



A REPORT TO MEMBERS OF  
THE SOUTH CAROLINA BAR  
YOUNG LAWYERS DIVISION

## Was Han Solo an independent contractor or an employee of the Rebel Alliance under the Fair Labor Standards Act?

By Jeremy R. Summerlin

You know you've always wanted to know the answer to this question, but because you wanted friends in the real world, you've kept this desire stuffed down deeper than the Spice Mines of Kessel. How else could you expect to impress a potential mate unless you can provide a detailed legal and in-universe explanation for one position or another that does not violate sacred Star Wars canon? You can't, of course, which is why you're here. They don't call me the Juris Doctor of Love for no reason. In fact, they don't call me that for any reason at all. Or at all, period. Nonetheless, it's on my business cards.

Seriously though — and I do take this far more seriously than is healthy — the answer depends on which movie we look at in the ever-increasing Star Wars film universe. So for this article, we will consider just the first *Star Wars: Episode IV: A New Hope: The One Where Han Shot First (In Some Versions): A Star Wars Story: Being the First Part of the Lord of the Rings*.

Oh, Han Solo: smuggler, scoundrel, scruffy-looking nerfherder. Until the start of *Star Wars: A New Hope*, he's a down-on-his-luck outlaw with a price on his head larger than a fanboy's expectations of Season Two of *The Mandalorian: Baby Yoda's Cutest Little Revenge*. Until, that is, an agent of the Rebel Alliance, the lonely, wan, only one Obi-Wan Kenobi, makes a proposal: transport humans and cargo past the Imperial patrols and deliver them safely to Alderaan. Han Solo's first question, logically and cinematically, is whether he would be an employee or an independent contractor in this scenario, and given his business savvy, he immediately contacted a skilled, talented, sophisticated, handsome, dashing,



and debonair employment law attorney in South Carolina for the answer. That person wasn't available, so he contacted me.

### Episode I. What makes Han Solo an independent contractor or employee?

"Control, control, you must learn that CONTROL" is the key to determining whether the person is an independent contractor or employee. The Imperial Internal Revenue Service (IRS) has issued guidance for the general analysis of employee v. independent contractor matters. See [www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee](http://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee). Two key factors noted by the IRS are (a) control over the person's behavior and (b) control over the financial and business aspects of the employee's job. In other words, is the person permitted to exercise complete discretion in getting the work done and in how the person gets paid? If not, then the person is more likely an employee.

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# Spotlight on the ABA YLD Scholars Program



*Have you heard of the ABA YLD Scholars Program? Read below about one of South Carolina's very own young lawyers, Lauren Barnes' experience as an ABA YLD Scholar!*

## **About the ABA YLD Scholars Program**

This past year, I was selected as an American Bar Association Young Lawyers Division 2019-2020 Diversity Scholar. The ABA YLD Scholars Program is designed to encourage active participation of minority attorneys in the Young Lawyers Division. Scholars attend the YLD Fall Conference in October, Midyear Meeting in February, and the Spring Conference in April. Each year, 16 scholars are selected based on professional excellence, public service, and bar involvement history. The Scholars program is from September 1-August 31. During my scholar year, I have had the opportunity to learn, interact, and network with various YLD leaders and emerging leaders in the division.

Additionally, the ABA YLD has implemented a diversity pipeline program entitled "What Do Lawyers Do?" (WDLDD). The program is aimed at providing information to college (undergraduate) students, particularly students attending a historically Black college or university or a Hispanic serving

institution, concerning the different facets of the legal profession. This year, WDLDD reached out to middle and high school students. Each scholar must implement a WDLDD program in their area before the close of the bar year. Unfortunately, due to COVID-19 and school cancellations, majority of scholars (including myself) were unable to complete the WDLDD programming and fulfilled an alternative requirement. To learn more about WDLDD programming, check out: [www.americanbar.org/groups/young\\_lawyers/projects/diversity/what-do-lawyers-do/](http://www.americanbar.org/groups/young_lawyers/projects/diversity/what-do-lawyers-do/).

