FORUM 8

Volume 69, No.5 | Eighth Judicial Circuit Bar Association, Inc. | January 2010

President's Letter

By Rebecca O'Neill

Identity Theft and Health Care. We've all heard the horror stories of people who have had their identities stolen, people who may have been declined new credit or who received credit card statements in the mail for unfamiliar purchases on unknown credit cards. Now imagine going to a hospital or outpatient clinic for a medical procedure and being asked questions about a condition you have never had, only to discover that another person accessed your personal information, including your health insurance information, and received medical care under your identity. Under the best of these bad circumstances, a patient finds out the easy way: by talking to the medical professional. Under more emergent circumstances, it could cost a life. Imagine a scenario when the patient's documented medical history resulted from health care identity theft. Perhaps the medical record indicates that the patient's blood type is O positive when, in fact, the "real" patient has AB negative blood. If the "real" patient needs blood emergently and comes to the emergency department in an unconscious state, the patient could be given the wrong type of blood. More frequently, medical information is lost or stolen and the patient may not immediately learn about it.

Public theft or loss of medical information is reported in the news far too frequently. Most recently, Health Net of the Northeast, Inc. confirmed that one of its computer hard drives has been missing for six months. This drive contained 7 years of medical claims information for approximately 1.5 million of their customers, including physician billing details. Previously, San Jose Medical Group reported a loss of patient information for 185,000 patients, including patients' names, addresses, social security numbers and billing codes, some of which was encrypted. This medical group had copied patient information from its secured servers to two local PCs, which were later stolen. In another case, Providence Health System reported the theft of CDs and disks containing social security numbers and sensitive health information of over 300,000 patients. Fortunately, the information was highly encrypted. And yet another is Wilcox Memorial, who reported the disappearance of a computer drive containing unencrypted data, including patients' names, addresses and social security numbers. Below are some basic tips to help protect your medical identity:

- Be proactive. Be cautious on the front end, prior to providing medical information. Share your medical information only with your health care providers.

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Forum 8 is Going Green!

As of January 2010, this newsletter, Forum 8, will automatically be 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.

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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:
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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

Pro Bono News

By Michael Pierce
Chair, EJCBA Pro Bono Committee

As Chairman of the Eighth Judicial Circuit Bar Association Pro Bono Committee, it is my privilege to take on the responsibility and role to promote, advocate, and encourage attorney participation in pro bono and volunteer opportunities throughout our circuit.

In late October, the Florida Bar Pro Bono Legal Services Committee unveiled the "One: One client. One attorney. One promise." campaign, which urges every lawyer to take a single pro bono case. Pro Bono awareness has become a priority of the Florida Bar as pro bono work has been stagnant as evidenced by a recent study revealing that only about half of the state's lawyers are performing pro bono work.

EJCBA is ready to follow in the Florida Bar's footsteps and prioritize and encourage pro bono awareness throughout our local community by helping promote the "One" campaign and coordinating efforts with our local legal service organizations.

In an effort to aid our Circuit with pro bono promotion and inspiration, we are excited to report that First District Court of Appeal Judge William Van Nortwick, chair of the Pro Bono Legal Services Committee, and Adrianne Davis, coordinator of the Florida Bar's "One" campaign have agreed to attend and speak at our March 19, 2010, bar luncheon. EJCBA and Three Rivers Legal Services hope to hold an informal reception for Judge Van Nortwick and Ms. Davis the evening before the luncheon. Please look for more updates in early 2010.

www.onepromiseflorida.org
one
one client. one attorney. one promise.

In this month's newsletter, Three Rivers Legal Services highlighted and recognized the volunteer attorneys of the Eighth Judicial Circuit who provided and continue to provide pro bono services to the low income community. I urge the rest of our legal community to follow the example set by these volunteer attorneys and undertake a pro bono case. Three Rivers Legal Services welcomes the opportunity to work with volunteer attorneys to assist low income or indigent clients with a wide range of legal problems including domestic and family, housing, landlord/tenant, probate, and consumer matters. In early 2010, Three Rivers Legal Services will be conducting educational seminars in several of these practice areas arming our legal community with the basic tools required to represent these clients.

We all need to recognize our obligation and responsibility as attorneys to provide legal counsel to those less fortunate and who are unable to help themselves. It is through these volunteer efforts that we can continue to make a positive and visible difference in our local community. In the next several newsletters, we will highlight pro bono and volunteer experiences of individual attorneys and uncover and explore additional attorney volunteer opportunities throughout our circuit.

