

FORUM 8

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Eighth Judicial Circuit Bar Association, Inc.

September 1999

President's Message



Hello to everyone in this, the fifty-ninth year of the Eighth Judicial Circuit Bar Association. As we approach the new century we expect this year to be a special one and I look forward to serving as your President with both excitement and anticipation.

First, I would like to thank Sam Hankin, who is editing this newsletter. All contributors are excited not only about Sam serving as editor but also his making this publication available on the internet. Leave it to Mr. Hankin to give us a much needed push into the Twenty-First century. Thanks, Sam!

As many of you know, our proud assemblage is older than the Florida Bar that recently celebrated its fiftieth anniversary. The Eighth Judicial Circuit continues to be a terrific place to live and practice our chosen profession. Without doubt the remainder of 1999 and the upcoming Y2K will abound with opportunities to serve all segments of the Bar including Judges, private practitioners, lawyers in the public sector, law educators and students. In order that all parties in all six counties might be served we hope that all might participate as well. Any readers interested in helping out should contact Dan Williams, Jennifer Cates Lester, Ben Hutson or any individual chair or board member. Progressive efforts to make our Bar the best it can be have already begun.

Thanks to all who have taken the time to offer valuable input regarding Bar activities. Many of you took part in the now complete all-inclusive Bar Membership Survey but we will continue to accept your important opinions via more informal methods.

Bar members recently shared ideas and opinions at a pleasant retreat in Macclenny, Florida. Dan Williams was one of many to make the trip over. The event was an enjoyable opportunity to talk shop, talk of everything except shop and eat fabulous Cajun fare.

Terrific victuals will certainly continue to be the order of the day at upcoming Bar Luncheons. The luncheons will feature the talents of Jennifer Cates Lester as well as Carl Schwait. We have some grand plans for guest speakers and special programs and presentations to boot! By popular demand door prizes will make a return as will Pro Bono awards. Lynn Schackow will continue CLE sessions following planned luncheons.

Per Sheree Lancaster tasting trips to lovely Cedar Key are also slated in the coming months. All committee members look forward to food, drink and hospitality in abundance. In addition, our Socials are bound to be very good. Mark Fraser will chair the events joining new young lawyers with other friends and members of the Bar.

By popular demand Ray Brady's Professionalism seminars will again commence. Ray has conducted the seminars for us over the last two to three years and will undoubtedly continue doing the same excellent job.

With these positive events and gatherings coming on the near horizon, and our own Rick Knellinger covering the long-range planning, our Bar Association's continued success is virtually ensured. Thank you all again for the opportunity to serve as President. You have my pledge that I will serve with zeal and to the best of my ability.

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I apologize for the delay in getting out this first issue for the new term. The changes that I implemented took a little longer than I expected, but I hope you enjoy the results. I expect all future issues to be in the mail by the first week of each month. Please submit all articles and advertisements to my office by e-mail (samuel.hankin@hankinlaw.com) or in disk form (delivered to 305 N.E. First Street, Gainesville, FL 32601) by the 15th of each month.

The Buck Stops Here

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About This Newsletter

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Any and all opinions expressed by the Editor, the President, other officers and members of the Eighth Judicial Circuit Bar Association, and authors of articles are their own and do not necessarily represent the views of the Association.

News, articles, announcements, advertisements and Letters to the Editor should be submitted to the Editor by E-mail, or on 3.5" diskettes labeled with your name. Also, please submit a black and white photograph with your name written on the back. Diskettes and photographs will be returned. Files should be saved in any version of WordPerfect, or ASCII.

Deadlines are the 15th of each month.

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Curmudgeon Redux

by Sam Hankin

I'm sure some of you recall my debut as your editor back in the early 50s. It seems, in retrospect, that much of what I attempted to accomplish back then was based on shocking and appalling the readership. How puerile! In any event, I have re-emerged, Phoenix-like from the ashes of my previous incarnation. Let me recount my experiences since leaving the editorship.

While on hiatus, I spent a great deal of time studying obscure Buddhist tracts and visiting remote monasteries in Tibet and Mongolia. I lived in a yurt just outside of Ulaan-baatar for several years, during which time my diet consisted primarily of fermented mare's milk and curd. It was during this period that I perfected the technique of inward breathing, giving me the unusual and unexpected ability of being able to e-mail without using my computer. The only deleterious side effect is that each message gets blind carbon copied to Regis Philben.

After my return to the states, I finally obtained my degree in circus management from Florida State University and joined for a time, the Beatty-Cole Circus where I was placed in charge of some of the side show performers. I worked most closely with the Dog Boy and a novelty act called the Human Sweat Gland. I still stay in touch with many of the folks I met on the road and carry on, at a distance, a platonic but intense relationship with the bearded lady, Oedipa Maas. When the show got into legal difficulties, after an unusual performance by the sword swallower, I left Clyde and returned to my first love, intricate Greek Orthodox egg painting. I spent a great deal of time with some women in Amish country, perfecting the technique of pointilistic impressionism on brown Lancaster County Mallard cackleberries.

I highly recommend a similar sabbatical exploration of alternative lifestyles for each of you. Such a journey provides an enlightened perspective, so that upon your return to the practice of law, (as have I) you feel refreshed and invigorated. However, you might develop a slight astigmatism and a nagging rash.

