FORUM 8

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President's Letter

By Rebecca O'Neill

Mindfulness and the Practice of Law

There have been recent initiatives to incorporate mindfulness into the lives of law students and lawyers. We've heard that the practice of law is one of the most stressful professions and that lawyers have a high rate of alcoholism and drug use/abuse. Many lawyers drink and use drugs to unwind and relax after a challenging day. The problem is that every day is challenging. If lawyers do not learn other coping skills, then drinking and drugs (and overeating) become a daily practice.

Far too often, the practice of law is adversarial, which tends to create tension in our lives and bodies. People hold tension in different ways. You may notice your shoulders are rising to your ears or your body is rigid. Or you may snap at a loved one. This tension affects the flow of energy in our bodies. In Chinese medicine, this is referred to as creating blockages of energy. Some say it is the blockages of energy that cause illness and disease. "Dis-ease" - not being at ease in our bodies. Physical tension can also contaminate the mind, translating into negative thoughts, thereby creating more tension and dis-ease. In general, our society reaches for a quick fix. So lawyers may reach for alcohol, drugs or food. But there are other, more healthy, options.

Since I am not one to tell people what to do (except for my husband), I will write in first person. Practicing mindfulness, while not a quick fix, is rewarding in the short and long run. For those who are not familiar with the concept of mindfulness, I usually sum it up in three words: BE HERE NOW. To me, mindfulness is not living this precious moment, of which there is only one, in the past, lamenting what could or should have been. That is living with the "udda" triplets: "shoulda, coulda and woulda." Mindfulness is also not projecting into the future - what I want or hope to be or what I "should" do. I practice being here now and trust that I will be there then.

But, as a lawyer, I must set goals and prepare arguments. For example, in preparing for an upcoming event such as negotiation, I explore the various arguments that may arise at some future point. By using mindfulness techniques, I can learn to listen to my body to more effectively do my job. For me, when my body and mind are in a more relaxed state, mental creativity flows more freely and I am better able to "think outside the box." However, while preparing for a future event or even during a hearing, if I am feeling stressed, I may become too focused on one particular issue or train of thought, experiencing tunnel vision. Being mindful

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Forum 8 has Gone Green!

As of January 2010, this newsletter, Forum 8, is automatically being sent electronically to the email address that EJCBA has for you instead if being mailed to your address. If you wish to continue receiving paper copies of the Forum 8, you must opt in by emailing Judy Padgett, Executive Director, at execdir@8jcba.org. EJCBA is helping our planet, one newsletter at a time.

The officers of the Eighth Judicial Circuit Bar Association for the year 2009-2010 are:

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

Margaret Stack
Past President
408 West University Avenue
Suite 110-B
Gainesville, FL 32601
(352) 377-8940
(352) 373-4880 (fax)
mmstack@att.net

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

Mac McCarty
President-Elect Designate
926 NW 13th Street
Gainesville, FL 32601-4140
(352) 336-0800
(352) 336-0505
mmccarty@nflalaw.com

Audrie Harris
Secretary
P.O. Box 358595
Gainesville, FL 32635-8595
(352)327-1170
audrie.harris@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

MEMBERS AT LARGE:

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

Ray Brady
2790 NW 43rd Street, Suite 200
Gainesville, FL 32606
352 378-6118
352 378-8530 (fax)
rbrady1959@gmail.com

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

Flint Crump
4703 NW 53rd Avenue, Ste. A-1
Gainesville, FL 32653
(352) 327-3643
flint@rflintcrump.com

Deborah E. Cupples
2841 SW 13 St, G-327
Gainesville 32608
(352) 273-0600
(352) 392-8727 (fax)
Cupples@law.ufl.edu

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

Evan George
4400 NW 23rd Avenue, Ste. A
Gainesville, FL 32606
(352) 378-5603
(352) 378-5604 (fax)
edglaw@gmail.com

Virginia Griffis
4041 NW 37th Place, Suite B
Gainesville, FL 32602
(352) 416-3494
griffis@scruggs-carmichael.com

Marynelle Hardy
201 E. University Avenue
Gainesville, FL 32602
(352) 374-3636
mnh@thor.co.alachua.fl.us

Phil Kabler
502 NW 16th Avenue
Gainesville, FL 32601
(352) 375-4600
pnkabler@amjinc.com

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

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

Geoffrey Mason
4545 NW 8th Avenue
Gainesville, FL 32605
(352) 377-7800
grmlaw@bellsouth.net

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

Michael D. Pierce
18 NW 33rd Court
Gainesville, FL 32607
(352) 376-4694
mpierce@clayton-johnston.com

Jeanne Singer
120 W. University Avenue
Gainesville, FL 32602
(352) 374-3670
singer@sao8.org

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

Gloria Walker
901 NW 8th Avenue
Gainesville, FL 32601
(352) 372-0519
gloria.walker@trls.org

Contribute to Your Newsletter!

From The Editor

I'd like to encourage all of our members to contribute to the newsletter by sending in an article, a letter to the editor about a topic of interest or current event, an amusing short story, a profile of a favorite judge, attorney or case, a cartoon, or a blurb about the good works that we do in our communities and personal lives. Submissions are due on the 5th of the preceding month and can be made by email to dvallejos-nichols@avera.com.

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

An Easement To A Closed Road

By *Siegel, Hughes & Ross*

Who owns the roads we live on, and how might road ownership effect private property rights? Many live in platted subdivisions, whose roads are open to the public and maintained by the county. It is common for developers to dedicate the roads of a subdivision to the county in which the subdivision is located. A dedication is simply the donating or appropriating of one's own land for use by the public. *See* 1978 *Fla. Op. Atty. Gen.* 289 (1978), Fla. AGO 078-118. However, legal title to the dedicated road remains in the grantor, while the public acquires only a right of easement in trust over the road. *Id.* As the grantor sells off individual parcels, his grantees take legal title, subject to the public easement, of the portion of the road abutting their property up to the center line. *Id.* The public holds its easement until the county closes or abandons the road. *See id.*; *see also* § 336.12, *Fla. Stat.* When the county decides it no longer wants to maintain the roads, what happens to the road and how are the rights of surrounding property owners affected?