Thank You from Three Rivers Legal Services

By Marcia Green

Three Rivers Legal Services wishes to thank the following attorneys for their donations of pro bono time and/or financial resources to further the availability of legal assistance to the indigent residents of our community. 2009 was a difficult year for the lower income residents of our communities and more than ever the support of the legal community is needed and appreciated. We look forward to greater participation in 2010, involvement in the ONE campaign, and new and interesting projects and training opportunities. Thank you and Happy New Year!

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Alternative Dispute Resolution

Top Ten Irritating Phrases

By Chester B. Chance and Charles B. Carter

Researchers at Oxford University compiled a list of the top ten irritating phrases. At the end of the day, the most irritating phrase was "at the end of the day . . . ." This phrase was followed closely by "fairly unique" which, we assume beat out "totally unique." Third on the list was "I personally" although we personally don't find anything wrong with this phrase.

Number four on the list at this moment in time, was "at this moment in time." Look to this column at some future moment in time to see if this changes.

We respectfully submit number five on the list: "With all due respect. . . ."

While nothing is absolute, in sixth place was "absolutely" which is used so often it appears, with all due respect, its use is an absolute given at the end of the day.

"It's a nightmare" comes in at the number seven spot and suggests the jet age has found a substitute for "it's a train wreck".

Making the list at number eight is the grammatically incorrect quote "shouldn't of" instead of "shouldn't have". Although in the South "shouldn't of" ain't that bad a thing to say.

The researchers suggest many expressions began as office lingo such as "twenty-four/seven" which holds down the number nine spot on the list. Interestingly, some defense attorneys use the phrase "thirty-six/seven" based upon references to their time sheets.

Rounding out the top ten list is "it's not rocket science." Most lawyers use the similar phrase "it's not the rule against perpetuities."

The researchers suggest "we grow tried of anything that is repeated too often – an anecdote, a joke, a mannerism – and the same seems to happen with some language [with all due respect]."

Mediation and negotiation sessions have their own often repeated phrases. "That's my line in the sand number" is often heard minutes before someone gives their next settlement number.

"It's a matter of principle" often follows an outrageous monetary settlement demand/offer. This can be used interchangeably with "it's not about money."

"This is my 'walk away number'" usually involves a fast walk across the parking lot if the other party believes that statement and is attempting to leave the negotiation.

"I'd rather pay my lawyer a million dollars than pay the other side a dime" is a statement heard *before* the speaker has received the latest bill/statement from their attorney.

"They are asking me to bargain/bid against myself" is regularly coupled with the phrase "I won't bid against myself because it's a matter of principle."

"Haven't they considered what it's going to cost them to take this to trial?" is often used in lieu of the real thought which is "there is no merit to my case and I'll take whatever I can get." "This is a total waste of time" is often repeated several times before the negotiations result in a successful final agreement.

Mediators, including the authors, are very good at stating the obvious, including "litigation is expensive, time consuming and uncertain." See, it is amazing what you can learn in a 40-hour mediation certification course. How about: "The only qualification for a juror is that they possess a driver's license." (It is assumed Gainesville Sun editor Ron Cunningham is never called for jury duty as bike riders are excluded from the jury pool.)

Consider: "No matter how thin you slice the bread/bacon/meatloaf, there are always two sides" (some things are so meaningful and wise they just bear repeating).

After all, with all due respect, some phrases are fairly unique and, at the end of the day, should be used 24/7.

Immigration Matters

by Evan George

The ICE-man cometh, local businesses beware. In the past, employers rarely faced any threat of civil or criminal punishment for hiring individuals who did not have employment authorization. The U.S. immigration authorities now are cracking down on such employers. This enforcement surge has already reached Gainesville and could present serious civil and criminal consequences for some of your clients.

In 1986, the U.S. government enacted the Immigration Reform and Control Act, establishing criminal and civil sanctions for employers who fail to properly verify the employment eligibility of their employees. For years, the primary enforcement strategy to deter unlawful employment was to target those individuals who were working without lawful immigration status, as opposed to their employers. In 2008, of the more than 6,000 worksite enforcement arrests made, only 135 were of the employers. Times have changed and the United States Immigration and Customs Enforcement (USICE) has signaled its intent to begin extensive criminal prosecution of employers of unauthorized workers. USICE defines "employer" as someone involved in the hiring or management of employees, including CEOs, owners, supervisors and managers.

