FORUM 8

Volume 69, No.8 Eighth Judicial Circuit Bar Association, Inc. April 2010

President's Letter

By Rebecca O'Neill

This is my last President's letter. As of April 1, my good friend and your resourceful and competent President Elect, Elizabeth Collins, will assume all presidential responsibilities for EJCBA. I accepted an in-house position at a four-hospital system in Boise, Idaho. I leave the State of Florida, my family, and community on April 10. And, yes, I've been warned that the white stuff on the ground won't be sand. I've never lived in the snow, so please send bursts of sunshine my way!

I am dedicating this column to Truth, since this journey to Boise is my Truth. In Sandskrit, Satya is the word for Truth. Actually, "sat" means Truth, and "ya" is an activating suffix, meaning "to do" or "do it." So "Satya" actually means living the truth or aligning oneself with Truth. It is important to remember that Truth is relative. My Truth is not necessarily your Truth. So Satya is also interpreted to mean to align oneself to one's highest truth.

Truth is a good topic for lawyers. Practicing Satya can be particularly challenging for lawyers due to the adversarial nature of our profession. In dealings with other attorneys, lawyers may justify the telling of little white lies to advance our clients' best interests. But speaking an untruth seems to perpetuate the telling of more untruths as one may need to tell more lies to cover the first lie. Also, once a person tells one lie, it seems easier to tell another, and another, and so on.

But the primary drawback in telling white lies is what it does to the Self. We may tell ourselves it is justifiable, but it really goes against our higher Self, like creating a distortion, which must be accounted for in the long run (karma). It is one thing to do that for your own advantage, but to do it for a client is greedy. And when attorneys tell lies, the clients may not learn the lesson that would have been learned from the event. Plus it sends the wrong message. Ultimately, we compromise a little piece of ourselves each time we engage in this behavior.

Experience has taught me that when I tell the truth, my life flows more easily. The more honestly a person lives, the easier life is to live. Yes, being truthful is downright difficult at times. But when we are true to ourselves and speak the truth, integrity flows from us to others and returns magnified. The Yoga Sutras teach that when a person always speaks the truth, and never tells even little white lies, then the words that person speaks manifest as truth. If the person never lies, what the person says must be true, so the universe creates the truth. Patanjali said that "first follow truth, and then truth will follow you." And once we are established in truth, fearlessness and purity follow. And when the heart is pure, happiness is inevitable. The Yoga Sutras of Patanjali, Translation and Commentary by Sri Swami Satchidananda

Truth can also be our path in life. My Truth is sometimes revealed to me in meditation, but more often is revealed to me by other people. My first leap of faith was to go to law school because that was a Truth. I practiced dependency and family law before being guided to the path of health care. Now my path leads me away from Florida. Knowing that this is my Truth, I have no choice but to take this blind leap of faith and go. That is, after all, how I ended up in Gainesville 16 years ago.

I thank each and every one of you for the lessons you taught me and the laughter you brought to my life and will continue to bring to the world. I wish you peace and joy on your journeys and hope our paths will cross again.

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EJCBA Luncheon Policy

Please be advised that beginning with our April 2010 luncheon, the EJCBA will once again be enforcing its long-standing policy that if you RSVP to the EJCBA luncheon, but do not attend, you must still pay for your lunch. You will receive a bill if you have not pre-paid. The EJCBA is obligated to pay for the lunches regardless of whether you attend or not and we will expect the same obligation of you.

In addition, we encourage you to RSVP, when possible. We welcome your attendance and always hope to have as many of you attend as are able, but we need your help in ensuring an accurate headcount, so that our lunches can continue to run smoothly. Thank you in advance for your cooperation!

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** 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.

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Deadline is the 5th of the preceding month

Bar President to Speak at Bar Luncheon on April 16, 2010

Jesse Diner, President of the Florida Bar, will be attending our Bar luncheon on Friday, April 16, 2010.

Jesse H. Diner is a shareholder in Atkinson, Diner, Stone, Mankuta & Ploucha in Fort Lauderdale, where he has an active commercial and construction litigation practice.

Diner has been a member of The Florida Bar Board of Governors since 1996, serving three times as chair of the Budget Committee, twice as chair of the Legislation Committee and one year as chair of the Communications Committee. He is past president of the Broward County Bar Association and a past president of the Legal Aid Service of Broward County.

After attending South Broward High School in Hollywood, Diner attended Gettysburg College, where he majored in political science and minored in economics and history. He serves on the college's Board of Trustees. Diner received his law degree from St. John's University, becoming a member of The Florida Bar in 1973.

As president of the now 88,000+ member and one of the largest state bars in the country, Diner has focused his efforts on supporting adequate funding and resources for our state courts in 2010-11, advocating for legislation to create a child legal representation system, and promoting the One campaign to convince every Florida Bar member to take one pro bono case. While serving as a vocal and visible proponent for state court funding, Diner has pushed for implementation of a uniform statewide e-filing system to improve timeliness in the processing of cases and significantly reducing the costs of paper and storage for the courts.

Also among Diner's goals for this year was to provide assistance to members negatively affected by the economic downturn. His goal was realized in establishing an online legal job and resume posting service for members. That service – The Florida Bar Career Center Network -- began on October 1 and has already had more than 15,000 site visits.

Upgrading the Florida Bar's Web site to be easier to navigate and to be recognized by lawyers as a valuable and relevant resource for their practices is also a front-burner issue for Diner. Already, improvements to the site search function and to the Find a Lawyer directory have been made and a Quick Links feature added to the homepage for the most-visited pages.

Diner is married to attorney Adele Stone, who is also a partner in his firm and who serves this year as President of The Florida Bar Foundation.

Please make every effort to attend this Bar luncheon.

Save the Date!

In May, the EJCBA luncheon will be held on Thursday, May 13th , rather than our usual Friday, to accommodate our special guest, Stephen Zack, President-Elect of the American Bar Association. Please note this change of date on your calendar.