## **My experience**

The Fall Conference was in "The Big Easy" New Orleans, Louisiana. I attended various CLE programming and the "What Do Lawyers Do?" (WDLDD) event at Dillard University. Walmart graciously sponsors our Scholars Dinner at each conference. During these intimate scholar dinners, we interact with Walmart attorneys and debrief on our scholar requirements and goals we plan to fulfill during our scholar year. Additionally, this is a time where we

get to know our fellow scholars because our conference days are usually packed with back to back meetings.

As a huge proponent of Diversity and Inclusion in the legal profession, I was selected to work alongside both the Diversity and Inclusion (D&I) Team and Board. I was fortunate to work closely with the Diversity and Inclusion Director, Tamara Nash who served as an amazing mentor during this process. I have assisted with various D&I programming throughout the year. Currently, I am collaborating with the D&I Team on our Webinar "Underrepresented Representatives: How to Navigate a Profession that Doesn't Look Like You" which will be implemented this upcoming summer on July 15, 2020.

The Mid-year Meeting was hosted in Austin, Texas. During the Mid-year Meeting, I attended several events including, Council Meeting, the Present and Powerful Speaker Series that discussed 100 Years of Women in Politics, and the YLD Diversity Dialogue Breakfast. As scholars, we were also able to certify as delegates and participate at the ABA YLD Assembly, which is the principal policy-making body of the ABA YLD. It serves as a gathering of young lawyers representing affiliated national, state, local, affinity, and specialty bar associations from across the country. During Assembly, many issues of importance to young lawyers are formed into resolutions, debated, and then voted on. All debates are conducted in accordance to the Rules of Parliamentary Procedure with time given to both pro and con speakers, as appropriate. The resolutions are then voted on by all YLD Assembly delegates. In order for any external policy position approved by the YLD to take effect, it must also be passed by the ABA house of Delegates, which is the primary policy-making body of the ABA. More information can be found at: [www.americanbar.org/groups/young\\_lawyers/leadership/assembly/](http://www.americanbar.org/groups/young_lawyers/leadership/assembly/).

By taking part in this event, we had the opportunity to have our voice heard and to help shape the profession. Resolutions considered this term included parental leave in the legal profession, young lawyer participa-



tion prioritization, and many others. The ABA YLD unanimously passed Constitutional Amendment 11-5. This Resolution amends the ABA YLD's Bylaws such that all gender binary language (she/her/hers & he/him/his) is changed to more welcoming gender nonbinary terms (they/them/theirs), to help effectuate Goal III of the ABA Diversity Plan. It was an incredible experience to participate as a delegate and learn first-hand everything Assembly entails.

Scholars are required to produce a written piece during their scholar year. I co-authored this year's ABA White Paper entitled "A Frank Conversation on Diversity and Inclusion: Moving Beyond Lip Service." This white paper is part of the American Bar Association's effort to identify and raise awareness on moving beyond lip service to propel the needle forward and measurably increase diversity in the legal profession. Additionally, this paper seeks to propose ways to disseminate change and eliminate the effects of this identifiable issue. This paper summarizes an event discussion hosted at the American Bar Association (ABA) Midyear Meeting in Austin, Texas, on February 15, 2020, titled "Diversity Dialogue Breakfast." The candid conversation on diversity and inclusion featured industry leader Don Prophete of Constangy, Brooks, Smith, & Prophete, LLP based in Kansas City, Missouri.

### Looking forward

Although a part of my scholar experience and some of my project involvements were shortened due to COVID-19, I am still grateful to have been a part of this invaluable experience and the new friends I have made along the way. I am looking forward to serving in my new appointed 2020-2021 leadership positions for the next bar year.

More information about the program and application and requirements can be found at: [www.americanbar.org/groups/young\\_lawyers/leadership/scholars/](http://www.americanbar.org/groups/young_lawyers/leadership/scholars/).

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### Han Solo

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The U.S. Department of Labor also provides for a Sith-factor economic realities test in making an FLSA-specific determination:

1. the extent to which the work performed by the worker is an integral part of the employer's business;
2. the worker's opportunity for profit or loss depending on his or her managerial skill;
3. the extent of the relative investments of the employer and the worker;
4. whether the work performed by the worker requires special skills and initiative;
5. the permanency of the relationship between the employer and worker; and
6. the degree of control exercised or retained by the employer over the worker.

Let's take a look at some of these factors in the context of Han Solo's business relationship with the Rebel Alliance.

