applicable case law construing the statutes and rules.

In transactions where the calculation of taxes is not clear-cut, Opining Counsel may wish to seek written advice from the DOR as an additional basis for the opinion. Written advice in the form of a "Letter of Technical Advice" does not require disclosure of the taxpayer's identity to the DOR, but it is not binding on the DOR; in contrast, a "Technical Assistance Advisement" is binding on the DOR with respect to the particular taxpayer to whom it is issued, but requires disclosure of the taxpayer's identity and takes longer for the DOR to issue.

When such written advice from the DOR is obtained, the opinion regarding mortgage taxes should be qualified by adding the following language:

**Our opinion regarding Mortgage Taxes is based upon a [non-binding letter of technical advice/binding technical assistance advisement] issued by the Florida Department of Revenue dated \_\_\_\_\_, a copy of which is attached hereto.**

If the position of the DOR differs from the applicable statutes and rules, the distinction should be pointed out to the Opinion Recipient, with Opining Counsel giving no opinion as to which position might prevail.

3. **Documentary Stamp Taxes on Deeds and Similar Writings; Conduit Entities.** Florida documentary stamp tax is also applicable to deeds or other instruments conveying real property located in Florida. The tax is imposed at a rate of a certain dollar amount per \$100 of the consideration for the deed (currently a rate of \$0.70/\$100.00 in most counties). Determination of the amount of consideration for the deed may not be straightforward and can be affected by matters such as the amount of any mortgage and the consideration payable in other than money. In addition, the relationship between the transferor and the transferee can affect whether or not the tax is payable.

Effective on July 1, 2009, Section 201.02, Florida Statutes, was modified to provide that in the event that owners of real property transfer the property for less than full consideration to an entity that they also own, the grantee will be treated as a "conduit entity" (as that term is defined in the statute) for a period of three years following such transfer and the sale of any interest in the "conduit entity" during



TCSF042Y168V-ZM

such three-year period will be subject to tax based on the consideration paid for such interest. The documentary stamp tax statute was also modified to address the conversion or merger of a trust into an entity in circumstances where real estate had previously been placed into the trust. Under the statutory modification, the conversion or merger is treated as a conveyance of real estate for documentary stamp tax purposes. These changes effectively limit the Florida Supreme Court's decision in Crescent Miami Center, LLC vs. Florida Department of Revenue, 903 So. 2d 913 (Florida 2005) to the facts of that case (no documentary stamp taxes will be due on a transfer of unencumbered real estate to an entity owned by the same owners as the real estate for no consideration), and make clear that it is the intent of the Florida legislature to impose documentary stamp taxes on virtually all transfers occurring in the future that are in the nature of "two-step" transfers.

4. **Other Taxes.** Under typical circumstances, Opining Counsel is not in a position to know all of the Opinion Recipient's activities in Florida or the extent to which certain activities of the Opinion Recipient might expose the Opinion Recipient to state income taxes or other taxes. Accordingly, Opining Counsel should not be asked to opine as to whether the Opinion Recipient will, as a result of a real estate transaction, or otherwise, be exposed to any state tax based upon or related to the Opinion Recipient's income. It is customary practice in Florida to exclude from the scope of all opinions matters related to taxation, unless such matters are expressly included in the opinion letter. See "Common Elements of Opinions – Limitations of Laws of Specific Jurisdictions or to Substantive Areas of Law; Excluded Areas of Law." However, although not required, where an opinion involving documentary stamp tax and/or intangible tax is being given, Opining Counsel often also express this exclusion regarding their opinion on documentary stamp tax and intangible tax using the following recommended language:

**[Except for our opinion on Mortgage Taxes], we exclude from this opinion letter any opinion as to the applicability or effect of any federal and state taxes, including income taxes, sales taxes and franchise fees.**

**E. Tax Parcels**

Because title insurance endorsements concerning tax lots are not available in Florida, an Opinion Recipient may request the Opining Counsel to opine that the tax parcel number or folio number assigned to the mortgaged property (i) includes all of the intended parcels, and (ii) excludes any other parcels.

Because certain estates in real property are not separately assessed for ad valorem taxes in Florida (e.g., easements, leaseholds, etc.), the sample opinion language set forth below pertains only to fee simple interests in order to avoid inadvertently opining with respect to other real estate interests that might be part of the mortgaged property but that would be included in the tax parcel numbers of their respective servient estates. In addition, the foregoing sample opinion language should not be used in a real estate secured transaction that involves a so-called "split" or "cut-out" parcel, and the Opinion Recipient should be advised that a separate tax folio number or parcel number can be obtained for the mortgaged property by application to the county property appraiser.

The recommended form of opinion is as follows:

**The real estate tax parcel number(s) or folio number(s) set forth in [the Mortgage, or other Transaction Document that specifies the number(s)] for the [Real Property] include(s) all of the Client's fee simple interest in the [Real Property] and do(es) not include any fee simple interests other than the [Real Property].**

The due diligence necessary for a tax parcel opinion is straightforward: the Opining Counsel should obtain a copy of the legal description assigned by the county property appraiser to the particular tax parcel or folio number, and then compare it to the legal description being used in the real estate secured transaction. If the legal



the express or constructive intention of the parties with respect to choice of law where the transaction has a "normal and reasonable relation" to the state whose usury laws are selected. However, what constitutes a "normal and reasonable relation" in a particular transaction must be determined based upon the facts present in that transaction.

It should be noted that the Florida Statutes expressly address a choice of law provision where the Selected Jurisdiction is Florida as opposed to another state. If the transaction involves at least \$250,000, the parties may select Florida as the law to be applied, whether or not the contract bears any relation to Florida, unless the transaction both (i) bears no substantial or reasonable relation to Florida, *and* (ii) no party is a resident of Florida or is incorporated in Florida or maintains a place of business in Florida. Section 685.101, Florida Statutes. This choice of law statute is not applicable, however, to certain contracts listed in Section 685.101(2)(b)-(e), Florida Statutes.

