FORUM 8

Volume 67, No. 4 | Eighth Judicial Circuit Bar Association, Inc. | December 2007

President's Letter

by John Whitaker

The statute says WHAT????? This one surprised me when I first read it, but then I realized it is just more of the same from the legislature -- write it, pass it, and worry about what it means or how to fund it later. The legislators' thought process is obvious, as the law is called the "Keeping Children Safe Act." So how can it be wrong? You can tell what my opinion is, but I'll let you decide. Look up FS §39.0139; it is under the general provisions of proceedings relating to children. This statute is just one of many recently enacted in the wake of Jessica Lunsford's tragic murder.

Here is my interpretation based on several readings of the statute and a recent local court ruling interpreting the same. If you are the subject of a call to the abuse hotline alleging sexual abuse of ANY child (not just yours), a rebuttable presumption of detriment to a child is created. Thereafter, you may not visit with a child (including your own) until after a hearing. If at that hearing you prove by clear and convincing evidence that the safety, well-being, and physical, mental, and emotional health of the child is not endangered by such visitation, the court may allow ONLY supervised visitation with a specialized person or at an approved visitation center. This is a very brief summary; I invite you to read 39.0139 in its entirety.

My biggest problem with this statute is that an accusation is all that is needed to require the suspension of a parent's visitation with their children. A person loses their right to be a parent to their child immediately upon a phone call and an accusation, whether there is a basis in fact or not. More chilling is that it becomes

Continued on page 3

Holiday Project(s)

Please join us for two very important (and fun) events at Duval Elementary School in December:

First, EJCBA, with a little help from several Gator football players, will be handing out books to 4th and 5th graders at Duval Elementary School on Monday, December 10, 2007 at 12:30 p.m. in the cafeteria. Duval is located at 2106 NE 8th Avenue.

Second, Santa will be on hand to distribute gift bags to every kindergartner through 3rd grader at Duval on Wednesday, December 12 beginning at 8:00 a.m. in the school cafeteria. The excitement of the children is CONTAGIOUS – come experience the true joy of the season.

PLEASE MAKE SURE YOUR GIFT BAG AND/OR YOUR MONETARY DONATION IS DELIVERED TO THE ATTENTION OF MANAGING ELF MARGARET STACK AT THE STATE ATTORNEY'S OFFICE ON UNIVERSITY AVENUE BY DECEMBER 7, 2007!!!!!

Happy Hanukuh…Merry Christmas… Happy Kwanzaa…Happy Hanukuh…Merry Christmas…Happy Kwanzaa…Happy Hanukuh…Merry Christmas… Happy Kwanzaa…

Have A Joyous And Safe Holiday Season!

The officers of the Eighth Judicial Circuit Bar Association for the year 2007-2008 are:

John D. Whitaker
President
224 SW 2 Ave
Gainesville, FL 32601
352 375-6229
352 375-6652 (fax)
jdw@kinsellandassociates.com

Rebecca O'Neill
President-Elect Designate
720 SW 2 Ave., Ste 360A
Gainesville, FL 32601
(352) 733-0030
(352) 733-0052 (fax)
oneilr@shands.ufl.edu

Denise Ferrero
Past President
2312 NW 14th Place
Gainesville, FL 32605
352 372-9999
352 375-2526 (fax)
drferrero@yahoo.com

Sharon Sperling
Treasurer
2830 NW 41 St., Ste. C
Gainesville, FL 32606-6667
352 371-3117
352 377-6324 (fax)
Sharon@sharonsperling.com

Margaret Stack
President-Elect
PO Box 1437
Gainesville, FL 32601
352 374-3670
352 491-4488 (fax)
stackm@sao8.org

Leslie Haswell
Secretary
2233 NW 41st Street, Suite 700-A
Gainesville, FL 32605
(352) 373-3800
(352) 373-8991 (fax)
leshaswell@aol.com

MEMBERS AT LARGE:

Nancy Baldwin
309 NE 1st St
Gainesville, FL 32601
(352) 376-7034
(352) 372-3464 (fax)
baldwinnt@cox.net

Lua J. Mellman
120 W University Ave
Gainesville, FL 32601
(352) 374-3670
(352) 491-4553 (fax)
mellmanl@sao8.org

Ray Brady
1216 NW 8th Ave.
Gainesville, FL 32601
352 378-6118
352 378-8530 (fax)
rfbrady@bellsouth.net

Sheree Lancaster
PO Box 1000
Trenton, FL 32693
(352) 463-1000
(352) 463-2939 (fax)
shlpa@bellsouth.net

Pamela Brockway
P O Box 1437
Gainesville, FL 32601
(352) 374-3670
(352) 491-4488 (fax)
brockwayp@sao8.org

Frank Maloney – Historian
445 E Macclenny Ave Ste 1
Macclenny, FL 32063-2217
(904) 259-3155
(904) 259-9729 (fax)
Frank@FrankMaloney.us

Virginia Clapp
4041 NW 37th Place, Ste B
Gainesville, FL 32606
(352) 374-4120 Ext 331
(352) 378-9326 (fax)
clapp@scruggs-carmichael.com

Howard Rosenblatt
2830 NW 41 St Ste H
Gainesville, FL 32606
(352) 373-7100
(352) 376-3760 (fax)
hmr.law@gmail.com