Three Rivers Holds CLE Training

By Marcia Green

Three Rivers Legal Services is thrilled to announce the success of our first big CLE training on Basic Family Law. The training was funded in part by the Florida Bar Foundation through their Pro Bono Pilot Projects grant and was attended by more than 80 attorneys from the Eighth and Third Judicial Circuits.

A big thank you goes out to our speakers and presenters, who included Circuit Judges William Davis and Greg Parker, private family law practitioners Pam Schneider and Dan Marsee, mediator Louise Godfrey, TRLS staff attorneys Staci Chisholm and Najah Adams, UF College of Law professors Steven Willis and Peggy Schrieber, along with adjunct professor Steve Pennypacker.

We look forward to short presentations covering additional topics in family law that may include such topics as income tax considerations, parenting plans and considerations of the best interests of the children, equitable distribution and other matters involved in the practice of family law.

Look for announcements about these presentations, webinars and other information on Three Rivers Legal Services' new website at www.trls.org.

Alternative Dispute Resolution

Are We Entitled To Our Opinions?

By Chester B. Chance and Charles B. Carter

At multiple points in a mediation the participants express their opinions. It may be an opinion on value, or, perhaps an opinion on the chances of prevailing. Or maybe someone has an opinion about the cost of litigation, the admissibility of evidence, etc.

Ultimately the phrase is heard, “I am entitled to my opinion.” In fact this phrase is heard not only in mediations but also at town hall meetings, debates over abortion or the color of the living room drapes, and discussions on the right to healthcare.

In 2005 author Jamie White published the book “Crimes Against Logic.” In the first chapter of the book White states one purpose in writing the book “. . . is to stop you from believing in another right that you do not really have, namely, the right to your own opinion.”

To illustrate his point, White provides an example: Jack offers some opinion- that President Bush invaded Iraq to steal its oil- and Jill disagrees. Jill offers some reasons why Jack’s opinions are wrong and after a few unsuccessful attempts at answering them, Jack retorts that he is entitled to his own opinion.

White asserts this reply “is totally irrelevant.” Jill merely gave reasons to believe why she thought Jack was mistaken. Jill did not assert Jack had no right to take a mistaken view. By claiming he is entitled to his view, Jack “has simply changed the subject from the original topic . . . to a discussion of his rights. For all it contributes to the invasion question he may as well have pointed out whales are warm blooded . . . .”

White puts it simply by saying if the opinions to which we claim entitlement are false, then entitlement cannot properly be invoked to settle a dispute. Such an opinion, he suggest, adds no new information and does nothing to show the opinion is true.

Why then is insisting on one’s right to an opinion such a popular argumentative ploy? White opines it is encouraged by ambiguity in the word entitlement. The ambiguity, White says, is cloaked in political and legal interpretation suggesting we are all entitled to any opinion we might have, however groundless. The muddled idea is:

1. If someone is entitled to an opinion then the opinion is well supported by evidence.

2. I am entitled to my opinion (as is everyone else).

3. Therefore my opinion is well supported by evidence.

We hope you are not buying this fallacy. But, many do. “. . . [I]t is part of a mindset that increasingly impedes the free flow of ideas and their robust assessment.” White posits many people feel their opinions are sacred, so everyone else is obliged to handle them with care. When confronted with counterarguments, White says these folks do not stop and wonder if they might be wrong, rather, they take offense.

Thus arises an obstacle to getting at the truth, as to do so we must strip away bogus ideas (such as that we all have a right to our own opinion). This obstacle arises at mediation, at trials and at hearings and motion practice. Despite all this, at mediation, we still suppose everyone involved has a right to their opinion, but interestingly, suggest they do not have a right to a certain set of facts, the law, etc. A right to an opinion may lead to divorce over the color of the drapes, or an impasse at mediation.

White suggests asking people questions not about rights but about duties. When someone claims a right, any right (the right to an opinion, to healthcare, to choice, to life, etc.) ask them what duties are imposed on others as a result of the claimed right? When you have a right to an opinion, do I have the duty to agree with you? No, because I have the right to a different opinion. Does it mean I have to listen to you? No, I don’t always have the time. Does your right to your opinion oblige me to let you keep it? Not really, as I may have a duty to try to change your opinion. (You cross the street under the opinion no car is coming, but I see a car bearing down on you. Shall I let you keep your opinion?) If your opinion is that your case is worth $50,000 do I have a duty to pay you?

White, from whom we plagiarize the above, concludes by saying:

> “. . . truth is not the point, and it is most annoying to be pressed on the matter. And to register this, to make it clear that truth is neither here nor there, they declare, “I am entitled to

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Dismissal Bathed In Prosecutorial Conduct

By Stephen N. Bernstein

A judge's decision to throw out the indictment against Blackwater Contractors accused of murdering Iraqi civilians is infuriating. Nevertheless it is also correct. In a detailed, 90 page opinion, Judge Ricardo M. Urbina of the U.S. District Court of the District of Columbia blasted Justice Department prosecutors who "knowingly endangered the viability of the prosecution" by flaunting legal rule and constitutional provisions making dismissal of the charges inevitable. Clearly it's time for the Justice Department to police its own prosecutorial misconduct.

These law enforcement blunders leave profound questions about what happened that September day in 2007 when 17 people were shot dead and some 20 others injured after a Blackwater convoy drove into a crowded Nisoor Square in Baghdad and opened fire.

The Blackwater contractors were summoned by State Department interrogators shortly after the incident and told they could lose their jobs if they did not cooperate. Because the Government was essentially forcing the contractors to give up their constitutional rights against self incrimination, it guaranteed that any information provided would not be used in a criminal investigation. This prohibition is broad and strict and bars government agents from using such statements to form a theory of a criminal case or to develop leads. It also prevents them from relying on witnesses whose testimony may have been shaped or influenced by such information.

The Blackwater statements, which included details about which weapons were fired and who fired them, were widely disseminated. They were shared with the FBI and the Justice Department's Criminal Division; entire statements were leaked to the press and posted on the internet.