One type of contract excluded from Section 685.101, Florida Statutes, by subsection (2)(e) of the statute, is a contract covered or affected by Section 655.55, Florida Statutes. Section 655.55(2) Florida Statutes, validates the parties' express choice of Florida law to govern any contract relating to an extension of credit made by a Florida branch or office of a "deposit or lending institution" as defined in Section 655.55(3), Florida Statutes, regardless of whether the contract bears any other relationship to the State of Florida and regardless of the citizenship, residence, location or domicile of any other party to the contract. Unlike Section 685.101, Florida Statutes, Section 655.55(2), Florida Statutes, prescribes no minimum transaction amount.

If a choice of law provision in a contract is ineffective due to the lack of a substantial relationship or reasonable basis for the law selected or for public policy reasons, or if the contract lacks a choice of law provision, the court will look to either local conflict of law rules or the provisions of Section 188 of the Restatement (Second) of Conflict of Laws (1971), which provides a list of factors to apply to determine the applicable law, including place of contracting, place of negotiation, place of performance, and location of subject matter of the contract. Florida courts typically begin their analysis with the traditional rule of *lex loci contractus* (i.e., the law of the place where the contract is made), generally holding that the nature, validity and interpretation of contracts are governed by the laws of the state or country where the contracts are made or are to be performed. Matters connected with the performance of a contract are regulated by the law of the place where the contract is to be performed. Matters of procedure and remedy in the enforcement of contracts, on the other hand, depend on the forum or the place where the suit is brought. Agreements governing the descent, alienation, transfer or conveyance of real property located in Florida, including the construction, validity and effect of such conveyances, are governed by Florida law (the principle of *lex rei sitae*, or law of the place where the property is located). See *Denison v. Denison*, 658 So. 2d 581 (Fla. 4<sup>th</sup> DCA 1995); *Kyle v. Kyle*, 128 So. 2d 427 (Fla. 2d DCA 1961).

Choice of law opinions are not definitive legal opinions, unlike most of the other opinions discussed in this Report. They are dependant upon the factual assumptions bearing on the opinion conclusion, and usually will go no further than to describe the outcome more likely than not to be reached by a court applying existing law in Opining Counsel's jurisdiction. See "Introductory Matters – Reasonableness; Inappropriate Subjects for Opinions."

In order to give a choice of law opinion, even a "more likely than not" choice of law opinion, an Opining Counsel must determine whether there are sufficient contacts with the law of the Selected Jurisdiction to create a "normal and reasonable relation" between the parties or the Transaction and the Selected Jurisdiction. Opining Counsel must also determine that the public policy of the State of Florida would not require that Florida law be controlling as to a particular substantive point.

## B. Opinions of Florida Counsel as to Choice of Law

When the law selected in Transaction Documents is other than Florida law, the Opinion Recipient will often request an opinion regarding whether the choice of law selected in the Transaction Documents will be upheld by





One of the key issues for Florida counsel to consider when acting as local counsel is what law governs the creation, attachment and perfection of the security interests granted by the Transaction Documents. Under Article 9 of the Florida UCC, creation and attachment opinions may be governed by laws of a state other than Florida, while issues of perfection may be governed by Florida law (for example, where the entity making the pledge of assets is organized under the laws of another jurisdiction, the choice of law selected in the Security Documents is other than Florida law, but the “fixtures” being pledged are located in Florida). In such event, appropriate assumptions should be included in the opinion letter to cover those issues that are not governed by Florida law and that are predicates to the requested opinion. See “Opinions With Respect to Collateral Under the Uniform Commercial Code-Perfection Opinions-Law Applicable to Perfection Opinions.”

### G. Usury

Florida local counsel are often asked to render opinions as to whether the loans that are the subject of the Transaction are usurious. The form of the recommended opinion on usury is contained in “Florida Usury Law – Opinions of Florida Counsel Relating to “Usury.” In rendering this opinion, Florida local counsel should be mindful that if the law selected in the Transaction Documents is the laws of a state other than Florida, then any such opinion will need to be rendered “as if” Florida law applies. See “Common Elements of Opinions-Limitations to Laws of Specific Jurisdictions or to Substantive Areas of the Law; Excluded Areas of Law.”

Further, Florida counsel should remember that if they render a “remedies opinion” or a “no violation of laws” opinion under Florida law with respect to a Transaction and Transaction Documents, such opinion includes an opinion regarding compliance with Florida usury law. However, if an express opinion regarding usury is included in the opinion letter, than the remedies opinion and “no violation of laws” opinions will be limited to the scope of the express usury opinion included in the opinion letter. See “The Remedies Opinion-Analysis of the Foundational Building Block: The Meaning of the Basic Remedies Opinion-Legal Issues Covered by the Remedies Opinion.”

### H. Florida Taxes

1. Real Estate Transactions. Often, Florida local counsel will be asked to render an opinion regarding the documentary stamp taxes and intangible personal property taxes due with respect to a particular real estate loan Transaction. The form of such opinion is discussed in “Opinions Particular to Real Estate Transactions-Florida Taxes,” and the illustrative form of local counsel opinion letter that accompanies this Report includes an illustrative form of this opinion.
2. Documentary Stamp Taxes and Intangible Taxes on Instruments. Florida documentary stamp taxes are also due on promissory notes and other written obligations to pay money (including loan agreements that incorporate a promissory note or are incorporated by reference into a promissory note) executed and delivered in Florida. When there is both a promissory note and a mortgage, the tax is paid on the mortgage and a notation must be made on the promissory note that the applicable tax has been paid on the mortgage.