Elizabeth Collins
PO Box 850
Gainesville, FL 32602-0850
(352) 372-4381
(352) 376-7415 (fax)
ecollins@dellgraham.com

Dawn Vallejos-Nichols – Editor
2814 SW 13 St
Gainesville, FL 32608
(352) 372-9999
(352) 375-2526 (fax)
dvallejos-nichols@avera.com

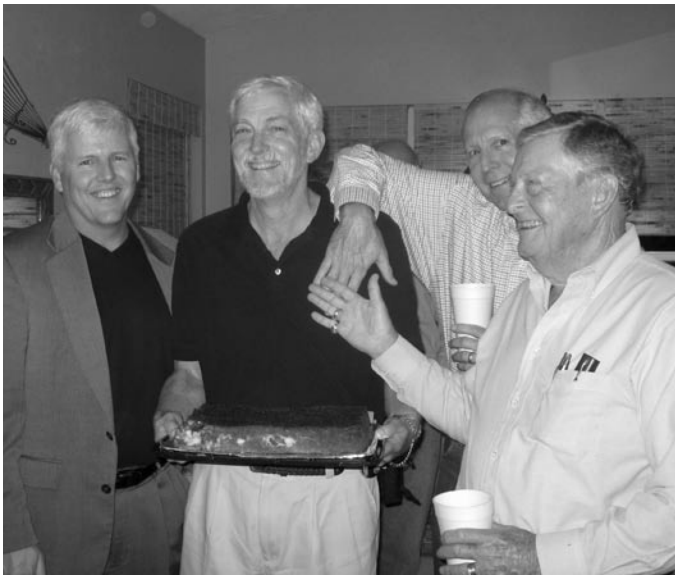
Kathleen Fox
PO Box 1930
Alachua, FL 32616-1930
(386) 462-5157
(352) 538-2172 cell phone
(386) 462-1996 (fax)
kathleen@kcfoxlawoffice.com

Adam S. Vorhis
20 W University Ave Ste 202
Gainesville, FL 32601-3323
(352) 337-8373
(352) 505-6188 (fax)
adamvorhis@hotmail.com

Craig F. Hall
PO Box 2188
Gainesville, FL 32602-2188
(352) 375-2290
(352) 373-5865 (fax)
hallnhall@aol.com

Karen S. Yochim
2815 NW 13 St Ste 305
Gainesville, FL 32609
352 373-3334
352 376-1214 (fax)
karenrmk@bellsouth.net

AuBroncee Martin
P. O. Box 2820
Gainesville, FL 32602
(352) 338-7369
(352) 955-2400 (fax)
martina@pdo8.org



Judge Davis, Hearing Officer Baxter, Judge Monaco and Judge Pierce caught trying to make off with a cake at the Dessert Reception at Cedar Key!

About This Newsletter

This newsletter is published monthly, except in July and August, by:

Eighth Judicial Circuit Bar Association, Inc.
P.O. Box 127
Gainesville, FL 32602-0127
Phone: 380-0333 Fax: 380-9112

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** or **Executive Director** by Email, or on a CD or CD-R labeled with your name. Also, please send or email a photograph with your name written on the back. Diskettes and photographs will be returned. Files should be saved in any version of MS Word, WordPerfect, or ASCII text.

Judy Padgett
Executive Director
PO Box 127
Gainesville, FL 32602
352 380-0333
866-436-5944 (fax)
execdir@8jcba.org

Dawn Vallejos-Nichols
Editor
2814 SW 13 St
Gainesville, FL 32608
(352) 372-9999
(352) 375-2526 (fax)
dvallejos-nichols@avera.com

Deadline is the 5th of the preceding month.

President's Letter *Continued from page 1*

the parent's burden to prove they are not a detriment to their child based solely on an accusation. There is no requirement of finding of probable cause; only that you are the subject of a phone call. The only thing in the statute about evidentiary standards comes into effect at the hearing to see if you will get supervised visitation. The statute allows the admission of any relevant evidence at that hearing even if it may NOT be competent in an adjudicatory hearing. I understand that an accusation is usually brought before the court when the Department of Children and Families feels they have probable cause to shelter a child, or file a petition for dependency, but this statute doesn't say that. If the statutes had the same restrictions on visitation after a finding of probable cause to shelter a child in a sexual abuse case, I would probably not be writing this. But it doesn't, it just says "subject of a report to the child abuse hotline alleging sexual abuse of any child".

This statute potentially takes your children from you by not allowing you to visit, and affords a person no due process to stop the State. I am all for protecting our children, but an accusation should not eliminate a parent's Federal and State constitutional right to due process and cause them to lose the right to visit their children without any proof of wrongdoing.

FBA Presents "A Day in the Life" at Levin College of Law

On October 31, Levin College of Law Dean Linda Calvert Hanson invited Federal Bar Association members Liz Waratuke, Gary Edinger, and Jim Sullivan to speak as part of the college's "A Day in the Life" speaker series. While enjoying a pizza lunch with the students, the Federal Bar Association members described their experiences practicing law, as well as their involvement with the Gainesville Chapter of the Federal Bar Association. Each member offered advice on how to establish a federal practice and highlighted the benefits of joining the Federal Bar Association. Over 30 students attended the event and many showed an interest in learning more about the Federal Bar Association.