To overcome any possible taint, the Justice Department removed from the prosecution team anyone who had knowledge of the statements, assigned a fresh legal team and installed a senior justice lawyer to guard against misuse of the Blackwater testimony. Members of the new team, however, almost immediately ignored the warnings from this advisor and went so far as to obtain copies of the Blackwater statements. Prosecutors also failed aggressively to press witnesses on whether their recollections were affected by reading the Blackwater account. The Justice Department argued repeatedly that it did not rely on the Blackwater statements to build this case, but the judge painfully and precisely debunked these assertions.

The murder of innocent people should never go unpunished. The Justice Department prosecutors were right to investigate this incident brought to their attention by U.S. soldiers who inspected the scene and determined it was a criminal event. The prosecutors were right to try and build this case despite the enormous hurdles introduced by immunized statements. However, they went terribly wrong when they disregarded the rule of law and focused only on achieving a desired result - a win at any cost. The proverbial "throwing the baby out with the Blackwater."

Alternative Dispute

Continued from page 4

my opinion". Once you hear those words, you should realize that it is simple rudeness to persist with the matter. You may be interested in whether or not their opinion is true, but take the hint, they aren't."

"I'm entitled to my opinion" is voiced at mediation in various forms including "It's the principle" or "I'm just so angry with the other side" as well as "I'm entitled to my opinion on [value or chance of success]." Such phrases do not have relevance to the application of a statute or case precedent or the historic value of similar cases. And, as White suggests, get ready for clients to take offense when you ask them to consider their opinion in light of the facts or law or past similar case results. How you handle this touchy etiquette/logic issue may mean the difference between resolution and impasse.

[By using the word 'mediation' in this article we have attempted to make this remotely related to A.D.R. In truth, it is mostly food for thought mixed with entertainment value, and easier to compose than a holiday poem.]

Criminal Law

By William Cervone

In a tribute to the true purpose of this column, today I will focus on something legal and criminal. The 4th DCA, the source of my topic, recently wrote in an opinion styled Mitchell v State, and for the moment located at 35 FLW D63, that "technology confronts Florida's statutory scheme." Isn't that an enticing trailer for a blockbuster slip sheet opinion? And just in time for the awards season. Anyhow, I have a nagging suspicion that many of you do not read FLW or any other source of new legal information, for some reason preferring to be surprised in court when opposing counsel whips out controlling precedent on which the ink is not yet dry, so here goes with the news of the day.

It seems that one Mark Mitchell committed a home invasion robbery in Pompano Beach. We know this because he was convicted. He was convicted, among other reasons, because he ran his mouth to his daughter, who must not have been a big fan of his because she apparently had no compunction against ratting him out. In any event, I am guessing that Mitchell was a member of the Now Generation or whatever we call people who simply cannot bear to be out of touch with other people at all times, even while committing robberies, because also included in the State's evidence was "historical cell phone site" evidence that showed that Mitchell had been in the area of the crime at the appropriate time. Since he lived some distance away in West Palm Beach this was helpful to the State.

As an aside, while I am sure everyone knows it, this evidence identifies the relay tower through which a customer's cell calls are handled, thus showing the location of the phone and the person using it with reasonable precision. These records are not a recording of the content of a call. In Mitchell's case, the State first obtained the records through an investigative subpoena. On defense motion, that set of records was suppressed because the provisions of Chapter 934 had not been complied with. Armed with the clue that they had made a mistake that was provided by the suppression order, the State then followed Chapter 934 properly and got the records a second time, and off Mitchell went to trial, conviction and prison.

Now for the legal stuff. Noting that case law on this topic is "relatively new and unsettled" and that the how to of obtaining such records is unaddressed in Florida law, the 4th DCA has set us all straight. By basically adopting a federal opinion from Massachusetts because Florida's statute is very similar to federal law, the court held that historical cell site information is not content based, that there is no expectation of privacy in those records, and that since they disclose only past locations and not present whereabouts that might pinpoint a person in a private area the 4th Amendment is not implicated.

So we now know this: cell phone service providers are providers of electronic communication services as contemplated by Chapter 934. Historic cell site information is a record pertaining to a customer because it contains data about the handling of the customer's calls. That record is not content information, however, because the location of a cell tower discloses nothing about the "substance, purport or meaning" of a call. The 4th Amendment is not a factor and there is no expectation of privacy in those records. And, finally, to get their hands on them what law enforcement needs to do is comply with Chapter 934.

As an aside, the court also said that the State's incorrect attempt at getting the records by subpoena was no problem and no bar to getting them subsequently the right way. Much like with medical records originally obtained without the required steps regarding notice and so on, the court allowed a do-over.

So, consider yourself legally updated and educated. Feel free to apply to the Bar for an hour of CLE credit. Tell them you're a slow reader.

Announcements

DON'T MISS the following Family Law Section Meetings:

March 16 – Adjunct Professor Bernard A. Raum, UF Levin College of Law, speaking about judgment enforcement in courts of equity

April 20 – Teresa Drake, Esq., speaking about the Intimate Partner Violence Assistance Clinic, UF Levin College of Law.

In Memoriam: Magistrate Judge Allan Kornblum

By Peg O'Connor

Most of us in the Northern District of Florida community were shocked and saddened to learn that United States Magistrate Judge Allan Kornblum had suddenly passed away from cancer. He had not shared news of his illness with anyone, so it came as an enormous surprise to read an article in the Gainesville Sun on Saturday, February 13, 2009, reporting that he had passed away the day before.

Many attorneys never get to know the judges before whom they appear in the federal courts. The Sun article revealed little-known facts about Judge Kornblum, such as the fact that he began his career as a New York City policeman and eventually graduated from Princeton with a Ph.D., along the way serving as a military police officer, FBI agent, and criminal investigator with the Treasury Department.

Even so, not many people knew the man behind the robe. Having had the privilege of serving as Judge Stephan Mickle's law clerk from 2004 through 2007, I spent a little bit of time with Judge Kornblum and would like to share the few things I learned about him during my time there.

