

## MEETING AGENDA

### **JOINT COMMITTEE MEETING OF: COMMERCIAL REAL ESTATE and REAL PROPERTY LEASING COMMITTEES**

Date and Time: November 8, 2019 (2:00 p.m. – 5:00 p.m.)

Location: JW Marriott, Miami

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1. **Introduction of 2019-2020 CRE Leadership Team:**
  - a) *Chair:* Jen Bloodworth, Sr. Underwriting Counsel, First American Title Insurance Co.
  - b) *Co-Vice Chair:* Burt Bruton, Greenberg Traurig, P.A., Miami
  - c) *Co-Vice Chair:* Ashley McRae, Assistant VP and Florida Commercial Counsel, Old Republic National Title Insurance Company
  - d) *Co-Vice Chair:* Jim Robbins, Jr., Hill Ward Henderson, Tampa
  - e) *Co-Vice Chair:* Marty Schwartz, Bilzin Sumberg Baena Price & Axelrod, LLP, Miami
2. **Introduction of CRE Committee Sponsor:** Attorneys' Title Fund Services, LLC
3. **Introduction of RP Leasing Committee Leadership:**
  - a) *Chair:* Brenda Ezell, Chair, Ezell Law Firm, P.A., Jacksonville
  - b) *Co-Vice Chair:* Rick Eckhard, Co-Vice Chair, Holland & Knight, Tampa
  - c) *Co-Vice Chair:* Christopher A. Sajdera, Sajdera Kim, Boca Raton
  - d) *Committee Liaisons:* Technology - Kristen King Jaiven; CLE - Christopher A. Sajdera  
Publications - Phyllis Harley; Legislative - Arlene Udick
4. **Attendance:** Committee members will receive a link by email to record attendance
5. **Legislative Matters**
  - a) Removing Witness Requirements on Leases, revision to 689.01.  
White paper and proposed legislation attached.
6. **CRE CLE Presentation: Completion of Commercial Real Estate Top 10 Reasons to Review Contracts**, an interactive panel discussion led by Jen Bloodworth, Burt Bruton, Ashley McRae, and Marty Schwartz. Attendees will be encouraged to be ready to participate in the discussion. Marty Schwartz is going to lead the discussion on our final two reasons to review contracts: Reps & Warranties and Remedies.
7. **Joint CLE with RP Leasing Committee: Insuring Leases: Valuations, Endorsements, Considerations**, presented by Mishele Schutz, Senior Commercial Services Underwriting Counsel and Jacqueline Marzan, Associate Underwriting Manager, Commercial Services, Attorneys' Title Fund Services, LLC
8. **Old Business: Time Permitting** – Update from Subcommittee for Revision of Supreme Court Approved Form Leases for Single-Family and Multi-Family – Michelle Hinden. Update on sales tax and tourist development tax on leases with early termination language. Brenda Ezell
9. **Upcoming Committee Meetings**
  - a) January 29 – February 2, 2020 – Grand Hyatt Tampa Bay, Tampa
  - b) May 28 – 31, 2020 – Loews Sapphire Falls, Orlando

Adjournment.

## WHITE PAPER

### PROPOSED AMENDMENT TO F.S. 689.01 (No witnesses needed for leases)

#### I. SUMMARY

This proposed legislation will modify Section 689.01 of the Florida Statutes (known as the Statute of Conveyances) to remove the requirement for two subscribing witnesses on any instrument creating, making, granting, conveying, transferring, releasing, assigning or surrendering a leasehold estate.

#### II. CURRENT SITUATION

Section 689.01(1) F.S. requires that certain instruments affecting interests in real property must be made in writing and be signed in the presence of two subscribing witnesses, including any instrument creating, making, granting, conveying, transferring, releasing, assigning or surrendering a leasehold estate having a term of more than one year. Historically with respect to deeds, “The manifest object of requiring an attestation of subscribing witnesses is to enable the grantee to prove the execution by the grantor of the deed, and to show the circumstances attending the sealing and delivery.” quoting from Richbourg v. Rose, 53 Fla. 173, 44 So. 69, text 72, the Supreme Court of Florida. This same reasoning applied to leases to protect the tenant from bogus transactions.

The current statute concerning subscribing witnesses as written is not without issue: “Although the provisions of Section 689.01, Florida Statutes, F.S.A., require that such an instrument be executed in the presence of two subscribing witnesses, the Statute does not require that such witnesses shall subscribe in the presence of the grantors, or in the presence of each other. Likewise, the Statute does not by express terms require that subscribing witnesses shall sign the document before the delivery thereof is accomplished.” Medina v. Orange County, 147 So. 2d 556, 557 (Fla. Dist. Ct. App. 1962).