Attendant upon my return, due no doubt in part to my karmic renewal, I was rewarded with the personal injury case *non pareil*. An elderly and somewhat crotchety gentleman lay in a nursing home bed, neglected by the staff and suffering from a particularly nagging decubitus ulcer. While he pondered his fate and the vagaries of life, an errant Florida Rock truck careened over a precipice, bounded through the front glass doors of the facility, tipped and then dumped its entire load of number 6 slag through the lobby and down the hallways. One large rock bounced and, as if it had eyes, landed on my client's mid-section causing substantial internal damage. On the way to the hospital, a rather aggressive shutzhound chose to give chase to the ambulance. The driver, distracted by the rapidly approaching Shepard, didn't notice oncoming traffic and slammed to a stop. The partially latched rear door of the ambulance blew open and the beast bounded into the ambulance, took hold of my client's left foot and removed a not insubstantial gobbet. On arrival at the hospital, the triage team promptly tagged the wrong toe and my client was efficiently divested of his right foot.

Now recovering, this gentleman began using a Fen-Phen combination to get himself in fighting trim. He also made numerous telephone calls from his hospital room and was charged an excessive connection fee for the first minute. He is home now convalescing and I must say doing quite well. His stressful experiences; however, have awakened, until now unexplored and repressed memories of early abuse by his local priest, now Archbishop of Canterbury.

In any event, that brings you up to date. I hope, in the coming year, or until such time as you remove me, that I have the opportunity to share many more memories from my travelogue, and my current caseload.

The “Mozart Effect” Effect



by Sam Hankin

As always, the opinions of the editor are his alone and are not intended to reflect the positions of individual members of the Eighth Judicial Circuit Bar Association, its board of directors, or any other sentient creature, as if this were not already self-evident.

Back in 1992, Frances Rauscher, a new Ph.D. with a diploma in psychology from Columbia University, set off for The University of California at Irvine with a suitcase full of predictions, based on a theory which she was ready to see proved. Dr. Rauscher felt that music, particularly Mozart, in addition to its inherent charms, had the uncanny effect of altering the cortical firing patterns in our brains, enhancing our ability in spacial temporal problem solving. So certain was our idealistic young theoretician, that she could hardly wait to create the study that would make her theories gospel and her name legion.

Unable to obtain funding for a larger study, Dr. Rauscher decided to “do something very quickly and easily” using the resources that she had available at her university and thus, chose 36 college students, sat them down and played them the Mozart Sonata for Two Pianos in D Major for ten short minutes. She then borrowed an IQ test, Xeroxed™ 36 copies of a standard spacial temporal task [the kind of problem one encounters when one imagines a folded piece of paper and then tries to figure out how to cut it in order to open it into a series of paper dolls] and tested her subjects. Lo and behold, the students’ IQs jumped a whopping ten percent and Dr. Rauscher was off to the races. A prestigious journal, *Nature*, beguiled by the charms of our young doctor, published her “results” in the journal in 1993.

Once the “Mozart effect” became known to the general public, the idea took wing, as CDs, books and articles spread like topsy. A recent search on Amazon.com showed thirteen - count them - thirteen CDs, advertising the “Mozart effect” and its beneficial tonic-like results on human intelligence. There’s the Mozart effect - “Music for Babies;” the Mozart Effect - “Strengthen the Mind” series; the Mozart Effect - “Relax, Daydream and Heal the Body;” and the Mozart Effect - “Unlock Your Creative Spirit” boxed set. A similar search on Yahoo yielded scores of hits.

Recently, some have finally begun to question the results reached by Dr. Rauscher. Dr. Kenneth Steele, at Appalachian State, a somewhat less prestigious university, was approached by an undergraduate student, who asked

him if she could attempt to reproduce the “Mozart effect” results. Dr. Steele sat back in his chair, crossed his hands behind his head and said sure. He then waited until the undergraduate came back at the end of the semester and said that she couldn’t replicate the effect. Dr. Steele, with time on his hands, followed up on his student’s work and found that he too, could not find any effect after trying “just about every standard design used in psychology.”

Nature published Steele’s results in its current issue. Dr. Rauscher back pedals in her response to Steele and says, “We’re finding....that with this particular type of task, a spacial temporal task, **under certain conditions** the effect can be replicated. And I think researchers that are seeking to explore this have to be **careful** about the way they design their studies.”[emphasis added] I guess it’s important when duplicating Dr. Rauscher’s experiment to be very careful how you do so, otherwise, you might find out that there really isn’t any Mozart effect. Dr. Rauscher, however, displeased with Dr. Steele’s intimation that she may have conducted her studies with less than the necessary and requisite scientific rigor, concludes that “Because some people cannot get bread to rise, does not negate the existence of a ‘yeast effect.’”

The “Mozart effect” EFFECT is just another manifestation of an increasingly recursive and, in a sense, corrupt search for substance

Another study mentioned in the National Public Radio broadcast, which drew me to this topic, found that “listening either to Mozart or to a passage of a Stephen King story enhanced subjects’ performance in paper folding and cutting, but only for those who enjoyed what they heard.” Still another experiment found that thousands of British school children had enhanced performance when they listened to popular music, rather than Mozart music. This, relative to a control group, listening to a discussion of scientific experiments. Whether or not Dr. Rauscher or Dr. Steele ignored data that didn’t fit their hypotheses, is not the question here; nor is the editorial dumbing down of *Nature* magazine by publishing either the first or the second article. You see, Dr. Rauscher is wrong when she equates science to baking bread. Yeast always rises when good science is applied, because the formulaic basis for repeating experimental results is pristine. Whether you’re smart or not, the water going down your bathtub drain will likely corroborate the coriolis effect.¹

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¹ Some might argue that the coriolis effect is *de minimis* when compared to other forces affecting bathwater drainage. If you are one of those, use Hurricane Dennis as your analogue.

