Friendly Passages

Supporting Equal Access to Law in Florida

March/April
2016

A Publication of The Friends of the Rupert J. Smith Law Library of St. Lucie County Florida

March/April 2016

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Friendly Passages — Supporting Equal Access to Law in Florida — March/April 2016

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Library Holiday Schedule

Sunday March 27, 2016 Easter Sunday

On The Cover

Florida Sunset.
Photograph by James Wilder.

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On Behalf of the Publisher

A Report on the Future of the Rupert J. Smith Law Library

By James T. Walker President, Friends of the Rupert J. Smith Law Library

Roughly every ten years, the law library's Trustees convene for hard thinking on the future of law libraries generally, and the future of the Rupert J. Smith County Law Library specifically. The last preceding Ten Year Plan for the library is dated March 18, 2004. A successor update is now being prepared. Most recently, on January 25, 2015, the Trustees met in a half-day workshop given over to discussion of long-term trends and challenges. The process has been ongoing for awhile and a few of the more short-term policies that were identified have already been partially implemented. What follows is intended to brief readers about some of what is going on with this process. Naturally, none of it is intended to reflect any official position or view held by the Board of Trustees. Any opinions expressed are strictly my own as an individual Trustee. Nor, for that matter, do such opinions necessarily represent the views of the Friends of the Rupert J. Smith Library. The Friends is a 501(c)(3) corporation charged with supporting and promoting our county law library here in St. Lucie County.

In presenting this report, it is my intent to first address the larger existential question that must be answered in laying a predicate before next identifying several of the major issues, and strategies for addressing those issues, that the Trustees are looking at presently.

The Case for Law Libraries

Why a law library? In a time when change is happening so quickly in every area of life, traditional institutions, even the legal profession itself, are called upon to justify their continued existence. Law libraries are no different. Of what use is a law library's Ten Year Plan if law libraries cannot fairly be justified as an integral element in the spectrum of ways by which the profession and general public acquire legal information? To put it another way, are the same services as otherwise provided by a system of county law libraries better accessed through some other means?

For instance, the Florida Commission on Access to Civil Justice is currently looking at a proposal to create a statewide gateway e-portal, a computer website that anyone can tap in to. The Commission's Interim Report (October 1, 2015) describes the portal as a devise "… to provide all individuals with a way of effective and meaningful access to civil justice. For Floridians falling into the civil justice gap who do not, or cannot find the assistance they need, the gateway portal will serve as an online connector to existing information/resources, self-help, advice, and/or representation." Pg. 8. Does such a portal, if implemented, moot or supplant the role otherwise occupied by a law library? Or what about Google, Yahoo, Bing, or some other search engine? A user may simply key in a cite and easily find information for the asking. Does a statewide portal as described by the Commission, or even just a computer keyboard, eliminate the need for a law library?

Law libraries remain relevant for several reasons. One of the proudest ideals of the law is the concept that every American should receive equal justice, that the treatment meted out to each comes without regard to invidious classification. A corollary of this principle is that equal justice must carry with it equal ability to obtain knowledge of the law. All must have equal access to awareness of what the law says. As to that, James Madison warned: "It will be of little avail to the people that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood." This is

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On Behalf of the Publisher

one of the reasons that law libraries remain relevant in the Twenty First Century. Law libraries have law librarians.

The role of the law librarian is well-described by one Richard Leiter, Professor and Director of the library for the University of Lincoln-Nebraska College of Law: "The most important aspect of being a law librarian is a knowledge of legal bibliography. This is foundational. As the professionals charged with building a collection of legal materials to serve the needs of their constituents, this knowledge is absolutely essential. Law librarians should possess an expansive knowledge of all the sources of the law. This knowledge is critical for building a useful collection and for assisting researchers in finding the appropriate materials needed for their research. Whether a collection is primarily a print collection or a digital one, knowing which materials will best serve the needs of lawyers, law students, and faculty is and should be obvious." See "Law Librarians' Roles in Modern Law Libraries"

Though Mr. Leiter was speaking from an academic vantage point, the same is particularly true of the general public's need for assistance with navigating legal resources. Law librarians are very often lawyers or law school graduates. The law student learns that knowledge often comes by looking at a subject broadly, and then narrowing down to particulars. The knowledgeable librarian can help the lay user with the interplay of legal dictionary, encyclopedia, annotation, digest, case and statute. The librarian can educate the lay user on how to use Westlaw, Lexis, HeinOnLine, or any number of other data bases, how to use connectors, and frame a meaningful search inquiry. Such friendly, helpful tutelage goes far in overcoming the sense of reluctance or intimidation that otherwise inhibits the average individual from seeking out assistance and learning that these resources are there and available. It's people helping people.

The requirement for such direct involvement is greater than ever. Florida's Commission on Civil Justice Access cites to The Justice Index, a project of the National Center for Access to Justice at the Cardozo Law School, which observes that "In our states, more than 80% of the litigants appear without lawyers in matters as important as evictions, mortgage foreclosures, child custody and child support proceedings, and debt collection cases." See Interim Report, supra, pg. 2. And it is not only the poor and disadvantaged who find difficulty in procuring access to justice: "A large category of moderate income Floridians are effectively excluded economically from access to justice because they cannot afford to hire a lawyer and they do not qualify for legal aid." Interim Report, supra at pg. 5.

Law libraries are uniquely positioned to service this unmet need: "Law libraries serve as a resource for state and federal courts working to address the challenges raised by self-represented litigants. They have implemented processes to provide initial triage and referrals and the direct assistance of library staff or other legal aid groups. They also provide information about substantive and procedural law, implement various forms of live assistance in the library (e.g., Lawyers in the Library, clinics, library-based self-help centers, videoconferencing); provide simplified, plain language guides, form templates, and instructions; and use technology to increase accessibility to the courts (online chat, e-filing, automated forms, etc.). Law libraries can both enable the development and expansion of these innovations to assist the person without a lawyer in meeting their needs and challenges. These are ways in which law libraries can both provide the self-represented with the information needed to know when they should be in court, and, if in fact they should be in court, to truly have access to justice." Law Libraries and Access to Justice: A Report of the American Association of Law Libraries Special Committee on Access to Justice" (July 2014), AALL.

Another reason supporting the role of law libraries more directly impacts the legal profession. Lawyers are typically able to acquire standard packages of online data from several competing publishers. The Florida Bar additionally offers a basic collection of cases and statutes on its website for members. And there are always the free search engines. All that may suffice for the normal work a day world of daily practice. But any serious research effort addressing complex, novel issues or unfamiliar topics soon encounters "out of plan" notification advising that the needed material is out of reach except upon payment of an expensive fee. And the average lawyer can't afford the big, comprehensive databases, which are often available at the law library. Nor are all the copyrighted specialty manuals, hornbooks and treatises found online. A good law library contains many such texts for the lawyer's use.

So for these and other reasons, law libraries are and remain an essential tool for dissemination of legal information to the general public, the court system and attorneys. That said, times change. The task of the Trustees is to assure that the Rupert J. Smith Law Library is responsive to changing needs of a dynamic legal, economic and technological environment. Three topics in particular are receiving attention: how is data best presented or consumed, whether in print or in electronic format; how space is best utilized to accommodate equipment, the collection and anticipated services; and how to meet the needs of the south county area for legal information, in light of substantial growth there that has already occurred and is presently foreseen. Each is discussed here in turn.

Print versus Electronic Resources

Books or computers or both? This is a question much debated by academics and librarians. See ex. Wu, Michelle; "Why Print and Electronic Resources are

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Overcoming Depositions With Rambo

Practice Pointers for *Problematic* Depositions

By The Hon. F. Shields McManus, Circuit Judge

Taking depositions is a frequent activity for many lawyers, even those who rarely try a case. Most practitioners obey the rules and behave professionally; once in a while, however, a deposition becomes something other than a search for evidence. Sometimes the deposition becomes an opportunity to bully the other attorney or the other party. Sometimes one party intends to prevent discovery of evidence by distracting and manipulating the process. And sometimes it is simply that the attorneys lose their temper. If you find yourself in a deposition where uncooperative attorneys or witnesses ruin your day, you need to know how to overcome. To do this, you need to know the rules, keep your cool, and properly make the record. And if you are the cause, you need to stop what you are doing and follow the rules.

Scheduling Depositions

The Oath of Admission to The Florida Bar includes this promise: "To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications." When scheduling depositions, an attorney should consult with opposing counsel and make an effort to cooperate. An attorney should not avoid scheduling depositions unnecessarily for the purpose of delay or harassment or otherwise engage in obstructionist tactics. Nor should an attorney refuse to grant reasonable extensions of time that will not have a material, adverse effect on a legitimate interest of the client. If a cancelation is necessary, prompt notice must be given, and new dates should be offered. Failure to attend without notice or failure to serve a subpoena on the deponent is not only inconsiderate but the Rules of Civil Procedure specifically provide for an award of reasonable expenses and attorney's fees to the other party in such instance. Fla. R. Civ. P. 1.310(h).

Examination

Depositions should be conducted in the same manner "as permitted at the trial." Fla. R. Civ. P. 1.310(c). If an attorney would not say it in front of a judge, it should not be said in a deposition. Counsel should not conduct an examination by repetitive and argumentative questions. Persistent discourtesy, insulting the witness, threats, and questions or comments designed to harass or intimidate the witness are improper. Certainly the other counsel present should object to such behavior and request that it stop. If it continues after an objection has been made, it may be necessary to terminate the deposition.

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Overcoming Depositions With Rambo

Termination

"Upon demand of any party or the deponent'" unilaterally, without the other party's agreement, the deposition can be stopped to the court for a ruling. Fla. R. Civ. P. 1.310(d). The court reporter must stop taking down the testimony at that point. Rule 2.535(c), Fla. R. Jud. Admin. However, the objections to the misconduct and the motion for protective order should be made orally and recorded by the reporter. The party or deponent who stopped the deposition must show to the court that the examination was being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, or that objection and instruction to a deponent not to answer are being made in violation of rule 1.310(c).

A written motion should be filed promptly with a copy of the pertinent parts of the transcript attached. Attaching the part of the deposition showing what occurred eliminates the need for verification. If the transcript does not adequately demonstrate the examiner's conduct, additional facts showing the misconduct should be alleged in the motion and then the motion must be verified, i.e., signed under oath. If the record shows an attempt to resolve the problem made and failed, a certification of good faith effort to resolve it per Rule 1.380(a)(2) and (d) should not be necessary. After a hearing, the court may terminate the deposition or order it to resume with limits on the scope and manner of the taking of the deposition per rule 1.280(c).

Terminating a deposition should be the rare exception, not common place. The attorney terminating the deposition should contribute to the improper conduct or use the termination as a tool to delay discovery. It is important to keep calm and act rationally. Stopping a deposition is a risky business because expenses and attorney's fees can be assessed if the objection is not sustained. The rule clearly states: "The provisions of rule 1.380(a) apply to the award of expenses incurred in relation to the motion." Fla. R. Civ. P. 1.310(d). The prevailing party is entitled to expenses and attorney's fees.

Objections

Objections should be limited to questions and matters which cannot be corrected later. Errors and irregularities in the oral examination in the manner of taking the deposition, in the form of questions or answers, or in the conduct of parties are waived unless a timely objection is made at the time of the deposition. State v. Wells, 538 So. 2d 1292 (Fla. 2d DCA 1989) (holding that the defendant's failure to object to the authority of the officer in charge of the deposition waived the issue).