The tax is based on a rate per \$100 or fraction thereof of the face value of the instrument (currently \$0.35/\$100.00). When there is no mortgage, this tax is capped at \$2,450 per instrument. As a result, in Florida transactions involving one or more instruments, the promissory notes and any other loan documents that contain a “written obligation to pay money” are often executed and delivered outside of the State of Florida with the party executing such instruments also executing a “tax affidavit” evidencing out-of-state execution and delivery of the instruments. This “tax affidavit” is used to prove to DOR that the instruments were executed and delivered out-of-state.



1CSP042Y28QV08M

In such cases, Florida counsel may be asked to opine that no documentary stamp taxes are due on the out-of-state execution and delivery of the promissory note and other loan documents that contains a "written obligation to pay money." The recommended form of such language is as follows:

The [instruments] are exempt from Florida documentary stamp taxes assuming that (i) the [instruments] were made, executed and delivered outside of the State of Florida, and (ii) no mortgage, trust deed, security agreement or other evidence of indebtedness (except for the Financing Statements) has been or will be filed or recorded in Florida. Pursuant to Rule 12B-4.053(35) of the Florida Administrative Code, this exemption is based on the [Opinion Recipient's] ability to provide the "tax affidavit" or other evidence satisfactory to the Florida Department of Revenue to establish that the [instruments] were made, executed and delivered to the [Opinion Recipient] outside of the State of Florida. We caution you that any subsequent renewal of the [instruments] may be subject to the Florida documentary stamp tax unless the renewal [instruments] are also executed and delivered outside of the State of Florida.

The recommended language includes precautionary language at the end to make clear that renewal instruments are subject to documentary stamp taxes unless also executed and delivered outside Florida.

Further if this opinion is rendered, many Florida counsel add an express exclusion to the opinion letter with respect to other taxes. For a discussion on this exclusion, see "Opinions Particular to Real Estate Transactions—Florida Taxes—Other Taxes."

Florida intangible taxes are due only on promissory notes or other obligations for the payment of money secured by a mortgage, deed of trust or other lien on real property situated in the State of Florida. As a result, opinions regarding intangible personal property taxes in non-real estate secured loan transactions are rarely requested.

Because of the complexities involved, this opinion should only be given by lawyers who reasonably believe themselves competent to render this opinion.

**I. Other Opinions that are Sometimes Requested of Florida Local Counsel in Real Estate Transactions**

There are a number of opinions that are sometimes requested in multi-state Transactions involving Florida real property where the other parties to the Transaction (and their counsel) are not located in Florida. Although these opinions were often rendered in the past, the Committees believe that such opinions are no longer generally provided in opinions of Florida counsel under Florida customary practice. Opining Counsel should consider the following issues before agreeing to render any of these opinions.

1. Opinions Regarding Customary Provisions in Loan Documents and/or a Mortgage. Counsel for out-of-state Opinion Recipients in loan transactions may request an opinion that the loan documents or the mortgage contain all of the provisions that are customarily contained in Florida loan documents or Florida mortgages.

The key problem with this opinion request is that it requires Florida Opining Counsel to determine (subjectively) which provisions in loan documents and mortgages are "customary." Further, there is a risk in this analysis that Opining Counsel and the Opinion Recipient (or its counsel) may have a different viewpoint as to what provisions in loan documents and mortgages are or should be "customary." Finally, this "opinion" is actually a factual confirmation, since it involves an assessment of which provisions in Florida documents are the "customary" provisions. As a result of these factors, the Committees believe that under Florida customary practice this is an inappropriate opinion request.

Notwithstanding, some Florida Opining Counsel continue to render this opinion based on their belief that the following provisions are the "customary" provisions that are required in loan documents and mortgages in Florida: (i) an acceleration after default provision, (ii) a provision allowing for a remedy upon foreclosure, (iii) a provision allowing for the appointment of a receiver upon the occurrence of a material default, (iv) an assignment of rents provision (either in the mortgage or in a separate

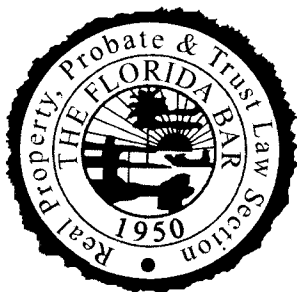
RPPTL 2009 - 2010  
Executive Council Meeting Schedule  
JOHN NEUKAMM'S YEAR

<b>Date</b>	<b>Location</b>
July 30 – August 2, 2009	<b>Executive Council Meeting &amp; Legislative Update</b> The Breakers Palm Beach, Florida Reservation Phone # 561-655-6611 www.thebreakers.com Room Rate \$176.00 (Superior King) \$189.00 (Deluxe Double) Cut-off Date: June 29, 2009
September 24 – September 27, 2009	<b>Executive Council Meeting</b> Ritz-Carlton, Naples Naples, Florida Reservation Phone # 800-241-3333 www.ritzcarlton.com/naples Room Rate \$199.00 Cut-off Date: August 10, 2009
January 14 – January 17, 2010	<b>Executive Council Meeting</b> The Casa Monica Hotel St. Augustine, Florida Reservation Phone # 904-827-1888 www.casamonica.com Room Rate \$199.00 Cut-off Date: December 14, 2009
March 16 – March 21, 2010	<b>Executive Council Meeting / Out-of-State Meeting</b> The Ritz-Carlton, Kapalua Lahaina, Maui Hawaii Hotel Phone # 800-241-3333 <b>*Room Rate \$250 (Deluxe Room)</b> Cut-off Date: January 30, 2010
May 27 – May 30, 2010	<b>Executive Council Meeting / RPPTL Convention</b> Tampa Marriott – Waterside Hotel & Marina Tampa, Florida Reservation Phone # 800-228-9290 Room Rate \$159.00 (Single/Double) \$179.00 (Triple) \$199.00 (Quad) Cut-off Date: April 27, 2010

*\* This rate is subject to restrictions that which will be addressed during the Chair's report at the Executive Council Meeting*