Furthermore, the statute does not seem to require the tenant’s signature to be witnessed although some would argue that it does due to the reconveyance of the leasehold at the end of the term. Although the statute is unclear on this issue, almost all leases in Florida have witness blanks for both the landlord and tenant as lawyers are unwilling to advise their clients regarding a requirement or lack of requirement that a tenant’s signature be witnessed.

Most residential leases in Florida are written for a term of one year and therefore do not require two subscribing witnesses. Commercial leases, on the other hand, are usually written for longer terms. As a result, the witnessing requirement in FS 689.01(1) rarely applies to the landlord’s signature on a Florida residential lease but almost always applies to a landlord’s signature on a Florida commercial lease.

Historically, the requirement for two subscribing witnesses for the conveyance of real property is similar to the statutory requirement that the conveyance must be made in a written

instrument, and the statutory requirement that the instrument must be acknowledged by the grantor before a notary public in order to be recordable in the public records. It serves as an additional means of verifying that the deal is real, and to protect the property owner against bogus claims that the property had been conveyed or (in this case) leased. In the modern era of communications, electronic documents and the transmission of leasing documents via email or other electronic means, the witnessing requirement always proves burdensome to both the landlord and the tenant, even though this formality was originally intended to *protect* the tenant.

In the case of commercial real property, leasing is essential to realizing its value through the creation of a stream of rental income. When a landlord signs a lease with a tenant, the landlord has not parted with ownership of the property, but has only surrendered the right of possession in exchange for the tenant's obligation to pay rent. A lease simply does not present the same opportunity for fraud as in the case of a deed transferring ownership of the property, even though both qualify as instruments transferring rights in real property, because the tenant incurs obligations to the landlord under the lease.

Florida is among the minority of American states that still require subscribing witnesses for conveyances or leases of real property. Thirty-nine states require no witnesses. Of the remaining 11 states that require a witness:

- Four (4) require only one witness;
- One state requires two witnesses for greater than 20 years (Alabama); and
- One state requires witnesses for an interest greater than five years (Virginia).

The National Association of Industrial and Office Properties ("NAIOP") is a proponent of streamlining the execution of commercial leases in Florida by eliminating the requirement that the landlord's signature be witnessed by two subscribing witnesses. As a representative of landlords in the real estate industry, NAIOP argues that landlords find the witnessing requirement more burdensome than protective of tenants' interests.

The RPPTL Section filed an amicus brief in a 2009 case concerning the lack of subscribing witnesses on a commercial lease, *Skylake Insurance Agency, Inc. v. NMB Plaza, LLC*, 23 So.3d 175 (Florida 3d DCA 2009). In that case, a landlord's signature on a ten-year pre-construction lease was not witnessed by subscribing witnesses, and the landlord repudiated the lease on that ground as the construction of the premises neared completion. The tenant sued for specific performance of the lease and alternatively claimed damages for fraud. The Third DCA refused the tenant's claim for specific performance, holding that the lease was not a valid conveyance of the leasehold because it failed to comply with the two-witness requirement in FS 689.01. However, the appellate court remanded the case for consideration of the tenant's damage claim because the written lease was otherwise validly executed by the landlord in accordance with the LLC statute and therefore constituted a binding contract. The Third DCA expressly declined to permit the landlord in that case to profit from its own failure to comply with the witnessing formality.

### **III. EFFECT OF PROPOSED CHANGE**

If the requirement of two witnesses for a lease had been eliminated from FS 689.01 when the *Skylake* case was decided, the tenant in that case might have been able to obtain specific performance of the lease and there would have been no need for an amicus brief by the Section. With the elimination of the witnessing requirements on leases, all of the confusion and vagueness of the Statute of Conveyances regarding leases will be gone.

Going forward, if the witnessing requirement for leases is removed from the statute, controversies like the one in the *Skylake* case will no longer be possible. Further, commercial leasing will be more streamlined for Florida properties, as there will be one less formality required in order to create a valid contract *and* a conveyance of the leasehold. Landlords and tenants and their lawyers will not need to waste valuable time dealing with this subject and the obligation to obtain subscribing witnesses.

Subsection (1) of section 689.01, Florida Statutes, is amended to read:

**689.01 How real estate conveyed.—**

(1) No estate or interest of freehold, or for a term of more than 1 year, or any uncertain interest of, in or out of any messuages, lands, tenements or hereditaments shall be created, made, granted, transferred or released in any other manner than by instrument in writing, signed in the presence of two subscribing witnesses by the party creating, making, granting, conveying, transferring or releasing such estate, interest, or term of more than 1 year, or by the party's lawfully authorized agent, unless by will and testament, or other testamentary appointment, duly made according to law; and no estate or interest, either of freehold, or of term of more than 1 year, or any uncertain interest of, in, to, or out of any messuages, lands, tenements or hereditaments, shall be assigned or surrendered unless it be by instrument signed in the presence of two subscribing witnesses by the party so assigning or surrendering, or by the party's lawfully authorized agent, or by the act and operation of law; provided, however, that no subscribing witnesses shall be required for an instrument creating, making, granting, conveying, transferring, releasing, assigning or surrendering a leasehold estate. No seal shall be necessary to give validity to any instrument executed in conformity with this section. Corporations may execute any and all conveyances in accordance with the provisions of this section or ss. 692.01 and 692.02.