First, the jukebox. Anyone who knew him for any length of time knew of his fascination with jukeboxes. He had a beautiful one sitting in chambers. It was a 1940's-era machine, complete with tube lights and ten-inch records. I don't remember the brand, but I do remember it sitting larger than life, rainbow colors glowing, against the north wall of Judge Kornblum's office. It was the first thing attorneys saw when they walked in, and it never failed to elicit an appreciative "ooh" and "aah".

The judge appreciated it, too. He told me once that he arrived at 6am every morning and sat in his chair, lights off, with just the glow of the jukebox in the room, to watch the sun come up through the large glass windows on the east side of his office. And sure enough, on the few occasions when I had to arrive at work early in the morning, his car was there in the parking lot.

Cars were another of his passions. He and I shared an interest in cars. We both owned Buick Roadmasters at the time (he had a red one and a grey one, and mine was white), and we enjoyed talking about the cushy ride and LT1 engine. One day, as I passed the parking lot, I saw a shiny, brand new, dark blue Chrysler 300 in his parking space. I thought perhaps it was a rental car, but when I next talked to the judge, he told me that he had sold both of the Roadmasters and bought the Chrysler. I gently teased him, telling him he would soon regret his decision.

A few months later, we talked again, and I asked him how he liked the Chrysler so far. His short and simple answer: "I wish I had never gotten rid of those Buicks!" Apparently the Chrysler was not the most reliable of vehicles, and he had taken the car back to the dealer multiple times for a host of problems. Every time I asked him about it after that, he would just shake his head and roll his eyes. He even asked me if I would sell my Roadmaster to him so he could get rid of the Chrysler. I think it was only half in jest, although to this day I'm not positive.

Another thing few people knew was that Judge Kornblum, had he retired from the bench, would have made an amazing mediator. I had the rare opportunity to watch a judicially-mediated personal injury case. The parties were on the eve of trial, having locked horns every step of the way. It seemed an impossible case to settle. All past mediations had reached impasse. Out of near desperation, Judge Mickle asked whether the parties would be willing to mediate with Judge Kornblum, and they agreed.

It's difficult to describe exactly what makes a mediator effective, and I can't do it in this case. But I would use the word "masterful" in describing Judge Kornblum's abilities in this arena. His no-nonsense, cut-to-the-chase attitude kept the parties in line, and his precise questioning compelled each side to acknowledge the weaknesses in their arguments and the strengths in the other side's position. I watched, fascinated, as the offers and demands grew closer and closer. Finally, after many grueling hours, it happened: the parties settled. And they were so grateful to Judge Kornblum. He accomplished what no other mediator had been able to do to date. The ironic thing, as he confessed to me later, was that he had never mediated a case before. I think he may have even surprised himself with his effectiveness.

Judge Kornblum was a good man. We will miss him greatly. I can tell you that it will be difficult for me to see his parking spot empty. No cushy Roadmaster, no troublesome Chrysler. Just bare concrete. But I also know that I'll smile to myself every time I see a jukebox, thinking of him sitting in his office watching the sun come up.

Setting Cases For Trial

By Siegel, Hughes & Ross

The Civil courts are overcrowded and place a significant strain on the time and resources of the court system. Despite the pressure this overcrowding may cause, Florida case law and well established rules of procedure and judicial administration set forth very specific procedures and policies for setting cases for trial and movement of cases on the courts' dockets.

Civil trials are to be scheduled only as set forth in Rule 1.440 Fla.R.Civ.P. Rule 1.440(c) specifically states:

> If the court finds the action ready to be set for trial, it shall enter an order fixing a date for trial. Trial shall be set not less than 30 days from the service of the notice for trial. By giving the same notice the court may set an action for trial.

In local practice in the Eighth Judicial Circuit, trial scheduling is often accomplished at a case management conference, at which all parties are in attendance and able to advise the Court on their positions and recommendations regarding trial scheduling. Yet, regardless of when the parties feel the case is ready for trial, the Rule specifically defines when cases are "ready" to be set for trial. It is well established that actions are only "ready" to be set for trial when they are at issue. Rule 1.440(a) defines when a case is "at issue", stating:

> An action is at issue after any motions directed to the last pleading served have been disposed of or, if no such motions are served, 20 days after service of the last pleading. The party entitled to serve motions directed to the last pleading may waive the right to do so by filing a notice for trial at any time after the last pleading is served.

Put another way, unless a case is "at issue" within the meaning of the Rule, it cannot be set for trial.

One of the leading cases on trial scheduling is *Bennett v. Continental Chemicals, Inc.*, 492 So.2d 724 (Fla. 1st DCA 1986). In *Bennett*, the First District Court of Appeals held that it was adopting a "bright line approach," stating, "(I)n the interest of promoting uniformity and upholding the requirements of due process, that strict compliance with rule 1.440 is mandatory." *Bennett* at 726. See, also, *Alabau v. Town of Lake Park*, 617 So.2d 827 (Fla. 4th DCA 1993). The Court concluded that failure to follow the strict, bright line procedures in Rule 1.440 was an abuse of discretion and automatic reversible error. The Court noted that this was because Rule 1.440 is "very clear" and leaves no room for improvisation. The procedures set out in Rule 1.440 are more than formal rules, they are a matter of fairness and due process. The Fourth District Court of Appeals held that the overriding principle inherent in Rule 1.440(c) Fla.R.Civ.P. is one of due process. *Mourning v. Ballast Nedam Const., Inc.*, 964 So. 2d 889, 892 (Fla. 4th DCA 2007).

In establishing a bright line rule and mandating strict compliance with the procedures set forth in Rule 1.440, the *Bennett* Court was also mindful of the principles set out in the Florida Rules of Judicial Administration. These rules speak directly to improving case management at all levels of the judiciary. They direct trial courts to take charge and better control the cases, their calendars and develop "rational and effective trial setting policies." It does seem that in some instances the procedural requirements of Rule 1.440 can be at odds with the policy found in the Florida Rules of Judicial Administration that call for the efficient resolution of cases.