The Gainesville chapter of FBA is currently working to establish a student division at Levin. This meeting was a successful first step towards achieving that goal.

Professionalism Seminar:

Inexpensive (CHEAP) CLE Credits

by Ray Brady

MARK YOUR CALENDARS NOW FOR THE ANNUAL PROFESIONALISM SEMINAR. THIS YEAR THE SEMINAR WILL BE HELD ON FRIDAY, MARCH 28, 2008, FROM 8:30 A.M. UNTIL NOON, AT THE UF LEVIN COLLEGE OF LAW.

The keynote speaker is Edward M. Waller, Jr., Esq., speaking on the topic of "The Legacy of Atticus Finch: Higher Standards for New and Experienced Lawyers Alike." Mr. Waller is a partner in Fowler White Boggs Banker, P.A., practicing in their Tampa Litigation Department. Mr. Waller frequently publishes and speaks on the topic of professionalism and ethics in the practice of law, and he is actively involved with the committees of various bar associations dedicated to this subject.

We expect to be approved, once again, for 3.5 General CLE hours, which includes 2.0 ethics hours and 1.5 professionalism hours.

Watch the newsletter for further information and look in your mail for an EJCBA reservation card in early March. Questions may be directed to the EJCBA Professionalism Committee chairman, Ray Brady, Esq., at 378-6118.

TED C. CURTIS, ESQ.

is pleased to announce his certification as a

family law mediator

719 Northeast First Street
Gainesville, Florida 32601
Telephone (352) 378-1405
Fax (352) 335-4214
E-mail AT392@aol.com
www.TedCurtisLaw.com

Extinction or Evolution? The Choice is Yours

by Frank Williams

Advances in computer and information technology are presenting our society with challenges we ignore at our own peril. These challenges extend to everyone, and the legal community has an inherent responsibility to face them head-on. As legal professionals, we cannot afford to live in the past. We cannot afford to be "technology dinosaurs."

Let me put it this way - the Internet has impacted our world much like a gigantic meteorite did some 65 million years ago, wiping out the dinosaurs and replacing them with an entirely new evolutionary scheme. "Technology dinosaurs" simply *will not survive* the Age of Information Technology.

Some of the greatest challenges we face are in criminal law. The Internet is a vast new frontier, and like the frontier of our American experience, this new frontier is prone to lawlessness. If the frontier analogy seems far-fetched, consider Second Life. Second Life is a 3-D virtual world entirely created by its users. Since opening to the public in 2003, it has grown explosively and today is inhabited by millions of users from around the globe.

The boundaries of the lawless Internet frontier continue to expand. Whether it's on MySpace, Facebook, "Second Life" or other Web flavors of the moment, criminals and victims -- especially young ones -- are leaving clues in plain sight on-line, even for off-line crimes. Things people once wrote in private diaries now cascade through Web sites that stimulate free expression -- and are open to anyone who comes looking. Law enforcement is finding advantage in the brazen conduct of frontier marauders. In one recent example, a detective in New Jersey tracked the alleged killers of three college students by mining MySpace pages maintained by the suspects and their friends. In another, pictures and prose posted on-line by the killer of Taylor Behl, a 17-year-old Virginia college freshman, connected him to the victim and ended up revealing where her body was stashed. And in an Indiana case, a young man wrote on his MySpace page: "I just killed two cops." (One officer survived the shooting.)

Perhaps the most visible evidence of the increasing interrelationship of crime and technology is the proliferation of technology-facilitated sex crimes against children. The threat of sexual predators soliciting children for physical sexual contact is well-known and serious; the danger of the production, distribution, and possession of child pornography is equally dramatic and disturbing.

Ignoring dramatic environmental change didn't work out well for the dinosaurs. As legal professionals and individual Americans, we cannot ignore the change taking place around us. As advocates, we must be prepared for the novel legal issues being presented. As individual Americans and attorneys, we need to recognize we are uniquely qualified both to educate the public and to establish new standards of justice in an ever expanding Internet frontier.

Clerk's Corner

by Buddy Irby, Clerk of the Circuit Court

Thank you EJCBA for your invitation and hospitality at the Justice Jimmy Adkins Annual Cedar Key Celebration. I very much enjoyed the event and the opportunity to visit with so many members of the Bar. However, what made it extra special was that I was able to attend with my son Jess Irby. Jess is a young Assistant State Attorney working in the Juvenile Division of the SA office. He's been on Bill Cervone's staff now for about a year and a half and I am pleased that he is becoming active in the EJCBA.

Also, I have been working on a state committee to which I was appointed regarding eRecording. The committee has been charged with advising the Secretary of State's office in the development of eRecording rules. While eRecording may not be of much interest to many of the local Bar, our office also continues to study eFiling too. I'll write more about eFiling within the next few months.

Lastly, the availability of online information continues to improve. Anyone interested in becoming a subscriber and being able to access document images in their Alachua County cases and other docket information via the internet should contact Edward Stiles, Assistant Clerk at (352) 491-4406.

