

**IN THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR MANATEE COUNTY, FLORIDA**

MARY LOU SMITH
an individual, and
SHARON DENSON,
an individual

Plaintiffs,

vs.

CASE NO.: 2008 CA 11315

TRAILER ESTATES PARK AND
RECREATION DISTRICT,
an independent special taxing district

Defendant.

PLAINTIFFS' MOTION FOR REHEARING OF JUDGMENT

COME NOW, the Plaintiffs, MARY LOU SMITH (hereinafter "Smith") and SHARON DENSON (hereinafter "Denson") and (hereinafter referred to collectively as "Plaintiffs"), by and through their undersigned counsel and pursuant to Rule 1.530, Florida Rules of Civil Procedure, and hereby file this Motion for Rehearing, and as grounds therefore state as follows:

- 1) On November 3, 2010, the Court entered Final Judgment (hereinafter "Final Judgment") in the instant matter.
- 2) Following the Court's rendering of a Final Judgment, a party may move for a motion for rehearing on all or part of the issues. *See*, Rule 1.530, F.R.C.P.
- 3) "A 'rehearing' is the second consideration of a cause for the sole purpose of calling to the attention of the Court any error, omission, or oversight that may have been committed in the first consideration." *Cole v. Cole*, 130 So. 2d 126, 130 (Fla. 1st DCA 1961). The prime function of a petition for rehearing is "to present the court some point

which it overlooked or failed to consider, which renders the decree inequitable and erroneous.” *Hollywood v. Clark*, 15 So. 2d 175, 180 (Fla. 1943); *Diamond Cab Co. of Miami v. King*, 146 So. 2d 889, 891 (Fla. 1962). Further, a motion for rehearing can also be used for clarification of an order. *Kirby v. Speight*, 217 So. 2d 871 (Fla. 1st DCA 1969)

4) Grounds for rehearing include errors on the face of the record and errors committed during trial, such as the exclusion of evidence or improper determination of trial motions. *See, Braznell v. Braznell*, 191 So. 457, 459 (Fla. 1939); *Hutcherson v. Am. Heritage Life Insurance Co.*, 220 So. 2d 47, 48 (Fla. 1st DCA 1969).

5) In the Final Judgment, the following demonstrate errors, omissions, and oversights that Plaintiffs request the Court grant rehearing or alternatively clarification of the Final Judgment:

- a. The Court found Sunshine law violations, that there were excessive delays in the production of public records, and that public records were not timely produced because they were misfiled, misplaced or lost, but it failed to state Plaintiffs’ entitlement to an award of attorney fees pursuant to Fla. Stat. §§ 283.011(4) and 119.12. Plaintiffs request that the Court clarify the Final Judgment to include an award of attorneys’ fees to Plaintiffs.
- b. In the Final Judgment, the Court stated that it would discuss the website committee, yet the Final Judgment contained no further reference to such committee. Final Judm. ¶ 3.
- c. There was no evidence presented at trial to support a finding that “Trailer

Estates historically employs one person in their office, TJ Miller, and now employs a part time assistant, primarily to address the multitude of public records requests and this litigation.” Final Judm. ¶ 2, Nov. 3, 2010. The evidence presented at trial demonstrated that since 2006, Trailer Estates has employed more than one (1) employee in its office. Tr. Transcr. vol. 6, 693:16-694:2 (Oct. 6, 2010).

- d. The Final Judgment failed to address allegations 37(m), (u), (bb), (pp), (yy), (fff), (ppp), (dddd), (iiii), (pppp), (ssss), (rrrr)(xv) of the Third Amended Complaint and Addenda. Significant evidence was presented at trial supporting a finding of a violation of the Sunshine Law on each of these allegations and the Court should enter a judgment in favor of the Plaintiffs on each allegation. *See*, Testimony of John Vander Molen, Janet Jones, Mary Lou McNulty, Mary Lou Smith, Sharon Denson and Tr. Ex. 86, 907, 908, 109, 112, 79, 418, 419, 420, 421, 422, 627, 628, 252, 540, 645.
- e. In paragraph 7 of the Final Judgment, the Court found no Sunshine Law violation regarding allegation 37(d), because the mere presence of two trustees without debate on a matter which foreseeable action may be taken by the board does not give rise to a Sunshine Law violation. Final Judm. ¶7. While Plaintiffs do not disagree with this general point of law, the only evidence presented at trial demonstrated that two trustees, Cole and Bigley, discussed, interpreted, and debated the applicability of the multiple conflicting District policies in existence regarding the District’s storage

space fees. Tr. Transcr. vol. 2, 219:15-220:20 (Oct. 4, 2010), Tr. Transcr. vol. 6, 691:19-693:15 (Oct. 6, 2010), Tr. Transcr. vol. 11, 1097:10-1099:3 (Oct. 8, 2010). Further, the District did not provide any evidence to the contrary.