In weighing the competing interests of due process and the efficient flow of cases, Rule 2.545 Fla.R.Jud.Admin. must be taken into account. Subsection (a) of the Rule states: "Judges and lawyers have a professional obligation to conclude litigation as soon as it is reasonably and justly possible to do so. However, parties and counsel shall be afforded a reasonable time to prepare and present their case."

Obviously some cases will require more time to prepare than others, but due process and the Rules of Judicial Administration require that both sides in a contested matter should be given a "reasonable time" to take all necessary discovery and to prepare their case. One of the most fundamental of Florida's Rules of Civil Procedure is Rule 1.280(a) Fla.R.Civ.P. This rule permits parties to obtain discovery by depositions, interrogatories, and production of documents. Id. While taking the time to utilize each of these discovery tools may be time consuming, they are permitted by the rules and due process demands that the parties be afforded the opportunity to use them. Given the fact that the Florida Rules of Civil Procedure permit parties to obtain discovery of "any

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More Random Thoughts from a Florida Bar Foundation Board Member

By Phil Kabler

In my past submissions to Forum 8 I have introduced The Florida Bar Foundation, its Fellows Program, and the "One" initiative ("One Client. One Attorney. One Promise."). By the time you read this, First District Court of Appeals Judge William Van Nortwick and Florida Bar Foundation Executive Director Jane Elizabeth Curran will have spoken at the EJCBA's March 19 luncheon. Hopefully you were so inspired by their appeal that you immediately decided to participate. (If you have not already signed-on, please consider doing so soon.)

Like the other people who submit pieces to Forum 8, I research the topics about which I write. This submission is no different, except that the subject program's background materials were so well done that I offer them verbatim as opposed to "reinventing {better, rewriting} the wheel." That being the case, the following is a description of a program operated by Three Rivers Legal Services, a Foundation grant recipient, which is personally crucial to its clients. (Many thanks to Nancy Wright, Esq., a staff attorney at Three Rivers.) And, as you read it, please do note the kudos Three Rivers offers to two other Foundation grant recipients, Southern Legal Counsel and Jacksonville Area Legal Aid. Our grantees often work collaboratively to benefit clients needing legal assistance, which is an effective, efficient, and economical way of delivering services and using our donors' funds.)

Medicaid Waiver Cases in Eighth Judicial Circuit

Many persons with developmental disabilities who choose to live at home or in licensed residential facilities rely on the Medicaid Waiver program for services to allow them to avoid institutionalization. In September of 2008, the agency in charge of these services (the Agency for Persons with Disabilities or "APD") notified over 21,000 clients of their placement in one of four new "tiers." All but one of these new "tiers" established annual spending limits on services. The unfortunate result was that thousands of people were facing substantial cuts to their medically necessary services.

For the last several years, The Florida Bar Foundation has funded a regional project with Three Rivers Legal Services, Southern Legal Counsel and Jacksonville Area Legal Aid to provide assistance to persons on the Medicaid Waiver. Three Rivers has represented at least 70 clients in the Eighth Judicial Circuit alone in the fight to maintain services. Approaches have ranged from ongoing rule challenges in the Division of Administrative Hearings to successful due process challenges in the First District Court of Appeal. Last year Three Rivers, with the help of some dedicated pro bono attorneys, was able to preserve over $360,000 of annual services for clients in this circuit by pushing APD to place those clients into a higher tier.

One such client is "Sam," a strong, healthy young man with autism, bipolar and hyperactivity. His behavioral challenges are extreme. He has no concept of his own safety or strength and will "escape" his caregivers and run into streets or intrude into private homes. He has injured both himself and others in these episodes. He lives at home with his mother, a single parent who works during the day and cannot physically manage his care without assistance. Sam receives intensive behavioral therapy to modify these destructive behaviors.

APD placed Sam in a tier that would have required a $65,000 yearly reduction in services and almost complete elimination of behavioral therapy. On Sam's behalf, Three Rivers requested a hearing and then filed a separate administrative challenge based on APD's failure to adopt as rules certain policies that were used in all tier placements. As discovery on this challenge proceeded, APD was forced to admit that it had placed Sam into the wrong tier. Sam is now assured of receiving the services he needs to avoid being institutionalized – an illusory option for Sam since there are currently no institutional placements in Florida for persons with his behavioral needs.

Here is a follow-up thought to consider concerning the developmental disabilities waiver program. In Florida the average yearly cost of serving persons with developmental disabilities in an institutional care facility is $86,027. By contrast, the average annual cost is only $28,912 to serve a person under the developmental disabilities waiver program. (Source: "A Strategic Path Forward: Responding to the Needs of People with Developmental Disabilities in Florida", September 2009, Human Services Research Institute. And another "tip o' the hat" to Nancy Wright for locating this data.)

As a closing note, if you want information about The Florida Bar Foundation, its grantees, the Fellows Program, or the "One" program, please feel free to call me (352-332-4422).

Howdy From Haiti

By Dan Sikes

On January 26, 2010, my wife and I were sitting in our pastor's office discussing our church's relief efforts in support of an orphanage which has been our church's missionary outreach in Haiti. Prior to the earthquake, we had intended to take our two daughters down there with us so they could see first hand what life was like in a third world country and learn just a little about how blessed their life has truly been. My cell phone rang.

"Is this Captain Sikes?"

First thought, I am in front of my pastor. The "oh $#!@" response would not be appropriate.

"Yes"

"Captain Sikes, your unit [the 377th Theater Sustainment Command] is being mobilized in support of the Haiti disaster. You are to report no later than January 28th at 1600 hours (4:00 p.m.)

"Okay."

Now, how do I tell my wife that I will be going to a hot and remote island to live on an airport next to a runway in a tent with no air conditioning eating army issue prepackaged food? First thought: "Honey, I am going on an all expense paid trip to the Caribbean, at an all inclusive accommodation conveniently located near the airport. You aren't going."

Dan Sikes in Haiti

Too cold and the pastor would not approve.

"Honey, I am being mobilized to Haiti."

After a long pause of disbelief, my wife, Paulette, asked: "Why does the Army need a lawyer to go to Haiti?"