Family Law Section

by Cynthia Stump Swanson

The Family Law Section met on October 31, 2007 for an interesting discussion about working with clients who may be suffering from a mental illness or certain personality disorders. You know what the saying is: "Criminal defense attorneys work with bad people trying to look their best; family lawyers work with good people acting their worst." As family lawyers, we have all had clients who seemed anxious, depressed, paranoid, uncooperative, unable to comprehend procedures, and even belligerent, loud, obnoxious, and rude. We have also had clients who are always asking for special treatment, or dropping by unannounced and expecting to be able to immediately talk to us or our paralegals, and who take up an inordinate amount of our time. Sometimes these are also the clients who don't seem to be able to manage to pay their bills. But we'll save that particular topic for another meeting.

Would it be helpful to us to be able to distinguish whether the traits a troubled client is exhibiting mean the client is suffering from a mental illness or from a personality disorder? To help us answer that question, we heard from Dr. Gerald Kish from the North Florida Evaluation and Treatment Center and from Leah Vail from Meridian. They pointed out that one of the significant differences between a mental illness and a personality disorder is that the former is often treatable and symptoms can be ameliorated and even eliminated. However, a personality disorder is not easily treatable, and is not going to "get better." Usually, though, those "good people acting their worst" are often people who have neither a mental illness nor a personality disorder, but are just regular people in a crisis.

People suffer a crisis when their stressors outweigh the assets (and I don't just mean financial assets) they have available to cope with stress. A person's assets in this context can mean money, but it can also mean their personality traits, existence of supportive family and friends, access to professional help, and so on. And, as we all know, stress comes at us from lots of different places. Probably for most family lawyers, their clients are their single greatest source of stress! But generally speaking, the greatest stressors are the death of a spouse, a divorce, a marital separation, a jail term, death of another family member and so on. Interestingly, even in this day of apparently rampant divorce, it still ranks higher on the Holmes & Rahe "Social Readjustment Scale," (that is a list of things causing stress) than does serving a jail term, the death of a family member (other than a spouse), personal injury or illness, or being fired at work.

Our speakers also pointed out that the three dimensions of a life change are important in determining how much stress they cause: (1) The degree of change evoked; (2) The undesirability of the change; and (3) The aspect of one's life that is affected (e.g., personal, occupational, etc.). It is often the degree of change that a situation engenders that is the most important. Thus, even when a client has made a considered decision that a divorce is the best thing and really wants it, it can still be a huge degree of change, and thus it still engenders lots of stress.

Dr. Kish reminded us that clients don't come to see us because something good happened. And, that, no matter how well educated a client may be, and especially if he or she is not well educated, clients don't understand the legal system; don't understand legal jargon; are often intimidated; and don't want to appear foolish. So, the mere fact that they're coming into our offices is probably adding some stress to the already difficult situation they may find themselves in. If we don't do our best to put our clients at ease, to speak clearly, to provide plenty of information, to be careful and considerate, then we won't be lessening their stress, we'll be adding to it.

While everybody is vulnerable to a crisis, persons who are mentally ill or poor are more vulnerable. Those persons have fewer mental, emotional and financial assets available to help them cope with stress.

While the precipitating event may be different for everyone in a crisis, people in crisis respond in similar ways. Their cognitive thought processes might be affected, and they often find it hard to think, hard to concentrate, and their short term memory may be impaired. I think this may be why we often have to answer the exact same question or hear the exact same story 15 times. Also, as a client's world seems to fall apart, they often try desperately to cling to it, but lose the ability to discriminate as to what's really important, and either nothing or everything becomes hugely important. Clients may find themselves unable to remember names, social security numbers, bank account numbers, or their children's pediatrician's name. They may feel they are losing their minds. This is not a signal of a mental illness,

Continued on page 6

 Continued from page 5

but of crisis. And a crisis can be gotten through!

Clients may also develop a sort of tunnel vision, and seem to be unable to deal with more than one or two aspects of their divorce. I had a client who was desperate to keep her family property in her family and for it not to be distributed to her husband upon their divorce. Because the property was clearly a non-marital asset (which even the husband conceded), this was not a concern. But I could not get her to focus on her own health and vocational issues which were integral to her claim for permanent alimony. Thus, her tunnel vision was really detrimental to her own case. I suspect the husband kept saying things to her like, "You better accept my alimony offer, or I'm going to go after your property." If so, this certainly heightened her feelings of stress and crisis.

So, as we have experienced, clients in crisis often act out, may scream, cry, be verbally abusive, angry, and so on. How can we try to defuse some of that acting out? It's not helpful to say things like, "Oh, you're just overreacting." The rules of advice given to persons in crisis are, as Dr. Kish pointed out, a lot like communicating with teenagers. They will only accept advice from a person whom they believe has their best interest at heart, and from people they believe understand them. Teenagers may believe that their parents have their best interest at heart, but they certainly do not believe their parents understand them. So, it might be helpful for us to sort of envision our clients in crisis as teenagers whom we really want to listen to us. We have to endeavor to convince them we have their best interest at heart - and this is usually not so much of a problem. But then we also have to convince them we understand them.

Tools to help in that endeavor include three basic communications skills (and feel free to use these with your teenagers): Empathic understanding, genuineness, and acceptance. Empathic understanding refers to the attorney's ability to understand the client's feelings and concerns. This is not the same as feeling sympathy. Empathy refers to understanding and entering into another person's feelings. Sympathy refers to a feeling of pity or sorrow for another person's misfortunes. Feeling empathy for our clients requires us to focus on the client and his or her world, and to block out distractions. This focus requires us to attend to words, tone of voice and body language, to restate what the client is saying and to reflect back the client's feelings. This will set the stage for a successful resolution of the crisis.

