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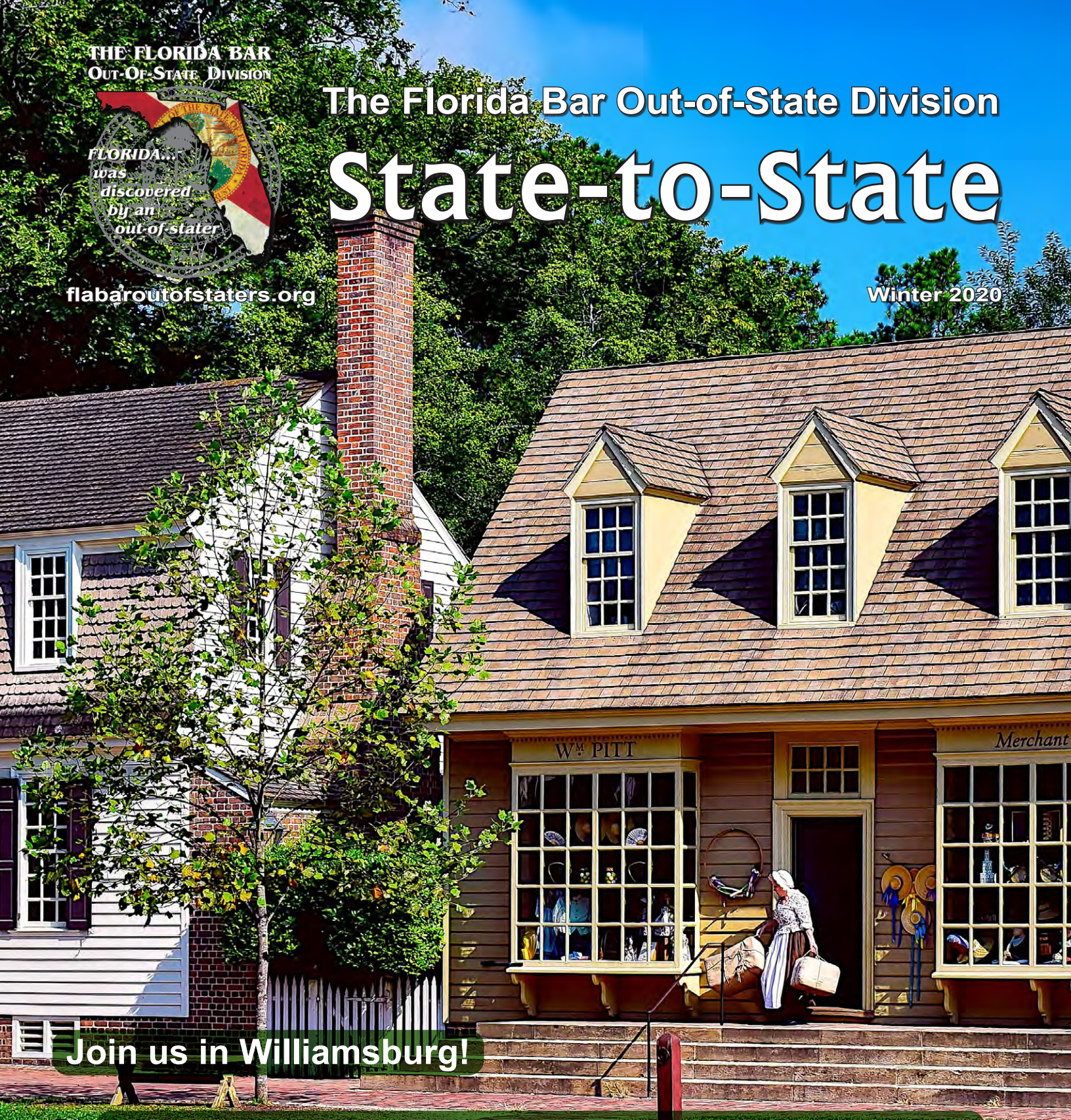