Good question. I proceeded to explain how the United States military has a long proud legal tradition. The country's oldest and largest law firm is the United States Army JAG Corps. My mission would be to ensure that the command obeyed both military and international law. I would help facilitate military justice, review claims actions for damage to personal property that occurred as a result of non-combat military operations, and I would review contracts for compliance with federal law.

"But why you?"

I reminded her of our conversation after September 11th, 2001. The Army had invited me back to flying attack helicopters. This was an invitation she declined on my behalf. Nonetheless, I had a personal duty to do something to help. We spoke and I, as a competent lawyer, cut a deal. I would go back in the reserves as a JAG so long as I did not volunteer to deploy. But if I did deploy, she would support me. We agreed. And now the Army was calling.

In the Army, I had spent a tour with Special Forces, I had served as a Border Pilot on the East German Border logging almost one thousand hours flying against the Soviet Union, and I spent countless nights sleeping (or trying to sleep) in rain, snow, heat, in a parachute harness, near firing artillery, waiting to be jumped, waiting to jump someone else, or just waiting. Whenever the orders came to march, I marched. . . . but . . . now I am married with two children. My how marriage and procreation change things.

Later that night we told the children.

"Why does the Army need a lawyer to go to Haiti?" My daughters are so much like their mother.

I started to explain the long standing Army tradition, when my wife interrupted. "Daddy is going to help the poor people of Haiti."

I notified Chief Judge Martha Lott and Bradford County Judge Johnny Hobbs. I did my best to secure coverage with much help from Lane Prebor, Karl Green, Marc Hardesty, John Cooper, and many others. I kissed my wife and children, choked back unexpected tears and departed for what I was sure to be a rapid call up and then flight out to Haiti.

Little did I know that I would need to qualify with my 9mm weapon at nighttime in a gas mask in the cold of Mississippi, so that I would be certified as deployable to provide humanitarian assistance to people in the Caribbean. The next stop in my journey to the Caribbean from Florida was a flight to Ft. Bliss, Texas to finalize my medical and legal readiness so I could be properly activated. Now I thought, I am getting closer to going to Haiti.

Nope. Next, I was bussed up to New Mexico (not too far from Roswell which is another story I don't have time to go over) to participate in a command post exercise to hone my fine tuned legal skills. In the evening while I trudged through the blowing snow back to my bunk, I knew I was getting closer to Haiti.

Finally we get ready to board our plane for Haiti. I am issued my 9mm pistol to wear with me at all times including my flight down to Haiti. But, I am also told that I cannot take my survival knife. I am carrying a firearm and a Gerber knife issued to me compliments of the Army, but my survival knife is a danger to a plane load of similarly armed soldiers. How I love the Army.

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The Florida Bar Board of Governors Update

By Carl B. Schwait

At its January 29 meeting in Tallahassee, The Florida Bar Board of Governors:

Approved a motion to support a petition filed at the Florida Supreme Court asking the court to establish an Innocence Commission to explore reasons for a large number of exonerations in first degree murder and other crimes in recent years. Former ABA President Sandy D'Alemberte made the request.

Was advised the Bar should also be in the black this year with its budget, despite initially expecting a small deficit. Initial expectations are the Bar's 2010-11 budget will also be in the black.

Heard ABA President-elect Steve Zack ask the board for help on his top three priorities. Those include having an "Opening of the Legal Year" ceremony similar to those in England, France, Canada, and Australia which will promote the rule of law, improving civics education so citizens have a better understanding of how government works, and improving the legal response to disasters, both natural and man-made. Zack also said he plans to set up a Commission on Hispanic Civil Rights.

Heard Chief Justice Peggy Quince talk about the court's priorities for the upcoming legislative session, including protecting the money in the state court trust fund and improving the mental health system. She also expressed support for the court electronic filing program and for the One pro bono campaign.

Voted to revamp the Bar's Legal Publications office, including reducing the staff size and having Lexis/Nexis take over more of the production work of producing legal handbooks. The action also divides into separate operations the office's duties of producing legal publications and staffing procedural rules committees.

Heard from the Board Review Committee on Professional Ethics that a special committee will be appointed to study rules and ethics issues involving the hiring of lawyers to negotiate specific liens in personal injury cases. I have been appointed to this committee.

The Board Review Committee also considered changes to Ethics Opinion 07-2 on outsourcing legal services, but decided not to make any alterations.

Received on first reading several rule and policy changes relating to the Clients' Security Fund. Amendments include increasing from $2,500 to $5,000 the fee amount that can be repaid when an attorney provides no useful services and rewriting the rule defining what constitutes useful services. The committee is still studying ways to prevent losses from trust accounts, including random audits and/or requiring surety bonds.

Received two items on first reading from the Disciplinary Procedure Committee. Standing Board Policy 15.92 on public reprimands will clarify when in-person public reprimands are necessary and provides that all in-person public reprimands must be before the Board of Governors. Proposed changes to Rule 3-5.2 will eliminate the need for a separate complaint to be filed by Bar counsel when there is a petition filed for emergency suspension or interim probation. The emergency motion will serve as the bar's formal complaint in those cases.

Howdy From Haiti

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After a four hour flight, we descended from the clouds over Haiti. The first view is the absence of green trees. I am not kidding. It is the tropics without trees. The country side is brown and littered with debris. The homes of the haves and the have nots can be identified by the size of the house and the strength of the surrounding concrete walls (or what is left of them). We arrive at the airfield and find our tents about 3 football fields distance from the taxi way and just enough further away from the runway to avoid being overturned by the jet blast. In my first visit to the porta-let I made friends with a friendly tarantula whose relatives, I think, made guest appearances in the Harry Potter movies. I am getting situated and trying to find the internet.

Throughout this grand adventure, my wife has struggled to keep upbeat, Kathleen Clifton, my legal secretary has juggled my clients like a master in the middle of a three ringed circus, and the judges have been incredibly patient with me. I was originally told I would deploy for one year. Next, I have been told that I will be gone for 180 days. Now there is a rumor that it will be much shorter. We shall see what we shall see. Semper Gumby! (Always be flexible).