### Episode II. In Mr. Solo's FLSA lawsuit against the Rebel Alliance in Imperial court, what would the court consider that weighs in favor of him being a contractor?

First, the Solo Plaintiff in this case has virtually no restrictions placed on his discretion in performing his mission. The only directions he receives from Defendant Kenobi? "No questions asked." Solo has the discretion to determine time and location for departure (docking bay 94, of course), the means of transport (the *Millennium Falcon*), and calculating the proper course to Alderaan, which, as we know, ain't like dusting crops, boy. So the element of control (or lack thereof) over Solo's behavior leans in favor of an independent contractor arrangement.

Second, Solo has no restrictions placed on the financial and business aspects of this arrangement. Solo remains free to use his own resources and tools to accomplish the mission, as he sees fit, and he can make all the upgrades and modifications to the *Falcon* that would be necessary. This factor also tends to support Solo's status of independent contractor. Also, his name is SOLO, so....

### Episode III. Can a person's status change from independent contractor to employee?

Yes, if the level of control changes during the course of employment. So, in Captain Solo's case, he begins as independent contractor, subject to the terms of payment of 2,000 credits now and 15,000 when they arrive safely at Alderaan.

However, the Force has other ideas, for upon arriving at where Alderaan USED to be, the mission changes. Solo's ship, with its passengers hidden on board, is captured by the Empire and brought to the Death Star, which leads to a rescue attempt of Princess Leia, a high-ranking member of the Rebel Alliance.

Once the Princess enters the picture, the level of control changes almost immediately. Princess Leia asserts control over the mission and begins bossing around Han Solzzzo and Luke Skywalker like she's, well, like she's royalty or something. At this point, I would argue that Han Solo instantly becomes an employee of the Rebellion, pursuant to Princess Leia's assertion of control over the mission. (The sexual tension/harassment between Solo and the Princess, especially in a work context, strikes me as potentially problematic and will be addressed in a future article.) At the point of Princess Leia's takeover, Han Solo becomes an employee who would be entitled to overtime under the Fair Labor Standards Act. If Mr. Solo is Forced to file a lawsuit to receive overtime payments, he can also seek liquidated damages and those sweet, *sweet* attorney's fees.

If there's one idea I want you to take away from this much-needed article, it's this: I will do ANYTHING to avoid writing about real life legal topics when writing about Star Wars legal topics remains a viable option. So stay safe out there, my friends, and may the Force be with you...always.

*Jeremy R. Summerlin is an expert on the myriad of important legal issues involving the intersection of Star Wars and employment law. He also practices regular employment law throughout South Carolina and is married to a real-life lady who often wonders how this marriage thing happened anyway since she doesn't even speak Klingon.*

# Spring 2020: A Time of Change and a Look into the Termination of LIBOR

By Ashley Adams Brown

I would wager that all of our practices have been significantly impacted by COVID-19. Some of us no longer go into an office; whereas, others have implemented new procedures to still accommodate in-person consultations. Outside of the impact that COVID-19 has had on our daily operations, one of the biggest changes to the way the world conducts business is under way yet there seems to be little discussion on the matter given the impact for many of our clients.

The London Interbank Offered Rate (LIBOR) has long been used primarily used when determining rates on various loans including residential mortgage loans, student loans and credit cards (Otten Johnson Robinson Neff + Ragonetti PC, *LIBOR, The Key Real Estate Lending Benchmark Rate, Is Nearing its End*, (September 2018), [www.ottenjohnson.com/news-events-resources/otten-johnson-alerts/2018-otten-johnson-alerts/libor-the-key-real-estate-lending-benchmark-rate-is-nearing-its-end](http://www.ottenjohnson.com/news-events-resources/otten-johnson-alerts/2018-otten-johnson-alerts/libor-the-key-real-estate-lending-benchmark-rate-is-nearing-its-end)). While most commercial and residential loans are based on a fixed interest rate, the remaining portion use an adjustable rate which reference the LIBOR specifically in the Note and Security Instruments.