- f. In paragraph 9, the Court found that the Executive Committee meetings were not noticed to the public and, therefore, would be in violation of the Sunshine Law. Final Judm. ¶ 9. The Court also found that the illegal meetings were addressed at subsequent public meetings and the Board ratified the hiring of their attorney and other recommendations that were made illegally. Final Judm. ¶ 9. The Court failed to specifically identify the allegations found to be violations of the Sunshine law, when the alleged cure meetings occurred, and what occurred at those meetings to cure the violations. Further, a committee's violation of the Sunshine Law cannot be cured by a board's perfunctory ratification of the committee's report; only a full, open public hearing by the board can cure a Sunshine Law violation. *Spillis Candela & Partners, Inc. v. Centrust Savings Bank*, 535 So. 2d 694 (Fla. 3d DCA 1988). Further, a Board meeting which was open to the public for comment where there was no significant discussion of the issues or a discourse related to the illegal meeting cannot cure a Sunshine Law violation. *Zorc v. City of Vero Beach*, 722 So. 2d 891 (Fla. 4th DCA 1998), at 903-904. A violation can only be cured when the process that violated §286.011 is begun over and all **matters previously considered** are brought by independent action into the "Sunshine." *Port*

Everglades Auth. v. International Longshoremen's Ass'n, Local 1922-1, 652 So. 2d 1169 (Fla. 4th DCA 1995), *supra* (emphasis supplied). Cure is an affirmative defense with the burden of proof on the defendant. *See, Wagner v. Wagner*, 196 So. 2d 453, 454 (Fla. 4th DCA 1967). Further, in finding cure, the Court relied on evidence that the terms of the offending Board members had expired and the Bylaws had been amended to eliminate the Executive Committee. Final Judm. ¶ 9. However, the Court did not identify who the “offending Board members” were, when their terms of office ended or when the Bylaws were in fact amended. The Court failed to recognize that both of these alleged curative actions took place after the lawsuit was filed. Tr. Transcr. vol. 4, 361:4-17 (Oct. 5, 2010).

- g. Further, the Court found that the Executive Committee minutes did not establish who attended the meetings, but **only established the final recommendations of the committee**. Final Judm. ¶ 9. The Court recognized that the Executive Committee conducted closed door interviews for candidates for the board and for the hiring of counsel; yet it ruled that the interviews were not violations of the Sunshine Law because the Committee was merely fact-finding. Final Judm. ¶ 9. While a committee established for fact-finding only, with no decision making authority, is not subject to the Sunshine Law; ‘search and screen’ committees are subject to the Sunshine Law. *Cape Publications, Inc. v. City of Palm Bay*, 473 So. 2d 222 (Fla. 5th DCA 1985); AGO 95-06; *Wood*

v. Marston, 442 So. 2d 934, 938 (Fla. 1983). Further, where a committee is charged with “weed[ing] through the various proposals, to determine which were acceptable and to rank them accordingly,” then that committee was subject to the Sunshine Law. *Silver Exp. Co. v. District Bd. of Lower Tribunal*, 691 So. 2d 1099 (Fla. 3d DCA 1997) (“Governmental advisory committees **which have offered up structured recommendations . . . or which rank applications for the final authority-have been determined to be agencies governed by the Sunshine Law.**”) Additionally, where a committee was tasked with meeting, conducting interviews, evaluating the candidates, and recommending the top four or five best candidates, even though the decision making authority was not bound to the applicants submitted by the committee, such a committee is subject to the Sunshine Law. *Krause v. Reno*, 366 So. 2d 1244 (Fla. 3d DCA 1979).