P.S. I am not smart enough to be able to adjust the date stamp on my camera but that photo is of me here in Haiti.

Nominees Sought for 2010 James L. Tomlinson Professionalism Award

Nominees are being sought for the recipient of the 2010 James L. Tomlinson Professionalism Award. The award will be given to the Eighth Judicial Circuit lawyer who has demonstrated consistent dedication to the pursuit and practice of the highest ideals and tenets of the legal profession. The nominee must be a member in good standing of The Florida Bar who resides or regularly practices law within this circuit. If you wish to nominate someone, please complete a nomination form describing the nominee's qualifications and achievements and submit it to Raymond F. Brady, Esquire, 2790 NW 43rd Street, Suite 200, Gainesville, FL 32606. Nominations must be received in Mr. Brady's office by April 30, 2010, in order to be considered. The award recipient will be selected by a committee comprised of leaders in the local voluntary bar association and practice sections.

James L. Tomlinson Professionalism Award
Nomination Form

Name of Nominee:_______________________

Nominee's Business Address:_______________

____

____

County in which Nominee Resides:___________

The above named nominee exemplifies the ideals and goals of professionalism in the practice of law, reverence for the law, and adherence to honor, integrity, and fairness, as follows (attach additional pages as necessary):

____

____

____

____

Name of Nominator:______________________

Signature:_____________________________

You are cordially invited to attend
the investiture of the
Honorable

Victor Lawson Hulslander
Circuit Court Judge

Friday, April 9th at 4:00 p.m.
Union County Courthouse
55 West Main Street
Lake Butler, FL 32054

Reception immediately following

Setting Cases

Continued from page 8

matter, not privileged, that is relevant to the subject matter of the pending action", whether the discovery would be admissible at trial, or is merely "reasonably calculated to lead to the discovery of admissible evidence, it is clear that the primary purpose of the broad scope of discovery is to prevent the use of surprise, trickery, bluff and legal gymnastics at a final hearing or trial. Id. See Rule 1.280(b) Fla.R.Civ.P.; *Grinned Corp. v. The Palms 2100 Ocean Blvd., Ltd.,* 924 So. 2d 887, 893 (Fla. 4th DCA 2006).

There is no question that a balancing act must be performed in order to serve both the due process of civil litigants and the need to keep cases efficiently moving. But one cannot be sacrificed for the other, and Rule 1.440 Fla.R.Civ.P. and Rule 2.545 Fla.R.Jud. Admin. are in place to try and avoid the "surprise, trickery and legal gymnastics" that may result from bringing cases to trial or final hearing before both parties have had a reasonable opportunity to prepare and present their case.

Clerk's Corner

By J. K. "Buddy" Irby

As Florida's courts move toward paperless record keeping and electronic document filing, we at the Alachua County Clerk of Court's Office continue our efforts to improve and expand on-line access to case information. In doing so, we remain mindful of the need to comply with restrictions imposed by the Florida Supreme Court in its Revised Interim Policy on Electronic Release of Court Records.

The Supreme Court's policy permits (but does not require) the Clerk to provide electronic document images in any case to attorneys of record. If case documents are not confidential, the policy permits the Clerk to provide electronic images to other attorneys as well.

The Clerk's Office now is able to provide attorneys with the permitted levels of access to electronic document images. Attorneys of record will be provided with on-line access to all available document images in their cases. Other attorneys generally will be provided with on-line access to non-confidential documents. However in confidential case types, such as delinquency and dependency, only attorneys of record will have on-line access to document images and other case information.

So, for example, prosecutors and defense counsel in a criminal case will have access to all available document images in that case. However, access to images of confidential documents (unexecuted warrants, pre-sentence investigations, etc.) will be blocked for attorneys not involved in the case. In a delinquency case, access to on-line information will be blocked entirely, except for attorneys of record.

Even for attorneys of record, electronic image access will not be available for all documents filed with the Clerk's Office. There are certain especially sensitive documents for which document images are not created. These include documents filed in adoption cases. We are in the process of developing system safeguards to ensure that if these documents are imaged, no unauthorized disclosure will occur. These types of images will become available to attorneys of record once appropriate safeguards are in place.

Also, the Clerk's Office did not begin creating electronic document images until 2001. Therefore, documents filed prior to that time will not be available electronically.

If there is an accessible electronic image, a looking glass symbol will appear beside the document entry on the progress docket. The viewer can access the image by clicking on the looking glass.

Because of the Supreme Court's restrictions, on-line attorney access to document images will be provided by subscription only. There is a one-time subscription fee of $50, to defray setup costs. If you already have a subscription account, your on-line access will be automatically enhanced. If you do not have a subscription account, e-mail LINDAS Coordinator Sonja Mechaney at sbm@alachuaclerk.org to request one.

Publication of Notices:

Last year's legislative session imposed limits on the Clerk's court-related functions to those expressly authorized by law or court rule. In the course of reviewing these functions, we have determined there is no authority for the Clerk to coordinate, send to newspapers, track, and account for notices required to be published by the parties in a court case.

Therefore, effective April 1, 2010, the clerk's office will no longer send notices for publication to the various newspapers on behalf of parties. Rather, a party who needs a notice published will be responsible for getting that notice to the appropriate newspaper. To expedite publication, the Clerk will email issued notices to a requesting party so the parties can send them to the selected newspaper, track them and account for them.

This policy will apply to the publication of all types of notices in all types of cases. Additional information regarding publication in foreclosure cases will be posted on the Clerk's web site at www.alachuaclerk.org. The foreclosure information sheet provides contact information for all of the Alachua County newspapers that publish such notices.

For Sale

Set of Florida Statutes Annotated	$ 2,000.00
Set of Fla. Jur. 2d	$ 2,500.00
Southern 2d Reporter 1 So.2d to So.2d 999; So.3d 1-9	$22,000.00
Shepards Citations set	$ 2,000.00

Call H. Silver
(352) 359-4135 or (352) 375-8563

It's that time again!