RPPTL 2010 - 2011  
Executive Council Meeting Schedule  
BRIAN FELCOSKI'S YEAR

<b>Date</b>	<b>Location</b>
August 5 – August 8, 2010	<b>Executive Council Meeting &amp; Legislative Update</b> The Breakers Palm Beach, Florida Reservation Phone # 561-655-6611 <a href="http://www.thebreakers.com">www.thebreakers.com</a> Room Rate: \$185.00 Cut-off Date: July 4, 2010
September 23 – September 26, 2010	<b>Executive Council Meeting</b> Ritz-Carlton Orlando, Grand Lakes Orlando, Florida Reservation Phone # 1-800-576-5760 <a href="http://www.grandelakes.com">http://www.grandelakes.com</a> Room Rate: \$219.00 Cut-off Date: August 25, 2010
November 4 – November 7, 2010	<b>Executive Council Meeting</b> Sandpearl Resort Clearwater, Florida Reservation Phone #1-877-726-3111 <a href="http://www.sandpearl.com">http://www.sandpearl.com</a> Room Rate: \$199.00 Cut-off Date: October 1, 2010
February 24 – February 27, 2011	<b>Executive Council Meeting / Out-of-State Meeting</b> Four Season Resort Santa Barbara, CA Reservation Phone #805-565-8299 <a href="http://www.fourseasons.com/santabarbara">www.fourseasons.com/santabarbara</a> Room Rate: \$350.00 Cut-off Date: January 25, 2011
May 26 – May 29, 2011	<b>Executive Council Meeting / RPPTL Convention</b> Eden Roc Hotel Miami Beach, Florida Reservation Phone # 1-800-319-5354 <a href="http://boldnewedenroc.com/">http://boldnewedenroc.com/</a> Room Rate \$199.00 Cut-off Date: May 3, 2011



## RPPTL FINANCIAL SUMMARY

2009 – 2010 [July 1, 2009 – January 31, 2010<sup>1</sup>]

Revenue: \$764,288\*

Expenses: \$563,578

**Net: \$200,710**

*\*\$157,645 of this figure represents revenue from corporate sponsors and exhibitors*

Beginning Fund Balance (7-1-09)

\$ 908,659

YTD Fund Balance (1-31-10)

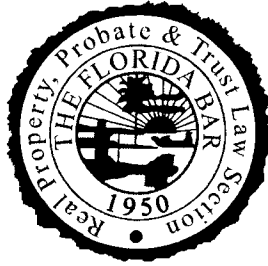
\$1,109,369

RPPTL CLE

RPPTL YTD Actual CLE Revenue  
\$119,161

RPPTL Budgeted CLE Revenue  
\$200,000

<sup>1</sup> This report is based on the tentative unaudited detail statement of operations dated 1/31/2010.



**RPPTL Financial Summary from Separate Budgets**  
2009 – 2010 [July 1, 2009 – January 31, 2010<sup>1</sup>]  
YEAR TO DATE REPORT

**General Budget**

Revenue:	\$ 676,751
Expenses:	\$ 450,977
Net:	\$ 225,774

**Attorney / Trust Officer Liaison Conference**

Revenue:	\$ 44,957
Expenses:	\$ 4,430
Net:	\$ 40,527

**Legislative Update**

Revenue:	\$ 42,515
Expenses:	\$ 95,897
Net:	(\$53,382)

**Convention**

Revenue:	\$ 65
Expenses:	\$ 12,274
Net:	(\$12, 209)

**Roll-up Summary (Total)**

Revenue:	\$ 764,288
Expenses:	\$ 563,578
<b>Net Operations:</b>	<b>\$ 200,710</b>

Reserve (Fund Balance):	\$ 908,659
<b>GRAND TOTAL</b>	<b>\$1,109,369</b>

<sup>1</sup> This report is based on the tentative unaudited detail statement of operations dated 1/31/2010

	January 2010 Actuals	YTD 09-10 Actuals	Budget	Percent Budget
Total Real Prop Probate & =====				
31431 Section Dues	850	452,300	465,000	97.27
31432 Affiliate Dues	0	2,100	1,750	120.00
31433 Admin Fee to TFB	-298	-159,169	-163,450	97.38
-----				
Total Dues Income-Net	552	295,231	303,300	97.34
-----				
32001 Registrations	0	11,475	140,000	8.20
32006 Live Web Cast	0	7,000	8,500	82.35
32010 Legal Span On-line	0	2,690	750	358.67
32191 CLE Courses	9,460	105,936	180,000	58.85
32205 Compact Disc	1,175	13,160	19,200	68.54
32207 DVD	235	4,465	10,000	44.65
32293 Section Differential	1,300	13,225	20,000	66.13
32301 Course Materials	0	2,000	3,500	57.14
34704 Actionline Advertise	450	5,025	12,000	41.88
35003 Ticket Events	0	39,154	0	*
35101 Exhibit Fees	0	15,000	33,000	45.45
35201 Sponsorships	46,845	142,645	235,000	60.70
35603 Bd/Council Mtg Regis	50	28,944	160,000	18.09
38499 Investment Allocatio	-14,986	78,338	17,654	443.74
-----				
her Income	44,529	469,057	839,604	55.87
-----				
Total Revenues	45,081	764,288	1,142,904	66.87
-----				
36998 Credit Card Fees	0	1,725	5,896	29.26
51101 Employee Travel	1,193	5,932	14,435	41.09
61201 Equipment Rental	0	6,787	15,000	45.25
62202 Meeting Room Rental	0	-889	0	*
71001 Telephone/Direct	100	800	1,000	80.00
71005 Internet Charges	178	722	0	*
75102 1st Class & Misc Mai	0	43	300	14.33
75401 Express Mail	20	2,047	1,500	136.47
81411 Promotional Printing	0	1	2,000	0.05
81412 Promotional Mailing	0	0	14,000	0.00
81425 Brochure Insert Fees	0	2,329	0	*
84001 Postage	185	1,577	11,500	13.71
84002 Printing	0	362	4,950	7.31
84006 Newsletter	0	21,858	40,000	54.65
84009 Supplies	0	0	500	0.00
84010 Photocopying	28	174	500	34.80
84012 Registration Support	0	2,899	3,000	96.63
84015 Officers Conference	0	0	1,200	0.00
84051 Officers Travel Expe	0	359	3,000	11.97
84054 CLE Speaker Expense	0	1,171	3,000	39.03
061 Reception	0	1,262	67,500	1.87
062 Luncheons	0	29,936	60,000	49.89
84064 Golf Tourn Expenses	0	0	11,000	0.00