- h. In paragraph 10, the Court stated that the District’s bylaws provide a schedule of when financial information was to be mailed to the residents, and hence, Trustees discussing the distribution of the financial information was not a violation of the Sunshine Law. Final Judm. ¶ 10. The Bylaws were entered into evidence as exhibit 1 and nowhere in the Bylaws does it provide a schedule of when the District’s financial information should be mailed to the residents. Tr. Ex. 1. The District’s charter provides for a schedule of when the District’s financial information should be mailed, and the only evidence provided at trial showed that the District failed to comply with this schedule until after the two trustees, Vander Molen and

Salerno, discussed and changed the District's current procedure related to this matter outside of a noticed public meeting. Tr. Ex. 280, Tr. Transcr. vol. 7, 728:23 – 732:12 (Oct. 7, 2010).

- i. In paragraph 11, the Court stated that the Plaintiffs had no standing to request relief because neither of them applied for a permit. Final Judm. ¶ 11. This statement is contrary to the evidence in the record at exhibits 861 and 751, which both show that the Plaintiff, Smith, applied for an ARC permit. Tr. Ex. 861, Tr. Ex. 751. Further, Smith testified to the permit, and the Court erroneously denied Plaintiff's opportunity to present further testimony on the permit. *See*, Testimony Mary Lou Smith.
- j. In paragraph 13, the Court ruled on allegations 37(oo) and (qq) related to the multiple trustees attending and participating in the Deed Restrictions Committee, but failed to rule on allegation 37(pp), which relates to similar Sunshine law violations occurring at the Deed Restrictions Committee. Final Judm. ¶ 13. Significant evidence was presented at trial supporting a finding of a violation of the Sunshine Law on this allegation and the Court should enter a judgment in favor of the Plaintiffs on allegation 37(pp). *See*, Testimony of John Vander Molen, Joe Salerno and Tr. Ex. 109 and 112.
- k. In paragraph 14, the Court stated that there was insufficient evidence that the Seasonal Recreation Trustee appointed a committee, and hence failed to prove a Sunshine Law violation. Final Judm. ¶ 14. The Sunshine Law applies to committees that are appointed by a single public official. *Wood*, 442 So. 2d at 934. Any gathering, whether formal or casual, of two or

more members of the same committee to discuss matters on which foreseeable action of the committee will be taken, is subject to the Sunshine law. *See, Hough v. Stembridge*, 278 So. 2d 288 (Fla. 3d DCA 1973). The evidence presented at trial showed that both Tom Featheringill and Pam Cole, while holding the position of the Seasonal Recreation Trustee, had and used the Seasonal Recreation committee to assist them in performing their duties as Seasonal Recreation Trustee. Tr. Transcr. vol. 9, 1025:16-20 (Oct. 8, 2010); Tr. Transcr. vol. 11, 1118:17-25 (Oct. 8, 2010).

- l. In paragraph 17, the Court found that although the Referendum Committee's purpose was to make recommendations to the Board of a procedure to initiate a referendum for voter action and the committee presented its recommendation to the Board, the Referendum Committee was not subject to the Sunshine Law because it was not a decision making authority. Final Judm. ¶ 14. However, advisory boards established by public agencies are subject to the Sunshine Law, even though their recommendations are not binding upon the entities that create them. *Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974).
- m. Also, in paragraph 17, the Court also found that the Referendum Committee's meetings were not noticed or open to the public but minutes were taken at these meetings. Final Judm. ¶ 14. There was no evidence presented at trial that demonstrated minutes were taken at the Referendum Committee meetings; the only documentary evidence regarding the

Referendum Committee was the Committee's report which was entered as trial exhibit 523. Further, Pam Cole testified that she was a Trustee at the time and chaired the Referendum Committee meetings which were not public meetings. Tr. Transcr. vol. 11, 1113:17-19 (Oct. 8, 2010).