Objections to improper questions should be made by saying, "I object to the form of the question." The witness should answer and the deposition should continue until concluded, as the rule says, "evidence objected to shall be taken subject to the objections." Fla. R. Civ. P. 1.310(c). The validity of the objection can be determined later when the deposition is sought to be used in court. An attorney can conduct a deposition asking potentially impermissible leading questions of a party or witness over objection. However, the question and answer may not be able to be read at trial. "Discovering evidence is one thing, admitting it at trial is quite another." Jones v. Seaboard Coast Line R.R., 297 So. 2d 861 (Fla. 2d DCA 1974).

If the examiner is in doubt about the correctness of the question objected to, although it is not necessary, it is appropriate to ask for the ground for the objection so that it may be corrected. However, this should not be done frequently because it will interrupt the flow of the examination and is often received by the objecting attorney as an invitation to argue. This just plays into the hand of the attorney who may want to cause distraction and delay.

In the course of the deposition, it is improper to make speaking objections. The Florida Supreme Court was concerned enough about the abuse of speaking objections in depositions, that in 1996 it added this sentence to the deposition rule, "Any objection during a deposition shall be stated concisely and in a nonargumentative and nonsuggestive manner." The court explained, "Rule 1.310(c) is amended to state existing law which allows attorneys to instruct deponents not to answer questions only in specific situations. This amendment is intended to be an instruction for conduct during a deposition. It is derived from Federal Rule of Civil Procedure 30(d) as amended in 1992." In re Amendments to Florida Rules of Civil Procedure, 682 So. 2d 105, 106 (Fla. 1996).

For example, when a lawyer makes an objection such as, "Objection! You can answer if you remember", the witness has been coached improperly. Predictably, the answer will be, "I don't remember." This also violates the Rules Regulating the Florida Bar 4-3.4: "A lawyer must not (a) unlawfully obstruct another party's access to evidence," or "(b) fabricate evidence, counsel or assist a witness to testify falsely."

An attorney should not instruct a witness not to answer

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Lie Detectors and Criminal Courts

By Richard Wires

"the extravagant claims for lie detector machines and dramatic press stories about their use in sensational cases gave polygraphs an aura of infallibility in the public's mind that was unwarranted by the facts."

With the many advances in science during the late nineteenth century came a widespread belief that crime detection could benefit from new knowledge and methods. There could be greater certainty about evidence, decisions and overall justice in our criminal trials. Over the years courts admitted testimony by experts concerning their findings in a number of science-based fields: fingerprint identification, handwriting analysis, ballistic comparison, forensic psychology. But attempts to introduce another type of supposedly "scientific" evidence into criminal proceedings were blocked by courts. Findings from newly developed lie detector tests were rejected because the concept and methodology remained controversial among the majority of scientists working in the field. Implicit too in the courts' opposition has been the assumption that juries should decide whom and what to believe without being influenced or misled by claims of truthfulness or lying based on tests of doubtful reliability. It is also noteworthy that only in America did lie detectors have much impact. No other country used them very much.

Deciding whether someone is telling the truth or lying is always difficult. The idea of sustained monitoring of a person's physiological responses under questioning, changes in pulse rate, perspiration, or in blood pressure, for indications of possibility of lying emerged in the early twentieth century. Early lie detectors, often called machines, were recording boxes. Wires connected to the subject's body during questioning carried physiological reactions to the machine for recording as written graphs. From the number of measurements ("poly") and format ("graph") came the device's alternative name. All questions required a yes-or-no answer; some queries were relevant while others were not. Equipment changed little over the decades except for making the boxes less primitive. From the outset responsible people acknowledged problems and doubts. Too many factors could affect the testing outcome. Could a determined individual's mind control or suppress the body's physical responses? What impact did a person's fear and anxiety at being tested have upon the results? Was a reaction linked specifically to the matter under investigation or triggered by some other incident or memory? Some early operators wondered if a person's sex or race might influence a response. What about the questions' content and arrangement, the examiner's experience and skill, and the interpretation of the graph's data? Because someone else might read a graph differently, operators disliked sharing material, fearing a challenge to their work and reputation.

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Lie Detectors and Criminal Courts

The early history of lie detectors is closely identified with three men. They also represent the different approaches and disputes that illustrate the field's difficulties.

In 1921 William H. Marston published an article entitled "Physiological Possibilities in the Deception Test" which built on work by the late experimental psychologist Hugo Munsterberg at Harvard. He believed that emotions or feelings were not controlled by the brain. Munsterberg's other students included young Gertrude Stein. Both a psychologist and a lawyer, Marston wanted polygraph evidence accepted legally in the 1920s, but his efforts were unsuccessful. The first important court ruling came in 1922 when Marston claimed his lie detector testing exonerated James Frye of a murder in the District of Columbia despite a confession to the crime by Frye and Marston's attempt to testify in court. But at the trial he was not deemed a qualified expert, was not allowed to testify, and was therefore unable to have his findings presented. The District of Columbia appellate court upheld the decisions by the trial judge and set forth what became the Frye rule. Scientific evidence to be permitted must be "sufficiently established to have gained general acceptance in the particular field in which it belongs." Certainly that was not the case with polygraphs. The restrictive rule stood for seventy years. Surveys of academic psychologists in both 1926 and 1952 confirmed their skepticism about polygraphs. Marston later used his knowledge to advise filmmakers on audience reactions, counseled advertisers on psychological aspects of product marketing, and created a new comic book character he called "Wonder Woman." The adventures began in January 1942 with "Charles Moulton" the author's pseudonym. Over the years his showmanship and popularizing of lie detectors annoyed those working to have polygraphs taken seriously in scholarly and legal circles. Marston defended his views and contributions in *The Lie Detector Test* (1938).

No single person is accepted as the inventor of the lie detector, but his work gives John Larson the far strongest claim, though others citing their own roles and equipment would use the title. Larson was a young man with a doctorate in physiology, later adding a medical degree and becoming a psychiatrist, who worked in the early 1920s as a policeman in Berkeley. The city was known nationally for progressive policing in an era of corruption and patronage. To help solve local crimes he measured people's blood pressure while being questioned. Larson even addressed the American Bar Association at its San Francisco meeting in 1922. His work over the years provided corroborative evidence for prosecutions and helped establish the innocence of others in hundreds of cases. He would be called a forensic detective in today's term. Though Larson remained interested in the machines' potential and in improving questioning techniques, he opposed all exaggerated claims and misuse, becoming increasingly critical of both carelessness and the popular exploiters in Marston's mold. His psychiatric training also made him most concerned in later years with handling individual cases. While voicing his dismay with movement away from serious science in *Lying and Its Detection* (1932) he took no clear lead in pursuing a more disciplined approach.

A third lie detector pioneer, Leonarde Keeler, courted publicity from the start. After beginning as a disciple and co-worker of Larson, he abandoned his studies for an academic degree, craving quick success and fame, and soon began making exaggerated claims for polygraphs, Larson finally becoming so annoyed that their relations turned cool. He did introduce improvements to the very first machines with his Keeler Polygraph but his assertions of having invented the lie detector were untrue. Spending most of his career working for law enforcement authorities, he tended to look hardest to prove guilt and get subjects to confess, his long and grueling test sessions drawing criticism from other operators. Anxious for publicity and wider recognition, Keeler like Marston became involved in prominent crime cases during the 1920s and 1930s, enjoying the sensational headlines they inspired. His well-publicized activities made him by the late 1930s the nation's most famous figure in lie detection work. Sometimes he worked for the defense. In 1944 he played a role in clearing imprisoned Joseph Majczek of a 1933 Chicago murder, basis of the James Stewart film *Call Northside 777* (1948) about the case, and in getting Count Alfred de Marigny acquitted in the 1943 killing of Sir Harry Oaks in Nassau. In those and other cases lie detector findings were just part of the evidence. In 1949 Keeler and Erle Stanley Gardner were concerned about false convictions and helped found the Court of Last Resort. Gardner later disagreed with the group's approach and resigned; it was eventually absorbed by the American Polygraph Association.

Together the extravagant claims for lie detector machines and dramatic press stories about their use in sensational cases gave polygraphs an aura of infallibility in the public's mind that was unwarranted by the facts. Lie detectors became something of a national craze during the 1920s-1940s as both the idea and inflated claims captured people's imaginations. Polygraphs were seen as an important weapon in the battle against rampant crime in the prohibition and depression decades. Tests became a regular feature in major police investigations, helping or hurting the subject, who had volunteered with confidence or as a gamble. The misbelief that "nobody can beat the machine" was soon popular. That test findings were not admissible in courts had little impact: some people accepted the publicized test results as more convincing than any court evidence. At the same time lie detectors were being used as a novelty act in theaters, the demonstrations just entertainment, often to the real or feigned embarrassment of the subjects being

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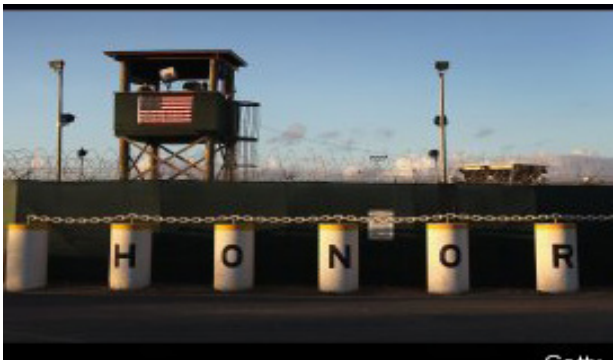
Obaidullah, the Forgotten Prisoner of Guantanamo Bay



By Ashley Walker

In the middle of the night on July 20, 2002, U.S. Special Forces raided a home in a small village in Afghanistan and arrested a 19-year-old man named Obaidullah.[1] Obaidullah worked in a shop selling clayware and pots. He had recently married, and just two days before he was captured, he became a father to a baby girl. Ever since his arrest that night, Obaidullah has been a prisoner. For three months, he was held at Bagram Air Force Base, and in October of 2002, he was transferred to Guantanamo Bay. As of January 28, 2016, he has been at Guantanamo for 13 years and three months. There have been 220 Afghani prisoners at Guantanamo Bay since 2002; Obaidullah is one of only eight Afghans who remain there today.

For almost 13 years, Obaidullah's family has waited for his return, believing in his innocence and trusting that justice would prevail. Obaidullah and hundreds of others were captured in the mainly Pashtun areas of eastern and southern Afghanistan, when many of them were in their teens and early 20s. Since then, the Taliban has negotiated the release of some captives, such as the five freed in May of 2014 as part of a swap for U.S. prisoner of war Sergeant Bowe Bergdahl. But Obaidullah's turn has not come; he is not important enough to bargain for. President Obama's pledge to close the detention center at Guantanamo continues to run into political obstacles in Washington, so there is little hope that he will be able to leave in the near future. He has said that all he wants is a trial, a chance to prove his innocence. But Obaidullah is not charged with any crimes, so there is nothing for which to try him.

An American official who was formerly involved in decisions about Afghanistan detainees said in the New York Times that "such a 'run of the mill' suspect would not have been moved to Cuba had he been captured a few years later"; according to this official, "he probably would have been turned over to the Afghan justice system, or released if village elders took responsibility for him".[2] However, because Obaidullah was arrested during a particularly volatile time in Afghanistan, he was sent to Guantanamo with hundreds of other young Afghani men.

After 13 years, only three pieces of evidence have been gathered against Obaidullah and used to support his detainment at Guantanamo: 1) Soviet-grade landmines were discovered in a field near his home, 2) Obaidullah was carrying a notebook that he used throughout his life for record-keeping and school notes, and 3) a car was discovered near his house with blood in the backseat. The importance of each of these pieces of evidence will be recounted in this article.