	January 2010 Actuals	YTD 09-10 Actuals	Budget	Percent Budget
Total Real Prop Probate & =====				
84101 Committee Expenses	3,718	40,151	50,000	80.30
84106 Realtor Relations	0	2,000	5,000	40.00
84107 Diversity Initiative	0	2,025	15,000	13.50
84109 Spouse Program	0	92	0	*
84110 Exhibitor Fees	0	0	250	0.00
84115 Entertainment	0	0	20,000	0.00
84201 Board Or Council Mee	35,592	254,179	400,000	63.54
84216 Strategic Planning M	-71	143	0	*
84238 Council Mtg Recreati	466	6,881	35,000	19.66
84239 Hospitality Suite	109	7,530	20,000	37.65
84241 Spouse Functions	0	2,785	0	*
84253 Sleeping Rooms	0	0	2,500	0.00
84254 Speaker Gifts	0	1,837	2,000	91.85
84258 Web Services	0	3,538	6,000	58.97
84279 Council Members Hand	0	2,831	3,500	80.89
84310 Law School Liaison	0	0	7,500	0.00
84322 Fellowships-Exc Cou	1,099	2,649	10,000	26.49
84422 Website	283	22,783	50,000	45.57
84501 Legislative Consulta	0	50,000	100,000	50.00
84503 Legislative Travel	0	7,327	12,000	61.06
84524 Memorial Tributes	0	0	500	0.00
701 Council Of Sections	0	300	300	100.00
84998 Operating Reserve	0	0	79,684	0.00
84999 Miscellaneous	0	1,549	7,667	20.20
85064 Service Recognition	0	1,306	5,000	26.12
85084 OSCA E-Filing Proj	0	7,667	0	*
86432 Time Taping Editing	0	4,850	4,500	107.78
88211 Steering Committee	0	0	1,500	0.00
88230 Speakers Expense	0	486	7,000	6.94
88233 Speakers Hotel	0	3,722	3,700	100.59
88241 Outline Prt-Inhouse	0	1,413	7,000	20.19
88242 Outline Prt-Contract	0	9,936	13,000	76.43
88252 Course Credit Fee	0	200	150	133.33
88262 Meeting Meals	0	13,163	84,800	15.52
88265 Refreshment Breaks	0	9,334	13,000	71.80
88269 Breakfast	0	9,457	38,000	24.89
88281 A/V Ctr Dup/Prod	0	49	1,600	3.06
-----				
Total Operating Expenses	42,900	549,278	1,266,432	43.37
-----				
83431 Time CLE Courses	0	0	500	0.00
86431 Meetings Administrat	400	4,020	5,988	67.13
86532 Advertising News	0	3,196	4,958	64.46
86543 Graphics & Art	511	6,985	12,686	55.06
86623 Registrars	11	99	2,500	3.96
-----				
Total TFB Support Services	922	14,300	26,632	53.69
-----				



	January 2010 Actuals	YTD 09-10 Actuals	Budget	Percent Budget
Total Real Prop Probate & =====				
Total Expenses	43,822	<u>563,578</u>	1,293,064	43.58
Net Operations	1,259	<u>200,710</u>	-150,160	-133.66
21001 Fund Balance	0	908,659	882,682	102.94
Total Current Fund Balance	1,259	1,109,369	732,522	151.45

	January 2010 Actuals	YTD 09-10 Actuals	Budget	Percent Budget
<b>Real Prop Probate &amp; Trust</b>				
31431 Section Dues	850	452,300	465,000	97.27
31432 Affiliate Dues	0	2,100	1,750	120.00
31433 Admin Fee to TFB	-298	-159,169	-163,450	97.38
<b>Total Dues Income-Net</b>	<b>552</b>	<b>295,231</b>	<b>303,300</b>	<b>97.34</b>
32191 CLE Courses	9,460	105,936	180,000	58.85
32293 Section Differential	1,300	13,225	20,000	66.13
34704 Actionline Advertise	450	5,025	12,000	41.88
35003 Ticket Events	0	38,407	0	*
35101 Exhibit Fees	0	0	15,000	0.00
35201 Sponsorships	32,345	111,645	210,000	53.16
35603 Bd/Council Mtg Regis	50	28,944	160,000	18.09
38499 Investment Allocatio	-14,986	78,338	17,654	443.74
<b>Other Income</b>	<b>28,619</b>	<b>381,520</b>	<b>614,654</b>	<b>62.07</b>
<b>Total Revenues</b>	<b>29,171</b>	<b>676,751</b>	<b>917,954</b>	<b>73.72</b>
998 Credit Card Fees	0	1,277	3,672	34.78
.101 Employee Travel	1,193	3,106	6,525	47.60
71001 Telephone/Direct	100	800	1,000	80.00
71005 Internet Charges	178	722	0	*
81411 Promotional Printing	0	1	0	*
84001 Postage	137	1,185	7,000	16.93
84002 Printing	0	62	2,500	2.48
84006 Newsletter	0	21,858	40,000	54.65
84009 Supplies	0	0	300	0.00
84010 Photocopying	28	174	500	34.80
84015 Officers Conference	0	0	1,200	0.00
84051 Officers Travel Expe	0	359	3,000	11.97
84054 CLE Speaker Expense	0	1,171	3,000	39.03
84101 Committee Expenses	3,718	40,086	50,000	80.17
84106 Realtor Relations	0	2,000	5,000	40.00
84107 Diversity Initiative	0	2,025	15,000	13.50
84109 Spouse Program	0	92	0	*
84201 Board Or Council Mee	35,592	254,179	400,000	63.54
84216 Strategic Planning M	-71	143	0	*
84238 Council Mtg Recreati	466	6,881	35,000	19.66
84239 Hospitality Suite	109	7,530	20,000	37.65
84241 Spouse Functions	0	2,785	0	*
84279 Council Members Hand	0	2,831	3,500	80.89
84310 Law School Liaison	0	0	7,500	0.00
84322 Fellowships-Exc Cou	1,099	2,649	10,000	26.49
84422 Website	283	22,783	50,000	45.57
.501 Legislative Consulta	0	50,000	100,000	50.00
.503 Legislative Travel	0	7,327	12,000	61.06
84524 Memorial Tributes	0	0	500	0.00