For example, when a client says, "I don't know what to do; I don't have enough money," you can say back, "You're not sure if you will be able to pay your bills after a divorce." When a client says, "She wants custody of the kids; I'll never see them," then you say back, "You're worried that your relationship with your kids will change after a divorce." Or something like that.

Some tips to help us enhance our listening skills: Be patient and supportive; show your interest; offer reassurance - even if you don't know the answer, you can say, "I am not sure of the answer right now, but I am willing to work with you to find out." Also, we should avoid criticizing or correcting and should not argue with clients. It's also good to say, when appropriate, "Stay with me now. Let's work on this together. I want you to stop for a minute and take a deep breath . . . that's good. Now, what about . . . ?" and so on.

One last tip. When you're faced with a client who seems to be unable to understand your question, do not vary your verbiage. To me, this was counter-intuitive. If somebody doesn't understand when you say or ask something one way, try another - that's my usual method. But Dr. Kish emphasized that it is more important to be consistent, and ask only one question at a time and wait for a response. Don't just push ahead and ask the same question in a different way, and then in yet another way.

Our speakers also touched on some descriptions of some mental illnesses and some personality disorders and their traits. The "big three" mental illnesses are all highly treatable with medication. Without medication, they are very unlikely to improve. They pointed out that schizophrenia, whose symptoms include delusions, hallucinations and mood changes, affects about 1% of the population. Bipolar disorder, characterized by cycles of manic high, normal periods, and depression, affects about 1.3% of the population. The third, major depression, affects about 1.6% of the population.

They also mentioned five major types of anxiety disorders, including generalized anxiety disorder, obsessive-compulsive disorder, panic disorder, post-traumatic stress disorder, and social phobia or social anxiety disorder. These disorders can also be treated with medication and therapy. They may be pervasive, or may be associated only with a certain time period in

Continued on page 7

Advertisement

Gainesville Executive Center, 309 NE 1st Street, has space and virtual offices available. Please contact Patricia at 352-374-7755.

EJCBA December Luncheon Topic

Implementing Purposeful Change in Practice Management

On Friday, December 14, 2007, Gary Holstein, Marketing Director for Atticus, Inc. will present a 30 minute luncheon seminar at Steve's Courtyard Cafe in which he discusses a powerful concept involving how to conceive, construct, and implement effective changes in the business of practicing law. This seminar will help you identify the impediments that can constrain progress and understand the model needed to make the changes that can dramatically effect your professional and personal life.

Atticus, Inc. has been providing quality training, workshops, and coaching for attorneys in the area of practice management for almost twenty years. The company was founded by Mark Powers, president, and is dedicated to helping attorneys reduce stress, gain control of their practices, increase their incomes, and serve their clients and their own lives better. Atticus has trained over 10,000 attorneys and is a leader in innovations, systems, and methodologies for solo to mid-sized law firms. Web site: www.atticusonline.com

Gary Holstein has consulted with large and small corporations throughout the United States, Europe, and the Pacific Basin. Gary has worked with clients such as Chevron, IBM, Daimler Chrysler, Hearst Magazines, Western Digital, BMC Software, Polaroid, and many start-ups. Additionally, he has experience owning three small businesses and serving as a senior level manager for several other small corporations that worked with law firms. He blends a number of diverse disciplines with practical experience to help clients exceed their goals by implementing ***purposeful change***. He is currently writing a series for The Complete Lawyer entitled, "The 7 Deadly Sins of Marketing in the Legal Profession".

Gary is equally adept working with groups and individuals with organizations addressing: Client Development; Performance Coaching; Change Process; Strategic Planning; Collaborative Negotiations; Leadership and Management; Organizational Design; Consultative Marketing; Team Development; and Private Executive Coaching. He holds a Masters Degree in Management and Organizational Development. Contact: gary@atticusonline.com or visit www.atticusonline.com.

Family Law

Continued from page 6

one's life or certain events.

Ten types of personality disorders were also mentioned. The ones we most often hear about include antisocial personality disorder (characterized by a lack of social or moral conscience); borderline personality disorder (meaning a person who sees no boundary between themselves and the rest of the world - these may be clients who inappropriately drop by, don't follow your policies for contact, expect special treatment, and so on); narcissistic personality disorder (this is the person who is king of the world, knows everything, and who also doesn't really need to follow your policies and who demands special treatment).

Dr. Kish and Ms. Vail provided some great materials for us, and I have some extra copies. If you would like one, please email me at cynthia.swanson@acceleration.net or call my office at 375-5602. Also, I would commend to you a book I find to be very helpful: "The Family Lawyer's Guide to Building Successful Client Relationships," by Sanford M. Portnoy, Ph.D. You can buy it on the ABA website. And I can't find my copy of it right now, so if anybody needs an idea of what to buy me for a Christmas present . . .

Looking ahead, Judge Stan Griffis has again volunteered to provide us with a presentation. This time, he'll be talking about domestic violence actions, including criteria for four different types of injunctions, and the sometimes unexpected consequences of the entry of such an order. Look for this presentation at our meeting on November 28, 2007. We will not have a meeting in December.