Regarding the first piece of evidence, U.S. Special Forces appear to have been working off of an anonymous tip that someone in Obaidullah's family complex was hiding antitank mines to use against American forces. It is true that landmines were later found in a nearby field. However, Obaidullah's family has explained this by stating that these landmines were left over from their home's occupation during the Soviet war in Afghanistan in the 1980s. During that time, Obaidullah's family was living in Pakistan to escape the war. An investigator from the United States Naval Reserve, Lieutenant Commander Richard Pandis, conducted an investigation in Afghanistan in 2011, and found evidence that supports the family's explanation.[3] As Lieutenant Commander Pandis writes, "in the 1980s, a communist official named Ali Jan used the Obaidullah family compound as his residence" and kept landmines and other munitions in the compound. When the family returned to their home, they buried the leftover landmines in a nearby field, believing that they were all disabled.

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Overcoming Depositions With Rambo

except in very limited circumstances. "A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion [for protective order]." Fla. R. Civ. P. 1.310(c). Under such a circumstance either attorney could choose to suspend the deposition in order to get a ruling on an objection, or the attorneys could agree to reserve the answer until a ruling can be obtained from the court. It is proper to suspend the deposition when there is a reason to believe that to answer an objectionable question would be so damaging that even though not permitted at trial, the answer would reveal information which "would be devastating beyond repair." Smith v. Gardy, 569 So.2d 504, 507 (Fla. 4th DCA 1990), rev. den. 581 So.2d 1310. The scope of questions is governed by Rule 1.280(b). As long as the information sought is reasonably calculated to lead to the discovery of admissible evidence, it is not grounds for objection simply because the information will not be admissible at trial.

Sanctions

When an attorney or party violates the rules of depositions or fails to appear, sanctions against the violator may be ordered per Rule 1.380. The determination of sanctions for violations is up to the discretion of the trial court. Many lawyers file motions seeking the ultimate sanction of striking the pleadings, default, or dismissal of the action. This is not likely to be granted in the routine case. The appellate courts have repeatedly held that judicial default or involuntary dismissal for failure to comply with orders compelling discovery is the most severe of all sanctions which should be employed only in extreme circumstances. There must be an evidentiary hearing proving "[a] deliberate and contumacious disregard of the court's authority [that] will justify application of this severest of sanctions, as will bad faith, willful disregard or gross indifference to an order of the court, or conduct which evinces deliberate callousness." Mercer v. Raine, 443 So.2d 944, 946 (Fla.1983).

Before a court may dismiss a cause as a sanction, it must first consider the six factors delineated in Kozel v. Ostendorf, 629 So.2d 817 (Fla.1993), and set forth explicit findings of fact in the order that imposes the sanction of dismissal. Bennett v. Tenet St. Mary's Inc., 67 So.3d 422 (Fla. 4th DCA 2011) (the trial court's failure to make express findings as to the six Kozel factors required reversal of the dismissal for repeated disregard of orders compelling discovery including failure to attend depositions); Chappelle v. South Florida Guardianship Program, Inc., 169 So.3d 291 (Fla. 4th DCA 2015) (prior to entering judicial default for failure to comply with a discovery order trial court should have made explicit findings as to each relevant Kozel factor).

Striking a witness for failure to appear at a deposition, or for failing to list the witness as required by a pretrial order, requires an evidentiary hearing and findings as to the Kozel factors when the effect is an involuntary dismissal. Onewest Bank, FSB, v. Alessio, __ So.3d __, Fla. L. Weekly D98, 2016 WL 6737541 (Fla. 4th DCA 2016) (motions in limine are properly used to prevent admission of prejudicial evidence, but not to enforce pretrial orders).

If a non-party witness fails to appear at a deposition or fails to bring documents per a subpoena duces tecum, the attorney seeking to enforce the subpoena and recover expenses must first seek an order compelling attendance and/or production. If the witness violates that order, then sanctions are only available if the court finds the witness to be in civil contempt. Rule 1.380(b)(1); CB Condominiums, Inc. V. GRS South Florida, Inc., 165 So.3d 739 (Fla. 4th DCA 2015) (sanctions against a non-party witness reversed because the court failed to find the witness in contempt); Pevsner v. Frederick, 656 So.2d 262 (Fla. 4th DCA 1995) (sanctions may not be imposed against nonparty for discovery violation in absence of finding of contempt).

Short of dismissal, default, or striking of a witness, there are other sanctions available. The rules provide for an award of expenses and attorney's fees as noted above. Additionally, fines have been held appropriate through the vehicle of civil contempt in a discovery context. Allstate Insurance Company v. Biddy, 392 So.2d 938 (Fla. 2d DCA 1980). Fines assessed for contempt should be used to obtain compliance with discovery orders but should not be so excessive as to be punishment. Florida Physicians Ins. Reciprocal v. Baliton, 436 So.2d 1110 (Fla. 4th DCA 1983) (a fine of $150,000 against a company for failure to make discovery as ordered was held excessive).

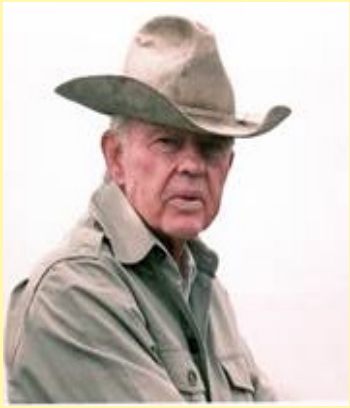
Conclusion

Attorneys and judges need to correct violations of the rules governing depositions. To do this effectively requires careful attention to detail so that the effort of correction does not also conflict with the rules and legal precedent. Sanctions for bad behavior must be based on an evidentiary hearing providing due process and findings of fact which justify the sanction.

Judge F. Shields McManus is a Nineteenth Judicial Circuit Court Judge appointed in 2007 and elected in 2010. Since then he has been assigned to many divisions and has a broad judicial experience. Judge McManus is a graduate of FSU and FSU College of Law. He is active in the legal community and has sat on several boards and served as president. Additionally, Judge McManus is active in educational, charitable and civic organizations in Stuart and Martin Counties.

Alto, "Bud" Adams Jr.

"Bud" Alto Adams, Jr., St. Lucie rancher, has sponsored the Alto Adams Writing Competition for Florida Law Students. The award is named in his father's honor, Justice Alto Adams. 2016 is the second year the Friends of the Rupert J. Smith Law Library helped promote the contest. Last year's honorable mention, Adrianna La Kam's article appears on page 12. To learn more about Bud Adams and the Adams family see: http://www.tampabay.com/features/humaninterest/florida-ranchers-wish-a-legacy-of-his-land-pristine-forever/2212394.



Last Issue's Cryptoquote Answer

X AXTP LMY OCYIL LMXTO XT LMXN QVCDP XN TVL NV HZFM QMYCY QY NLITP, IN XT QMIL PXCYFLXVT QY ICY HVEXTO: LV CYIFM LMY JVCL VA MYIEYT, QY HZNL NIXD NVHYLXHYN QXLM LMY QXTP ITP NVHYLXHYN IOIXTNL XL - GZL QY HZNL NIXD, ITP TVL PCXAL, TVC DXY IL ITFMVC.

- VDXEYC QYTPYDD MVDHYN, NC.

I find the great thing in this world is not so much where we stand, as in what direction we are moving: To reach the port of heaven, we must sail sometimes with the wind and sometimes against it - but we must sail, and not drift, nor lie at anchor.
Oliver Wendell Holmes, Sr.

Poet's Corner

When I look up at the morning
Sky, watching flocks of
Songbirds moving in from the
West; hearing crows calling out,
Poking fun at the squirrels;
Feeling the cool breeze off the
Gulf, carrying the coming storm;
I know the pine sway softly as
The soul at the center of my
Being.

I know the moments in which I am
Moved to tears are coordinated
By forces beyond my control. I
give myself to my faith in the
world around me. I trust my will
Will carry me beyond the
Present moment.

For there is nothing worse than
The death of the mind, and fear
Is the mind-killer.

By Jacob Michael Peter Welch
For additional poems please see:
http://www.jacobmichaelpeterwelch.com

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FLORIDA'S CONSTRUCTION LIEN LAW: ALLOWING FOR NOTICE OF TERMINATION PRIOR TO COMPLETION OF CONSTRUCTION

By Adrianna La Kam

Endnotes for this article can be found on page 25 of the online edition of Friendly Passages.

I. INTRODUCTION

A common issue for lenders and property owners is obtaining title insurance when the property owner seeks new financing for an ongoing construction project, either through refinancing an existing mortgage or executing a new mortgage. Common examples include when an owner personally financed the construction project and subsequently seeks to obtain mortgage financing; or when the owner sells the property midway through the construction project to a new buyer, who then seeks to obtain mortgage financing to continue the construction project. In both instances, generally the owner of the property retains the original contractor to finish the project. Chapter 713, Florida Statutes, provides no guidance for owners seeking new financing on a construction project already in progress.

In Florida, section 713.132, Florida Statutes, provides a method to terminate a Notice of Commencement, known as the Notice of Termination. A Notice of Termination may only be recorded "after completion of construction, or after construction ceases before completion and all lienors have been paid in full or pro rata."[1] Section 713.07, Florida Statutes, provides liens "shall have priority over any conveyance, encumbrance or demand not recorded against the real property prior to the time such lien attached."[2] Attachment occurs either at the time of recordation of the Notice of Commencement or at the time the claim of lien was recorded.[3] During the effective Notice of Commencement period, title over property is clouded due to the lien claimant's priority interest.

Section 713.132, Florida Statutes, should be amended to allow property owners to record a Notice of Termination at any time, provided that the owner pays all lienors in full or pro rata in accordance with section 713.06(4), Florida Statutes.

II. PRIORITY OF LIENS: FLORIDA STOP-START CONSTRUCTION

Chapter 713 of the Florida Statutes was developed to afford builders protection from nonpayment, while also defending property owners from potential liability to lien claimants.[4] The priority interest of mortgages and mechanic's liens depends on the order in which the interests attached the real property.[5] While perfection does not occur until after the filing of a claim, mechanic's liens of contractors or subcontractors relates back to the date of the recordation of the Notice of Commencement.[6]

Chapter 713 currently fails to provide a mechanism for terminating a Notice of Commencement in cases where the owner is seeking new financing on the property, and the original contractor is staying on the job. Under the current statutory framework, the mortgagee would have no protection against the mechanic's lien, causing such mortgage to be uninsurable.

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FLORIDA'S CONSTRUCTION LIEN LAW:

Prior to completion of the construction project, the only way for an owner to obtain a Notice of Termination is if the construction has ceased and all lienors have been paid in full or pro rata.

In an effort to compensate for this statutory deficiency, the title industry has relied on section 713.07(4), Florida Statutes, to insure the priority of mid-project mortgages. Section 713.07(4) "allows an owner to recommence construction if construction ceases before completion and further allows an owner to protect itself against liens arising before the cessation."[7] Section 713.07(4) provides,

> If construction ceases or the direct contract is terminated before completion and the owner desires to recommence construction, he or she may pay all lienors in full or pro rata in accordance with s. 713.06(4) prior to recommencement in which event all liens for the recommenced construction shall take priority from such recommencement[.]