However, after a large scandal was uncovered in 2008, the LIBOR has been the subject widespread scrutiny and, in 2017, the Financial Conduct Authority first stated that there would no longer be a requirement for banks to use the LIBOR—effectively making the index void due to nonuse. (Federal Housing Finance Agency, *LIBOR Transition*, (February 6, 2020), [www.fhfa.gov/SupervisionRegulation/LIBORTransition](http://www.fhfa.gov/SupervisionRegulation/LIBORTransition)). But if you're like me, you thought that we as attorneys had plenty of time to digest the changes in the law prior to effective date of December 31, 2021. However, in February 2020, it has become apparent that is not the case. Changes to the documents that many of us explain to our clients each day are coming in June 2020, if not earlier.

After the initial scandal was uncovered during the peak of the Great



Recession, an international investigation revealed that many influential financial institutions were manipulating the process used to set interest rates at a specific amount for their own profit (McBride, James, Council on Foreign Relations, *Understanding the Libor Scandal*, (October 12, 2016), [www.cfr.org/backgrounders/understanding-libor-scandal](http://www.cfr.org/backgrounders/understanding-libor-scandal)). Specifically, it has been found that the rate was manipulated downward so that they appeared more stable than they actually were during 2007 and 2008. (*Id.*) However, despite this scandal and the push to use other indices in the years since 2012, “the LIBOR mechanism was kept for existing contracts and new contracts were allowed to use either the LIBOR or a transaction-based benchmark rate until the ongoing reforms of the system are completed.” (*Id.*)

Now that the LIBOR is essentially void due to nonuse, it has left the financial market in search of a viable substitute. (Wipf, Tom, *Wave Goodbye to Libor. Welcome its successor, SOFR.*, (December 6, 2019), [www.bloomberg.com/opinion/articles/2019-12-06/wave-goodbye-to-libor-welcome-its-successor-sofr](http://www.bloomberg.com/opinion/articles/2019-12-06/wave-goodbye-to-libor-welcome-its-successor-sofr)). Some experts have expressed concerns

that replacing LIBOR could trigger negative market implications at the end of the year and waves of lawsuits. (Cruise, Sinead and Lawrence White, *The end of Libor: the biggest banking challenge you've never heard of*, (October 8, 2019), [www.reuters.com/article/us-britain-libor-transition-analysis/the-end-of-libor-the-biggest-banking-challenge-youve-never-heard-of-idUSKBN1WN0H4](http://www.reuters.com/article/us-britain-libor-transition-analysis/the-end-of-libor-the-biggest-banking-challenge-youve-never-heard-of-idUSKBN1WN0H4)). This coupled with the declining economy due to the massive countrywide shut down due to COVID-19 could lead clients to be wary to obtain, borrow, or to become concerned post-closing once they hear of these changes later in the year through the news media.

Moving forward, South Carolina Residential Real Estate Attorneys' areas of focus regarding the upcoming transition to Secured Overnight Financing Rate, or SOFR should lie in counseling those who are acquiring new Adjustable Rate Mortgages and counseling past clients who may call once/if this transition is being more widely discussed. One of my main concerns stems from that fact that the language used in the adjustable rate mortgages which reference LIBOR, gives broad discretion to the lender to choose a



replacement index to determine the rate on these loans in the future. Luckily, the Federal Housing Financing Agency, Fannie Mae, and Freddie Mac have worked to solve this problem in the future by creating a model for a Secured Overnight Financing Rate (SOFR) based adjustable rate mortgage and more specific language for these types of mortgages in the event a new index should need to be used in the future. (See *LIBOR Transition*). The New York Federal Reserve Bank's Alternative Reference Rates Committee (ARRC) released its recommendations on Nov. 15, 2019, which Fannie Mae and Freddie Mac quickly adopted in full. (Jaworski, Bob and Douglas Youngman, *Libor Index Discontinuance: Impact on Residential Adjustable-Rate Mortgages*, (December 2, 2019), [www.jdsupra.com/legalnews/libor-index-discontinuance-impact-on-76885/](http://www.jdsupra.com/legalnews/libor-index-discontinuance-impact-on-76885/)). The new guidelines state that if a new index will be determined by the note holder subject to certain limitations on their discretion and applicable contractual provision. (*Id.*) Additionally, the replacement rate shall be made publicly available and based on the SOFR index, either by term rates or averages. (*Id.*) However, in the event that no index has been selected at the time of the needed replacement, the note holder will make a "reasonable good faith effort to select the replacement." It was the hope of the various entities working to establish this new language that it would give consumer greater insight into how a replacement rate would be chosen in advance of the need to do so. (*Id.*) These fallbacks - originally designed to kick in if LIBOR was temporarily unavailable - usually stipulate alternative rates, such as calling other banks for a quote or using the last published Libor rate. But the fallback clauses were not designed to cope with Libor ceasing to exist indefinitely. That could create big risks for borrowers, for example, by potentially converting a "floating rate" loan, tied to the fluctuations of Libor into a fixed-rate one. (*Id.*)