	January 2010 Actuals	YTD 09-10 Actuals	Budget	Percent Budget
Real Prop Probate & Trust ~~~~~				
84701 Council Of Sections	0	300	300	100.00
84998 Operating Reserve	0	0	79,684	0.00
84999 Miscellaneous	0	0	7,667	0.00
85064 Service Recognition	0	1,306	5,000	26.12
85084 OSCA E-Filing Proj	0	7,667	0	*
-----				
Total Operating Expenses	42,832	441,299	869,848	50.73
-----				
86431 Meetings Administrat	400	4,020	4,456	90.22
86543 Graphics & Art	511	5,658	9,388	60.27
-----				
Total TFB Support Services	911	9,678	13,844	69.91
-----				
Total Expenses	43,743	450,977	883,692	51.03
-----				
Net Operations	-14,572	225,774	34,262	658.96
-----				
21001 Fund Balance	0	908,659	882,682	102.94
-----				
Total Current Fund Balance	-14,572	1,134,433	916,944	123.72
-----				

## A bill to be entitled

An act to provide for the judicial construction of certain trusts containing federal tax provisions, creating s. 736.04114, F.S.; providing for the judicial construction of certain wills containing federal tax provisions, creating s. 733.1051, F.S.; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 736.04114, Florida Statutes, is created to read:

736.04114 Limited judicial construction of irrevocable trust with federal tax provisions.—

(1) Upon the application of a trustee or any qualified beneficiary of a trust, a court at any time may construe the terms of a trust that is not then revocable to define the respective shares or determine beneficiaries, in accordance with the intention of the settlor, if a disposition occurs during the applicable period and the trust contains a provision that:

(a) Includes a formula disposition referring to the “unified credit”, “estate tax exemption,” “applicable exemption amount,” “applicable credit amount,” “applicable exclusion amount,” “generation-skipping transfer tax exemption,” “GST exemption,” “marital deduction,” “maximum marital deduction,” “unlimited marital deduction,” or “maximum charitable deduction;”

(b) Measures a share of a trust based on the amount that can pass free of federal estate tax or the amount that can pass free of federal generation-skipping transfer tax;

(c) Otherwise makes a disposition referring to a charitable deduction, marital deduction, or another provision of federal estate tax or generation-skipping transfer tax law; or

(d) Appears to be intended to reduce or minimize federal estate tax or generation-skipping transfer tax.

(2) For the purpose of this section:

(a) “Applicable period” means a period beginning January 1, 2010, and ending on the end of the day on the earlier of (i) December 31, 2010, or (ii) the day before the date that an act becomes law that repeals or otherwise modifies or has the effect of repealing or modifying s. 901 of The Economic Growth and Tax Relief Reconciliation Act of 2001.

(b) A “disposition occurs” when an interest takes effect in possession or enjoyment.

(3) In construing the trust, the court shall consider the terms and purposes of the trust, the facts and circumstances surrounding the creation of the trust, and the settlor’s probable intent. In determining the settlor’s probable intent, the court may

428181

RM:6724080:1

44 consider evidence relevant to the settlor's intent even though the evidence contradicts  
 45 an apparent plain meaning of the trust instrument.

46 (4) This section does not apply to a disposition that is specifically conditioned  
 47 upon no federal estate or generation-skipping transfer tax being imposed.

48 (5) Unless otherwise ordered by the court, during the applicable period and  
 49 without court order, the trustee administering a trust containing one or more provisions  
 50 described in subsection (1) may:

51 (a) Delay or refrain from making any distribution;

52 (b) Incur and pay fees and costs reasonably necessary to determine its duties  
 53 and obligations (including compliance with provisions of existing and reasonably  
 54 anticipated future federal tax laws); and

55 (c) Establish and maintain reserves for the payment of these fees and costs  
 56 and federal taxes.

57 The trustee shall not be liable for its actions as provided in this subsection made or  
 58 taken in good faith.

59 (6) The provisions of this section are in addition to, and not in derogation of,  
 60 rights under this code or the common law to construe a trust.

61  
 62 Section 2. Section 733.1051, Florida Statutes, is created to read:

63  
 64 733.1051 Limited judicial construction of will with federal tax  
 65 provisions.--

66  
 67 (1) Upon the application of a personal representative or a person who is or may  
 68 be a beneficiary who is affected by the outcome of the construction, a court at any time  
 69 may construe the terms of a will that has been admitted to probate to define the  
 70 respective shares or determine beneficiaries, in accordance with the intention of a  
 71 testator, if a disposition occurs during the applicable period and the will contains a  
 72 provision that:

73 (a) Includes a formula disposition referring to the "unified credit", "estate tax  
 74 exemption," "applicable exemption amount," "applicable credit amount," "applicable  
 75 exclusion amount," "generation-skipping transfer tax exemption," "GST exemption,"  
 76 "marital deduction," "maximum marital deduction," "unlimited marital deduction," or  
 77 "maximum charitable deduction;"

78 (b) Measures a share of an estate based on the amount that can pass free of  
 79 federal estate tax or the amount that can pass free of federal generation-skipping  
 80 transfer tax;

81 (c) Otherwise makes a disposition referring to a charitable deduction, marital  
 82 deduction, or another provision of federal estate tax or generation-skipping transfer tax  
 83 law; or

84 (d) Appears to be intended to reduce or minimize federal estate tax or  
 85 generation-skipping transfer tax.