Florida Statutes provide a fairly straight forward explanation of how a county's abandonment of a public road affects private property rights. Section 336.12, *Fla. Stat.*, states "[t]he act of any commissioners in closing or abandoning any [public] road, or in renouncing or disclaiming any rights in any land delineated in any recorded map as a road, shall abrogate the easement theretofore owned, held, claimed or used by or on behalf of the public and the title of the fee owners shall be freed and released therefrom, and if the fee of road space has been vested in the county, same will be thereby surrendered and will vest in the abutting fee owners to the extent and in the same manner as in case of termination of an easement for road purposes." In other words, when a public road is abandoned, the public no longer has the right to use the road. *See Id.* Further, if title to the road was vested in the county, it is surrendered to the surrounding fee owners, who take title to the center of the portion of the road that abuts their properties. *See U.S. v. 16.33 Acres of Land in Dade County*, 342 So. 2d 476, 480 (Fla. 1977)

Despite the clear language in the statute, several questions can arise in determining how road abandonment affects private property rights. For instance, how are the surrounding fee owners' rights affected by a reversionary interest reserved by the original dedicator of the road? Presumably, a dedicator's properly recorded reversionary interest in the road would trump the surrounding fee owners' rights to the abandoned road. *See* Fla. AGO 078-118; *see also, Emerald Equities, Inc. v. Hutton*, 357 So. 2d 1071, 1073 (Fla. 2d DCA 1978).

Another question is how does the road abandonment affect surrounding owners' rights to ingress and egress over portions of the road which are now privately owned? For example, may an owner fence off a portion of his road to exclude his neighbors from traversing the formerly public road? The answer, like most legal questions, depends on the circumstances. If the neighbors would be landlocked by an owner fencing in the road, then a fence fully obstructing access could not be erected. *See* Fla. AGO 078-118; *see also* § 704.01, *Fla. Stat.* However, a fence and gate may be permitted if they allow reasonable access to the neighbors, who would presumably either retain an implied easement over the road or obtain a statutory way of necessity over the portions of the road necessary for access to their property. *See Weber v. City of Hollywood,* 120 So. 2d 826, 829 (Fla. 2d DCA 1960); *see also* § 704.01, *Fla. Stat*.

The questions above are easily answered by reference to *Florida Statutes* and other firmly established rules of law. Indeed, it is well settled that all property owners are entitled to some reasonable access to their property. *See, e.g.,* § 704.01, *Fla. Stat.* The law is equally clear that a properly recorded reversionary interest can cause title to an abandoned road to revert back to the original dedicator (or grantor). *See, e.g., Hutton,* 357 So. 2d at 1073.

In light of the clear answers to the questions above, what is the effect of a road abandonment on a private owner's right of access by an express easement to the abandoned road when the easement holder has other reasonable access to his property? Consider the following hypothetical, and the illustration below. Owner A owns two lots: one on the north side and one on the south side of a public road known as 1st Avenue. Owner B owns a lot adjacent to, and south of, Owner A's southern parcel. In the year 2000, Owner A grants an easement appurtenant (i.e. an easement that

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Alternative Dispute Resolution

Tactics In Negotiations

By Chester B. Chance and Charles B. Carter

Roger Dawson authored a book Secrets of Power Negotiating which was published in 2001. In the book Mr. Dawson describes some negotiation tactics. The following are some tactics described by the author.

Nibbling: The "nibbler" asks for a little bit more after there has seemingly been an agreement on everything. The idea is you can get the other person to do things they had refused to do earlier because your opponent's mind reverses itself after it has made a decision. The nibbler works out what seems to be the best deal then asks for "just one more thing" and then "a little something else" then "one more tiny thing". Asking for a substantial reciprocal concession usually stops the nibbler.

Time Pressure: Some observe that 80% of the concessions occur in the last 20% of time available. Putting time pressure on the other side encourages concessions.

Being Prepared to Walk Away: Dawson suggests this is the most powerful negotiation tool. "It's projecting to the other side that you will walk away from the negotiations if you can't get what you want." He goes on to suggest if you learn to develop "walk-away power" it will make you 10 times more powerful as a negotiator.

The Decoy: One side uses the Decoy Gambit to take the other side's attention away from what is the real issue in the negotiation.

Taper Concessions: Dawson proposes the way you make concessions can create a pattern of expectation in the other person's mind. Taper concessions to communicate that the other side is getting the best possible deal.

Always Ask For a Trade-Off: The Trade-off Gambit suggests anytime the other side asks for a concession in the negotiations, you should automatically ask for something in return.

Splitting the Difference is the Fair Thing To Do: Dawson argues splitting the difference doesn't mean down the middle, because you can do it more than once. He advises not to fall into the trap of thinking that splitting the difference is the fair thing.

Vise Technique: This technique Dawson considers very effective "and what it will accomplish will amaze you". He urges you to respond to a proposal or counter-proposal with the Vise Technique: "You'll have to do better than that."

Flinch at Proposals: React with shock and surprise at the other side's proposal. "They may not expect to get what they are asking for; however, if you do not show surprise you are communicating that it is a possibility."

Ultimatums: According to Dawson, ultimatums are a high profile statement that tends to strike fear into inexperienced negotiators. However, he notes that it has one major flaw as a gambit: If you say you are going to shoot the first hostage at noon tomorrow, what had you better be prepared to do at noon tomorrow? Because,

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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, 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 associations and practice sections.

RESERVE NOW FOR THE 2010 PROFESSIONALISM SEMINAR!

WHEN:	Friday, March 26th , 2010 – 9:00 a.m. – 12:00 NOON
WHERE:	UF College of Law - Chesterfield Smith Ceremonial Classroom
PROGRAM:	Our keynote speaker is to be determined. However, we are hopeful that it will be Stephen N. Zack, who is the President-Elect of the American Bar Association and is a partner in the national law firm of Boles, Schiller and Flexner, LLP.
COST:	$60.00 (Make checks payable to EJCBA) (3.5 Hours of CLE is expected)
REMIT TO:	EIGHTH JUDICIAL CIRCUIT BAR ASSOCIATION, INC. c/o Raymond F. Brady, Esquire 2790 NW 43rd Street, Suite 200 Gainesville, FL 32606
RESERVE:	By Tuesday, March 23, 2010 – Remit payment with reservation to Raymond F. Brady, Esquire

NAME(s): _____

_____

NOTE: Please send a separate card with specialty areas for each attorney attending.