Probate Section Report



by Larry E. Ciesla

The August meeting of the probate section of the Eighth Judicial Circuit Bar Association was held on August 11, 1999 in the grand jury room of the Alachua County Courthouse, commencing at 4:30 p.m.

Larry E. Ciesla began the meeting with a discussion of the recent decision in the case of Estate of Mary

Ann Shearer v. Agency for Health Care Administration, 24 FLW D1805 (5th DCA July 30, 1999). The opinion discusses the propriety of the practice which has been adopted by the Agency for Health Care Administration/Medicaid Estate Recovery Unit in the filing of claims against estates for reimbursement of Medicaid benefits paid during the decedent's lifetime. The claims typically contain a dollar amount, together with a notation that the claim is subject to being amended pursuant to Rule 59G-5.090 of the Florida Administrative Code (which allows Medicaid providers to submit claims for reimbursement to Medicaid within 12 months of the date of death of the recipient of the medical services). To the extent there are non-exempt assets contained in the estate, the estate is liable for payment of this claim pursuant to Section 414.28(1), Florida Statutes. Pursuant to Section 733.704, the court has the discretion to permit a claim to be amended at any time, if the claim is defective as to form. In the Shearer case, the estate argued that the requested amendment represented a new, untimely claim. The court emphasized in its opinion that at the time of the filing of the original claim, Medicaid had all of the information in its files upon which the amended claim was based. Medicaid argued that the amendment should be allowed because it was a "tedious" job for Medicaid to go back and review all of its records within the 90-day period provided by the Probate Code. In ruling against Medicaid, the court pointed out that in order to prove the amended claim, Medicaid would be required to produce different evidence. Therefore, the amendment was indeed one of substance and not just of form. Hopefully, this very clear opinion of the Fifth District will put an end once and for all to the practice of the Medicaid Estate Recovery Unit whereby the amount of a claim would double or triple, overnight, for no valid reason.

Another important development in the Medicaid Estate Recovery area concerns a bill passed by the Legislature during the 1999 session. Effective July 1, 1999, it has been established that: (1) there will be no claim against an estate for Medicaid benefits paid during life if the decedent

had not yet attained the age of 55; (2) a Medicaid recovery claim will not be enforced if the deceased recipient was survived by a spouse, one or more children under the age of 21, or one or more children living in the deceased recipient's home who is permanently and totally disabled as defined in the Social Security Act; and (3) there will be no claim against an estate if enforcement of the claim would result in hardship to the heirs (as "hardship" is defined in the statute). Furthermore and most importantly, Medicaid's recovery will be limited to one-half of any amounts brought into the estate by virtue of a claim against a third party for negligence or wrongful death. Copies of this legislation are available by calling Larry Ciesla's office.

A definitive opinion has been rendered by the First District Court of Appeal on the issue of equitable adoption. The opinion, dated July 27, 1999, can be found at 24 FLW, page D1779, and was decided by Judge Sauls in Leon County. The court established a five part test to judicially establish equitable adoption, which must be proved by clear and convincing evidence: (1) an agreement to adopt between the natural parents and the adoptive parents; (2) performance by the natural parents in giving up custody; (3) performance by the child by living in the home of the adoptive parents; (4) partial performance by the adoptive parents by taking the child into their home and treating the child as their own; and (5) intestacy of the adoptive parents. Marvin Bingham pointed out

The probate section continues to meet on the second Wednesday of each month beginning at 4:30 p.m. in the grand jury room of the Alachua County Courthouse and all interested practitioners are invited to attend.

that he has prior experience in litigating such cases and the most difficult part is clear and convincing proof of element number 1. Marvin indicated that typically there either is no expressed agreement for adoption or it is difficult or impossible to prove an agreement if one existed.

A newer version of the preliminary notice and report form (Department of Revenue Form DR-301), revised July 1996, has been in use by the Department for several years; however, many practitioners in the probate section indicated that they were unaware of this newer form and have continued to use the older form. It was pointed out that the newer form requires information not previously set forth in prior versions of Form DR-301, including the date the decedent established domicile in Florida and the name and social security number of the decedent's spouse. The old line for stocks, bonds, mortgages, notes and cash has been divided into five separate lines. As far as could be determined, nobody has been refused a nontaxable certificate based upon use of the older version of this form. Copies of the newer form can likewise be obtained by contacting Larry Ciesla's office.

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Protecting The Limited Rights Of Unwed Fathers In Adoption Proceedings

By Doron Weiss, Judicial Law Clerk

In adoption proceedings before Judge Lott involving natural parents who are not married, there have been attempts by attorneys to skip the hearing on Motion to Waive Natural Father's Consent to the Adoption by the filing of affidavits stating that, pursuant to Florida Statutes, section 63.062, the consent of the father is not required for the adoption to proceed. Under Florida law, the consent of the natural father to an adoption is required when:

- the child was conceived or born while the father was married to the mother,
- the child is the father's through adoption,
- a court proceeding has established that the child is the father's,
- the father has filed an acknowledgment of paternity with the Office of Vital Statistics of the Department of Health, or
- the father has provided the child with support in a repetitive, customary manner.

63.062, Fla. Stat. (1997). Thus, in the absence of an affirmative act in compliance with the statute, an unwed father's consent is not required for the adoption of his child to occur. However, the court must be provided with *proof* that the statutory factors requiring an unwed father's consent are not present. This article explains why the Motion for Waiver of Consent should be the subject of a hearing in and of itself and should not be incorporated into the final adoption hearing.