In addition, the owner may record an affidavit in the clerk's office stating the owner's intention to recommence construction and that all lienors giving notice have been paid in full, except for those listed.[8] The rights of any person acquiring any interest, lien, or encumbrance on the property, or any lienors on the recommenced construction, are superior to any prior construction liens. Excepted are prior construction lienors who recorded claims of lien within 30 days after the recording of the affidavit.[9]

When the owner seeks new financing mid-project, the current industry procedure, known as the "start-stop" rule, requires the construction project to cease. Given the lack of statutory guidance on how long the project shut down must continue, there is no standard requirement in the title industry before a new mortgage, modification of an existing mortgage, deed or other new interest may be insured after the cessation of work begins.[10] Under this informal rule of title insurance, the owner must terminate the Notice of Commencement after the forced shut down of the project, provide for payment of all lienors who have done work to date, and then file the new mortgage, modification, deed, or lease. Once the new instrument is filed, the new Notice of Commencement is filed and the policy can be issued.

While section 713.07(4) has been used as a means to reconcile the priority interest of mortgage lenders and construction lienors, requiring the cessation of work often is either impracticable or burdensome. Several uncertainties and issues exist in the application of section 713.07(4), which may reduce the protections afforded to lenders, owners, lien claimants, and title insurers relying on affiants to prove that the entire project was properly shut down.

First, the statutory scheme of section 713.07(4) only pertains to priority between prior and subsequent construction lienors following the recommencement of the project. It does not provide expressly for the priority of mortgage financing. Second, in order to apply the notice of recommencement procedure, the entire construction project must cease; not merely a portion of the project.[11]

III. CESSATION OF THE CONSTRUCTION PROJECT

The plain meaning of the word "cease" is to "[t]o stop, forfeit, suspend, or bring to an end."[12] While the definition appears simple, ascertaining whether work on a construction project has ceased is difficult. This is especially true when the parties intend to continue the project.

Florida case law does not provide a rigid definition to determine whether a construction project has commenced or ceased. This is because such a determination requires a factually intensive analysis by the court, based on the applicable contractual provisions and conduct between the parties involved. Due to the subjective nature of these contracts, determining whether a construction project has commenced or ceased may become litigious.

Cessation of the original construction may occur either through abandonment by the contractor or by the owner's termination of the contract.[13] In the case of *Florida Wood Services, Inc. v. Osprey Links Joint Venture*, 720 So. 2d 591, 593 (Fla. 5th DCA 1998), the court ruled that the project was ongoing as long as the general contractor continued to perform his duties under the contract with the owner, even though the lien claimant had abandoned the job. This case highlights the ambiguities of cessation left uncertain by section 713.132, Florida Statutes.

Further, cessation appears to require work on the construction project to stop for a period of time.[14] In construction projects, there is an overriding importance of time for the owners and contractors.[15] Oftentimes, both parties are under a contractual obligation to finish the project by a certain time, and failure to complete the project by the specified time may result in liability for damages.[16]

Looking to the other statutory provisions of the construction lien law provides significant insight into the ambiguities that exist concerning whether a project has truly stopped. For instance, determining when the last date of labor, services, or materials was furnished to a project has been a heavily litigated issue. Section 713.08(5), Florida Statutes, provides a claim of lien is timely filed if it is filed within 90 days from the date that the last labor, services, or materials were furnished to the project. The 90-day filing period for the claim of lien will only be extended for work done by the contractor

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Proceed With Caution:
The Pitfalls Of Defending A Foreclosure After Bankruptcy

Endnotes for this article can be found on page 26 of the online edition of Friendly Passages.

By Malinda Hayes

Over the past year, Bankruptcy Courts in Florida have been inundated with motions filed by lenders seeking relief. The relief sought varies: from injunctive relief requiring the debtor to withdraw all pleadings and cease defending the foreclosure action, to sanctions, to requests that the debtors' discharges be revoked and that Chapter 13 Plans be withdrawn. Bankruptcy judges throughout the state have deeply analyzed the Code's requirements, considered tough jurisdictional questions, and have reached a variety of results as to a debtor's obligations and the Courts' jurisdiction to enforce those obligations. The majority of judges agree that "surrender" does not require a debtor to turn over property by executing a deed in the lenders' favor. Rather, for a debtor to be in compliance with the Code, he must refrain from taking any affirmative step to oppose the lender's exercise of state law remedies, including foreclosure. Many courts have enjoined debtors from defending foreclosure actions, ordering them to withdraw any defensive pleadings filed in a pending foreclosure action. Some have sanctioned debtors and their attorneys. A few have threatened to revoke a debtor's discharge for continuing to defend a pending foreclosure action. However, the rationale for these decisions is not uniform amongst Florida's Bankruptcy Judges, and the remedies afforded to creditors vary depending on the facts of each case and the opining judge's view of the Bankruptcy Court's jurisdiction and the equities involved.

When an individual debtor files for bankruptcy under chapters 7 or 13, and includes in the bankruptcy schedules a debt that is secured by property owned by the debtor on the date of the bankruptcy filing, the debtor must, within thirty days or less after filing his petition, express a stated intention to either retain or surrender the collateral securing the debt. In chapter 7, this obligation is imposed by §521, which requires a debtor to file a "statement of his intention with respect to the retention or surrender" of that property.[1] In chapter 13, this requirement is imposed by § 1325, which requires a debtor to propose a plan that indicates how he or she proposes to treat the property.[2]

Debtors are given only three options with regard to property pledged as collateral for a debt: to retain the property they must either redeem (pay the debt in full) or reaffirm the debt (execute an agreement obligating them to continue being bound by the terms of the parties' prior agreement) or, if they cannot afford to redeem or reaffirm, indicate an intent to surrender the property. The only controlling case in the 11th Circuit on the issue dates back to 1993, *In re Taylor*, where the 11th Circuit interpreted §521 to provide that a debtor could not retain collateral without either redeeming or reaffirming the debt it secures.[3] The issue in *Taylor* was whether a chapter 7 debtor would be allowed to "ride through" the bankruptcy and retain possession of collateral by staying current on his or her obligation to the lender, but without redeeming or reaffirming the underlying debt – essentially allowing the chapter 7 debtor to obviate all personal liability for the debt, while retaining the property for so long as the debtor remained current on the loan payment. The *Taylor* court did not permit this scenario, stating that the purpose of a bankruptcy is to give a debtor a "fresh start" but not a "head

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start."[4] Unfortunately, while the 11th Circuit ruled that such a "ride through" was not permissible, it merely noted that a debtor has the option to surrender, without offering any guidance on what, if any, obligations accompany a debtor's stated intent to "surrender" such property.[5]

Almost unanimously, bankruptcy judges in Florida agree that "surrender" means that a debtor may not take any affirmative action to oppose a foreclosure action, but that a debtor need not execute a deed or otherwise "deliver" the collateral to the lender until a foreclosure judgment is obtained.[6] In *Plummer*, Judge Jennemann analyzed §521 and found that "surrender" was "not equivalent to "foreclosure," reversing a state court's award of sanctions against debtors who took no action to oppose a foreclosure, but who had refused to deliver a warranty deed to the creditor, holding that "[s]ection 521 was not designed to provide a mechanism by which creditors may avoid obligations imposed by state law."[7] Bankruptcy judges do not require debtors to deliver collateral to their creditors, but they do agree that a debtor must act in a manner consistent with his or her stated intent in order to comply with § 521(a)(2). When a debtor impedes a creditor's efforts to foreclose, courts employ a wide variety of remedies such as revocation of discharge, revocation of a confirmed chapter 13 Plan; dismissal of the bankruptcy case, imposition of sanctions, and orders compelling compliance[8]; while a few courts have refrained taking any affirmative action to penalize debtors, holding instead that relief from the automatic stay is the preferred remedy under §521(a)(2)(B) absent compelling circumstances, and suggesting that the state court is the appropriate forum to address the dispute.[9]

Determination of the appropriate remedy is a highly factual analysis with outcomes that vary even in the same Court depending on the circumstances. In cases where a debtor admits to the validity of a debt and mortgage, elects to surrender, and then fights the foreclosure within a short time after receiving a discharge or while a chapter 13 case is still pending, almost all of the case law suggests that the court will order the debtor to withdraw all pleadings and defenses in the foreclosure action, under the threat of a penalty of sanctions, withdrawal of the confirmed chapter 13 plan, or even revocation of the debtor's discharge.[10] For example, in a joint decision in *Metzler* and *Patel*, Judge Williamson analyzed the Code's requirements in depth and held that because both Metzler and Patel took affirmative steps to oppose state court foreclosure actions, they had failed to surrender their properties under §§ 521 and 1325.[11] Metzler was in the midst of a pending chapter 13 case, so the Court revoked the Order confirming confirmation of Metzler's chapter 13 Plan.[12] Patel, a chapter 7 debtor who did not list the property on her schedules or file a statement of intention because she believed the property had been deeded to her ex-husband, was required to file a statement of intent and then was compelled by the Court to surrender the real property, and enjoined from defending the foreclosure proceeding.[13]

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Similar factual scenarios were at issue in *Fallia* and *Troutt* where Judges Hyman and Kimball entered orders compelling debtors - who were fighting foreclosures prior to the bankruptcy filing, chose to take the wild card exemption rather than exempt the real property, and

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continued fighting the foreclosure immediately after stay relief was granted – to cease all efforts to oppose pending foreclosures and threatened sanctions and revocation of discharge for non-compliance.[14] In *Fallia,* Judge Hyman relies heavily on an unpublished decision from Judge Kimball in *Troutt,* which in turn relies upon the *Metzler and Patel* opinion from Judge Williamson, holding that "while the Debtors do not have to physically surrender the Property . . . they cannot continue to defend and/or contest the foreclosure in the State Court which is in effect resisting the surrender of the Property to [the] bank. The Debtors do not have an absolute 'right' to defend in a foreclosure action because the Debtors explicitly admitted the validity of the debt and stated their intention before this Court to surrender the property."[15] Mr. and Mrs. Fallia were ordered to stop defending the foreclosure under threat of revocation of their discharge. Judge Kimball explains in *Troutt* that if a debtor admits the validity of a debt and mortgage, avails him or herself of the additional benefit of the wild card exemption, and represents that he or she will surrender the property in order to obtain a discharge of the underlying debt, all the while having no intention of turning over the property, "the only conclusion the Court could reach is that the debtor obtained the discharge based on fraud, and so the discharge should be revoked."[16] To prevent fraud on the court, Judges Hyman and Kimball have threatened to revoke debtors' discharges and have imposed sanctions on attorneys and debtors alike for refusing to abide by the court's injunctions against continued defense of these actions.[17]

Chapter 13 debtors who fight foreclosures after confirmation of their chapter 13 plans have faced similarly stringent rulings from Judge Mark. Chapter 13 debtors are afforded an opportunity to confirm a plan stating that they will proceed with the court approved mortgage modification mediation ("MMM" program), rather than redeem, reaffirm, or surrender the debt. However, if the MMM fails, a debtor is then required to modify its confirmed plan to provide for redemption or surrender of the real property. In *in re Calzadilla and Espinosa*, Judge Mark found that providing for stay relief in the amended plan was inadequate to meet the Codes' requirements, and ordered the chapter 13 debtors to amend their plan to provide for surrender, and ordered the debtors not to contest the lender's rights to complete the foreclosure in state court.[18] Similarly, in *In re Lapeyre*, Judge Mark entered an order compelling chapter 13 debtors to withdraw pleadings and affirmative defenses in a foreclosure action where the motion to compel was brought two years after confirmation of the chapter 13 Plan.[19]

Taking a step further down this path, Judge Briskman granted a motion to compel a chapter 7 debtor to surrender real property and abated a motion to reopen a bankruptcy case that was closed 5 years previously, under the threat that the case would be reopened and discharge revoked if the debtor did not comply with the order compelling surrender.[20] Judge Briskman's decision in *Grimm* appears to be an unusually severe result when viewed against other cases where relief was not sought in bankruptcy court by the creditor until several years after the bankruptcy case had closed.