Thank you.

Please identify first and second choices for your area of specialty for small group discussions.

_____ P. I./Insurance Defense Law

_____ Family/Domestic Relations Law

_____ Criminal Law

_____ Estates & Trusts Law

_____ Transactional/Commercial Law

Parking:
Decal requirements For Commuter parking will be waived. Spaces are limited, so arrive early.

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:_____

Professionalism Seminar:

Inexpensive (CHEAP) CLE Credits

By Ray Brady

Mark your calendars now for the annual Professionalism Seminar. This year the seminar will be held on Friday, March 26, 2010, from 8:30 AM until Noon, at the University of Florida Levin College of Law. The keynote speaker and topic are to be announced.

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 373-4141.

Random (Not Really) Thoughts from a Florida Bar Foundation Board Member

By Phil Kabler

The Florida Bar Foundation. You have heard of the Foundation. Or certainly read about it in *The Florida Bar News*.

You know that the Foundation administers Florida's IOTA funds, as well as personal donations, estate gifts, and cy pres awards, and provides grants from those funds to local and statewide legal aid organizations, to law school clinics, and to new lawyers pursuing careers in indigent legal service (to help them pay their law school loans). Some local "awardees" are Three Rivers Legal Services, Southern Legal Counsel, Florida Institutional Legal Services, and the UF Law School's Virgil Hawkins Civil Clinic.

Other Foundation grants promote improvements in the administration of justice, and range from start-up funds for a program to improve child support collection, to law-related education, to substantial funding for the Innocence Project of Florida. Another "AOJ" grant program supports community service programs by voluntary bar associations. In fact, the EJCBA applied for and received a grant several years ago to support our Holiday Project!

As one of the Foundation's newest board members, it would be too easy to allow my passion for the Foundation to develop into a numbing drone about the need to donate to the Foundation and to participate in pro bono activities. But I will not do that. Firstly, that is not my style. Secondly, that would cause you, my fellow EJCBA members, to "change the channel." (*I would.*)

Rather, from time-to-time I will offer {*brief*} updates on the Foundation's initiatives and activities. The initiative with which I would like to begin is one that individual attorneys can directly participate. That is the Foundation's "Fellows Program."

Let me be straightforward. The Fellows Program is a donation initiative. We ask individual lawyers to pledge $1,000 to the Foundation, payable over five years, or ten years for young lawyers, government lawyers, and employees of non-profit organizations. (Greater amounts, shorter payment periods, and renewed pledges are always welcome, of course.)

Believe me when I tell you that the Fellows are a revered group at the Foundation. Fellows receive e-mail and written update publications (including opportunities in estate planning), invitations to the Annual Dinner which coincides with the Florida Bar's Annual Meeting, and they have ready access to the Foundation's professional staff for questions and suggestions. The Fellows yellow ribbon is a mark of distinction at the Bar's Annual Meeting and all Foundation events.

Now for "The Ask." If you are not already a Fellow, please seriously consider becoming one. (If you already are, please consider a new gift.) Gifts can be directed to legal assistance for the poor, children's legal services, administration of justice, or law student assistance. Fellows gifts and other pledges are not onerous when amortized over five or ten years. Participation is a good thing for society generally, and as lawyers specifically.

You can learn about the Foundation and the Fellows Program by visiting www.floridabarfoundation.org. Or you could invite me (352-332-4422) to visit with you (or your firm), to go into further detail about the Foundation, and – *hopefully* – to enroll you in the Fellows Program. I promise to be brief.

More to come in future issues of *Forum 8*.

SPRING CLEs

The EJCBA CLE Committee has exciting opportunities to increase the depth and breadth of your insight, information, and understanding! The EJCBA is sponsoring a series of continuing legal education seminars this spring for current EJCBA members. Members are invited to participate in one or all of the seminars.

February Seminar:

Date & Time: February 12 – 9 a.m. – 12 p.m.

Topic: Needs of children and the development of an appropriate parenting plan.

Sponsors: This is an interdisciplinary program co-sponsored by FLAG, Cooperative Divorce, and Gainesville Psychologist.

Location: Criminal Courthouse (coffee & donuts)

Credits: 3 CLE credits applied for

Pro Bono News

By Audrie Harris, Esq.

One: One client. One attorney. One promise.

As a pro bono attorney for Three Rivers Legal Services, I have experienced first-hand the satisfaction a lawyer can gain from handling a pro bono case. When you handle a pro bono case, you give back to your community. You help change the unflattering impression many citizens have of lawyers as only interested in the financial gain a case can bring as opposed to helping a client achieve justice.

Whether you win or lose the case, your client will know that they had someone in their corner advocating for them, taking their case seriously. You will have given them not only their day in court, but a fighting chance. Once you experience the look on your client's face when you passionately argue on their behalf, you will feel a heightened sense of pride. Handling a pro bono case reminds many of us why we went to law school – to help those in need who are unable to effectively advocate for themselves.

Since you can specify the types of cases you can assist with, handling one pro bono case at a time is very manageable. You can handle only those issues you are familiar with and accustomed to handling. All cases are reviewed for eligibility, mentors are provided to answer questions for novice attorneys and trainings are being planned to involve attorneys not used to handling the referred cases. Furthermore, handling pro bono cases helps sharpen your skills and keeps you at the top of your game. The impact you will have on your client and others will be astronomical and will help further the legend that is YOU.

Whether you volunteer at Three Rivers Legal Services, the Guardian ad Litem program, or with some other legal services provider, you will enrich your client's life as well as your own. As we start this new year, 2010, how about committing to a resolution to take just one? One pro bono case. You may find the experience so rewarding that you return for seconds!

Start today with One promise. One client.

Save The Date

On April 30, 2010, the Annual EJCBA Golf Tournament (associated with Law Week) will be held at the UF Golf Course. Lunch will be from 11:30 a.m. – 1 p.m.; tee off at 1:00 p.m., with a reception to follow. Put this on your calendar NOW!