There is a distinction between having evidence that the natural father's consent is unnecessary for an adoption to proceed and submitting the evidence to a court and receiving a judicial ruling on it. Thus, while the court can waive the consent of a father to an adoption, the petitioner(s) seeking to adopt the child cannot unilaterally do so. The petitioner(s) must file a motion stating why the consent of the father should be waived, and the court must rule on that motion. Following the filing of the motion, there should be a hearing in order for the parties to present evidence into the record and have the court make a ruling on the motion based on the evidence presented.

As a starting point, it should be remembered that the effect of a judgment of adoption has serious and permanent repercussions on the rights of the natural parents. Under Florida law, a judgment of adoption abolishes all parental rights and responsibilities of the natural parents. The termination of the relationship between the child and the natural parents is to the extent that following an adoption, the child is considered to be a stranger to the former parents for all purposes. *See* §63.172, Fla. Stat. (1997).

In *Stanley v. Illinois*, 405 U.S. 645 (1972), the Supreme Court held that, as a matter of due process and equal protection, the state of Illinois was barred from taking custody of the child of an unwed father in a dependency proceeding absent a hearing and a particularized finding that the father was an unfit parent. The *Stanley* court stated that the determination of what procedures are required by due process has to begin by examining the precise nature of the government function involved as well as the private interest affected by the government action. *Id.* at 650-51. By noting that the rights to conceive and raise children are essential, and that such rights are more valuable than property rights, the court underscored that the relationship between par-

ent and child is constitutionally protected. *Id.* at 651. The court concluded by declaring that under the Due Process Clause, the advantages of procedural expediency and convenience are insufficient to "justify refusing a father a hearing when the issue at stake is the dismemberment of his family." *Id.* at 658.

Though *Stanley* recognized that birth fathers have a due process right in respect to their children, the extent of that right has remained unclear. *See In Re Adoption of E.A.W.*, 658 So. 2d 961, 972 (Fla. 1995)(Kogan, J., concurring in part and dissenting in part). At a minimum, the law provides an unwed father an opportunity to be heard prior to the adoption. *Id.*

In 1978, the Supreme Court again addressed the issue of an unwed father's rights in regard to his children in *Quillon v. Walcott*, 434 U.S. 246 (1978). In *Quillon*, the court upheld a Georgia statute which required only the mother's consent for the adoption of an illegitimate child unless the father had legitimated the child. *Quillon* dealt with a child who was to be adopted by a stepparent who was already part of the family unit. The natural father was afforded a hearing on his legitimation petition and was allowed to offer evidence on any matter he deemed relevant concerning his individual interest in the child. *Id.* at 250-251, 253. The natural father's legitimation petition was ultimately denied, and the adoption granted, in the best interests of the child. *Id.* at 255. The Georgia Supreme Court's ruling, affirmed by the U.S. Supreme Court, relied on a strong state policy of raising children in a family setting and the belief that requiring unwed fathers to consent to adoptions of their children would impede the state policy. *Id.* at 252.

In Florida, the fathers of illegitimate children have virtually no rights by which to contest the adoption of their children in the absence of an affirmative step described in Florida Statutes, section §63.062. The court in *In Re Adoption of Mullenix*, 359 So. 2d 65 (Fla. 1st DCA 1978), permitted the adoption of a father's illegitimate child over his objections. Since the father was given notice of the adoption proceedings, had the opportunity to be heard and, in fact, was heard at such proceedings, the court felt that there was no violation of his substantive due process rights, procedural due process rights, or equal protection. *Id.* at 69.

It is well established that unwed fathers are afforded very limited protection in contesting the adoption of their children. Nevertheless, because of the permanent and extreme repercussions of an adoption on previously existing or potential familial relationships, a Motion for Waiver of Consent to an Adoption before Judge Lott should be the subject of a hearing in and of itself so that the court can ensure that the natural father's due process rights are not violated. However, if there is proof that the natural father has been served with the adoption petition and has failed to respond, the court will hold a brief hearing on the Motion for Waiver of Consent immediately preceding the final judgment of adoption. In cases where the unwed father has not been personally served, has filed an objection to the adoption, or has indicated to the attorney of record or any other party that he objects to the adoption, a hearing on the Motion for Waiver of Consent should be scheduled separately in order to avoid the potentially unpleasant scenario of a denial of the waiver of consent at a final adoption hearing.

It is well established that unwed fathers are afforded very limited protection in contesting the adoption of their children.

EJCBA Board Of Directors Minutes Of The Annual Planning Retreat

Minutes submitted by Lauren N. Richardson

Members Present: Frank Maloney, John Stokes, Beverly Graper, Mary Adkins, Phyllis Rosier, Jill Greaves, Laura Varela, Brenda Chambliss, Rick Parker, Pan Zettler, Ben Hutson, Jennifer Lester, Paul Donnelly and Scott Krueger.

Others Present: Rick Knellinger and Dan Williams, Executive Director.

The 1999 Annual Planning Retreat for the Board of Directors of the Eighth Judicial Circuit Bar Association, Inc. was held on July 24, 1999. President Frank Maloney called the meeting to order at 9:10AM.

Minutes of the June 2, 1999 Board Meeting were not available.

Scott Krueger presented the Treasurer's Report, and began a discussion of the 1999-2000 budget. Motion was made and seconded to approve this budget. Motion was carried.

Executive Director, Dan Williams, informed the Board that because our existing office space at 20 South Main Street had been rented out, it was now necessary to move the EJCBA office. We had received an offer of office space from Dennis Comfort. Based on a recommendation by both the Executive Director and the President, motion was made and seconded that the Association accept an offer of office space from Dennis Comfort, and that the Association pay Mr. Comfort a monthly stipend of \$75.00 to help offset utility costs related to the move. Motion was carried. This move will be effective Monday, August 4th, 1999.