An opposite approach was taken by Judge Delano in a unique ruling in *In re Townsend*, where the debtor's chapter 13 Plan provided for surrender, but purported to retain the debtor's state law rights. Judge Delano writes that she agrees with the reasoning in *Metzler, Plummer, and Fallia*, but finds that none of those cases addressed a chapter 13 case where the plan specifically reserved the debtor's state law contract rights.[21] Judge Delano also holds that the reasoning of those cases should not be applied retroactively to a case filed in 2008, perhaps implying, but not outright stating, that the remedy requested by the lender is barred by laches.[22] In that case, the foreclosure was not even initiated until the very end of a five-year plan, and the creditor did not bring the action to re-open the chapter 13 case until one year after the discharge was entered and the case was closed.[23]

In the majority of cases where a Debtor agreed to surrender or reaffirm (but never executed a reaffirmation agreement), and foreclosure proceedings were not brought for several years after the discharge was entered and the bankruptcy case closed, bankruptcy judges have declined to reopen the cases to compel surrender, arguing that such actions are barred by laches or lack of jurisdiction.[24] Under these circumstances Judges Olsen, Cristol, Williamson[25] and Jennemann have all declined to re-open bankruptcy cases to compel surrender, finding that, absent compelling circumstances, the code provides that stay relief is the appropriate remedy and that creditors must seek relief in the state court proceeding.[26]

Issuing a strongly worded and well-reasoned opinion that followed Judge Jennemann's analysis in *Plummer*, Judge Olsen held in *In re Kourogenis* that the relief sought by the creditor was barred by laches and declined to reopen a chapter 7 case to compel surrender of real property.[27] Stating that "[on]e of the most fundamental principles of equity jurisprudence is that equity aids the vigilant, not those who sleep on their rights,"[28] Judge Olsen stated that reopening the debtor's chapter 7 case 5 years later would prejudice the debtor and such relief was not supported by the Code.[29] "Whatever the meaning of 'surrender' under Section 521, it cannot possibly mean that a party who, for instance, does not own the note and mortgage can nonetheless foreclose on the property, without the Debtor being heard, solely because the Debtor indicated an intent to surrender."[30] Judge Olson suggests that the proper remedy if the debtor fights a foreclosure in an attempt to "get a free pass" is for the creditor to assert the defense of judicial estoppel in state court. Judicial estoppel is a

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relatively new doctrine, with numerous factors, and the doctrine is not well settled – it is "nuanced, balanced, and discretionary" – but it is always made in the later court proceeding.[31] It is not for the bankruptcy court, the court where the representation was originally made to apply the doctrine of judicial estoppel, but for the second court – the foreclosure court in these cases – to exercise its discretion to estop a former debtor from taking an inconsistent position in the second forum. Judge Olsen argues that federal courts do not have jurisdiction to apply judicial estoppel in these situations, stating "[e]ven if laches did not bar the relief sought here, that relief is nonetheless unavailable because it is outside the jurisdiction of this Court. Federal courts simply cannot intervene in pending state court litigation to give instruction to a state court on how it should exercise its judicial discretion.[32] Resolution of the foreclosure dispute in state court does not mean that the ex-Debtor gets a free pass." It simply means that the lender needs to raise the issues in the appropriate forum – and bankruptcy is not that forum.[33]

In a recent opinion in *In re Guerra*, Judge Williamson distinguished the facts of a discharged chapter 7 case from his prior opinion in *Metzler and Patel*, declining to grant the relief sought by the creditor finding that "given the lapse of time between the time the Debtor obtained her discharge and the time she opposed the secured creditor's foreclosure action, the Court cannot conclude that the Debtor never intended to surrender her home."[34] *Guerra* did not conclude that the relief sought was barred by latches, but agreed that state court is the appropriate court to determine issues of judicial estoppel.[35] Unlike the lenders in *Metzler and Patel,* the creditors in *Guerra* waited over two years after the debtor received her discharge to commence the foreclosure action. Three years after receiving her discharge, the debtor defended the foreclosure and succeeded in obtaining a dismissal of the case. The lender moved to reopen the chapter 7 case and revoke her discharge, or to compel the debtor to withdraw her defense of the foreclosure action, based on her statement of intentions. Limiting its decision to the facts of that case, the Court declined to grant either request and concluded that the state court should be left to determine whether the debtor should be judicially estopped from taking contrary positions in the bankruptcy proceeding and the foreclosure action.[36] Consistent with Judge Kimball and Hyman's earlier decisions, Judge Williamson agreed that a court could and should vacate a discharge if obtained by fraud, but he distinguishes this case from others by saying that in the prior cases, the debtors were taking overt acts to oppose state court foreclosure actions pending at the same time the debtors were actively prosecuting their cases in the bankruptcy court, and the debtors' efforts to oppose summary judgment took place shortly after (less than one year) their stated intentions in the bankruptcy cases. "What went unstated in *Metzler*, but was the rationale behind the Court's decision, was that the short time between the time the debtors received the relief they sought in bankruptcy, on the one hand, and opposed foreclosure contrary to their statement of intentions, on the other hand, led the Court to infer the debtors had no intention of surrendering their property – i.e., they had misled this Court."[37] The "crucial aspect" distinguishing this case is that the creditor did not even file its foreclosure action until more than two years after the Debtor received her discharge. It was not until nearly 3 years after Debtor received her discharge that she first took some affirmative step to impede the creditors' foreclosure efforts. Then the creditor waited another year before seeking to reopen the bankruptcy case. These facts are similar to those presented in Olsen's *Kourogenis* case, but Judge Williamson was not convinced that there would be prejudice to the debtor and declined to apply the laches doctrine, resorting instead to the doctrine of judicial estoppel. In cases where a debtor takes contradictory positions in separate courts, judges should be concerned that debtors could be "making a mockery of the legal system by taking inconsistent positions."[38] The matter of which court should apply the doctrine of judicial estoppel depends on timing. If a debtor is opposing foreclosure while the bankruptcy case is still pending or shortly after, then the bankruptcy court should address the issue because it would then appear that the debtor is perpetrating a fraud on the court. However, when years pass in between the time the debtor indicates intent to surrender and the time the debtor opposes the state court action, then the state court should decide the issue of judicial estoppel. Judge Williamson is clear that this does not mean that the debtor should be allowed to take contradictory positions, only that the state court should be the one to decide the issue when the proceedings are brought in state court well after the bankruptcy case is closed.

Slightly different, but similar issues arise in cases where a chapter 7 debtor elects to reaffirm a debt, but fails to execute a reaffirmation agreement prior to entry of the debtor's discharge. Judges Jennemann and Cristol have addressed the issue in *In re Trussel* and *In re Rodriguez*, and refused to impose an injunction on the debtor fighting foreclosure or to compel the debtors to surrender the property.[39] The rationale for both cases is that the creditor had the opportunity to move to compel the debtors to reaffirm during their chapter 7 cases, and no evidence was presented that the debtors acted in bad faith in not reaffirming the debts. Section 521 refers to §362(h), which provides only for stay relief. Judge Jennemann determined that relief from the automatic stay is the preferred method of dealing with a debtor who does not timely reaffirm a debt, absent compelling circumstances.[40] Citing a pre-BAPCPA case, *In re Harris*, Judge Cristol indicates that failure of a debtor to reaffirm in bad faith should result in dismissal of the bankruptcy case, not injunctive relief requiring surrender of the property.[41] While the *Rodriguez* opinion did not involve a debtor who had opted to surrender the real property, Judge Cristol

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went so far as to state: "[e]ven in a case where the debtor indicates an intent to surrender the property in its petition and then fails to do so, the remedy would be stay relief and not a bar by injunction to defending a foreclosure action which would be unconstitutional, inequitable, and unjust."[42]

To conclude, it can only be said that bankruptcy attorneys and debtors alike should proceed with caution when filing bankruptcy with the intent of opposing a pending foreclosure proceeding. In situations where a foreclosure has not yet been filed, there may be leeway; but it is clear that the majority of judges will not allow debtors to game the system by obtaining a discharge of the underlying debt and then fighting a foreclosure. Specific facts and reservations in plans and schedules (what if a debtor indicates a standing dispute in the bankruptcy schedules and does not admit the validity of a purported mortgage holders claim?) may lead to varying results, but until the 11th Circuit or the US Supreme Court enter an opinion on these matters, there can be no certainty as to treatment.

Malinda Hayes is a graduate of FSU College of law, graduating magna cum laude, and studied International Law at Oxford University, England. She earned her a B.A. in History from the University of Washington. Malinda clerked for the Hon. J. Rich Leonard of the US Bankruptcy Courts. She is a partner with Frank, White-Boyd, Hayes, P.A. where she specializes in bankruptcy and related areas of law.

Endnotes for this article can be found on page 26 of the online edition of Friendly Passages

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Obaidullah, the Forgotten Prisoner of Guantanamo Bay

Obaidullah was carrying a notebook when he was captured, which he has owned since he was a young boy. The notebook was mostly devoted to bookkeeping entries for the pots and pans he sold in his family's shop, and other pages featured poetry and sketches. However, a few pages of the notebook described, and contained diagrams of, explosive devices. The U.S. Government has argued that this is proof that he was involved in terrorism. Obaidullah's explanation is different. He has said that when he was 15, he and all of the other young men in his village were required to participate in a school run by the Taliban. He was a student in the school for just a few days before he realized that it was dangerous. He then ran away and hid from the Taliban until he was able to make it back home. Obaidullah received the diagrams of the explosive devices as a student in that school, just as the other students did. He kept the notebook because he had owned it for so long, and it contained all of his poetry and records that he kept of sales in his family's store. When he was captured, U.S. Special Forces took the notebook away from him and discovered the diagrams he had been given more than four years earlier, when he was forced to go to a school run by the Taliban.

The final piece of evidence against Obaidullah involves an anonymous tip made to U.S. Special Forces; the allegations of this tip have never been corroborated or verified. In Obaidullah's village it was rumored that several men were selling false information to the Americans, so it is unclear whether any of these tips were trustworthy. In any event, someone claimed that Obaidullah had been seen driving a bloody car, which they alleged was bloody from transporting wounded Taliban fighters. A Toyota Corolla with blood in the backseat was later found near Obaidullah's family compound.

However, Lieutenant Commander Pandis's investigative report describes what that Toyota Corolla was actually used for. As Lieutenant Commander Pandis writes, the car had been "borrowed, only days before Obaidullah's arrest, for the express purpose of taking Obaidullah's wife to the hospital for the birth of their first child". In Afghanistan, it is normal custom for the husband to move out of the home when his wife approaches her due date. Other women in the family, like her mother and sisters, will move in to take care of her. At that time, therefore, Obaidullah was living in a nearby home in the family compound. Obaidullah's wife began to experience labor pains one night, and her family members got her into the car to drive her to the hospital, which was about six kilometers east of the village. However, on the way they were stopped at several militia checkpoints, which had been set up along the road to check every car that passed by. Their progress was delayed so much that they eventually had to pull over to the side of the road, because

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FLORIDA'S CONSTRUCTION LIEN LAW:

in fulfillment of the contract.[17] If, however, the work is done for "repair, corrective, or warranty work", the 90-day filing period will not be extended.[18] This is known as the "substantial-trivial test."[19]

Case Law

Florida courts have devised a four-prong test to determine whether the final work has been performed. The test applied is whether the work was "(i) performed in good faith; (ii) within a reasonable time; (iii) in pursuance of the terms of the contract; and, (iv) whether the work was necessary to a 'finished job.'"[20]

In the case of *Viking Builders, Inc. v. Felices*, 391 So. 2d 302, 304 (Fla. Dist. Ct. App. 1980), the Fifth District Court of Appeals held that a contractor's repair work done to an air conditioner unit carried out under a warranty was considered "later services in the nature of correction or repair[.]"[21] Therefore, the work was not regarded as a part of the installation contract. Further, the court held that the repairs were too remote in time and unsubstantial to extend the filing period. As a result, the work was not considered to be the final furnishing of labor or material.