Space Available

Space available to share. Separate office and secretary area, common conference room, copy room. Ideal for one attorney. call Pete Enwall, 376-6163

Closing Law Office

Selling Fla. Jur2d, Florida Statutes Annotated, So.2d and So.3d Reporters, and Sheperds. No reasonable offer refused. Call Hal Silver @352-359-4135.

Rebecca O'Neill, Gainesville Police Chief Tony Jones, Elizabeth Collins and Lisa Chacon (PACE) at the December 2009 EJCBA luncheon

Judges Davis, Monaco and Glant at the January 2010 EJCBA luncheon

Criminal Law

By William Cervone

I am almost hesitant to write about the following for fear of giving my brethren in the defense Bar any bad ideas, but what the heck, this column is supposed to be about issues in criminal law so I'll do it.

An interesting and maybe novel situation has come to my attention from, of all places, New Mexico. It seems that Santa Fe Police Officer John Boerth made an otherwise unremarkable DUI arrest there one day in 2006. The defense lawyer, no doubt an enterprising soul, demanded as a part of his discovery entitlement under New Mexico's rules the personal cell phone records of the officer. Apparently, his theory was that the officer might have had a personal cell phone on him at the time, and might have used it to somehow contrive an excuse to stop the defendant's car because there might have at the same time been some sort of drug sting going on in Santa Fe. Apparently, the records might have shown that the officer was talking to a snitch or someone else to set up the defendant. I say apparently because there is nothing in the opinion that ultimately was rendered by the New Mexico Court of Appeals that is anything less than vague about this.

Regardless, the prosecutor immediately threw the legal equivalent of a hissy fit and basically refused to turn over any such thing, making any number of objections. These ranged from the lack of any showing of relevance or likelihood to lead to admissible testimony up to constitutional (and I mean THE constitution, not just New Mexico's) level privacy rights.

The trial judge decided that the matter was relevant and ordered production. Interestingly, at no point did anyone proffer anything to say whether or not the officer even had a personal cell on him at the time, much less whether it had been used. Regardless, the prosecutor simply did not comply and ultimately the case was dismissed as a sanction. That dismissal stuck on appeal, by the way.

This is all very interesting to me on several levels. First of all, I have no idea what kind of public records laws New Mexico has but Florida's are very broad. Even ours, however, are not without limits. For one thing, under Chapter 119 a telephone number (as well as lots of other personal information) for a law enforcement officer is exempt from public records disclosure. That exclusion, however, doesn't really seem to be on point to the content of conversations or even records of whether or not they occurred, and the officer's records could have been redacted to delete his number while still showing a record of calls.

Second, Florida case law establishes that a private communication does not become public record even if made over a publicly owned computer, and that logic would have to apply to a cell phone. Personal communications have nothing to do with official business and thus aren't public records, no matter how they are made. The risk of some invasion of privacy therefore seems small. Of course, official business communications are public record even if made on private phones or computers, a whole different complication

Maybe more to the point, there are also general exceptions for on-going investigation information that shields that kind of material from Chapter 119 disclosure. This could have come into play in the New Mexico case, or here for that matter. The interplay between that kind of sanctioned secrecy and discovery rights very much requires a case by case resolution, and we have mechanisms for that if necessary. All of this leaves me feeling a bit queasy, however, for admittedly selfish reasons. The idea of having to even litigate entitlement to private matters because one is a public employee casts a certain chill on the willingness to work in the public sector.

All of that said, the most interesting part of this, at least to me and from a purely intellectual point of view, is the continuing development of legal systems to deal with the growing technology of communication. Some of you will have seen where governments (Alachua County, for one) actually direct employees not to use methods like texting for public purposes for fear that a record can't be made of that kind of business, meaning that they will run afoul of public records retention requirements. As with so many other things in our modern but not necessarily better world, for every advance and convenience we make, there are balancing considerations that may well paralyze us if we don't use common sense.

There was, of course, one course Officer Boerth could have followed that would have avoided all of this angst: just don't use your personal cell phone for official business. And, no, I won't give my defense colleagues the cite where to find the case. Do that yourselves.

Family Law: Cloud Computing

By Cynthia Stump Swanson

I write this month about a topic which is related not only to family law, but also to law office management in general. A technology concept which is gaining more acceptance is that of "cloud computing." I can remember when my mother first got a computer and tried to understand it, I used to talk to her about how she could store some things - like documents she created - on her own computer, but how her email might be stored "in the big computer in the sky." She always had trouble finding photos or other things we sent her in email. Little did I know years ago that this would actually become a real thing. And, no, I'm not claiming I invented cloud computing.

Instead of running applications from your own office, stored on your own server, in cloud computing you run software which resides on some computers "up in the sky;" and your data is also stored, not on the server in your own office, but on some other computers "in the cloud." And, more importantly, it's not just on one particular computer, but may be on many different computers and, even more importantly, you don't really know which computer it's on. Companies which host software applications and store your data in large data centers may be located anywhere, and are all accessed via the internet.

This is also sometimes referred to as "Software as a Service" or "SaaS." You open up your browser every morning (Internet Explorer, Firefox, etc.) and go to one website, and everything you need is delivered via the internet and accessible through your web browser. In contrast to the more traditional boxed software distribution model, everything required to interface with the application is downloaded each time the service is accessed.

If you use Hotmail, Gmail, or Yahoo email, you are already involved in cloud computing. You have no Gmail software application on your computer. Instead, you open a web browser on anybody's computer anywhere anytime, and go to the Google website and then to Gmail, and voila! All your email is accessible to you all the time from anybody's computer. Really handy when you're visiting family over the holidays and really, really need to get away from everybody for a little while. You can run back to wherever they keep their computer and check to see if anybody sent back to you that cool snowball fight email.

Social networking sites, like My Space and Facebook, are also examples of Software as a Service. You can access your Facebook page from any computer, your mobile phone, and so on.