Presented proposed Policy Procedure related to operation of the Newsletter. Policy included revising advertising rates, which had not been revised for almost three years. Motion was made and seconded to approve the recommended increases in advertising rates. This motion carried. After further discussion, the overall policy was tabled until the September meeting in order to allow Board members to become more familiar with it.

Presented the Florida Bar's Communication Plan. President feels that we already have two representatives in place that can implement this plan within this association: Dan Glassman, Publicity Chairman, and Ray Brady, Professionalism Chairman.

Motion was made and seconded to pay expenses of Executive Director related to the upcoming Bar Leadership Conference in Cocoa Beach. Expenses to be paid included Lodging, Registration (\$75.00), .29/Mile travel, and \$10.00 for the dinner. This

motion carried. After further discussion, an additional motion was made and seconded to allow reimbursement of registration fee for additional Board Members. This motion was amended to allow Board members to bring back documentation of expenses to the September meeting for possible reimbursement. This motion was defeated. A third motion was made and seconded which authorized the payment of Registration fee and expenses up to \$100 for any Board Member who wants to attend the conference. This Motion carried.

Membership fee was discussed. It was proposed that the Board needed to take a realistic view that a large portion of the current operating budget goes to subsidize projects, which were originally designed to be cost-neutral. Most notably the Directory. After a discussion of various options, motion was made and seconded to increase annual membership fees to \$60/year. Discussion centered around the fact that the additional \$10.00 would basically cover expenses of the Directory and Newsletter (depending upon advertising income), leaving the former \$50.00 to cover other traditional Bar Association projects. Motion Carried. Increase is effective immediately, and will be reflected on Dues Card for the 1999-2000 year.

Meeting recessed for approximately 20 minutes

After the Recess, Jennifer Lester discussed the need for both Board Representatives and Area Chairpersons for major areas of EJCBA operation.

These include, but are not limited to: Website, Long Range Planning, Luncheon/Speakers, Publicity, UF Relations, Tech Fair, Law Week, CLE, Pro Bono, Judicial Poll, Cedar Key, Newsletter, Judicial Relations, Professionalism, Law Clerks, Socials, Directory, Bar Survey and Membership. A Board Representative represents each of these areas, but not every area has a chairperson.

After a Lunch Recess, Meeting resumed. Afternoon session was spent discussing Association goals for the coming year, and a general brainstorming session having to do with possible projects for the coming year. Finally, the planning calendar was discussed. Luncheons during the 1999-2000 year will be held at the Sovereign Restaurant, and will be the second Friday of each month at 11:45 AM. Board Meetings will remain scheduled for the first Tuesday of each month, except for November and January meetings, which will be deferred to the second Tuesday (November 9 and January 11 respectively).

There being no further business, the meeting was adjourned.



EJCBA Board Members hard at work during the July Annual Planning Retreat.

Musings

by Samuel Hankin

Once again, I assure the reader that my opinions are mine and mine alone and would probably only reflect the opinions of some other similarly situated left-wing, liberal, effete, intellectual snob.

See *Sixth Sense*. Vote for Warren Beatty. Put Linda Tripp and Ken Starr in jail. The idea of Kansas determining that evolution will not be the curriculum of choice is perhaps the most blindly stupid decision this century.

Who in their right mind would want the electric chair to stay in Florida? I think we should upholster it in the confederate flag, as long as we're keeping it.

As to the new Alachua County Courthouse, what's the idea? Just leave a trail of hideous buildings behind us as we move towards the millennium? First, the county administration building replaces a beautiful old courthouse of the last century. The county administration building is macabre. Then the new courthouse, also one of the grimmest buildings on record, and now, we leave those two behind and build some new federal architecture we don't need in the first place. Send a TV crew down to film the courthouse on slow speed video. Find out how much it's utilized on a daily basis and then figure out whether we really need a new courthouse or a new monument.

Young Lawyer's Division

by Craig Crawford

It's Time To Volunteer . . . Attorneys from the Young Lawyer's Division, in coordination with Alachua Habitat for Humanity, have volunteered to build a house on Saturday morning/afternoon, October 23, 1999 from 8:00 - 2:30. (No Gator football game will be missed - Spurrier and Company have that Saturday off).

The Young Lawyer's Division cordially invites (or pleads for) attorneys with the Eighth Judicial Circuit Bar Association to participate in this worthy cause. If interested in making a donation, send checks payable to Alachua Habitat for Humanity to Laura Varela, YLD Treasurer, P.O. Box 90028, Gainesville, Florida 32607. She will collect all donations and forward them to Habitat for Humanity around October 23.

If you are interested in volunteering to build, please contact Craig Crawford at (352) 373-5823 by October 8. We look forward to seeing many attorneys shed their court apparel for blue jeans and tee shirts. No expertise or skill in building homes is required. Come join us on October 23rd.

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Breaking Ground in High Office

Reprinted from *The Baker County Press*, June 24, 1999

For the first time since the Eighth Judicial Circuit Bar Association was founded in 1941, a Baker County resident has assumed the post as president.

Frank E. Maloney, a Gainesville native who has been practicing law in the area since moving to Macclenny 18 years ago, was sworn in for a year term the evening of June 17th at its annual banquet-meeting. He has been a member of the organization's board for 15 years.

Mr. Maloney has an undergraduate degree from Georgetown University and a law degree from Florida State. His late father, Frank, was dean of the UF law school for years.