- n. In paragraph 18, the Court found that the evidence showed Trailer Estates Video Computer Club would manage and operate the District's closed circuit television system in accordance with the guidelines and practices set by the Board, and hence, the Board did not control the closed circuit television system's content. Final Judm. ¶ 18. No evidence was presented at trial demonstrating the existence of District guidelines and practices as set by the Board; rather the only evidence presented at trial showed that, in lieu of adopted guidelines, individual board members on an ad hoc basis would decide the content of the closed circuit television system. Such individuals included John Vander Molen who testified that on multiple occasions, he made decisions regarding content. Tr. Transcr. vol. 8, 896:8 – 897:22 (Oct. 7, 2010). Further, evidence submitted at trial indicated that John Vander Molen and Janet Jones, while both trustees, made decisions concerning the content of the closed circuit television channel. Tr. Ex. 355.
- o. In paragraph 18, the Court made several findings related to the video club's operation of closed circuit television as alleged in 37(oooo), but it failed to address the Board's editing of its newsletter as also alleged in 37(oooo). Final Judm. ¶18. Significant evidence was presented at trial

supporting a finding of a violation of the Sunshine Law on this allegation and the Court should enter a judgment in favor of the Plaintiffs on allegation 37(oooo). *See*, Testimony of Mary Lou McNulty, Sharon Denson and Tr. Ex. 355, 358, 449 and 871.

- p. In paragraph 19, the Court ruled on allegations related to multiple Trustees attending and participating in the Future Planning Committee but failed to address the allegation 37(dddd), which alleged a meeting of the Future Planning Committee's members that was not noticed and open to the public. Final Judm. ¶ 19. Unrefuted evidence was presented at trial supporting a finding of a violation of the Sunshine Law on this allegation and the Court should enter a judgment in favor of the Plaintiffs on allegation 37(dddd). *See*, Testimony of Janet Jones and Tr. Ex. 418, 419, 420, 421 and 422.
- q. In paragraph 19, the Court ruled that the Future Planning Committee and Policy and Procedure Committee operated as information gathering committees and were not subject to the Sunshine Act. Final Judm. ¶ 19. Advisory boards established by public agencies are subject to the Sunshine Law, even though their recommendations are not binding upon the entities that create them. *Gradison*, 296 So. 2d at 473. The undisputed evidence at trial showed that the Future Planning Committee served as an advisory board, charged with providing the Board of Trustees recommendations related to the future growth and development of the District. Tr. Ex. 237, page 139. Further, the Policy and Procedure Committee served as an

advisory committee charged with providing the Board of Trustees recommended District policies. Tr. Transcr. vol. 10, 1065:9-22; Tr. Ex. 237.

- r. Further, in paragraph 19, the Court stated that each Trustee who was involved in the meetings of the Future Planning Committee and Policy and Procedure Committee were no longer on the board. Final Judm. ¶ 19. The Final Judgment does not identify the Trustees or when their office terminated. To the extent that the finding is a finding of cure, the burden is on the Defendants to prove these facts. The evidence provided at trial showed that Joe Salerno, a Trustee at the time of the meetings and a current Trustee, was involved in the alleged meetings 37(yyy). Tr. Transcr. vol. 7, 813:8 – 815:2 (Oct. 7, 2010). Tr. Ex. 105, 108, 113 and 144.
- s. In paragraph 20, the Court found that although two Trustees were on the Auditor Selection Committee, one of the Trustees was appointed as a liaison without voting privileges. Final Judm. ¶ 20. The evidence presented at trial did not reflect this structure for this committee; rather Martha Brauer testified that there were two Trustees serving on the Auditor Selection Committee and both were voting members. Tr. Transcr. vol. 10, 1057:19 to 1059:2.
- t. In paragraph 20, the Court ruled the Plaintiffs' Third Amended Complaint and Addenda did not claim a specific violation related to the Auditor Selection Committee. Final Judm. ¶ 20. However, in the Plaintiffs' Third

Amended Complaint it states at allegation 37(r) – “In February 25, 2009, Board members Martha Brauer and Vander Molen discussed the auditor selection, outside of properly noticed board meeting.” Significant evidence was presented at trial supporting a finding of a violation of the Sunshine Law on this allegation and the Court should enter a judgment in favor of the Plaintiffs on allegation 37(r).