If you're an attorney who is more interested in practicing law than in installing software upgrades, figuring out why your computer all of a sudden is typing only in caps even though the Caps Lock key is off, learning the difference between CD-R's and CD-R/W's and DVD's, or remembering to exchange out an external hard drive every day or every week to back up your data, then cloud computing may be for you. In very small firms, where most family lawyers work, we have enough administrative stuff to do. Keeping up with insurance is a full time job in itself. Managing and paying employees – sheesh! Participating in sections, committees, doing other bar work, reading journals, taking CLE courses, finding office space, deciding between Lexis and Westlaw and Fastcase - yikes! That's enough stuff you don't get paid for. Wouldn't you like to take "keeping up with technology and fixing computers" off that list?

One thing most highly touted by SaaS firms is that you can get off that upgrade treadmill. I love that term, because it exactly describes how I feel. For example, we use Amicus Attorney, Timeslips, and Quickbooks for the billing and accounting tasks in our firm. When Timeslips announces an upgrade, we have to evaluate each time the cost vs. the benefit. And the cost includes not just the cost of the boxes and discs, but also the time involved in getting it installed and synchronized with Amicus and Quickbooks. So, you make a decision, and three months later, Amicus announces an upgrade. Here we go again, making the same decision again. Argh!

When you use SaaS, there are no up front fees for buying and maintaining servers, no up front costs for buying and licensing software applications, and you can reduce the fees you pay to computer guys to come to your office when you finally give up and yell "uncle." You don't have to pay to constantly upgrade versions of your software. Say good bye to that upgrade treadmill.

On the other hand - you knew this was coming, right? - there are some definite concerns for lawyers. We've read some recent cases about whether the privacy of your email which resides on somebody else's computer (like Gmail) is really protected. Of

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Easement

Continued from page 3

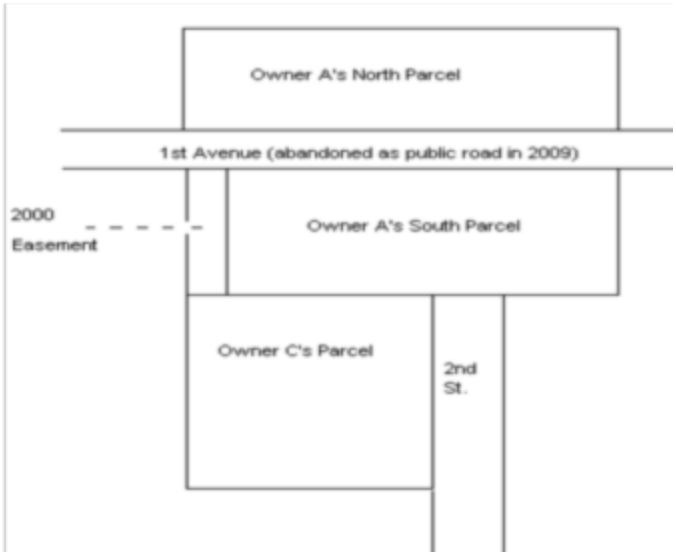
runs with the land and binds successors) over his southern parcel to Owner B. The express easement is properly recorded, and expressly grants Owner B the right of ingress and egress over the west 20 feet of Owner A's south parcel to access the public road 1st Avenue. In fact, the easement is described in reference to 1st Avenue, with the grant expressly stating that the easement is for access over Owner A's southern parcel to 1st Avenue. Owner B has other reasonable and convenient access to another public road (2nd Street) from his property, but the easement was granted to give Owner B a rear entrance to his lot from 1st Avenue. In 2001, Owner B sells his property to Owner C, who never gets along with Owner A, but is nonetheless permitted to use the easement to access 1st Avenue pursuant to the 2000 grant. In 2009, the county properly abandons 1st Avenue, thereby releasing the surrounding fee owners from the public easement. Does Owner C's easement survive the road abandonment?

If the original dedicator of 1st Avenue did not retain a reversionary interest, then Owner A has fee title to the portion of 1st Avenue abutting his properties. *See* Fla. AGO 078-118. Thus, Owner A now owns the property which was the road free from the public easement. In effect, Owner A's two parcels are now joined. Before the road abandonment, Owner C's express easement led to 1st Avenue, which was, although technically private property, subject to a public easement. After abandonment of the public's easement rights to 1st Avenue, does Owner C's express easement serve the same purpose, or is it extinguished due to these changed circumstances?

Clearly, Owner C does not have a way of necessity because his parcel is not landlocked. *See* § 704.01, *Fla. Stat.* Further, the express easement does not extend any further than the boundary of 1st Avenue and Owner A's south parcel. Under these circumstances, the easement would likely not survive the road abandonment because it would now lead to private, unencumbered property rather than the public road which it was created to access. The rationale behind such a rule is that the easement was created expressly for Owner B's, and his successor's (i.e. Owner C's), access to 1st Avenue. When 1st Avenue is closed it becomes the private property of the surrounding lot owner(s), which in this case happens to be Owner A. Owner A would then have the right to exclude Owner C from the portion of 1st Avenue that Owner A now owns because Owner C's express easement is defined by a boundary (i.e. 1st Avenue) that no longer exists. In short, the road abandonment eliminates the purpose for which the easement was created, thereby extinguishing the easement. *See Feather v. Donaldson*, 481 So. 2d 937, 938 (Fla. 5th DCA 1985).

We have found no Florida case which expressly addresses this issue. However, at least one jurisdiction has decided the issue as suggested above. The Supreme Court of Virginia has held that when a public road to which an easement gives access is closed, the easement is extinguished by cessation of the purpose for which it was created. *See American Oil Co. v. Leaman*, 101 S.E. 2d 540 (Va. 1958); *see also McCreery v. Chesapeake Corp.*, 257 S.E. 2d 828 (Va. 1979).

In light of the effect of section 336.12, *Fla. Stat.* and public policy favoring private property rights, there is no good reason to believe that a Florida court would treat this issue any differently than the courts in Virginia. It is difficult see how a contrary result could be consistent with a property owner's right to unencumbered fee title to the centerline of an abutting road upon abandonment by the public. *See* § 336.12, *Fla. Stat.* Upon extinguishment of the public's easement to a road, it is simply logical to also eliminate the rights of private easement holders whose easements were created for the express purpose of access to the once public, but now private, road.