Guest speaker at the Sovereign Restaurant that evening was Florida Attorney General Bob Butterworth, an acquaintance of the incoming president when they both practiced law in Broward County. The bar has more than 400 practicing attorneys as members over the six county circuit.

Mr. Maloney is vice-chairman of the Quality of Life Committee and the Agricultural Law Committee of the Florida Bar. He has practiced 27 years and lived in South Florida before moving here to take over the practice of the late Charles Furr. He and wife, Barbara, are the parents of four.

Phyllis Rosier of Starke, who maintains a private law practice in Macclenny, is on the bar's director board.

EJCBA Luncheons

by Jennifer Lester

Welcome to a new year of exciting luncheon speakers and fine cuisine. Please join us on the second Friday of every month to sit down with fellow Bar members, the Judiciary and guests at the Sovereign in downtown Gainesville. We are going to try some new things at lunch this year, including sponsored programs, controversial speech topics and some fun events.

This month, Ken and Linda McGurn led a discussion on the current state of downtown development in Gainesville. What's new with Union Station? Should Hooters come to downtown Gainesville? What role should the City Commission play in determining what businesses come to town? We hope you don't miss it.

Mark your calendar for lunches every second Friday, September through May. Next month's luncheon is on October 8, 1999 at 11:45 a.m. We'll see you there!

Governor's Report

by Robert Rush

As all of you know who attended the end of the year banquet for the local Bar, I have replaced Jimmy Feiber as the Board of Governors' representative. This is the first of my monthly reports on the latest activities of The Florida Bar and report on the meetings of the Board of Governors.

In preparation for the first meeting of the Board of Governors, I was required to travel to Tallahassee where they put us through a two-day orientation. This included a tour of The Florida Bar building as well as the Supreme Court. Each new member of the Board of Governors was given an orientation book which included an outline of our responsibilities, a calendar for the meetings for the new year, and a stack of papers about eight inches thick that represented the materials we needed to read for the first upcoming meeting.

I attended my first meeting on August 18-21, 1999. They assigned me, as they do many new members, to the Rules Committee and Disciplinary Review Committee. The Rules Committee acts as an editorial board for any new rules that are proposed. The Disciplinary Review Committee reviews appeals from a decision of a referee or a local disciplinary committee when there is a dispute between the recommendations of the trial judge, who sat as the referee, the Bar counsel, or the litigant.

The general meeting of the Board of Governors took place in a large room where fifty members sat at a huge circular table. The new Bar President, Edith Osman, outlined her agenda for the new year. Edith is undertaking the formulation of a public relations campaign to counter the false and misleading information about lawyers that the public is bombarded with from the popular media. The Board previewed several television ads that are works in progress as well as a media package that was given to each of us to share with the local bar committees. The goal is that we, as lawyers, need to explain to the public all of the good works that we do and how essential the legal profession is to the maintenance of a civilized society.

The major issue that is going to be facing lawyers, not only in Florida but throughout the country, is the issue of multi-disciplinary practices. It was reported that large accounting firms would like to buy up law firms and be able to share in legal fees. The great fear is that this will cause lawyers to lose their independence and be obligated to someone other than their client. Rule 4-5.4(d) states: "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal service for another to direct or regulate the lawyer's professional judgment in rendering such legal services." This is already occurring to a certain extent with insurance companies and how they direct lawyers handling insurance defense claims.

If any of the members have any thoughts or ideas regarding the public relations campaign that we are formulating, or the issue of multi-disciplinary practices, I would very much like to hear from you. I am going to try to get to each Bar luncheon early so that if anyone has anything in particular that they would like to discuss, they can do so in a convenient forum. Alternatively, all of you are welcome to call me at any time to share any ideas as to how The Florida Bar can help make our lives as attorneys better.

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Calendar of Events

October, 1999

Tues., Oct. 5th

Monthly EJCBA Board Meeting
5:30 PM Lake Butler

Wed., Oct. 6th

FAWL Monthly Meeting
4:00 PM Grand Jury Room, Courthouse
(Tentative Agenda: Discussion of newly passed legislation relative to Child Support)

Friday, Oct. 8th

Monthly Luncheon
11:30 AM Sovereign Restaurant
Speaker: Hon. Larry G. Turner, Circuit Judge, 8th Circuit

Bargain Basement Clear Out

Now that Sam Hankin has taken over as Editor, I'd like to clear out my file drawers, as well as the virtual file drawers on my computer. I have extra copies of most issues of the newsletter, plus I have beaucoup photos that were taken during the year, plus old articles saved on my computer for about the last 8 or 10 issues. If you want any of this, please contact me by the end of September. Otherwise, I'll be selling it all on Ebay.com! Cynthia Swanson, 375-5602, SwansonC@earthlink.net.

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Family Law Section

by Cynthia Stump Swanson

Meetings of the local Family Law Section are on the first Wednesdays of each month at 4:00 p.m. in the Grand Jury Room of the Alachua County Courthouse. The first meeting of this Bar year was September 1, 1999, with Jill Greaves presiding as this year's chair of the section.

At this meeting, the guest speaker was Curt Green, CPA. He talked with us about the valuation of businesses related to the equitable distributions required in divorces, and specifically about the valuation of goodwill.

The seminal case in this area is Thompson v. Thompson, 576 So.2d 267 (Fla. 1991), in which the Florida Supreme Court held that for goodwill to be a marital asset, it must exist separate and apart from the continued presence or reputation of the spouse in the business. The Court reasoned that if the goodwill depends upon the presence of the individual, then absent that individual's presence, there is no business goodwill. Thus was born in Florida law the concept of professional goodwill (that goodwill which is completely dependent upon and connected with the individual) as separate from business goodwill, which the business would possess on an ongoing basis even when the individual is no longer connected with the business.