Our meetings are always on the last (not the fourth) Wednesday of the month, at 4:00 p.m., and always in the Chief Judge's Conference Room in the Family and Civil Justice Center. If you would like to receive email reminders of the meetings, and do not presently receive them, please email me and let me know – cynthia.swanson@acceleration.net.

Attorneys' Charging Liens in Florida

by Jack M. Ross

Attorneys are really quite clever. We have found a way to develop a lien on our clients' property to secure payment of our fees all for the purpose of "protecting the confidential nature of the attorney-client relationship." *Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertnik, PA v. Baucom*, 428 So.2d 1383 (Fla. 1983). The lien, called an attorneys' charging lien, presents both opportunities and responsibilities for attorneys. An understanding of such liens allows us to take advantage of the opportunities while meeting our responsibilities.

An attorneys' charging lien is an equitable right which creates a lien on assets obtained for the client by an attorney to secure payment of fees and costs due the attorney for services rendered obtaining the judgment or recovery. The lien was not created by statute but has been developed through case law and has been recognized for more than 125 years. Courts developed the lien to protect the commercial expectations of lawyers. *Baucom*, supra. It is based on the principle that because an attorney has a special responsibility to his or her client, the attorney should have special protection for his or her compensation. "While our courts hold the members of the bar to strict accountability and fidelity to their clients, they should afford them protection and every facility in securing them their remuneration for their services. An attorney has a right to be remunerated out of the results of his industry, and his lien on these fruits is founded in equity and justice." *Id*. at 1385 quoting *Carter v. Bennett*, 6 Fla. 214, 258 (1855)

In order to establish a charging lien an attorney must prove four elements:

First there must be a contract between the attorney and the client. The contract need not be written, but may be express or implied.

There also must be an understanding between the attorney and the client that payment will come from the recovery or will be dependent on the recovery. Again, this "understanding" may be an express contract or may be implied from the context of the relationship. The necessary understanding may be inferred from the nature of the litigation.

There must be a positive judgment since the lien will attach only to the "tangible fruit" of the services.

Finally, there must be a dispute in the existence or amount of the fee due the attorney. *Id.; Neidermiller v. Amlong & Amlong, P.A.*, 563 So.2d 758 (Fla. 4th DCA 1990).

Perfection of the lien is simple; it requires nothing more than notice. With simple notice a charging lien is effective against all people that come into possession of the property. *Baucom*, supra.; *Brydger, P.A. v. Wolfe*, 847 So.2d 1074 (Fla. 4th DCA 2003). That tells us, as attorneys, to be careful to protect property which has been liened lest we be held responsible for its loss.

Procedurally, a charging lien should be enforced in the action in which it is asserted. *Baucom*, supra. This procedure is thought to promote the proper decorum of the bar by reducing legal actions between attorneys and clients. "The intervening years have not diminished the attorney's duty of loyalty and confidentiality to his client. For this reason, proceedings at law between attorney and client for collection of fees have long been disfavored. The equitable enforcement of charging liens in the proceeding in which they arise best serves to protect the attorney's right to payment for services rendered while protecting the confidential nature of the attorney-client relationship" Id. at 1385.

Of course a client must be given notice of the lien and an opportunity to present evidence at a hearing to determine entitlement to and the amount of the lien. *Rose v. Marcus*, 622 So.2d 63 (3rd DCA 1993). The issues at the hearing will be whether an amount is due and, if so, how much is due, as well as the existence of the four elements necessary to establish the lien.

The client is, of course, responsible for the lien. Any other person who has notice of the lien also is responsible for honoring the lien. *Brydger*, supra. Therefore, as attorneys seeking to enforce a lien, we want to give notice to anyone who may have, or come into, possession of the property to which the lien attaches. Also, to the extent we, as attorneys, have possession of any property subject to a lien, we want to be careful to protect the lien rights of any attorney who has given us notice of his or her lien. We, certainly, don't want to disburse property to our client or to the opposing party and find that we are personally responsible for fees and costs to another attorney because we did so with notice of their lien rights.

The law of attorneys' charging liens is relatively simple and straight forward. However, we need to know the principles underlying that law to effectively protect our clients and ourselves.

Criminal Law

by William Cervone

While it is hardly a Christmasy subject, this month I am providing an update on a topic I've written about several times before since it involves amendments to the criminal rules and jury instructions that will go into effect on January 1st. As you may recall, through my appointment to the Supreme Court's Criminal Jury Instructions Committee I've been involved in a project dealing with proposed innovations to our entire approach to jury involvement in criminal (and civil for that matter) trials. The Supreme Court has now issued an opinion on all of this. Although the opinion is more comprehensive than just the following items, these are the areas I think to be most relevant to every day trial practitioners.

First and of most significance to me, a new procedural rule will specifically codify the discretion trial judges already have to take written questions from jurors during trial and provide procedures for that. The rule requires the judge to review the proposed question and allows counsel for either side to object to it, both of those processes to be outside of the presence of the jury, as well as to ask follow-up questions. The jury is to be advised not to discuss a question that is not allowed. A new jury instruction gives the trial judge language to use when this comes up but really doesn't address if, how or when a jury is to be told that it has this option. Since my main purpose in this article is not to debate the wisdom of all of this, I'll keep my thoughts on the matter to myself for the moment.

Of perhaps somewhat less impact is a new instruction that tells jurors that they may but are not required to take notes during trial. Juror notes must be collected by the bailiff during recesses and are to be destroyed after deliberations, and jurors are to be told that taking notes should not be allowed to distract them from the proceedings and that notes should not be given any greater weight than memory of the testimony.