**REAL ESTATE LEASING COMMITTEE**  
**MEETING MINUTES**  
**The Breakers**  
**Palm Beach, Florida**  
**Thursday, July 25, 2019**  
**2:00 pm – 3:00 pm Gulfstream 3**

1. **Welcome and Introductions:** Chair, Brenda Ezell, called the meeting to order at 2:02 pm. She welcomed the committee members and introduced the following incoming Committee co-chairs and liaisons:

Rick Eckhard, Co- Chair attended by phone  
Christopher A. Sajdera, Co-Vice Chair  
Technology Liaison, Brenda Ezell/Kristen King Jaiven  
CLE Liaison, Christopher A. Sajdera  
Publications Liaison, Phyllis Harley  
Legislative Liaison, Arlene Udick
2. **Minutes.** Chair, Brenda Ezell, sought approval of the Minutes from the May 31, 2019 meeting, at the Opal Sands Resort, Clearwater Beach Florida. A motion was made and seconded. The Minutes were approved unanimously.
3. Brenda Ezell introduced CLE coordinator Wilhelmina Fettrow Kightlinger to the committee who encouraged continued CLE engagement from the Committee and commended the Committee on past CLE.
4. **Committee Liaison Reports:**
  - a. Legislative Liaison Report: Arlene Udick was not present so Brenda Ezell reported:
    - i. Report on Revisions to F.S. §83.05 (presumption of abandonment) by Art Menor. Art Menor provided a background on how and when the statute is used and provided an update on the comments he has received on this proposed legislation so far.
    - ii. Burt Bruton provided a report on proposed revisions to F.S. §689.01 (commercial lease witness requirements). Burt Bruton discussed the details of the white paper regarding the proposed edits to §689.01 and explained that the legislation was going to be an initiative of the National Association of Industrial and Office Properties (“NAIOP”). Discussion commenced as to whether the statute should be revised to exclude all leasehold interests or only leasehold interests of a minimum number of years. During the meeting: nine people voted to remove witnesses with no minimum term; twelve voted to remove the witness requirement with a minimum term; and three people voted to continue having a witness requirement for leasehold interests greater than one year.
  - b. Gabrielle Jackson provided an update on the Florida Supreme Court Lease revisions subcommittee explaining how the subcommittee was formed and is currently reviewing the terms of the existing Florida Supreme Court lease.
  - c. Publications Liaison Report: Brenda Ezell announced she wrote a new article to be published in ActionLine.

- d. CLE Liaison Report: Chris Sajdera provided an update on CLE reports including the upcoming Executive Suite CLE in November. Chris requested speakers for residential lease CLE topics for next spring. Brenda Ezell sought feedback from the committee on preparing an advanced leasing (half day) seminar.
- 5. **Old Business.** None.
- 6. **New Business.** Brenda Ezell announced a new case (July 19, 2019): Ace American Insurance Company v. The Wattles Company (11<sup>th</sup> circuit court case) dealing with environmental damages caused by tenants.
- 7. **Adjourn.** The meeting adjourned at 2:54 pm.

Timestamp	Username	Name	Please mark you attendance
2019/07/25 2:03:23 PM AST	lesstevens@earthlink.net	LES H. STEVENS	By Telephone
2019/07/25 2:03:23 PM AST	david.weisman@gmlaw.com	David Weisman	By Telephone
2019/07/25 2:04:10 PM AST	mark.grant@gmlaw.com	Mark Grant	In person
2019/07/25 2:07:12 PM AST	treyg@floridarealtors.org	Trey Goldman	In person
2019/07/25 2:08:27 PM AST	akison@bentleyandbruning.com	Amanda Kison	In person
2019/07/25 2:09:46 PM AST	bob@robertschwartzpa.com	Robert M Schwartz	In person
2019/07/25 2:12:25 PM AST	joshua.escoto@nexteraenergy.com	Joshua Escoto	By Telephone
2019/07/25 2:17:15 PM AST	GHaney@trenam.com	Gregory Haney	By Telephone
2019/07/25 2:17:36 PM AST	sebastian@wolfepincavage.com	Sebastian Jaramillo	By Telephone
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2019/07/26 9:38:05 AM AST	dcarusi@carusilaw.com	Daniel Carusi	By Telephone
2019/07/26 10:32:18 AM AST	diana.feng@gmlaw.com	Diana Feng	In person
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2019/07/29 10:49:40 AM AST	brenda@ezellfirmipa.com	Brenda Ezell	In person
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