In the case of *In re Jennerwein*, 309 B.R. 385 (Bankr. M.D. Fla. 2004), the issue brought before the bankruptcy court was whether a pool company timely filed its claim of lien under section 713.08(5). In that case, the debtors contracted with a pool company to install pavers. Construction was slowed due to debtor's failure to make payments; however, neither party formally terminated the contract. Following the missed payments, the pool company's supervisor inspected the work. No payments were made by the debtor, so the pool company filed its claim of lien. Applying Florida law, the court concluded that the pool company's visit constituted a final furnishing of services— rendering the pool company's claim of lien timely filed within the applicable 90-day period. The court held the supervisor's visit was made in good faith and within a reasonable time after the pavers were installed. Further, the court held that the visit was made in pursuance to the terms of the contract.

In the case of *Michnal v. Palm Coast Dev., Inc.*, 842 So. 2d 927, 933 (Fla. Dist. Ct. App. 2003), the Fourth District Court of Appeals held that communication by facsimile from the contractor to resolve outstanding truss issues constituted the furnishing of services for purposes of the 90-day filing period. The court found that the letter prepared and transmitted was made in good faith, per the contract and addendum. Further, the court held that the facsimile was done within a reasonable time[22] and in pursuance of the terms of the contract. Lastly, the court determined that the resolution of the truss issue was necessary before the construction could proceed. Accordingly, the service was necessary to a "finished job."

In the case of *Delta Fire Sprinklers, Inc. v. OneBeacon Ins. Co.*, 937 So. 2d 695, 699 (Fla. Dist. Ct. App. 2006), the Fifth District Court of Appeals concluded that the completion of punch list items under a final inspection/testing of a sprinkler system were insufficient to extend the 90-day statutory period. The court held this way despite the fact that such tasks were considered "important for the purpose of allowing the owner to acquire a certificate of occupancy[.]"[23]

IV. EFFECT OF PROPOSED CHANGES

The amended language to section 713.132(3) would provide as follows:

> (3) An owner may record a notice of termination whether or not construction ceases before completion so long as all lienors have been paid in full or pro rata in accordance with s. 713.06(4).[24]

It is imperative to emphasize that the purpose and goal of the Notice of Termination statute is not being altered with this amendment. In order to be effective, the Notice of Termination still must include the information required under section 713.132(1)(a)-(f), Florida Statutes.[25]

None of the information required on the Notice of Termination involves information regarding the completion of the construction project. In addition, since the statute's effective date in 1991, there appears to be no legislative history indicating the need for the construction project to be completed prior to obtaining a Notice of Termination.[26] The necessity of following an elaborate procedure to effectuate a Notice of Termination stems from the fact the lien claimants are relying upon the continuing

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Cryptoquote

XQQ MOT ZCLOMN NTDGZTI MB MOT DCMCPTWN GWITZ MOT DBWNMCMGMCBW XZT YBZMO WBMOCWL, XWI X FTZT JGJJQT, TKDTVM LGXZXWMTTI MB MOTF JA XW CWITVTWITWM XWI HCZMGBGN RGICDCXZA. – XWIZTY RXDENBW

For the impatient, e-mail your answer to nora@rjslawlibrary.org for confirmation. For the patient, the decoded quote will appear in the next issue.

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effectiveness of the Notice of Commencement. Therefore, the owner is required to give notice to provide lienors with adequate warning that the Notice of Commencement is terminating, and a sufficient period of time for lienors to file any claims they have against the property before the termination of the Notice of Commencement.[27]

Amending section 713.132, Florida Statutes, would ensure that the interest of construction lienors are fully protected, while also providing owners with a means to file a Notice of Termination prior to the completion or abandonment of the improvements covered in the Notice of Commencement. All lienors are required to be paid in accordance with the current statutory procedure, as provided under section 713.06(4), Florida Statutes. In addition, this amendment does not change the effective date of the Notice of Termination. Lienors are still provided at least thirty (30) days to file a claim of lien against the property prior to the Notice of Termination taking effect.

V. CONCLUSION

Florida case law illustrates the need for legislative action. Relying on the cessation of work as means of obtaining a notice of termination is neither practical nor secure for the parties involved.

The solution to this issue can only be remedied through legislative action. Accordingly, amending section 713.132(3), Florida Statutes, to allow for the Notice of Termination to be filed at any time, provided all the lienors' claims are satisfied, would significantly eliminate controversy and litigation for the real estate practitioner and construction lienors.

Adrianna graduated cum laude from Barry University Dwayne O. Andreas School of Law. Adrianna worked at First American Title Insurance as an underwriting associate. In addition, Adrianna worked a judicial extern at the United States Bankruptcy Court of the Middle District of Florida, and worked as a legal intern at Orange County Public Schools. Adrianna graduated magna cum laude from the University of Central Florida, where she received her Bachelor of Science in hospitality management.

Endnotes for this article can be found on page 25 of the online edition of Friendly Passages

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Lie Detectors and Criminal Courts

questioned before an audience. Some machines used for showmanship looked impressive but had little actual value. And the subjects might be actors as well.

Lie detectors were used extensively after World War II for government and private security checks. Keeler had a contract to test personnel in atomic research and arms programs in the late 1940s: during 1946-1952 some 18,000 people underwent 50,000 tests. Polygraphs also played a role in the McCarthy era, Whitaker Chambers welcoming a test, which supported him, and Alger Hiss refusing one, convincing many people that Hiss had something to hide. Yet it should be noted that the FBI harbored strong doubts about lie detectors. For several decades many private employers used polygraph tests. And both those accused of crimes and politicians continued to insist that a lie detector test would show that their stories or assertions were true. The heyday of fascination with polygraph tests had long been over, however, before federal courts looked again at using the findings as evidence.

In its 1993 option in Daubert v. Merrell the Supreme Court modified the Frye rule. Trial judges could allow scientific evidence if it met certain standards: proof of subjection to programs of testing, publication of findings in peer-reviewed journals, establishment of a recognized rate of error, acceptance by scientists in that particular field. Meeting such criteria would not be easy. Five years later in Scheffer v. United States the Supreme Court made a strangely vague point: evidence might not be allowed if the reason for doing so seemed rational. But that decision seems to have been narrowly based. In all likelihood results from lie detector tests will still be excluded since it appears clear that neither the scientific community nor the judicial system thinks that polygraph testing is sufficiently reliable for the findings to be allowed in court.

Richard Wires holds a doctorate in European History and a law degree. He served in the Counter Intelligence Corps in Germany and is Professor Emeritus of History at Ball State University, where he chaired the department and later became Executive Director of the University's London Centre. His research interests include both early spy fiction and actual intelligence operations. His books include "The Cicero Spy Affair: German Access to British Secrets in World War II."

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On Behalf of the Publisher

Essential to the Academic Law Library", 97 Law. Libr. J. 233-256 (2005), Georgetown University Law Center. In the preceding Ten Year Report (3/18/04), Nora Everlove, librarian for Rupert J. Smith, essentially recommended both, while keeping the print collection intact for the balance of the ensuing period covered by the Plan: "… a ten year bridge before we eliminate any print should be more than adequate." See Ten Year Plan for Rupert J. Smith Law Library (3/18/04), pg. 10.

But since then the economics of print have not been kind to purchasers. The cost of print material has been growing by as much as 12% to 18% annually. See ex. Draft, Ten Year Plan, Rupert J. Smith Law Library (8/3/12). A single volume of the Bankruptcy Reporter, for example, now costs $1,109.00. One hardbound volume of the Federal Reporter 3d is $618.00. Continued maintenance of a print collection in its current form is no longer financially sustainable for the RJS Law Library.

Still, printed materials offer advantages that are hard to ignore. Legal treatises are not always available in e-book format; on-line materials are not always accurate or authenticated; print offers greater stability, compared to on-line sites which may still suffer legal uncertainties regarding application of intellectual property law where there are multiple proprietary and open access formats; on-line documents are in essence fleeting and ephemeral, subject to removal from the database by the publisher "for reasons ranging from desire to keep the database current, to disinterest in maintaining a low-use resource, to fear of litigation of database copyright issues", with interim documents being particularly vulnerable to loss; print offers a greater guarantee of permanence-- "Changes in computing technology will insure that, over relatively short timeframes, both the media and the technical format of old digital materials will become unusable."; once purchased, print material belongs to the library, which may access it in perpetuity, offering long time resource value, so it is free of the potential licensing issues which often accompany many electronic products; printed contents are fixed and unchangeable, so may be safely archived and preserved; technology does not replicate the ease of book reading. See Wu, supra, pgs. 235-245.

Moreover, from a scientific standpoint, "… evidence from laboratory experiments, polls and consumer reports indicates that modern screens and e-readers fail to adequately recreate certain tactile experiences of reading on paper that many people miss and, more importantly, prevent people from navigating long texts in an intuitive and satisfying way. In turn, such navigational difficulties may subtly inhibit reading comprehension. Compared with paper, screens may also drain more of our mental resources while we are reading and make it a little harder to remember what we read when we are done." Jabr, Ferris; "The Reading Brain in the Digital Age: The Science of Paper versus Screens", Scientific American (April 11, 2013).

Ms. Nora Everlove thus recommends that the library continue to retain a limited print collection for users, providing "basic print resources, Florida primary law, for a variety of reasons". See "Simplified Librarian's Thoughts on Ten Year Goals", pg. 1, working papers.

But the clear emphasis is now on electronics. Jonathan Ferguson, Trustee, writes that "the Library needs to continue to leverage digital materials." He visualizes a "virtual law library", with its contents readily accessible to on-line users. Whether that is feasible and would not be viewed as a competitive threat by established publishers such as Westlaw, will require further examination of the library's user agreements and licensure contracts. But in any case such emphasis points to a greater need for accommodating electronic use on site.

Reallocation of Space

Several years ago, while visiting in Seattle, I went to see the Seattle Public Library to acquire a sense of what is happening with libraries. The Seattle Public Library enjoys a national reputation as being a particularly progressive facility. The stacks were extensive, holding a large collection of volumes. But as I wandered through, there were relatively few visitors seen there. When I came to a large reading room on the bottom floor, by contrast, scores of patrons were observed huddling over computer terminals. The room was crowded.

Particularly in the case of smaller libraries, this implies that where it is at a premium, use of precious space for the traditional physical stacking of books should be minimized. Like similar facilities, the Rupert J. Smith Law Library allocates most of its space to the physical storage of hard bound volumes.

Mr. Ferguson, I think, well describes the need to revisit this practice: "The library is designed and the space is utilized so that it can function as a 20th Century law library. We are fifteen years into the 21st Century and it is time that we reevaluate the space so that it can more effectively function as a law library for the first half of the 21st Century. … As aptly noted in the draft Plan the space is not conducive to digital research. The existing carrels were marginally effective in the print world and are largely ineffective for the digital world. There continues to be too much space devoted to shelves for print materials that are obsolete and very rarely used. We need to rethink what each individual workspace should look like and whether there should be different types of work spaces for different needs. The various workspaces should also remain flexible so that we can continue to adapt the space as the research tools, methods and habits evolve."