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Uniform Commercial Real Estate Receivership Act—Florida SB 660 and HB 783

Questions for the Bar president-elect candidates

Uniform Commercial Real Estate Receivership Act Florida SB 660 and HB 783

by Kenneth Dante Murena


K. MURENA

The decade-long economic boom in the United States has extended to most real estate markets, including in Florida, but many expect a correction in the real estate economy within the next couple of years that is likely to result in a surge in real estate disputes and litigation. Florida's trial courts already struggle to manage the increased workload and the complex issues underlying commercial cases, many of which stem from real estate disputes. So, any further increase in real estate-related cases could result in a crippling backlog and excessive delays in adjudication. Courts and litigants in real estate disputes will need a tool to stave off such delays and secure efficient resolutions. One such tool is receivership, which for years courts have utilized to assist in the resolution of real estate disputes pursuant to common law developed and applied by a multitude of courts over a number of years to varying degrees and effect, rather than pursuant to one consolidated body of law that could more consistently be applied by courts faced with similar real estate-related issues.

The Uniform Commercial Real Estate Receivership Act (UCRERA), a uniform law from the National Conference of Commissioners on Uniform State Laws (NCUSL), will offer courts and litigants throughout the state of Florida one such body of law. Indeed, UCRERA is a comprehensive codification of law that provides for the circumstances and conditions under which a receiver may be appointed over commercial real estate; the scope and procedures of a receivership proceeding; the effect of the appointment of a receiver; the authority of the receivership court; and the powers, duties, and liability of the receiver, all of which will provide courts and litigants alike a path and roadmap for the effective, efficient, and consistent resolution of the real estate disputes they may increasingly confront.

Presently, there is no clear or uniform legal standard, or statutory guidance, in Florida governing the circumstances under which a receiver should be appointed over commercial real property, the powers and duties of a receiver for commercial real estate, or the procedures a court should follow in a receivership proceeding. Consequently, there is significant variation among the judicial circuits and districts in the application of legal principles and procedures governing receivers and receiverships. This increases the burden on the courts, costs all litigants unnecessary money, and disserves the public by keeping productive real estate off the market (and tax rolls).

SB 660 and HB 783 are Florida's proposed implementation of UCRERA. They will provide consistency, uniformity, and guidance to the courts throughout the state with respect to when a receiver should be appointed and will ensure that the status quo is preserved and/or the value and condition of the property is preserved or realized for the benefit of the interested parties while a foreclosure or other action affecting the real property is pending.

SB 660 and HB 783:

- Set forth the procedures for providing notice and opportunity for hearing to all parties and creditors with an interest in the subject real property, consistent with Florida Rules of Civil Procedure Rule 1.610(b) to ensure adequate due process protections are guaranteed;
- Establish standards under which a court may appoint a receiver in the exercise of its equitable discretion and the standards under which a petitioning mortgage lienholder is entitled to appointment of a receiver;
- Provide consistency and guidance with respect to when a receiver should be appointed;
- List the conditions under which a receiver can be appointed pre-judgment, including waste, loss, substantial diminution of value, dissipation or impairment of the property or its revenue-producing potential;
- Provide that, on appointment, persons having possession, custody, or control of receivership property must turn the property over to the receiver, and persons owing debts that constitute receivership property must pay those debts to the receiver;
- Set forth the receiver's presumptive powers and those the receiver may exercise only with court approval, the duties of the receiver, and the duties of the owner of receivership property;
- Permit the receiver, *before* judgment and with court approval, to use, sell, lease, license, exchange, or otherwise transfer receivership property other than in the ordinary course of business if (a) the owner of the property expressly consents or fails to object before or at a hearing after the receiver has provided reasonable advance notice of the transfer to all interested parties, including lienholders, and (b) the receiver establishes that the property is subject to waste, loss, dissipation, or substantial diminution in value;
- Permit the receiver, *after* judgment and with court approval, to dispose of receivership property to carry the judgment into effect or to preserve nonexempt real property