A third potentially significant change encourages judges to give final instructions prior to closing arguments but allows the trial judge the discretion to do or not do so on a case by case basis. Changes to various rules have been made to authorize this.

There are, to be sure, many other changes of a less significant nature that the Supreme Court's opinion discusses and implements. It is obviously incumbent on all trial practitioners to read the entirety of the opinion, which has attached to it the new rules and instructions that will soon govern us. For those of you who practice exclusively in the civil arena, be advised that the opinion also addresses these and other changes in the conduct of civil trials. For your reference, the opinion is No. SC05-1091, released October 4, 2007, and can be found at 32 FLW S600.

Now for some brief editorializing. I'm not sure what we're doing here. On the jury instructions committee there was a distinct split between attorneys, prosecutors and defense lawyers alike, who did not like these changes for many reasons, and judges, appellate and trial court level, who generally thought them to be a positive thing. To me, we seem bound and determined to try and make jury service a warm and fuzzy experience while also eliminating any need for or benefit from good lawyering. We are inviting jurors to be participants in the fray rather than neutral deciders of fact. We are taking strategy decisions about what evidence should be proffered from the hands of the lawyers, who I assume have valid reasons for what they do or don't ask, and putting everyone at risk from the questions from jurors who are ill equipped to ask them for many reasons. We are distracting jurors from their critical and essential function, that being to pay attention to what is presented to them without wondering or speculating about what isn't presented. And we are needlessly complicating and lengthening trials with processes that will bring us no closer to our goal of finding the truth.

Yes, I admit that I am probably old fashioned about all of this.

Announcements

The deadline for submission to the January issue of the Forum 8 will be December 3, 2007. Please make a note of it if you plan on submitting an article or advertisement.

Alternative Dispute Resolution

Mediating the Holiday Fruitcake Dispute

by Chester B. Chance and Charles B. Carter

This article combines two seemingly unrelated matters, which dovetail during the holiday season into a perfect storm of controversy.

Every issue is ripe for mediation. Every civil case is ordered to mediation. Why: Because mediation works. Thus, it is logical, indeed a compelling idea, to apply mediation to the ever-present holiday debate/joke/question: *does anyone eat fruitcake?*

Chester B. Chance (referred to as the older CBC) is inflexible in his position that people may use fruitcake to balance a wobbly kitchen table, third world countries may use fruitcakes as railroad ties, FEMA may use fruitcakes to bolster levies in New Orleans, and Tim Tebow may bench press 400 lbs. of fruitcake (two cakes), but, no one *eats* fruitcake.

Charles B. Carter (referred to as the younger CBC), while munching on a slice of Claxton Fruitcake, insists fruitcake is in fact the manna from heaven, the staff of life, possessing historical and nutritional value over and above the fact it tastes really yummy *and* often contains rum or brandy.

The wives of both CBCs ordered the dispute to mediation.

The mediator opened the joint session by explaining the reasons mediation was successful as an alternative dispute resolution mechanism. The mediator explained, "no matter how thin you slice the fruitcake there are always two sides."

Chance began his presentation during the joint session and it was obvious he was unprepared. This sometimes happens at mediations even though participants are constantly reminded of the benefits of preparation.

Chance cited to the Manitou Springs, Colorado annual Fruitcake Toss (eight categories of competition) as proof people may use fruitcakes for sport, but, not to ingest. Chance referred to deposition testimony of 5 witnesses who admitted eating liver & onions, but, never fruitcake.

Chance produced a mounted blow-up display of an article from a Freeport, New York newspaper interviewing representatives of organizations who collect and distribute food for the homeless. The quotes included:

"I can't say we encourage the donation of fruitcakes."

"I never met a fruitcake I liked."

"You could probably build a homeless shelter with fruitcakes."

Chance concluded by noting fruitcake is very high in calories, thus, no one who watches their figure would ever eat fruitcake. "My position is non-negotiable."

Carter opened with a Power Point presentation since everyone knows anything displayed digitally is much more compelling.

Carter began his presentation by expressing regret for the gastrointestinal problems suffered by Chance the previous Christmas after Chance ingested a piece of fruitcake by mistake. It is a medical fact that 2% of the population is allergic to green candied fruit. Still, one regrettable event did not meet the preponderance of evidence burden.

Carter presented a well-prepared presentation on the history of the fruitcake. Food Scholars date fruitcake back to Ancient Egypt and the Roman Empire. Egyptian fruitcake was considered as essential for the after-life. (Chance's comment that fruitcake probably killed most of the pharaohs was noted as a breach of mediation etiquette by the mediator). Carter noted even today in England it is the custom for unmarried wedding guests to put a slice of fruitcake under their pillow at night so they will dream of the person they will marry. (Again Chance interrupts by suggesting fruitcake is at best some form of birth control device).

Carter presented fruitcake production figures and said his expert had extrapolated data indicating the consumption of fruitcake in at least three Midwestern states. However, the expert's report could not be revealed at mediation (again frustrating the process).

Carter countered Chance's high calorie argument by noting "the fact fruitcake is high in calories proves it is delicious." He then revealed surveillance film of Chance turning down a piece of fruitcake but asking for a third slice of cheesecake a la mode.