As an example, Mr. Green distinguished a dentist and a lawyer, both of whom are sole practitioners. He pointed that most people only use a lawyer once or twice in a lifetime, and so a lawyer's business is dependent upon her having a very large client base developed by referrals, advertising, etc. She must build her personal reputation in order to build her business.

A dentist, on the other hand, sees his patients a couple times a year, year in and year out. Most people keep going to the same dentist because they get a little postcard in the mail reminding them it's time for another check up. They go back to the same dentist's office, even if it has actually been sold to a different dentist. Many dentists offices have generic names, like "Dr. Smileyface" and it doesn't really matter to most of that office's patients who the actual dentist is. Thus, the dental practice can be said to have business goodwill, where the lawyer's practice probably does not have much business goodwill, but does have professional goodwill.

You can also compare a physician in a general family practice with nine other doctors who have a lot of HMO patients. Doctors may come and go, and the practice stays in business, because the HMO's keep paying that \$10 per month per patient regardless of whether the patients ever come in for treatment. The patients keep going because the practice stays on their approved list. This practice has some business goodwill because the practice will continue to exist even if one particular doctor leaves.

On the other hand, a very specialized neurosurgeon, for example, makes her practice from referrals one at a time, based upon her reputation in the medical community. That neurosurgeon's practice probably has very little business goodwill, but lots of professional goodwill.

The Court in Thompson held that business goodwill is a marital asset, but that professional goodwill is a nonmarital asset and thus, not subject to equitable distribution.

Mr. Green also cited Young v. Young, 600 So.2d. 1140, in which the 5th DCA said that determining the value of the goodwill of a sole professional practitioner absent consideration of his reputation is like trying to hear the sound of one hand clapping.

Two other cases are of concern to business valuers: Walton

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v. Walton, (Fla. 4th DCA 1993) and Weinstock v. Weinstock, (Fla. 5th DCA 1992). Walton involved a CPA practice and Weinstock involved a dental practice. In both cases, the valuers testified that there was some professional and some business goodwill, and they testified about the separate values. In both cases, however, the appellate courts determined that there was no business goodwill separate and apart from the professional goodwill because all comparable sales used by appraisers required either that the selling professional remain with the business for some time or sign a non-compete agreement. The appellate courts reasoned that this lent factual support to the proposition that to the buyers of those comparable businesses, the professional's presence was necessary and important to the value the buyer was willing to pay.

Mr. Green also showed at the meeting important things to consider when reading a company's income statement, and comparing businesses whose "bottom lines" looked the same. In one example, the business was paying market value for the rent of its premises, and salaries for its owner comparable to what the owner could earn in a similar position in a similar business. In the other example; however, the premises were owned separately by the owner and the business wasn't paying any rent, and the owner wasn't getting a salary. Thus, even though both businesses' net income was the same, the first business was really in a far superior position, and would be worth more.

FAMILY LAW ONLINE

I hope those of you with Internet access are aware of the "electronic digest of information related to Family Law compiled semi-monthly by the Editors from the Family Law Section of the Florida Bar and distributed free of charge to any subscribing section members and other guests." This is essentially an e-mail newsletter from the Florida Bar's Family Law Section, called FAMSEG. It includes articles by lawyers and others, e-mails to the editors, appellate issues and legislative updates, a calendar of the section's events, general news blurbs of interest to family lawyers, as well as movie reviews and jokes. No recipes, so far!

To sign up to receive this free service, send an e-mail to: jchpa@gte.net. Joe Hood, an attorney in Tampa, has taken over as Editor of FAMSEG in its second year. Norman Levin, from Orlando, was very instrumental in getting this set up last year and he served as its first editor.

Another big benefit to being on this list is "Tom Sasser's Family Law Case of the Week," in which he sends out blurbs about important and interesting family cases which are hot off the presses. Talk about being spoon fed!

NEXT MEETING

The section's next meeting is Wednesday, October 6, 1999 at 4:00 p.m. in the Grand Jury Room of the Alachua County Courthouse.

Eighth Judicial Circuit Bar Association, Inc.

FY 98-99 Treasurer's Report

	<u>97/98</u> <u>ACTUAL</u>	<u>98/99</u> <u>BUDGET</u>	<u>JULY-JUNE</u> <u>ACTUAL</u>	<u>Y-T-D</u> <u>TOTAL</u>	<u>UNDER(OVER)</u> <u>BUDGET</u>	<u>PRIORMONTH</u> <u>Y-T-D</u>
CURRENT REVENUES	51,956.32	58,850.00	44,863.28	44,863.28	13,986.72	34,611.29
CURRENT YEAR EXPENDITURES	<u>52,892.09</u>	<u>58,730.36</u>	<u>49,619.09</u>	<u>48,338.73</u>	<u>10,391.63</u>	<u>34,361.36</u>
NET REVENUES OVER EXPENDITURES	(935.77)	119.64	(4,755.81)	(3,475.45)	3,595.09	249.93

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BEGINNING BALANCE @ 7/1/98	2,047.43	13,843.16	15,890.59
MONEY MARKET/CHECKING TRANSFERS	5,000.00	(5,000.00)	0.00
NET REVENUES OVER EXPENDITURES	(3,475.45)		(3,475.45)
MONEY MARKET INTEREST INCL IN NET REVENUES	(251.77)	251.77	0.00
ACCRUED EXPENSES & ADJUSTMENTS	<u>1,395.45</u>		<u>1,395.45</u>
ENDING BALANCE @ 6/30/99	4,715.66	9,094.93	13,810