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A step in that direction was taken recently. Certain dated regional reporter sets, rarely used, were taken out. With the shelving gone, room was created for installation of individual study carrels wide enough to comfortably accommodate a laptop computer, notebooks and other study materials. In addition, enough space was created for another conference room, where patrons may either study in privacy or confer with clients. The library now has two smaller conference rooms and a much larger conference room which finds frequent use for legal seminars and research classes.

The physical rearrangement imposed by greater use of electronic material will, as Mr. Ferguson points out, entail more user hardware "with docking stations located at workstations; multiple touch screen monitors at each workstation; e-readers and tablets; hard wire and high speed wi/fi capability for maximum flexibility; user friendly log-in screens with easy access to all digital materials; cloud based resources… and the ability to adapt digital resources as the standards evolve. … (with) the high speed bandwidth to support the digital infrastructure." The law library of the not distant future will look very different from what it does now.

Addressing the Service Needs of South County

Anyone with knowledge of St. Lucie County well understands the magnitude of the growth absorbed in the southern half of the county in recent years. "In 2002, Port St. Lucie had less than 100,000 people and was twice as big as Fort Pierce. According to 2013 estimates, Port St. Lucie has 164,000 people and four times as many people as Fort Pierce. Despite the dramatic growth in the County, Fort Pierce has only grown a few thousand people in the last decade. There are another 70,000 people living within the county but outside of either PSL or Fort Pierce. Many of these people live in the South County, making the statistics even more lopsided." See First Draft, Rupert J. Smith Library of St. Lucie County: Ten Year Plan (2015-2025), pg. 6.

To service that growth, there is presently but a small two-room facility in the Port St. Lucie Court House Annex, with one computer and a very modest collection of Florida materials, staffed three hours a week. The facility is often locked. The librarian recommends a greater presence in South County. See *id*., pgs. 6-7.

Current planning to accomplish that is focused on a partnership with St. Lucie County. The Board of County Commissioners is getting ready to construct a new public library in Port St. Lucie on Rosser Road. The Trustees have entered into a Memorandum of Understanding with the County whereby 800 sq. feet of the public library will be given over to exclusive operation of a law library satellite facility. Attorneys registered through the library will be able to access it 24/7. There will be dedicated internet cable/data lines and access to on-site Wi-Fi. The public library and the law library will jointly share a conference room.

The new facility, replacing what is now at the Court House Annex, is described in the initial draft Ten Year Plan this way: "Because of limited space and an even more limited budget, the PSL branch will rely heavily on electronic resources. This isn't a negative because it stretches the money much farther and even our pro se patrons are more comfortable using electronic resources than print. At least 18% of the library budget must be spent in the south county to support a marginally enhanced print collection, more Westlaw seats as well as staffing the library 20 hours per week. To mirror the public library hours, roughly 40 hours a week, would require another 7% increase. Over the course of the next ten years, we will need to systematically add staff, computers, Westlaw/Lexis seats, pro se print materials and practice handbooks for attorneys." See *id*., at pg. 7. Construction on the project is still probably about a year away. But when it is through, south county residents will enjoy a significant improvement in their access to legal information.

Conclusion

In sum, law libraries remain an essential bulwark in protecting the public's right to equal justice under the law, by assuring equal access to knowledge of the law. Supplementing Mr. James Madison's remarks above, he also warned that "A popular government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance; And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."

To remain effective, law libraries must capture the opportunities presented by changing legal, economic and technological environments and respond to their challenges. The Rupert J. Smith Law Library has a process in place to do that and is examining such trends on a ten year timeline. The Board of Trustees is looking at many actual or potential issues and considering strategies to resolve them. Such areas of interest include, but are not limited to, consideration of the optimal means for delivering legal information, whether by print or electronics or both; anticipating the changing needs in physical layout and the best use to be made of limited floor space; and planning for future upgrades in service to be provided to south county. The Trustees think this is important. They hope you will agree. Thank you for your support. /JimW

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The Forgotten Prisoner Of Guantanamo Bay

the baby was coming. Obaidullah's wife gave birth in the back of the Toyota Corolla hatchback with the seat down. The blood stains and residue in the car were from her daughter's birth.

Because of Pashtun customs and a strong cultural taboo against male involvement in childbirth, Obaidullah had not yet seen his wife or his daughter by the time of his arrest and capture two days later. Thus, he has never met his young daughter, who is now almost 14 years old. Within the last couple of years, he has been able to speak on video chat with her, but the video and audio quality is very poor, and their talks are infrequent as a result of prison rules. She does not understand why he is in a prison controlled by the United States, and often asks him when he will be coming home.

On September 10, 2008, charges were filed against Obaidullah. The charges alleged that he hid mines and other explosives in the Khost area of Afghanistan from October 2001 to July 2002 and carried a notebook describing "how to wire and detonate explosive devices in preparation for acts of terrorism." However, on June 11, 2011, the charges were dismissed without prejudice. No explanation was given for this decision. Judge Richard Leon denied a habeas petition filed by Obaidullah's military attorneys several years ago, stating that "it was more likely than not" that Obaidullah was a member of Al Qaeda or the Taliban, because he was said to have confessed at a prison in Afghanistan that he was part of a cell. The U.S. Government has acknowledged that Obaidullah underwent "enhanced interrogation methods" while at that prison. One soldier there was later punished for having another soldier photograph him as he struck Obaidullah in the head with a rifle, and he was also subjected to sleep deprivation and physical abuse.

Obaidullah's case has been closed, but he remains at Guantanamo, waiting. Waiting for a trial, waiting to meet his daughter, and waiting for someone to remember he is there. He is a forgotten prisoner.

Ashley Walker is a third-year law student at Duke University. Before coming to law school, she was a legal assistant with the firm Lichtman and Elliot, PC, in Washington, D.C., specializing in immigration and asylum law. She graduated from Dartmouth College in 2010 after studying English Literature and Arabic. While in college, she participated in Arabic language study abroad programs and held internships in Fez, Morocco, Cairo, Egypt, and Jerusalem, Israel. Subsequently, she was a paralegal with Cleary Gottlieb Steen & Hamilton, LLP, working primarily on antitrust litigation and securities.

Endnotes for this article can be found on page 26 of the online edition of Friendly Passages

Florida Bar CLE Programs At The Law Library

CONTINUING LEGAL EDUCATION PROGRAM – FREE LENDING AND FREE SHIPPING TO YOU....BUT……
WE HAVE A NEW POLICY TO COPE WITH OVERDUE MATERIALS AND MANAGING OUR WAIT LIST:
Please note the overdue fines policy is revised, we will charge a flat rate fine or $20 for overdue CLEs and it will be enforced. Plan on having a tape no more than seven days to avoid penalties. We will notify you if your program is overdue by sending an invoice by email along with the bill for $20. If we do not have the return of the program in one week, we will send a bill for the cost of the program. We have programs that cost as much as $800 and cannot continue if only a few people are using them because of slow returns. Please be considerate of the other patrons. We often have six people waiting for a program and they expire before their turn comes due to slow returns. We will ask before we ship to you and if you have no time to view them, just let us know. We will send it to the next person on the list but you will be first in the queue again. We CANNOT allow another checkout until overdue fines are cleared.

Course #	TITLE	EXPIRATION DATE	GENERAL HOURS	ETHICS HOURS
1858	Criminal Law Update	6/5/2016	6	1.0
1876	Elder Law Annual Update and Hot Topics	7/16/2016	15	0
1837	Sunshine Law, Public Records & Ethics for Public Officers and Public Employees	8/20/2016	8	4
1911	Guardianship Intensive Program	8/26/2016	8	1
1841	Basic Trial Practice 2015	8/27/2016	7	0
1843	Real Estate: What All Family Lawyers Need to Know but Most Don't	9/6/2016	5	0
1840	Masters of DUI - 2015	9/27/2016	8	2
1836	Annual Civil Trial Update and Certification Review	9/27/2016	15	2
1847	Hot Topics in Evidence 2015	10/17/2016	7.5	1
2073	2015 Survey of Florida Law	11/4/2016	12.5	4
1962	Arbitration, Effective Joint Opening Sessions, And Ethical Issues	12/24/2016	3	1
1968	Differences among the DCAs	12/24/2016	2	0
1871	Florida Law 2015	12/25/2016	8	0
1964	Electronic Discovery and Digital Evidence Pre-Discovery Through Trial	12/26/2016	4.5	1
1931	2015 Masters Seminar on Ethics	12/26/2016	4	4
1980	The Income, Estate & Gift Consequences of Divorce	1/15/2017	2	0
1982	The 35th Annual RPPTL Legislative and Case Law Update	1/31/2017	8	0
1984	2015 Case Law Update	4/22/2017	2 .5	0
1989	Annual Ethics Update 2015	4/2/2017	5.0	2.0E/3.0P
1991	How to be an Estate Planning Wizard	4/9/2017	9	0
1997	Bankruptcy Law and Practice: View from the Bench	5/5/2017	4.5	0

Law Day 2016

Please join us in celebration of Law Day! Our annual reception is scheduled for May 2 at 5:00 p.m. The ABA Law Day theme is "Miranda, Not Just Words." The Honorable Mark Klingensmith, of the Fourth District Court of Appeals will lead the assembly in the Pledge of Allegiance and speak on its significance. The Honorable Janet Croom, of the 19th Judicial Circuit, will make the key note address. Judy Miller of the Boys and Girls Club and Ernesto Urbino of Florida Rural Legal Services will be honored for their contributions to the community. Each year the Friends of the Rupert J. Smith holds an art contest for all St. Lucie County students. School Superintendent Wayne Gent will officiate this part of the ceremony and distribute the awards to the winning students.

The reception and contest is underwritten by the St. Lucie County Bar Association, The Rupert J. Smith's Board of Trustees, Kim Cunzo and Nora Everlove.

We look forward to seeing you at the Fort Pierce Courthouse in the Jury Assembly Room!

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(Endnotes)

1. * J.D. 2015, Barry University Dwayne O. Andreas School of Law; B.S. 2013, The University of Central.
§ 713.132(3), Fla. Stat. (2012).
2. § 713.07(3), Fla. Stat. (2012).
3. § 713.07(2), Fla. Stat. (2012).
4. *See generally* Russel M. Blain, *Lien Rights and Construction Lending: Responsibilities and Liabilities in Florida*, 29 U. Fla. L. Rev. 411 (1977).

5. *See* § 713.07, Fla. Stat. (2012).
6. § 713.07(2),(3), Fla. Stat. (2012).
7. *Florida Wood Servs., Inc. v. Osprey Links Joint Venture*, 720 So. 2d 591, 594 (Fla. Dist. Ct. App. 1998).
8. § 713.07(4), Fla. Stat. (2012).
9. *Id.*
10. The required period of cessation varies considerably. Certain underwriters may require work on the construction project to cease for at least 24 hours, while other underwriters may require a cessation period upwards of 90 days.

11. *Florida Wood Servs., Inc.*, 720 So. 2d at 593.
12. Cease, Black's Law Dictionary (10th ed. 2014).
13. *See generally McCurry v. Eppolito*, 506 So. 2d 1110, 1113 (Fla. Dist. Ct. App. 1987); *see also Alexander v. Suncoast Builders*, *Inc.*, 837 So. 2d 1056, 1059 (Fla. Dist. Ct. App. 2002) (Determining whether the contractor abandoned the property for purposes of determining cessation is a fact intensive analysis. The court held that the uncompleted construction was deemed abandoned no earlier than the last date that the defendants promised to return to complete the project.).

14. *See Stock Bldg. Supply of Florida, Inc. v. Soares Da Costa Const. Servs., LLC*, 76 So. 3d 313, 315 (Fla. Dist. Ct. App. 2011) (Lack of funding causing construction project to cease from January 2006 through the end of March 2006 was effective cessation for purposes of satisfying section 713.132(3), Florida Statutes.).

