



# PALM BEACH COUNTY BAR ASSOCIATION

# BULLETIN

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

June 2013



## Dues Statements Mailed

Annual membership dues statements have been mailed to all PBCBA members for fiscal year 2013-2014, which begins July 1. If you did not receive a bill, contact Shoshanah at the Bar Office (687-2800) or [sspence@palmbeachbar.org](mailto:sspence@palmbeachbar.org)



The annual Dennis Koehler Memorial Attorneys vs. Judges Law Week Softball Game was held in late April. The attorneys won 15-12. For more photos, please see page 13.



## Mark your calendar for upcoming Membership Events

- June 1:** Annual Installation Banquet
- June 15:** Young Lawyers Section Annual Fishing Tournament
- June 20:** Young Lawyers Section Summer Intern Happy Hour
- September 19:** Third Annual Membership Speed Networking Event
- September 27:** Diversity Luncheon with Guest Speaker Florida Bar President-elect Eugene Pettis
- December 5:** Annual Holiday Party and Silent Auction
- March 7, 2014:** Bench Bar Conference



## YLS to Host Fishing Tournament June 15

The Young Lawyers Section will be hosting its fourth annual fishing tournament on Saturday, June 15 to benefit the Legal Aid Society's Legal Advocacy for Minor Mothers Project. This is the only legal-related fishing tournament taking place this year, so be sure to come out and join the fun! Entry fee is \$250 per boat and all activities will be held at the Palm Beach Yacht Club. For more information, go to the YLS website at [www.palmbeachbar.org/yls.php](http://www.palmbeachbar.org/yls.php)

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## Rule 1.310(b)(6): Corporate Representative Depositions

By Matt Triggs and Jonathan Galler

Every once in a while, you come across an opinion that just seems destined to become a most cited case on a particular topic.

The recent opinion issued by the Fourth District in *Carriage Hills Condominium, Inc. v. JBH Roofing and Construction, Inc.*<sup>1</sup> is a perfect example. It reads like a manual for practitioners on how to properly notice and prepare a witness for a corporate representative deposition.

In that case, the Court held that the deposition of the defendant's corporate representative – a deposition that set the stage for plaintiff's subsequent summary judgment award – was not, in fact, a "corporate representative deposition" at all. At least not the sort contemplated by rule 1.310(b)(6) that is designed to bind a corporate party.

The lawsuit involved a contract dispute between a roofing company and a condominium association. The plaintiff served a notice for what it seemed to believe would be a corporate representative deposition. The notice did not actually cite rule 1.310(b)(6), but it sought the deposition of a representative of the defendant with "the most knowledge of the allegations contained in the complaint." The defendant, in turn, tendered the witness that it believed had "the most knowledge" of the allegations in the complaint.

At the deposition, the witness offered testimony that appeared to undermine the defendant's legal position. She was asked about, and provided, her own, personal views on a variety of matters at issue in the lawsuit, many of which suggested her lack of support for or belief in the claims and defenses alleged by the entity for which she was supposedly testifying.

Not surprisingly, the plaintiff moved for summary judgment. In response, the defendant proffered the affidavits of one current and one former officer of the defendant. Both provided testimony that was more closely aligned with the defendant's legal position in the case.

At the plaintiff's urging, the trial court struck the affidavits "invoking the principle that in situations where the non-movant in a motion for summary judgment submits

<sup>1</sup> 2013 WL 1136399 (Fla. 4th DCA Mar. 20, 2013).

an affidavit which directly contradicts an earlier deposition & courts may disregard the later affidavit."<sup>2</sup> The trial court then granted the motion for summary judgment on the basis of the deposition testimony.

In reversing, the Fourth District held that four findings must be made before a trial court will strike testimony on grounds that it contradicts testimony offered at a prior corporate representative deposition. First, the prior deposition testimony must have been provided by a duly noticed rule 1.310(b)(6) designee on a matter specified in the deposition notice. Second, the testimony to be stricken must directly contradict unequivocal prior testimony regarding matters of fact. Third, there must be no credible and reasonable explanation for the discrepancy. And, fourth, the striking of the testimony must be necessary to protect the integrity of the judicial process. "Absent such findings the alleged discrepancy is a matter to be considered by the trier of fact."<sup>3</sup>

The Court determined that none of those criteria was satisfied. Perhaps most interesting was the Court's conclusion that the deposition testimony at issue did not satisfy the first factor. The Court's opinion – which seems destined to become a "most cited" case on the topic of corporate representative depositions – provides a very detailed review of how rule 1.310(b)(6) is supposed to operate.

The Court explained that rule 1.310(b)(6) imposes burdens upon both parties. "The party seeking discovery is required to describe, with reasonable particularity, the matter(s) for examinations. The responding entity must then produce one or more witness who can testify as to the corporations' knowledge of the specific topics."<sup>4</sup> Towards that end, the entity must prepare the witness sufficiently to enable the witness to give complete, knowledgeable and binding answers on behalf of the entity. "When a rule 1.310(b)(6) deposition is properly noticed and conducted, the testimony of the designee is deemed to be the testimony of the corporation itself."<sup>5</sup>

Despite the popularity of doing so,

<sup>2</sup> 2013 WL 1136399 at 2.

<sup>3</sup> 2013 WL 1136399 at 7.

<sup>4</sup> 2013 WL 1136399 at 3.

<sup>5</sup> 2013 WL 1136399 at 3-4.



a rule 1.310(b)(6) notice of deposition should not seek the testimony of a representative with the "most knowledge" on any particular topic. In fact, as the Court held, the plaintiff's use of that designation in this case was "fundamentally inconsistent with the with the purpose and dynamics of the rule" because the rule allows the entity being deposed to select a designee without regard to his or her personal knowledge or lack thereof.<sup>6</sup> Moreover, the Court determined that the designation, which is supposed to be made with reasonable particularity, was unduly broad in a case with multiple counts sounding in contract and tort.

The Court also determined that the defendant, for its part, failed to carry out its burden under the rule because it failed to properly prepare its designated witness to testify as to the entity's legal position. As the Court pointed out, the witness did just the opposite, making it clear that her beliefs and opinions were not necessarily shared by the defendant. She also repeatedly testified that she was not aware of critical facts, making it clear to the Court that she was testifying only as to her personal knowledge.

The Court held, for these and other related reasons, that the "corporate representative deposition" did not bind the defendant in the sense contemplated by rule 1.310(b)(6). In light of that, it was error for the trial court to strike the "contradictory" affidavits and enter summary judgment.

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<sup>6</sup> 2013 WL 1136399 at 4.