The Eighth Judicial Circuit Bar Association Nominations Committee is seeking members for EJCBA Board positions for 2010-2011. Please consider giving a little time back to your bar association. Please complete the application below and return the completed application to EJCBA. The deadline for completed applications is **June 1, 2010**.

EIGHTH JUDICIAL CIRCUIT BAR ASSOCIATION, INC.

Application to Nominations Committee

Name: ____ Bar No. ___________

Address: (Home) ________________________________

____

(Office) ________________________________

____

Telephone Numbers: (Home) ______________ (Office) ______________

(Fax ______________ (Cellular) ______________

(E-Mail) ____

Years in practice: ______ Type of practice: _____________________

Office of Interest: (Check all that apply)

President Elect Designate _______ Secretary _______ Treasurer _______

Board member _______ Committee Member _______

Areas of Interest: (Check all that apply)

Judicial Poll	_____	Membership	_____	Membership Benefits	_____
Community Services	_____	Publicity	_____	By-Laws	_____
Membership Survey	_____	Director	_____	CLE	_____
Law Week	_____	Newsletter	_____	Mentoring	_____
Sponsored Programs	_____	Programs	_____	Long Range Planning	_____
Professionalism	_____	Historian	_____	Pro Bono	_____
Computer Technology	_____	Meeting Activities	_____	Other (Describe below)	
Bag Luncheons with Judiciary	_____	Judicial Robes and Receptions	_____		

Briefly describe your contributions to date to EJCBA.

What new goals would you like to explore for our association?

How many hours per week can you devote to your EJCBA goals? ______________

Return to: EJCBA – Nominations Committee
P O Box 127
Gainesville, FL 32602-0127

Or email completed application to: execdir@8jcba.org

Return by June 1, 2010

EJCBA Charity Golf Tournament
Benefiting the Guardian ad Litem Program

Mark Bostick Golf Course at the University of Florida

2800 SW 2nd Avenue
Gainesville, FL 32607
Phone: 352-375-4866

Friday, April 30, 2010
Cost: $100 per player
Register & Eat: 11:30am
Tee-time: 1:00pm
Reception following round

To help us properly plan for this event, please pre-register by going to http://8jcba.org/events.aspx or return this form with payment.

- Longest Putt Contest
- Men and Women Longest Drive
- Closest to the Pin Challenge
- "Mulligans for Kids" for sale

2 Person Scramble

This year's event will be held **Friday, April 30th, 2010** at the beautiful Mark Bostick Golf Course at the University of Florida in Gainesville, Florida. Registration and lunch begin at 11:30am, with shotgun start at 1:00pm. Post-round reception immediately following golf.

The cost for this event is **$100** per golfer. This price includes 18 holes of golf, riding cart, lunch, reception and various awards and/or prizes. All net proceeds of this charity tournament will benefit the Guardian ad Litem program of the 8th Circuit through the Guardian ad Litem Foundation, Inc.

A Guardian ad Litem is a volunteer appointed by the court to protect the rights and advocate the best interests of a child involved in a court proceeding. Currently, the Florida GAL Program represents close to 27,000 abused and neglected children, but more than 4,600 children are still in need of a voice in court. Additional funding to the GAL Program provides invaluable financial support for the volunteers.

SIGN-UP DEADLINE APRIL 21ST

FOR MORE INFORMATION, CONTACT MAC MCCARTY

Brashear, Marsh, Kurdziel & McCarty, PL
926 NW 13th Street
Gainesville, FL 32601
Phone: 352-336-0800
Fax: 352-336-0505
E-mail:MMcCarty@NFlaLaw.com

ENTRY FEE: $100 per golfer

Name	Partner's Name
Address	Partner's Address
Phone Number	Partner's Phone Number
Email Address	Partner's Email Address

Make checks payable to Brashear, Marsh, Kurdziel & McCarty, PL Trust Account

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

April 2010 Calendar

1 CGAWL meeting, Flying Biscuit Café, NW 43rd Street & 16th Ave., 7:45 a.m.
2 Good Friday, County Courthouses closed
5 Deadline for submission to May Forum 8
7 EJCBA Board of Directors Meeting; Ayers Medical Plaza, 720 SW 2d Avenue, North Tower, Third Floor – 5:30 p.m.
8 North Florida Association of Real Estate Attorneys meeting, 5:30 p.m.
10 EJCBA Tailgate Social, 11:00 a.m. – 2 p.m., location TBA
14 Probate Section Meeting, 4:30 p.m., 4th Floor, Family & Civil Courthouse
16 EJCBA Luncheon, Jesse Diner, President of the Florida Bar, "The Florida Bar's Efforts to Ensure Financial Security and Responsibility of the Bar During Tough Economic Times," Steve's Café, 11:45 a.m.
20 Family Law Section Meeting, 4:00 p.m., Chief Judge's Conference Room, Alachua County Family & Civil Justice Center
30 EJCBA Charity Golf Tournament Benefiting the Guardian ad Litem Program, 11:30 a.m. – 1:00 registration; 1:00 p.m. tee off time; reception/awards following, UF Golf Course

May 2010 Calendar

5 Deadline for submission to June Forum 8
5 EJCBA Board of Directors Meeting; Ayers Medical Plaza, 720 SW 2d Avenue, North Tower, Third Floor – 5:30 p.m.
6 CGAWL meeting, Flying Biscuit Café, NW 43rd Street & 16th Ave., 7:45 a.m.
12 Probate Section Meeting, 4:30 p.m., 4th Floor, Family & Civil Courthouse
13 EJCBA Luncheon, Steve Zack, President-Elect of the American Bar Association, Steve's Café, 11:45 a.m. (Special Date)
13 North Florida Association of Real Estate Attorneys meeting, 5:30 p.m.
17 Family Law Section Meeting, 4:00 p.m., Chief Judge's Conference Room, Alachua County Family & Civil Justice Center
31 Memorial Day Holiday, County and Federal Courthouses closed.

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.