Many experts in the financing industry suspect that old notes may have to go through a manual review and many legal and compliance experts questions the logistics for updating those outstanding liens. Specifical-

ly, there are issues with notice to the borrowers or potential amendments to the notes. (Bafna, Sapan, [*PULSE*] *The shift from LIBOR to SOFR is on the horizon - Are you ready?* (February 28, 2020), [www.housingwire.com/articles/pulse-the-shift-from-libor-to-sofr-is-on-the-horizon-are-you-ready/](http://www.housingwire.com/articles/pulse-the-shift-from-libor-to-sofr-is-on-the-horizon-are-you-ready/)). However, the United States was one of the first countries to take decisive action to move forward with the SOFR, while the European Central Bank started publishing ESTR, its new interest rate benching in October of 2019. (See Cruise, *The end of Libor: the biggest banking challenge you've never heard of*). Many experts consider SOFR to be a "near risk-free" option because it is secured by U.S. Treasuries and based on actual daily transaction information as opposed to a panel of interested financial institutions like LIBOR. (See Bafna, [*PULSE*] *The shift from LIBOR to SOFR is on the horizon - Are you ready?*).

Also, the Alternative Reference Rates Committee (ARRC) finalized the new fallback language for in November 2019. (Alternative Reference Rates Committee, Summary of ARRC's LIBOR Fallback Language, November 2019, [www.newyorkfed.org/medialibrary/Microsites/arrc/files/2019/LIBOR\\_Fallback\\_Language\\_Summary](http://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2019/LIBOR_Fallback_Language_Summary).) The Adjustable Rate Mortgage's new fallback language easily digestible and clearly identifies a single spread-adjusted SOFR rate as the replacement rate. (*Id.*) This new language will be required for single-family uniform Adjustable Rate instruments closed on or after June 1, 2020, and to be eligible for acquisition, all LIBOR-based, single-family and multifamily ARMs must have loan application dates on or before September 30, 2020 as the acquisition of all LIBOR ARMs will not be permitted no later than December 31, 2020. (See Bafna, [*PULSE*] *The shift from LIBOR to SOFR is on the horizon - Are you ready?*). Although, the new language will be implemented shortly, some predict that litigation may result depending on the exact language used in the existing security instrument once replacement events take place. (Schenck, James, *Why Consumers Need to Be Aware of LIBOR*, Forbes Finance Council Post, (January 5, 2020), [https://reversemortgagedaily.com/2020/01/05/forbes-](https://reversemortgagedaily.com/2020/01/05/forbes-why-consumers-should-be-aware-of-libor%E2%BB%BF/)

[why-consumers-should-be-aware-of-libor%E2%BB%BF/](https://reversemortgagedaily.com/2020/01/05/forbes-why-consumers-should-be-aware-of-libor%E2%BB%BF/)).

These clear and concise instructions regarding new transactions will make future closing table conversations much easier for closing attorneys. However, questions regarding past closings may still be difficult to address beyond referring your clients to refinance due to the uncertainty surrounding needed amendments and notice for outstanding loans. It may be prudent, at a minimum, to mention the change in index to all mortgagors at the closing table regardless of loan type. But, closing attorneys would be wise to review any adjustable rate notes and clearly go over these terms with the mortgagors — and likely send some form of written communication or have an acknowledgement signed for your files — especially for those loans closings prior to June 1, 2020.

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## Stars of the Quarter

**Taylor Gilliam**

**Sterling Moose**

**Blair Streitenberger**

**Sutania Fuller**

**Mary Lee Briggs**

"The Bar has so many different opportunities for you to get involved. Want to meet new people? Join a committee. Want to give back to the community? Get involved. My involvement with the Bar has opened so many doors for me through opportunities with my local bar, the YLD, and by joining committees."