86 (2) For the purpose of this section:

428181

RM:6724080:1

87 (a) "Applicable period" means a period beginning January 1, 2010 and ending  
88 on the end of the day on the earlier of (i) December 31, 2010, or (ii) the day before the  
89 date that an act becomes law that repeals or otherwise modifies or has the effect of  
90 repealing or modifying s 901 of The Economic Growth and Tax Relief Reconciliation Act  
91 of 2001.

92 (b) A "disposition occurs" when the testator dies.

93 (3) In construing the will, the court shall consider the terms and purposes of the  
94 will, the facts and circumstances surrounding the creation of the will, and the testator's  
95 probable intent. In determining the testator's probable intent, the court may consider  
96 evidence relevant to the testator's intent even though the evidence contradicts an  
97 apparent plain meaning of the will.

98 (4) This section does not apply to a disposition that is specifically conditioned  
99 upon no federal estate or generation skipping transfer tax being imposed.

100 (5) Unless otherwise ordered by the court, during the applicable period and  
101 without court order, the personal representative administering a will containing one or  
102 more provisions described in subsection (1) may:

103 (a) Delay or refrain from making any distribution;

104 (b) Incur and pay fees and costs reasonably necessary to determine its duties  
105 and obligations (including compliance with provisions of existing and reasonably  
106 anticipated future federal tax laws); and

107 (c) Establish and maintain reserves for the payment of these fees and costs  
108 and federal taxes.

109 The personal representative shall not be liable for its actions as provided in this  
110 subsection made or taken in good faith.

111 (6) The provisions of this section are in addition to, and not in derogation of,  
112 rights under the common law to construe a will.

113

114 Section 3. This law is remedial to provide a new or modified legal remedy. Sections 1  
115 and 2 shall have retroactive effect and be effective as of January 1, 2010.

# LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received \_\_\_\_\_

## GENERAL INFORMATION

**Submitted By** Real Property Probate and Trust Section, Estate and Trust Tax Planning Committee

**Address** c/o Richard R. Gans, Esq., Chair, Estate and Trust Tax Planning Committee  
1515 Ringling Blvd., Ste. 1000, Sarasota, Florida 34236

**Position Type** RPPTL Section

## CONTACTS

**Board & Legislation Committee Appearance** Michael Gelfand, Esq., Gelfand & Arpe  
1555 Palm Beach Lakes Blvd., Ste. 1220, West Palm Beach, Florida 33401  
(561) 655-1361 mjgelfand@gelfandarpe.com

**Appearances before Legislators** Peter M. Dunbar, Esq.  
P. O. Box 10095, Tallahassee, Florida 32302-2095  
(850) 222-2126 pete@penningtonlawfirm.com

Martha Edenfield, Esq.  
P. O. Box 10095, Tallahassee, Florida 32302-2095  
(850) 222-2126 martha@penningtonlawfirm.com

**Meetings with Legislators/staff** Michael Gelfand, Esq., and Peter M. Dunbar, Esq.

## PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* be filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format – Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

**If Applicable,  
List The Following** \_\_\_\_\_

(Bill or PCB #)

(Bill or PCB Sponsor)

**Indicate Position** \_\_\_\_\_ Support \_\_\_\_\_ Oppose \_\_\_\_\_ Technical Assistance \_\_\_\_\_ Other \_\_\_\_\_

### Proposed Wording of Position for Official Publication:

“Support amendment of the Florida Probate Code and the Florida Trust Code to add new provisions in each to permit a court to construe provisions in wills and trusts that relate to the federal estate and generation-skipping transfer taxes in light of the unexpected suspension of these taxes for 2010 only, so as to give effect to the intent of the trust settlor or decedent.”





## **Real Property, Probate and Trust Law Section of The Florida Bar**

### **White Paper on Proposed Enactment of New Sections 733.1051 and 736.04114, Florida Statutes**

---

#### **I. SUMMARY**

The federal estate and generation skipping transfer taxes (“GST taxes”) have been suspended for 2010 only. Although the law creating the one-year suspension of the taxes was enacted in 2001, virtually no one took seriously the possibility that Congress would fail to act before 2010 to halt the suspension of the taxes. This creates havoc with countless wills and trusts, created both before and after 2001, which contain provisions assuming the estate and GST taxes will be in effect in 2010.

The legislative proposal would add two new provisions – one to the Florida Probate Code and one to the Florida Trust Code – that will enable fiduciaries and beneficiaries to request a court to construe certain tax-related provisions that may be ambiguous, or lead to unintended results, in light of the failure of Congress to halt the suspension of the federal estate tax and the federal GST tax for 2010 only.

#### **II. CURRENT SITUATION**

Wills and trust agreements (both revocable and irrevocable) frequently contain provisions designed to eliminate, minimize or defer payment of the federal estate tax and the federal generation-skipping transfer tax. These provisions are usually phrased not in terms of fixed-dollar amounts but, instead, in terms of a formula intended to produce the optimal result under the law prevailing at the time for application of the formula (usually, but not always, at the death of the testator, testatrix or trust settlor).

The suspension of the federal estate and GST taxes for 2010 only casts the interpretation of these tax-related formulas, and other provisions phrased in terms of a desired tax outcome, in significant doubt. A formula stated in terms of, for example, “the maximum GST exemption,” “the maximum estate tax marital deduction,” “the “maximum estate tax marital deduction,” or a “maximum charitable deduction” now has no meaning because, in 2010, there is no federal estate tax marital or charitable deduction, and there is no GST exemption.