USICE has launched an audit initiative and is now targeting U.S. employers, including local family businesses, for I-9 compliance and other workplace enforcement issues. This year, USICE has issued Notices of Inspection (NOI) to hundreds of businesses nationwide, selected as a result of leads and information obtained through other investigative means. With the issuance of an NOI, USICE alerts employers of an inspection of the business' hiring records to determine whether they are in compliance with employment and immigration laws. Some violations relate to technical and procedural errors in the completion and maintenance of I-9 forms, including incomplete or inaccurate address, signature and dates. Each such violation may constitute a fine ranging from $110.00 to $935.00 for first time violators. If USICE determines that the employers knowingly hired or continued to employ unauthorized workers, the violations for first time violators may include fines from $375.00 to $1,315.00, and the potential for criminal prosecution.

In September of this year, the owner of a family run business came to my office in a panic. Immigration agents from USICE had appeared at his business and served the owner with a NOI. It is clear that the ICE-man has reached Gainesville and several local businesses are already feeling the pressure of increased scrutiny of their hiring practices.

If you have an immigration-related issue or question, feel free to contact me at 352-378-5603 or evan@evangeorge-law.com.

WATCH FOR UPCOMING TRAININGS
Beginning in January

BASICS OF FAMILY LAW
and
BASICS OF WILLS AND PROBATE

- free to volunteer attorneys
- CLE credits
- followup seminars on specific related issues
- technology based forms available
- mentors and followup guidance
- malpractice coverage

ONE CLIENT ~ ONE ATTORNEY ~ ONE PROMISE

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.

"Fraud" Without Misrepresentation

By Siegel, Hughes & Ross

Proof of fraud, as we know, requires a misrepresentation of a material fact. However, historically courts have recognized a type of fraud that does not require misrepresentation: *constructive fraud.* Constructive fraud may be found without a misrepresentation and even without intent to defraud. "Constructive fraud may exist independently of an intent to defraud." *Harrell v. Branson*, 344 So.2d 604, 606 (Fla. 1st DCA 1977). Constructive fraud, while not requiring a misrepresentation, is applied to actions having "similar attributes or effects as actual fraud." *Taylor v. Kenco Chemical & Mfg. Corp.*, 465 So.2d 581, 589 (Fla. 1st DCA 1985).

Constructive fraud was first defined extremely broadly in *Price v. Winter*, 15 Fla. 66 (Fla. 1875) as "all acts, omissions or concealments which involve a breach of legal or equitable duty, trust or confidence justly reposed, and are injurious to another." The breadth of this definition was continued in *Douglas v. Ogle*, 85 So. 243 (Fla. 1920). In that case the Court defined constructive fraud as "a term applied to a great variety of transactions***which equity regards as wrongful, to which it attributes the same or similar effects as those which follow from actual fraud, and for which it gives the same or similar relief as that granted in cases of real fraud." *Id*. at 45, quoting Pomeroy's Eq. Jur. (4th Ed.) § 992.

The case involved a claim by a widow to set aside a satisfaction of mortgage executed by her late husband. She alleged that the defendants obtained the satisfaction without consideration while the deceased had been old and "enfeebled in body and mind" to such an extent that he was incapable of understanding the nature of the transaction. The Supreme Court held that the evidence did not show actual fraud but that there were ample allegations of constructive fraud. The facts of the case do not establish a fiduciary relationship between the plaintiff and defendants. Indeed, in no Supreme Court case located has the definition of constructive fraud ever been limited to a fiduciary relationship.

However, in spite of the breadth of the Supreme Court's definition of situations which can give rise to constructive fraud, numerous opinions in the district courts of appeal define constructive fraud as an "abuse of a fiduciary relationship" and require a fiduciary relationship as an essential element of the tort. "Thus constructive fraud is deemed to exist where a duty under a confidential or fiduciary relationship has been abused." *Harrell v. Branson*, 344 So.2d 604, 607 (Fla. 1st DCA 1977); *Taylor v. Kenco*, 465 So.2d 581, 589 (Fla. 1st DCA 1985). "Constructive fraud occurs when a duty under a confidential or fiduciary relationship has been abused or where an unconscionable advantage has been taken." *Levy v. Levy*, 862 So.2d 48, 53 (Fla. 3rd DCA 2003).

However, this limitation does not seem to be warranted by Supreme Court decisions. The extent of the Supreme Court's willingness to use the doctrine to reach equity is demonstrated by its decision in *Sheldon v. Tiernan*, 200 So.2d 183 (Fla. 1967). That case involved a dispute between a landlord and tenant, hardly a fiduciary or confidential relationship. The lease gave the tenant the right to assign the lease and by the assignment to escape liability for the obligations of the lease. When he realized he could not perform the terms of the lease the tenant created a corporation to which it assigned the lease. The landlord sued to set aside the assignment and obtain damages against the original tenant. The trial court found for the landlord and set aside the assignment. The district court, however, was unwilling to use its equitable power to relieve the landlord of the effects of its careless draftsmanship and reversed.