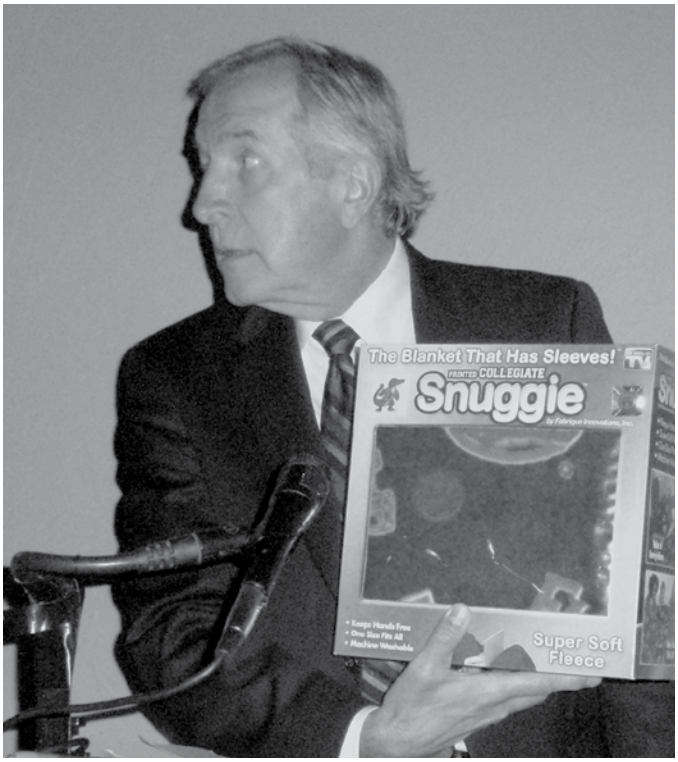
Federal Bar Association Update

By Peg O'Connor, FBA Secretary

The North Central Florida Chapter of the Federal Bar Association began 2010 with a bang. By the time you read this, the organization will have hosted "An Evening with Justice Clarence Thomas," a limited-admission event featuring dinner and dessert with the United States Supreme Court justice. Justice Thomas will present brief remarks and then interact with the audience in a question-and-answer format. Check next month's newsletter for the complete rundown.

We invite all attorneys in the community to consider joining FBA. Benefits include a variety of CLE opportunities each year pertaining to federal practice, as well as networking opportunities with attorneys, judges, and court personnel in the federal system. The local chapter of the Federal Bar Association also hosts events such as the "Brown Bag" lunch series, which provides an excellent opportunity to see the inner workings of federal court.

Local dues are only $25 per year, and national membership is required in order to be a member of the local chapter. National dues are based on number of years in practice. Please contact Margaret Stack, our membership chair, at 377-8940 or mmstack@att.net for more information or to request an application.



Judge Smith shows off his retirement "Snuggie" at the January Bar Luncheon

Sponsorship Opportunities Available!

If you would like to sponsor an EJCBA event and get some great perks, please contact the EJCBA Sponsorship Committee at execdir@8jcba.org to find out more.

Back row: Judges Morris, Smith, Moseley, Hulslander, MacDonald, Ferrero, Jaworski, and Clerk of Court Buddy Irby. *Front Row:* Judge Monaco, EJCBA President Rebecca O'Neill, Chief Judge Lott, Judge Pierce (Ret.), EJCBA Pres. Elect Elizabeth Collins.

Probate Section Report

By Larry E. Ciesla

The final monthly meeting of the Probate Section for 2009 was held on December 9th. Richard White began the meeting with a discussion of two proposed statutes regarding homestead real property which have been prepared by the RPPTL section of the Florida Bar. One deals with the situation where there is an attempt to devise a homestead by will, but the attempt is invalid due to the grantor being survived by a spouse and minor children. In such cases, the statute would give the surviving spouse the option to take title as a tenant in common with the children, as opposed to a life estate to the spouse with remainder to the children. The other proposed statute would allow a single parent with minor children to transfer title to the homestead into an irrevocable trust, with the parent and children as beneficiaries. Both proposals are the result of problems encountered by estate planners in attempting to create workable estate plans where these type situations are involved. One of the main problems is the undesirability of ending up with a homestead being owned by minor children. Another primary concern is the undesirability of the life estate form of ownership (which was the subject of a June 2007 Florida Bar Journal article entitled, "The New Homestead Trap: Surviving Spouses Are Trapped by Life Estates They No Longer Want and Can No Longer Afford"; and is occasionally the subject of litigation between the life estate holder and remainder holders. For example, see the recent case of Vaughn vs. Boerckel, 20 So.3d 443, (Fla. 4th DCA 2009), holding that the surviving spouse/life tenant can be held personally liable to the remainder holders for money damages due to any failure of the life tenant to pay property taxes; homeowners' insurance; repairs; mortgage payments; association dues or special assessments.

Our Clerk of Court, Buddy Irby, made a special guest appearance to extend best holiday wishes to the section and to update us on the status of the pending statewide e-filing project currently being negotiated between the clerks and court administrators. Mr. Irby indicated that Probate has been designated as the guinea pig to be the first division which will be required to use e-filing. Mr. Irby assured the section that mandatory e-filing is just around the corner and that we will be hearing a lot more about how the process will work as soon as the details are finalized.

The meeting concluded with a discussion of the current state of the law regarding whether a lender may obtain a deficiency judgment after foreclosure on a Florida homestead. Following some post-meeting research, it appears that there is currently no prohibition against entry of a deficiency under such circumstances. However, a bill has been introduced for consideration by the legislature during the 2010 session, HB35, which, if passed, would prohibit entry of deficiency judgments on homestead property, effective July 1, 2010.

The Probate Section continues to meet on the second Wednesday of each month at 4:30 p.m. in the 4th floor meeting room in the Civil Courthouse. All interested practitioners are invited to attend. If you wish to be added to the email list to receive notices of the meetings, send an email to lciesla@larryciesla-law.com.

Tactics in Negotiation *Continued from page 12*

if you don't shoot the hostage, you have just lost all of your power in negotiations.

Cherry Picking: Dawson gives the example of buying a piece of land in the country and the seller is offering it for $100,000 with 20% down and the balance due over ten years with 10% interest. He might ask the owner to quote his or her lowest price for an all cash deal. The seller might agree to $90,000 for all cash. Then you ask what the lowest interest rate would be for a 50% down transaction. The owner quotes you 7%. Then you Cherry Pick the best features of both components of the deal and offer $90,000 with 20% down and the balance carried by the owner with 7% interest.