The mediator spent 10 hours meeting in separate caucuses with the parties. She declared an impasse and commented on the lack of preparation by Chance and the posturing by Carter as being impediments to meaningful dialogue.

In a last ditch effort to salvage the process she brought

Continued on page 11

$99,000.00 On Ice

by Stephen N. Bernstein

When a troop of FBI Agents raided the Congressional Office of Representative William J. Jefferson (D-La.) last year, law makers of all stripes decried what they saw as an abominable violation of separation of powers. They insisted that any material seized by the Government must be returned immediately. A federal appeals court in Washington agreed but only to a point.

Prior to the raid, the Executive Branch had never searched the offices of a sitting lawmaker. Mr. Jefferson was under investigation for allegedly using his office to enrich himself and his family. In June, he pleaded not guilty to a 16-count Indictment. That case, which did not rely on documents seized in Congress, but did cite the $90,000.00 in cash found in Mr. Jefferson's freezer, continues.

After subpoenaing Mr. Jefferson for failing to strike an accommodation, the Justice Department obtained a warrant for that first-ever search. The warrant authorized the Justice Department to collect only non-legislative material relevant to the criminal investigation. For 18 hours, agents copied computer hard drives with the intention of later searching them using key words pertinent to the criminal probe. Hard copies of documents were perused by a "filter team" of lawyers who were not part of the prosecution team; only documents deemed by the team to be relevant to the investigation were taken away.

This wasn't enough protection for the Court of Appeals. The Court ruled that because it was likely that Government Investigators observed privileged legislative documents, the Government likely violated the Constitution's "Speech or Debate" clause, which is largely intended to shield lawmakers from intimidation by the Executive Branch. The Court, however, parted ways with Mr. Jefferson's suggested remedy for the constitutional breach that the Justice Department be forced to return all of the seized material and not just material related to legislative jobs. Instead, the Court endorsed the process for reviewing the seized evidence that protects Mr. Jefferson's interest and those of the Justice Department. Mr. Jefferson is being allowed to review all the material taken from his office to identify those documents which are privileged. The trial judge will decide whether to grant Mr. Jefferson's request to keep those documents from prosecutors.

This decision is a win for Mr. Jefferson and fellow lawmakers. Nevertheless, just as the Court recognized the importance of keeping the executives from treading on legislative toes, so, too did it reinforce the principle that legitimate law enforcement shall not be derailed just because the target happens to be an elected official.

Fruitcake Dispute

Continued from page 10

both parties back to a joint session and suggested a bit of libation might reduce rancor and create some rapport between the parties. She passed out mugs of eggnog sprinkled with nutmeg to both mediation participants.

"No one in their right mind drinks eggnog!" exclaimed Chance.

"Could I have some more eggnog with a bit more rum in it" smiled Carter.

The eggnog mediation was scheduled for January 5 and an entire day was reserved.

cloud 9
SPA•SALON

The Gift of Relaxation...The Best Gift of All!

Purchase Cloud 9 Gift Cards
in any denomination, easily!

24/7 @ www.cloud9spa.com

or drive up to our brand new
Gift Card Pick-up Window!

(352) 335-9920 | 6500 SW Archer Road | Gainesville

December 2007 Calendar

3 Deadline for submissions to January newsletter
3 EJCBA Board of Directors Meeting, Ayers Medical Plaza, 720 SW 2d Ave., North Building, Third Floor conference room, 5:30 p.m.
5 First day of Hanukah
10 Books for 4th & 5th Graders at Duval Elem. with Gator Football Players – 12:30 p.m.
12 Santa at Duval Elementary – The Holiday Project – 8:00 a.m.
14 EJCBA luncheon – Steve's Courtyard Café, 11:45 a.m.
20 Flex Day – Alachua County Public Schools
20-Jan 2 – Winter Holiday – Bradford County Public Schools
21 Flex Day – Alachua County Public Schools
24-Jan. 4 – Winter Holiday – Alachua, Gilchrist & Levy County Public Schools
24 Christmas Eve – County Courthouses closed
25 Christmas Day – County & Federal Courthouses closed
28 Kwanzaa

January 2008 Calendar

1 New Year's Day – County & Federal Courthouses closed
4 Deadline for submissions to February newsletter
7 EJCBA Board of Directors Meeting, Ayers Medical Plaza, 720 SW 2d Ave., North Building, Third Floor conference room, 5:30 p.m.
11 EJCBA luncheon – Steve's Courtyard Café, 11:45 a.m.
21 Martin Luther King, Jr.'s Birthday – County & Federal Courthouses closed
30 Family Law Section meeting, 4:00 p.m in the Chief Judge's Conference Room (former Grand Jury Room) of the Family and Civil Courthouse

Have an event coming up? Does your section or association hold monthly meetings? If so, please fax or email your meeting schedule let us know the particulars, so we can include it in the monthly calendar. Please let us know (quickly) the name of your group, the date and day (i.e. last Wednesday of the month), time and location of the meeting. Email to Dawn Vallejos-Nichols at dvallejos-nichols@avera.com.

FORUM 8

Eighth Judicial Circuit Bar Association, Inc.
Post Office Box 127
Gainesville, FL 32602-0127

Non-Profit
Organization
U.S. Postage
Paid
Gainesville, FL
Permit No. 179