15. *See generally* Ahmed, S., Azher, S., Castillo, M. and Kappagantula, P, Construction Delays in Florida; an Empirical Study, Florida (2002), http://www.cm.fiu.edu/publication/Delays .pdf.

16. *See* Ahmed, *supra* at note 14.
17. *Herpel, Inc. v. Straub Capital Corp.*, 682 So. 2d 661, 662 (Fla. Dist. Ct. App. 1996).
18. See Herpel, Inc., 682 So. 2dat 662; see also e.g., Viking Builders, Inc. v. Felices, 391 So.2d 302 (Fla. 5th DCA 1980).
The majority rule is that, after the installation of fixtures or equipment in a building, later services in the nature of correction or repair are not regarded as a part of the installation so as to make the time within which to file under a mechanic's lien based on the original installation run from the time of performance of such later services. This rule is followed in Florida.... Therefore, this warranty work was not the final furnishing of labor or materials.

19. See Viking Builders, Inc. v. Felices, 391 So. 2d 302, 304 (Fla. Dist. Ct. App. 1980).

20. In re Jennerwein, 309 B.R. 385, 388 (Bankr. M.D. Fla. 2004) (citing to Aronson v. Keating, 386 So.2d 822, 823 (Fla. 4th DCA 1980)).

21. Viking Builders, Inc., 391 So. 2d at 303.
22. Letter was faxed eleven (11) days following the meeting between the parties.

23. Delta Fire Sprinklers, Inc., 937 So. 2d at 699.
24. Section 713.132(3) currently provides, "An owner may not record a notice of termination except after completion of construction, or after construction ceases before completion and all lienors have been paid in full or pro rata in accordance with s. 713.06(4)." The only portion of the statute affected by the amendment would be the first sentence. The remainder of section 713.132(3) would not be changed.

25. The notice of termination requires: (a) the same information as the notice of commencement; (b) the recording office document book and page reference numbers and date of the notice of commencement; (c) a statement of the date on which the notice of commencement is terminated, which date may not be earlier than 30 days after the notice of termination is recorded; (d) a statement specifying that the notice applies to all the real property subject to the notice of commencement or specifying the portion of such real property to which it applies; (e)A statement that all lienors have been paid in full; and (f) a statement that the owner has, before recording the notice of termination, served a copy of the notice of termination on the contractor and on each lienor who has a direct contract with the owner or who has served a notice to owner. The owner is not required to serve a copy of the notice of termination on any lienor who has executed a waiver and release of lien upon final payment in accordance with s. 713.20.

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26. See Mechanics Liens Act, 1990 Fla. Sess. Law Serv. 90-109 (West).

27. See Unif. Constr. Lien Act § 302 cmt. n.2 (1987) (While Florida has not adopted the Uniform Construction Lien Act, the procedures and information required for the Notice of Termination under the Act are substantively similar to Florida's procedures. The same line of reasoning under the Uniform Construction Lien Act would be applicable to section 713.132, which is to require a highly structured system for effectuating a Notice of Termination "to provide [] the best practicable warning to lien claimants that the notice of commencement is being terminated and [] a period of time before termination within which claimants may record their liens.").

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The Forgotten Prisoner Of Guantanamo Bay

(Endnotes)

1. Individuals from Obaidullah's village in Afghanistan traditionally use only one name.

2. Charlie Savage, "Questions Raised in Afghan Detainee's Case", The New York Times, Feb. 8, 2012. http://www.nytimes.com/2012/02/09/world/asia/afghan-detainees-case.html?_r=0

3. The full report written by Lieutenant Commander Pandis is available at https://assets.documentcloud.org/documents/291075/obaydullah-pandis-decl.pdf

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(Endnotes)

1. 11 U.S.C. § 521(a)(2)(A) (2015).
2. 11 U.S.C. § 1325(a)(5)(A-C) (2015).
3. Taylor v. AGE Fed. Credit Union (In re Taylor), 3 F.3d 1512 (11th Cir. 1993).

4. Id. at 1516.
5. The footnote in Taylor referencing surrender as an option has been dismissed by courts as dicta, which is "not binding on anyone for any purpose." See In re Plummer, 513 B.R. 135,142 (Bankr. M.D. Fla. 2014) (citing Edwards v. Prime, Inc., 602 F.3d 308 (4th Cir. 2010).

6. See In re Metzler and In re Patel, 530 B.R. 894, 899 (Bankr. M.D. Fla. 2015) (J. Williamson) ("[S]urrender, at a minimum, requires a debtor to relinquish secured property and make it available to the secured creditor. That does not mean . . . that the debtor must 'deliver' the property to the secured creditor."); Plummer at 143 (J. Jennemann) ("'Surrender' does not require the debtor to turn over physical possession of the collateral; the Bankruptcy Code uses the word 'deliver' when it intends physical turnover of property"); see also In re Grimm, Case No. 6:09-bk-12873-ABB, ECF No. 38, Order Abating Motion to Reopen Chapter 7 Case (Doc. No. 29) and Granting Motion to Compel Debtors to Surrender Real Property Doc. No. 30) (Bankr. M.D. Fla. September 24, 2015) (J. Briskman); In re Calzadilla and Espinosa, 534 B.R. 216, 217 (Bankr. M.D. Fla. 2015) (J. Mark); In re Failla, 529 B.R. 786, 792-793 (Bankr. S.D. Fla. 2014) (J. Hyman) (citing Metzler and unpublished hearing transcript by Judge Kimball in In re Troutt, Case No. 13-39869-BKC-EPK, ECF No. 31); but see In re Townsend, No. 9:08-bk-12383-FMD, 2015 WL 5157505 (Bankr. M.D. Fla. September 1, 2015 (Judge Delano agrees with reasoning in Metzler, Plummer and Fallia, but declines to grant relief on other grounds).

7. Plummer at 143.

8. See, e.g. Metzler and Patel; Troutt; Fallia; Calzadilla and Espinosa.

9. See In re Guerra, No 8:11-bk-15663-MGW, ECF # 24, January 28, 2016, unpublished opinion "Memorandum Opinion and Order on Deutsche Bank's Motion to Reopen Bankruptcy Case and Compel Surrender" (J. Williamson); In re Kourogenis, No. 09-02936-JKO, 2015 WL 5935395 (Bankr. S.D. Fla. October 7, 2015) (J. Olson); In re Rodriguez, No. 12-12043-BKC-AJC, 2015 WL 4872343 (Bankr. S.D. Fla. August 13, 2015) (J. Cristol); In re Trussel, No.

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1:12-bk-10001-KSJ, 2015 WL 1058253 at *4 (Bankr. N.D. Fla March 5, 2015) (J. Jennemann) ("Section 521(a)(2)(A) requires a debtor to do what he says is going to do. If a debtor does not follow through with his or her stated intention, relief from the automatic stay is the preferred remedy absent compelling circumstances.").

10. See e.g. Metzler and Patel; Troutt; Fallia; Calzadilla and Espinosa

11. Metzler and Patel at 900.
12. See id. at n. 40.
13. See id.
14. See Troutt, Fallia.
15. Fallia at 792.
16. Fallia at 791 (citing Troutt at Tr. p. 7, lines 214).
17. See id. at 792 (citing Troutt, at ECF No. 31, at Tr. p. 13 line 25; p 14, lines 1-16, p. 15, lines 5-7).

18. In re Calzadilla and Espinosa, 534 B.R. 216, 217 (Bankr. M.D. Fla. 2015).

19. See in re Lapeyre, No. 13-17069-RAM, 2016 WL 320997 at *8 (Bankr. S.D. Fla. January 25, 2016). (Judge Mark declined to apply judicial estoppel, agreeing with other bankruptcy judges that only the state court had the right to make that determination, but he found that the bankruptcy court retained jurisdiction to enforce the confirmation order in the pending chapter 13 case, and thus ordered the debtors to withdraw their defenses and papers in opposition to the foreclosure).

20. In re Grimm, No 6:09-bk-12873-ABB "Order Abating Motion to Reopen Chapter 7 Case (Doc. No. 29) and Granting Motion to Compel Debtors to Surrender Real Property (Doc. No. 30) ECF#38, (Bankr. M.D. Fla. September 24, 2015) (unpublished opinion).
21. In re Townsend, No. 9:08-bk-12383-FDM, 2015 WL 5157505 at *2 (Bankr. M.D. Fla. September 1, 2015).

22. Id.
23. Id.
24. See In re Guerra, No 8:11-bk-15663-MGW, ECF # 24, January 28, 2016, unpublished opinion "Memorandum Opinion and Order on Deutsche Bank's Motion to Reopen Bankruptcy Case and Compel Surrender"; In re Kourogenis, No. 09-02936-JKO, 2015 WL 5935395 (Bankr. S.D. Fla. October 7, 2015) (J. Olsen); In re Rodriguez, No. 12-12043-BKC-AJC, 2015 WL 4872343 (Bankr. S.D. Fla. August 13, 2015) (J. Cristol); In re Trussel, No. 1:12-bk-10001-KSJ, 2015 WL 1058253 at *4 (Bankr. N.D. Fla March 5, 2015) (J. Jennemann).

25. Judge Williamson's decision in Rodriguez appears to depart from his reasoning in Metzler not because he believes that stay relief is the appropriate mechanism for relief in all circumstances, but because in that particular case the relief was not sought until well after the bankruptcy case was closed. See note 37, supra, and accompanying in-text quotation.

26. In re Kourogenis, No. 09-02936-JKO, 2015 WL 5935395 at *3 (Bankr. S.D. Fla. October 7, 2015) (J. Olsen); In re Rodriguez, No. 12-12043-BKC-AJC, 2015 WL 4872343 at *4 (Bankr. S.D. Fla. August 13, 2015) (J. Cristol); In re Trussel, No. 1:12-bk-10001-KSJ, 2015 WL 1058253 at *4 (Bankr. N.D. Fla March 5, 2015) (J. Jennemann).

27. In re Kourogenis, No. 09-02936-JKO, 2015 WL 5935395 at *4 (Bankr. S.D. Fla. October 7, 2015).

28. Id. at *1.
29. Id. at *2.
30. Id. at *3.
31. See id. at *3.
32. Id. at *4; see also Lapeyre, 2016 WL 320997 at *8 (and note 16, infra) (Judge Mark agrees with Judge Olsen that judicial estoppel would require a determination by the state court (the later court), but compels the debtor to cease opposing foreclosure as the bankruptcy court can still exercise jurisdiction over the debtor. In a pending chapter 13 case, that jurisdiction is clear, but had the case been closed, would Judge Mark have reached the same result?)

33. Id. at *4.
34. In re Guerra, No 8:11-bk-15663-MGW, ECF # 24, January 28, 2016, unpublished opinion "Memorandum Opinion and Order on Deutsche Bank's Motion to Reopen Bankruptcy Case and Compel Surrender"

35. Guerra at *2.
36. Id.
37. Id. at 4.
38. Id. at 6.
39. In re Rodriguez, No. 12-12043-BKC-AJC, 2015 WL 4872343 (Bankr. S.D. Fla. August 13, 2015) (J. Cristol); In re Trussel, No. 1:12-bk-10001-KSJ, 2015 WL 1058253 at *4 (Bankr. N.D. Fla March 5, 2015) (J. Jennemann).

40. Trussel at *4.
41. Rodriguez at *4. (citing In re Harris, 224 B.R. 924 (Bankr. S.D. Fla. 1998).

42 .Rodriguez at *4.