- u. In paragraph 21, the Court found that the Plaintiffs were well aware at the time of the filing of the lawsuit that Trailer Estates could not produce the Citation. There was no evidence produced at trial to support this finding; in fact, the evidence at trial showed that the District had only stated that the Citation was “unavailable” and that the District searched in 2009 to see if the District had maintained the record. Further, TJ Miller was unable to recall the limits of the search, including when she looked for the Citation in the Trustees’ desks. Testimony of Mary Lou Smith, Jennifer Cowan, TJ Miller, Tr. Transcr. vol. 9, 969:4-17 (Oct. 8, 2010), Tr. Ex. 292, 290, and 826).
- v. In paragraph 22, the Court found that the Plaintiffs made other requests for documents that they did not prove existed; however, the Court fails to identify the “other” documents it refers to.
- w. In paragraph 23, the Court found that the District reasonably responded to the Plaintiffs’ request to inspect a pet application in producing the record 5 days later. However, the evidence presented at trial was that the District’s records custodian possessed the record, but failed to provide it, and

instead, contacted the person who submitted the application and legal counsel regarding whether to release the record. Tr. Transcr. vol. 1, 72:4–73:5 (Oct. 4, 2010). There is no right to delay the release of public records so the person whose information is contained in those records may have time to pre-inspect the records, or to interpose an objection. *Tribune Co. v. Cannella*, 458 So. 2d 1075, 1078 (Fla. 1984). Further, an agency’s failure to produce records because of its good faith, but mistaken, belief that records requested were exempt from disclosure still constitutes an unlawful refusal under §119.12. *News & Sun-Sentinel Co. v. Palm Beach County*, 517 So. 2d 743, 744 (Fla. 4th DCA 1987).

- x. In paragraph 24, the Court found that, although there was a technical breach of Fla. Stat. § 286.011(8), the District properly withheld the transcript from the Executive Session until the conclusion of the litigation. The detailed provisions of Florida Statutes §286.001 (8)(d) are to be narrowly construed and strictly applied. “The clear requirements of the statute are neither onerous nor difficult to satisfy” and strict compliance with the statute is mandatory. *See, City of Dunnellon v. Aran*, 662 So. 2d 1026, 1027 (Fla. DCA 1995) (Holding that failure to specifically name an attorney in attendance at the meeting waived the exemption); *Zorc*, 722 So. 2d at 891. (Holding that inclusion of staff members, consultants or anyone other than members of the governmental entity, its chief administrative/executive officer, legal counsel and a court reporter effectively removes meeting from the exemption and subjects the entire

meeting to the Sunshine Law.); Op. Atty. Gen. Fla. 98-06 (1998).

- y. In paragraph 25, the Court found that the database was offered but not in the format the Plaintiffs requested, and was ultimately produced in the format in which the District stored it. The Court failed to state the dates when the database was offered and ultimately produced, and it failed to consider the delay in the production. The evidence at trial demonstrated that in mid April of 2008 Plaintiff Denson requested the database, the District specifically declined to produce the database on April 21, 2008, and that Plaintiffs ultimately received the database in the requested excel format only after the litigation had begun and it was ordered by this Court. Tr. Ex. 350, 985, and 388. The evidence also indicated that the database was kept in a digital format, that excel is a digital format that the system could readily produce, and that the only reason given for not producing it in excel was the records custodian's lack of training at the time of the request. Tr. Transcr. vol. 9, 1002:4-1003:18 (Oct. 8, 2010.)
- z. In paragraph 27, the Court found that the Plaintiffs did not prove that the specific information requested related to the Rant and Raves column existed on the date requested. However, the Court failed to address the other articles that the Plaintiffs requested in August of 2009 and that the District failed to provide. The evidence at trial showed that in August of 2009 the Plaintiffs requested verbally all of the articles submitted to the District and any documents reflecting edits to those articles prior to their publication in the District's Tribune in 2009. *See*, Testimony Melanie

Marken; Ex. 402. The evidence demonstrated that, even though the Plaintiffs' had served the District with a spoliation letter requesting it not destroy any documents related to the suit, the District destroyed articles submitted for publication in the District's Tribune during 2009 and did not change its practices related to the destruction of these articles until after August 2009. *See*, Testimony Melanie Marken, TJ Miller, Tr. Ex. 368.

aa. The Final Judgment failed to address allegation 69 related to the destruction of public records, but only discussed records that were misfiled, misplaced, lost or never existed. Final Judm. ¶ 9. Significant evidence of the destruction of records was presented at trial supporting a finding of a violation of the Sunshine Law on this allegation and the Court should enter a judgment in favor of the Plaintiffs on allegation 69.