Even if the tax provisions in these documents were clear on their face, in many instances the result compelled by the plain language during the 2010 federal transfer tax hiatus will not be consistent with the settlor’s or decedent’s intent. For example, a formula phrased in terms of “the most I can pass free from estate taxes at my death” can result in an unintended disinheriting of the surviving spouse if the decedent’s children are to receive the formula amount (in 2010, everything) and the surviving spouse is to receive the balance (in 2010, nothing).

There is now no statutory provision in the Florida Probate Code, and no clear precedent in common law, that would allow a court to construe tax formulas and other provisions in wills to fulfill the testator’s intent in light of the disruption brought to wills by the suspension of the federal estate and GST taxes in 2010. Likewise, although the Florida Trust Code contains several provisions that allow a court to construe a trust instrument, none of those provisions clearly makes the court available to construe a trust agreement in light of the particular effects wrought by the 2010 federal tax suspension.

### **III. EFFECT OF PROPOSED CHANGES**

The proposed changes would permit fiduciaries and beneficiaries to request a court to construe formula and other tax-related provisions. Construction of wills and trust agreements is necessary to give effect to the intent of the testator, testatrix or trust grantor in light of the ambiguities and unintended results that flow from the temporary suspension of the current transfer tax regime. Construction of the applicable document will also lend certainty to the administration of the estate or trust agreement, both for fiduciaries and beneficiaries. Under current Florida law, there is no clear authorization for the kind of construction action necessary to respond to the unexpected suspension of the federal estate and GST taxes.

Proposed new Section 733.105, Florida Statutes, would make it clear that the courts have authority to construe formulas and other tax-related provisions in wills. Proposed new Section 736.04114, Florida Statutes, to be added to the Florida Trust Code, would do the same in the context of trusts.

The application of both of the proposed provisions is limited to the construction of tax provisions, and, further, is limited in time to the period during which the federal estate and GST taxes are suspended (that period could be shorter than all of 2010). Both provisions allow the court to consider extrinsic evidence to arrive at the proper construction, and provide authorization for the fiduciary to expend funds for the construction action and delay distributions pending the outcome of the court's decision.

Because the legislative proposal is remedial in nature, it would be retroactive to January 1, 2010, which is the date upon which the suspension of the federal estate and GST taxes took effect.

### **IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS**

Adoption of this legislative proposal by the Florida Legislature should not have a fiscal impact on state and local governments; rather, it should be revenue neutral.

### **V. DIRECT IMPACT ON PRIVATE SECTOR**

The proposed statutes will benefit the private sector by permitting the court to fulfill the intent of Florida testators, testatrixes and trust settlors, as expressed in their estate planning documents, in light of the ambiguities and unintended results that might otherwise occur because of the failure of Congress to halt the temporary suspension of the federal estate and GST taxes.

### **VI. CONSTITUTIONAL ISSUES**

The Committee believes that the legislative proposal does not violate any of the provisions of the Constitution of the State of Florida or of the United States Constitution.

### **VII. OTHER INTERESTED PARTIES**

Other groups that may have an interest in the legislative proposal include the Tax Section of The Florida Bar and the Florida Bankers Association.

RPPTL 2009-2010 CLE Calendar				
DATE	EVENT	Course #	CITY	HOTEL
Oct. 8 -9, 2009	Real Property Seminar #1 RESPA & Regulatory Compliance	0885	Tampa/Ft. Laud	Airport Marriott/Airport Hilton
Oct. 23, 2009	Probate Seminar #1 Guardianship Law	0936	Tampa	Airport Marriott
Nov. 5-6, 2009	Real Property Seminar #2 Landlord and Tenant	0944	Ft. Laud/Tampa	Airport Hilton/Airport Marriott
Nov. 12-13, 2009	Probate Seminar #2 Trust Law	0955	Tampa/Ft. Laud	Airport Marriott/Airport Hilton
Dec.11, 2009	Probate Seminar #3 Estate Planning	0966	Tampa	Airport Marriott
Jan. 29, 2010	Real Property Seminar #3 Environmental and Land Use	0969	Tampa	Airport Marriott
Feb. 10-11, 2010	Probate Seminar #4 Trust and Estate Symposium	0989	Ft. Laud/Tampa	Airport Hilton/Airport Marriott
Feb. 19, 2009	Real Property Seminar Litigation Seminar	1063	Tampa	Airport Marriott
March 4-5, 2010	Real Property Seminar #5 Land Trusts	1014	Ft. Laud/Tampa	Airport Hilton/Airport Marriott
March 25-26, 2010	Probate Seminar #5 Probate Law	1003	Tampa/Ft. Laud	Airport Marriott/Airport Hilton
April 8-10, 2010	3rd Annual Construction Law Institute	1010	Orlando	Omni Resort ChampionsGate
April 8-10, 2010	Construction Law Certification Review Course	1011	Orlando	Omni Resort ChampionsGate
April 15, 2010	<del>Real Property Seminar #4 Condo Law- Canceled</del>	0995	Tampa	Airport Marriott
April 16, 2010	Real Property Seminar #4 Condo Law	1065	Tampa	Airport Marriott
April 23-24, 2010	Probate Seminar Wills, Trusts & Estates Certification Review	1039	Orlando	Hyatt Regency Airport
April 23-24, 2010	Real Property Seminar Advanced Real Estate Law Certification Review	1040	Orlando	Hyatt Regency Airport
April 29-30, 2010	<del>Probate Seminar #6 Power of Attorney- Canceled</del>	1018	Ft. Laud/Tampa	Airport Hilton/Airport Marriott
May 28, 2010	Convention Seminar Real Estate, Probate and Trust Law	1042	Tampa	Marriott Waterside
June 23-27, 2010	RPPTL Attorney/Trust Officer Liaison Conference	1035	Naples	Ritz Carlton Golf Resort