The Mozart Effect

continued from page 3

I'm the first to agree that if you sit in a quiet room with no distractions and listen to Mozart or Sibelius or Kitaro or Phillip Glass, your mind may be quieted. You may, in fact, achieve a certain harmony and focus, and because your mind set is now different than it was a few minutes before, you may be able to perform a spacial temporal problem in less time and with more efficiency. Dr. Rauscher however, took that "feeling" that we all have about music and performance and pretended to prove that her hypothesis was correct. She did it with bad research, bad science, and a bad experiment. One excellent by-product of this, of course, is that thousands, if not millions, of parents have bought Mozart CDs and played them to their children or to themselves, recognizing, perhaps for the first time in their lives, that this music is uplifting, spiritual, complex and beautiful.

Good science and good research (upon which good science is based) is all-important to our society and the results from such research allow us to travel to the moon, and understand a little more about our universe. As our society continues to spiral inward in a continuing devaluing of true knowledge, whether in terms of doctoral studies, federal grants, *Nature* magazine or National Public Radio, there's an increasing loss of context; maybe "realness" is a better way to put it. The "Mozart effect" EFFECT is just another manifestation of an increasingly recursive and, in a sense, corrupt search for substance.

Listen to Mozart, but not for the effect of the "effect." Listen to Mozart. The effect is inherent in the experience. ■

Probate Section Report

continued from page 4

A comprehensive and lengthy bill was passed by the 1999 Legislature which totally re-vamps the old elective share law. In essence, the new law provides for a surviving spouse to receive an amount equal to 30% of the decedent's "elective estate." This term is defined to include all assets in which the decedent owned an interest, including assets held in trust, the cash surrender value of life insurance immediately prior to death, all retirement accounts and pension plans, transfers made within one year of the date of death, pay on death accounts, in trust for accounts, and assets held as joint tenants with right of survivorship or in tenancy by the entirety. This bill is extremely complicated and members of the probate section do not have a firm grasp on all of the implications of the new law for estate planning purposes. One of the interesting problems is that the bill provides that a waiver of a spouse's rights under the new law, executed prior to October 1, 1999, will be valid. It is not clear if the provisions of the bill can be waived by virtue of a document signed after October 1, 1999. The bill provides that it applies to decedents dying after October 1, 2001. The members of the probate section are continuing to study this bill and additional reports will undoubtedly be forthcoming in this column.

Finally, Jean Sperbeck pointed out that based upon the most recent numbers released by the Supreme Court of Florida, "We're number one." That is, we have the largest percentage (79%) of probate cases being closed within the time frames provided in the Probate Code of any county in the state.



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Federal Bar Association Hosts a “View from the Bench” Seminar

On November 17, 1999, the Chapter will sponsor a CLE seminar entitled “A View from the Bench.” The event will start at 1:00 p.m. at the Sovereign Restaurant, 12 SE Second Avenue. The Chapter has applied for up to 4 hours of CLE credit for the seminar, including one hour of ethics/professionalism credit.

Speakers will address recent amendments to the Federal Rules of Appellate Procedure and the Local Rules of the United States District Court for the Northern District of Florida. Sharon Bruley, the Resident Deputy Clerk for the Northern District of Florida, Gainesville Division, will present some of the “do’s and don’ts” of federal practice from the Clerk’s perspective. Following these speakers, a panel consisting of Senior Judge Maurice M. Paul, District Judge Stephan P. Mickle, and Magistrate Judge Gary R. Jones (the Federal Judges sitting in Gainesville) will present a “View from the Bench” that will allow questions and answers between judges and lawyers.

This program will be very informative. Registration fees are minimal to encourage both chapter member and non-member participation. You can register with the form below or contact Chapter Treasurer Sharon Sperling at 375-5602.

If you have not joined the Gainesville Area Chapter, applications and information will be available at the November 17 seminar, or join before October 1, when membership in the national organization will increase from the current fee schedule. This fast-growing organization (to date approximately 75 judges, lawyers and law students have joined) currently represents Alachua, Dixie, Gilchrist, Lafayette, Levy, and Marion Counties in the national Federal Bar Association. Please note that those who practice primarily in state court, as well as state judges, are welcome to join and participate in the social as well as educational goals of the Chapter. Contact the Chapter’s membership chair, Elizabeth Waratuke, at 334-5011 for further information about applications and membership services.

<p><i>Cut out and send to:</i> Gainesville FBA CLE Committee P.O. Box 2361 Gainesville FL 32602-2361</p>	<p><i>Register me for the VIEW FROM THE FEDERAL BENCH seminar, Wednesday, November 17, 1999</i></p>
<p>Name(s) _____ _____ _____</p> <p>Firm: _____ Address: _____ _____ _____</p> <p>Phone: _____ _____</p>	<p>_____ GFBA member: \$25.00 _____ GFBA law student member: free _____ YLD member: \$25.00 _____ Non-member attorney: \$45.00 _____ Non-member law student \$10.00</p>
<p>Please include registration fee as indicated, payable to “Gainesville Area Chapter, FBA”. It is anticipated this course will qualify for 4.0 CLE hours, including 1 hour of Ethics & Professionalism. Non-members, join the Federal Bar Association now (before dues increase Oct. 1st) and register for this seminar as a member! Include \$86 (\$44 if 5 years or fewer in practice; \$11 law students) payable to Federal Bar Association.</p>	

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