6) The Plaintiffs further request the Court grant rehearing based on the following:

a. The Court erred in excluding, over objections made at trial, evidence of Sunshine law and public records law violations that occurred after the filing of the Third Amended Complaint which this evidence supported. Tr. Transcr. vol. 1, 55:20 (Oct. 4, 2010); Tr. Transcr. vol. 1, 80:10; Tr. Transcr. vol. 1, 101:11; Tr. Transcr. vol. 2, 111:9 (Oct. 5, 2010); Tr. Transcr. vol. 2, 132:8; Tr. Transcr. vol. 2, 155:5; Tr. Transcr. vol. 2, 162:15; Tr. Transcr. vol. 2, 165:3; Tr. Transcr. vol. 2, 223:6; Tr. Transcr. vol. 5, 544:22 (Oct. 6, 2010); Tr. Transcr. vol. 5, 558:3; Tr. Transcr. vol. 7, 797:19 (Oct. 7, 2010); Tr. Transcr. vol. 8, 900:20 (Oct. 7, 2010); Tr. Transcr. vol. 9, 981:18 (Oct. 8, 2010). The Third Amended Complaint

alleged a pattern and practice of violations (36, 37, 60, 62, 64, 65, 69) and requested injunctive relief.

- b. The Court erred in excluding, over objections made at trial, all evidence related to allegation 62(e), which is, “In October 2008, Ken Meierjurgan requested the doctor’s authorization relating to a resident’s emotional support pet application, Trailer Estates refused to provide the document claim it was privileged, in violation of the Public Records Law, and to date Trailer Estates has not provided Mr. Meierjurgan with the public record.” Tr. Transcr. vol. 4, 452:1 (Oct. 5, 2010); Tr. Transcr. vol. 5, 544:22 (Oct. 6, 2010). The Third Amended Complaint alleged a pattern and practice of violation and requested injunctive relief which this evidence supported.
- c. The Court erred in excluding, over objections made at trial, all evidence related to Sunshine law violations, especially executive committee meetings, that occurred prior to the lawsuit and were not specifically identified in the Third Amended Complaint and Addenda. Tr. Transcr. vol. 3, 301:3 (Oct. 5, 2010); Tr. Transcr. vol. 4, 389:9 (Oct. 5, 2010); Tr. Transcr. vol. 5, 500:13 (Oct. 6, 2010). The Third Amended Complaint alleged a pattern and practice of violation which this evidence supported, and this evidence was also to be used for the impeachment of the District’s witnesses and hostile witnesses.
- d. The Court erred in excluding Tr. Ex. 271 from evidence, over the objections made at trial. Specifically, this evidence demonstrated the

District's lack knowledge of what records it maintains in its possession related to Citations from early 2006, and shed light on the credibility of the witnesses in disproving the Defendant's assertion of a phantom Citation. In the Final Order the Court accepts Defendant's theory of a "phantom Citation," and fails to order the production of the Citation. Final Judm. ¶ 21.

WHEREFORE, the Plaintiffs request the Court enter an Order granting their request for rehearing on the Final Judgment to consider issues raised by this Motion for Rehearing of Judgment or, alternatively, issue a revised Final Judgment incorporating the corrections in the aforesaid Motion for Rehearing of Judgment to include findings and judgment in favor of the Plaintiffs on the matters discussed herein.

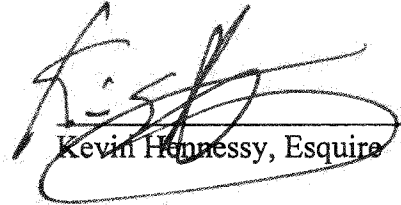
Respectfully Submitted,



KEVIN S. HENNESSY, ESQUIRE
Florida Bar No. 0602558
JENNIFER R. COWAN, ESQUIRE
Florida Bar No. 038081
Lewis, Longman & Walker, P.A.
1001 3rd Avenue West, Suite 670
Telephone (941) 708-4040
Facsimile (941) 708-4024
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of Plaintiffs' Motion for Rehearing of Judgment has been furnished to **Kurt Lee, Esquire**, Kirk Pinkerton, P.A., 50 Central Avenue, Suite 700, Sarasota, FL 34236, by *facsimile and U.S. Mail*, this 15th day of November, 2010.


Kevin Hennessy, Esquire