The authors of the book "Guerrilla Negotiating: Unconventional Weapons and Tactics to Get What You Want" comment on the following tactics:

Stonewall. The authors suggest this is the tactic your spouse uses when annoyed with you. The opposing side becomes withdrawn and sullen. This apparent retreat is tactically intended to apply pressure. The idea is you become so uncomfortable with the silence that you back off

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The Florida Bar Board Of Governors Report

By Carl Schwait

At its recent meeting in Amelia Island, The Florida Bar Board of Governors:

Approved a new legislative position at the recommendation of the Legal Needs of Children Committee. It includes that children in the dependency system have a right to a paid or pro bono attorney and that certain "critical categories" of children in the state's care should get publicly provided lawyers. The position also stipulates that any funding for those lawyers should not come at the expense of the court system or the state's Guardian ad Litem Program.

Heard a report that the Board Review Committee on Professional Ethics has voted to draft amendments to Florida Ethics Opinion 07-3, which addresses outsourcing. The amendments would require the informed consent of clients before outsourcing confidential information and amendments to the Rules Regulating The Florida Bar addressing either notice to third parties or redaction before outsourcing sensitive financial or medical information. I am currently working on this issue.

The board voted to again table an appeal from a staff ethics opinion on medical lien negotiations. The staff opinion held it would likely result in an excessive fee if a lawyer working on a contingency fee hired another lawyer under a reverse contingency fee to handle medical lien negotiations. The board voted to refer it to the appropriate committee to consider an amendment to the Rules Regulating The Florida Bar addressing the subject.

The board voted to place a six-month moratorium, beginning January 1, 2010, on the enforcement of the new Bar advertising rules affecting Web sites in order to give Bar members time to comply with the rules. The board also approved a policy on attempted voluntary filings of lawyer Web sites that Bar staff will not review the entire contents of a Web site even if a lawyer files that voluntarily, but will respond to specific questions involving a specific phrase or image to be included on a Web site.

The board voted to approve the six goals set out by the Board Review Committee on Professional Ethics for lawyer advertising, which will assist in the ongoing review of advertising rules. Those goals function under the overall policy that the primary purpose of lawyer advertising is to benefit the public by providing information about the need for and availability of legal services.

Heard a report on the ongoing efforts on e-filing for the state court system and the efforts to establish an Internet portal for electronic filing, including that clerks and the courts were trying to work out their differences over who would run the portal, and the Bar was working to help that along and push for a filing system that will be uniform statewide.

Approved a recommendation from the Program Evaluation Committee to create the Special Committee to Study the Decline of Jury Trials, as requested by President-elect Mayanne Downs. The panel will study the decline of jury trials at both the state and federal level, and determine the impact that has on the justice system and whether any action is needed.

Heard a report that the Clients' Security Fund Review Committee II will be proposing several rule changes to the CSF rules and regulations and is looking at the issue of loss prevention to see if there is anything the Bar can proactively do to prevent lawyers from stealing from clients.

Approved the Bar's 2010-13 Strategic Plan. The four main goals remain the same from recent plans, but there are some revised ways of meeting those goals, including making better use of technology and reaching out to help lawyers entering the practice.

Prosecutors As Defendants In False Prosecutions

By Stephen N. Bernstein

"There is no free standing constitutional right not to be framed" states a brief filed by Iowa prosecutors hoping to persuade the United States Supreme Court to dismiss a lawsuit against them for allegedly fabricating evidence that led to the 25 year incarceration of two innocent men. This is a shocking proposition which should be rejected.

According to court documents, the prosecutors took a leading role in 1997 when investigating the murder of a recently retired white police officer at an Iowa automobile dealership where he was working security. The prosecutors allegedly coaxed a witness to offer a version of events that implicated two African American men, Curtis W. McGhee, Jr. and Terry J. Harrington. The witness gave several different statements over time and he had trouble keeping his facts straight. The prosecutors also allegedly coerced other witnesses to lie and withheld evidence which pointed to a different perpetrator.

These contradictions and the fact that prosecutors apparently had a hand in the alleged fabrication came to light years after the men were sentenced to life without parole, when a prison barber made a public records request of police files in the case and came across exculpatory information that had been kept away from defense lawyers. The witness in question ultimately recanted his story. Mr. Harrington's conviction was overturned by the Iowa Supreme Court, which stated that the star witness was a "liar and perjurer" and Mr. Harrington was set free. McGhee tried to get a new trial but ultimately negotiated a conditional plea to allow him to go free after the time he had already served. Both defendants say they were targeted because of their race and later sued the two prosecutors under a law that gives individuals the right to seek damages from government officials who knowingly deprive them of their constitutional rights. The prosecutors argue that they should be immune from such lawsuits and point to a line of U.S. Supreme Court cases which shield prosecutors from legal consequences when they carry out their duties. They argue that the state and bar disciplinary structures are best able to deal with the accusations of prosecutorial misconduct and that prosecutors would be "chilled" in doing their job if they worry about being sued over innocent missteps.

Prosecutors need to be able to carry out their duties without fear that they will become the target of personal lawsuits if defendants are found not guilty or charges are dropped. Nevertheless, such lawsuits have high requirements before officials can be personally liable to the extent that there must be convincing evidence that the prosecutors were directly involved and knowingly violated a clearly established constitutional right.

Let me first point out that in my experience, mostly here in the Eighth Judicial Circuit, most of the prosecutors perform their work honorably and understand that they are duty bound not to secure convictions but to seek justice. However, I do recognize that for those two exceptions, the prospect of being held personally liable would at least hold people accountable, just like the defendants I represent who are charged with criminal conduct. I would respectfully submit that coercing witnesses to lie while at the same time withholding evidence indicating innocence is exactly the type of thing that civil lawsuits are meant to remedy when they do occur. This should be in addition to the bar association's assurance to the public that self policing does in fact mean something in the regulation of attorney conduct and ethics.

Tactics in Negotiation *Continued from page 14*

from your position just to restart the conversation.