**LESLIE MCINTOSH**



**Visit [www.scbar.org/yld](http://www.scbar.org/yld) to sign up!**

"My involvement with the Bar has afforded me an ever-expanding network of colleagues I call upon for advice on both professional and personal matters. The attorneys you work alongside while you are doing things like yard work for a domestic violence shelter or planning a CLE on drug suppression issues often become your true friends because of your common interests and goals."

**TECKLA HENDERSON**





# Letter from the President



Dear Young Lawyers:

When I began writing this letter (let's be honest, in my head) a few months ago, it had a very different tone. It had a different message. It was really hopeful about the upcoming months. See, this time of the year is when YLD really gets going. Traditionally, YLD hits its stride in the second part of the Bar year. This year was no exception, our committees had some excellent things planned.

And then COVID-19 struck. Just like that (imagine me snapping my fingers here), our lives were turned upside down. We are all navigating this "new normal." In just a short time, the ways in which we live and work have drastically changed. The things we have hoped to do, and even the things we took for granted that we merely "got" to do, have seemingly become distant memories.

As we add new phrases to our lexicon—"social distancing," "coronavirus," "COVID-19,"—and new laws get passed, we all yearn for the way things used to be. With this yearning comes another emotion that we should be cognizant of—grief. During our joint YLD and Wellness Committee session at the Bar Convention in February (wow, that seems like forever ago), Beth Padgett spoke about the importance of recognizing grief and its impact. Often,

we believe grief only emanates from death, and we discount its presence in other losses, when in truth, we feel grief whenever we lose something.

YLD members, let's face it — we've all lost something in the past few weeks. Whether it's our jobs, our autonomy, the ability to work out of the home, the ability to work without having to home school children, the ability to help others, the ability to go to establishments without government intervention, and heaven forbid, the people close to us — we've all lost things. We all have likely approached this in two different ways — either we've minimized the impact of these losses, or we've fully leaned into the devastating impact of these losses. Whichever path we have taken, we must first acknowledge that we are going through something difficult and find ways to cope with our grief. We must find our resilience and grit in these uncertain times. We — against most of our instincts — must see the glass as half full, rather than half empty.

Now, that doesn't mean pretend that we aren't going through a major, life-altering event. But, what it does mean is that we should adopt healthy coping mechanisms. We can focus our thoughts on positive things. For me, from a YLD perspective, that's thinking

about the great things we as a Division have done and will do for each other and our communities during this time. I think about the recent award we received from the American Bar Association YLD — an affiliate Star of the Quarter for our Diversity Committee's, "How \_\_\_ Can You Be?" program. I think about our VITA committee, which has pivoted and found a way to virtually prepare tax returns for our state's most vulnerable populations during this unprecedented time. Our Membership Committee was able to host two successful programs as part of their "Focus on the Lawyers as a Whole" series. Our Community Law Week committee is being agile and adapting their programs for this new era. Despite the circumstances, our Division is committed to being as impactful as we can to our members and our communities.

During this time, I'm reminded of the translation of our state motto, "While I breathe, I hope." And, while I found this phrase to be encouraging during "normal" times, it has, much like most things in my life, taken on a whole new meaning recently. No matter how bad we think things are, we must always try to have hope. It may seem corny, but it is true. We can hope for things to return to normal, we can have hope in the future, hope for a vaccine, hope we don't get asked to do a TikTok challenge, or hope for a virtual happy hour with friends. Having hope gives us something to look forward to even when things seem the darkest.

So, while I breathe, I hope. I hope that you and your families are safe. I hope that we survive and thrive in this "new normal." I hope that the effects of this pandemic are not too far-reaching. I hope that we have another Netflix show that we can collectively discuss and meme incessantly. I hope you are doing as best as you can. Most importantly, I hope that while you breathe, you hope.

Best regards,

Sheila M. Willis  
YLD President



# South Carolina Bar

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## What's Been Happening



**12th Circuit happy hour**



**YLD Home Buying Seminar**  
presented by the Membership Events  
Committee



Orangeburg **Cinderella Project**



**Color of Justice** presented at E.L.  
Wright Middle School Career Fair



Anderson Reads at Concord Elementa-  
ry School