Receivership Act
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pending appeal or when an execution has been returned unsatisfied and the owner refuses to apply the property in satisfaction of the judgment;

- Authorize the receiver to adopt or reject an executory contract of the owner relating to property or assign an adopted executory contract to the extent permitted by contract or applicable law, and limit the receiver's ability to reject the unexpired lease of a tenant, permitting rejection of the lease only in very limited situations;
- Require the receiver to notify creditors of the appointment unless the court orders otherwise, require creditors to file claims with the receiver as a precondition to obtaining any distribution from receivership property or the proceeds of such property, and permit the receiver to recommend disallowance of claims;
- Authorize the court to appoint a receiver appointed in another state, or its designee, as an ancillary receiver for the purpose of obtaining possession, custody, and control of receivership property located within this state and permit the court to enter any order necessary to effectuate an order of a court in another state; and
- Require the receiver to file interim reports and, on completion of the receiver's duties, a final report.

The Florida Bar Business Law Section, in consultation with the Real Property Section, the Florida Bankers Association, the Florida Land Title Association, and NCUSL (which initially presented the uniform law to the Business Law Section), has worked on refining UCRERA and making it consistent with existing Florida law for nearly four years. UCRERA has sponsors in the Florida Senate and the Florida House of Representatives and, during the current legislative session, has successfully advanced through all committees of reference to date in both chambers, with only the Senate Rules Committee remaining before it can be put to the floor of both chambers for a final vote.

Comprehensive laws similar to UCRERA have already been enacted in seven other states, Maryland, Arizona, Michigan, Tennessee, Nevada, Utah, and Oregon, and introduced in the legislatures of two other states, Connecticut and North Carolina. Perhaps Florida will be the next state added to the former list.

The superpower of 'but why?' ...

by Carolyn Kurtzack Kolben


C. KOLBEN

Attorneys are generally curious by nature, and of course, zealous advocacy demands a comprehensive understanding of your client's matter. How far does a comprehensive understanding go, however, and what's the fastest way to get there? The answer lies in this simple question: "but why?"

When counsel first elicits why a specific course of action was chosen, the response will often be fact based. When followed up with a genuinely curious "but why?" the response will accelerate counsel's understanding of the client's motivation and/or intent. Responses to follow-up "but why's" will thereafter reveal multidimensional responses serving to further fortify counsel's zealous advocacy arsenal.

Responses to "but why" questions reveal how your client/witnesses perform as a decision maker and grasp the responsibilities to which they have been assigned, as well as their judgment, values, and ethics. This information further enables counsel to laud or prevent the further deterioration of the credibility of the client. The "but why" may disclose a client's misunderstanding of what can truly be achieved, result in the discovery of favorable information the client deemed unimportant, or reveal another cause of action or defense. A seasoned attorney—fueled by curiosity—is often applying the law to the facts as they spill out of the mouth of the client. Most importantly, well-informed counsel further serves the cause of a well-protected client.

Conversely, when counsel fails to secure as much information from the client as soon as reasonably possible during the representation, counsel is often left to play catch-up. Often with a recalcitrant individual, the big dig into the "but why" questions may be best left for consultations after trust is attained. But so as not to waste time and resources—there are no shortcuts—it takes time and effort to really know and understand what the client wants and needs.

Reinforcing counsel's understanding of intent and motivation with a thorough "but why" inquiry is never a bad idea. Let it be known that while there are instances in which the information you hear might be so horrific that it gnaws at your soul, "I had too much information about my client and the case" said no attorney ever.

In conclusion, being doggedly curious coupled with the time and patience to conduct a very thorough inquiry early in the representation serves the cause of zealous advocacy. This intricate inquiry makes one a better counsel no matter what the case. Most importantly, the "but why" inquiry reduces the chance of any counsel ever having to declare at the eleventh hour "why did no one tell us that."