Tit-For-Tat. Negotiators use this tactic by not offering any concession without demanding a reciprocal concession in exchange.

Hardball. Described as the negotiator who is stubborn, uncompromising and belligerent, and, as a result "a negotiator's nightmare" because they are not really interested in negotiating at all. They want their own way and they are unwilling or unable to consider an alternative position.

Whatever's Fair. Negotiators sometimes take the position "as long as it's fair" they will accept the outcome. The danger: they are asking the other side to define what constitutes "fair", but, because the other side wants to be seen and viewed as "fair", as a result, the other side may be overly generous, compromise needlessly, or concede more than they really should.

Sometimes a person just naturally falls into one of the above-described negotiation tactics. Other times they have educated themselves on various strategies and styles. In any event, recognizing a tactic is half the battle.

Family Law

Continued from page 9

even more concern might be the question of the privacy protection of your data if the data center where it is stored is located in Malaysia or Venezuela or China.

Also, you don't have control over your upgrade treadmill. If your vendor decides it's going to upgrade, you're along for the ride whether you want to be or not. You have to all of sudden get trained in an upgrade on a schedule which might not be the best for you.

There is also the question of who owns the data? Do you have a Facebook page? Have you read the Facebook privacy policy? It's been in the news recently. It may seem ridiculous to contemplate a service where we lawyers are not the owners of the information we store in the cloud. However, social networking sites, for example, provide a disturbing lack of control over the data supplied to the service. In the case of your frequent and very important "status updates," this may not be an ethical issue, but when it comes to confidential client data hosted in the cloud, there has to be no question with respect to ownership.

Although by reading its Terms of Use or Terms of Service agreement you can ensure things like ownership and privacy, you still can't be sure the host company will never make a mistake. You want to be clear about the company's commitment for recovery help when data is corrupted or lost. Also, be sure you can make local back ups of your data if you want. Check to see if the company will outsource their data storage, and if so, to whom and where.

This is just a tiny discussion about cloud computing. As with virtually everything we do as lawyers, and with all the advice we give, we must consider, manage, and balance cost and risk. What are the chances that the worst thing will happen? And if it does, then what can you do? Computer disasters are usually personal. If my computer crashes, it's a disaster for me. You probably couldn't 'care less. So, I have to decide for myself how to manage that risk. Cloud computing lets you share some of that risk with thousands of others. Is that good? Or not so good? If my internet goes down, I can run home or to the library, or maybe to your office if you'll let me, and still access the stuff in the cloud. Is that good? As we say in America, read more about it and decide for yourself.

Now, for some actual family law related announcements:

Remember, there is a new cover sheet form to be used when filing a new family law case. Form 12.298. Also, don't forget to also file the Notice of Related Cases form.

On February 12th, there will be a local CLE workshop which gives us the opportunity to hear a presentation by Dr. Debra Carter who will review current research to help family law professionals understand how empirical science can be applied to the development of parenting plans to maximize outcomes for children and families. Contact Arlene Huszar, the Alachua County Family Court Manager to get a registration form and for further information.

The Family Law Section meets on the third Tuesday of each month at 4:00 pm in the Chief Judge's Conference Room in the Alachua County Family and Civil Justice Center. Hope to see you there.

President's Letter

Continued from page 15

of my body allows me to engage techniques which facilitate the flow of creativity, which allows me to better serve my clients.

The technique I use most frequently to engage mindfulness is my breath. It sounds too easy to be true, but people will generally hold their breath when feeling stressed. When I was a litigator, I often practiced breathing techniques in court. When I noticed the tension mounting in my body, I took a few deep breaths, being mindful not to hyperventilate. Doing so always facilitated a physical sense of calmness which, for me, often seemed to result in clarity and spontaneous inspiration. Deep breathing is free and can be done without drawing attention to oneself.

Living in the present moment and practicing mindfulness are not easy. Lawyers in particular have minds that are conditioned to live elsewhere. Being in the present moment requires rigorous mental training and reconditioning. It means listening to my body for signs of dis-sease. It means bringing myself back to the present moment when I notice that I am not here. It is doing dishes for the sake of doing dishes, not for the sake of getting the dishes done (from Thich Nhat Hanh's book "The Miracle of Mindfulness"). The reward is that when I am fully engaged in my life in the present moment (which is really all I have), I tend to be happier, more at ease, more fulfilled, and less tense and dis-ease. And when there is an absence of dis-ease, I am not looking for a quick fix.

Happy Valentine's Day to all.

FORUM 8

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February 2010 Calendar

3 EJCBA Board of Directors Meeting; Ayers Medical Plaza, 720 SW 2d Avenue, North Tower, Third Floor – 5:30 p.m.
4 CGAWL meeting, Flying Biscuit Café, NW 43rd Street & 16th Ave., 7:45 a.m.
5 Deadline for submission to March Forum 8
10 Probate Section Meeting, 4:30 p.m., 4th Floor, Family & Civil Courthouse
11 North Florida Association of Real Estate Attorneys meeting, 5:30 p.m.
12 CLE Workshop, Dr. Debra Carter, Helping Family Law Professionals Understand How Empirical Science can be Applied to the Development of Parenting Plans, 9 a.m. – 12 p.m., Criminal Courthouse
15 President's Day Holiday – Federal Courthouse closed
16 Family Law Section Meeting, 4:00 p.m., Chief Judge's Conference Room, Alachua County Family & Civil Justice Center
19 EJCBA Luncheon, Justice Jorge Labarga, Steve's Café, 11:45 a.m.

March 2010 Calendar

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10 Probate Section Meeting, 4:30 p.m., 4th Floor, Family & Civil Courthouse 11 North Florida Association of Real Estate Attorneys meeting, 5:30 p.m.
16 Family Law Section Meeting, 4:00 p.m., Chief Judge's Conference Room, Alachua County Family & Civil Justice Center
19 EJCBA Luncheon, Judge William Van Nortwick (First District Court of Appeal), Adrienne Davis, and Jane Curran from the Florida Bar Foundation speaking on the "ONE program," Steve's Café, 11:45 a.m.
26 Professionalism Seminar, 9 a.m. – 12 p.m., UF College of Law, Chesterfield Smith Ceremonial Classroom

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.