The Supreme Court reversed the district court and reinstated the judgment of the trial court. It held the tenant's "assignment" constituted constructive fraud which the Court, quoting *Douglas v. Ogle, supra,* again defined as, "simply a term applied to a great variety of transactions *** which equity regards as wrongful, to which it attributes the same or similar effects as those which follow from actual fraud, and for which it gives the same or similar relief as that granted in cases of real fraud." *Sheldon v. Tiernan*, *supra* at 188. Thus it seems that use of the doctrine as a remedy for inequitable conduct may be available even in situations outside of a fiduciary duty.

It appears that constructive fraud will be governed by the same rules as actual fraud. However, there are certain questions the answers to which are not completely clear.

1. Do the requirements of Rule 1.120, Fla.R.Civ.P., that fraud be plead with specificity apply to constructive fraud?

   National Ventures, Inc. v. Water Glades 300 Condominium Ass'n., 847 So.2d 1070 (Fla. 4th DCA 2003), does not specifically so hold, but seems to suggest the same pleading requirements apply to constructive fraud.

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of the Eighth Judicial Circuit.

* Recipients of the Florida Bar President’s Pro Bono Service Award

Criminal Law

By William Cervone

As we start another new year, now so far into the new millennium that I no longer find myself writing "1999" on checks, I wish each of you a Happy New Year. I'm also in a nostalgic mood, as I suppose at least some of you are as well.

Last summer - July 20th to be exact - there were a lot of TV shows and news stories focusing on the anniversary of the Apollo 11 moon landing in 1969. After 40 years, I remember it very well, maybe because I was a manned space flight geek growing up and maybe because it was to many of us one of those moments in a lifetime that are forever with you. I remember everything that led up to it - Mercury, Gemini, Apollo 8 and the stunning pictures of the rising Earth - and afterwards Apollo 13. Apollo 11 was a singularly exhilarating moment with a sense of national pride and achievement over the unachievable. My grandmother never believed that it was real. Far too many of you who might read this are too young to know it other than in your high school history books.

It was audacious, a triumph of human ingenuity and determination. A scant few years after President Kennedy proclaimed that we would go to the moon before the decade of the 60s expired, we did. Twice, actually, as Apollo 12 also landed before the decade was out. I remember Kennedy saying that we would do it, not because it was easy, but because it was hard. And we did. And while I had absolutely nothing to do with it, I don't remotely hesitate to use the word "we" because it was very much a national affair that captured the will and spirit of the entire country even as other events, notably Viet Nam, were so divisive at the same time.

And now? Divisive doesn't begin to capture now. Our elected leaders, national, state and local, are almost presumed to be incompetent if not corrupt. They are criticized just for the sake of criticism, no holds barred, and purely to make them politically vulnerable in the next election, which it seems begins before the ballots are completely counted from the last one. Worse, all too many of them deserve it for moral, ethical, and even criminal failings. But most don't and we do all of us a disservice by not at least considering that they can be well intended, despite disagreeing with our individual point of view.

Second-guessing has become an art form. "Shrill" substitutes for thoughtful or reflective. Just look at Walter Cronkite as compared to Bill O'Reilly.

We fixate on the weird. Michael Jackson's death is the biggest thing on TV for days and days on end? With nothing being said about the, shall we say, peculiarities of his life? This in the same month when more American soldiers died in Afghanistan than at any other time for reasons that are hard to fathom? Where were those deaths lamented, other than in the homes of their heart broken families?

The concept of the good of us all has given way to the self-interests of the individual. Materialism dominates, and we must have just to have. We consume resources at impossible rates, regardless of need or exhaustion of those resources. And we do little planning for the inevitable spoilage or depletion involved. Anyone remember the oil crisis of the 70s and how America simply had to end its dependence on foreign oil specifically and petroleum products in general? What's changed? And yet for all of this we are not an especially happy society or world.

I am not writing this to be a grumpy old man. Rather, what I want to say and what I hope you will consider is that the Age of Dissatisfaction that we live in simply has to be put behind us. We need to worry about global and local long term solutions, not "what's in it for me?" And we need to do it one by one as an individual commitment.

There is no better time than the beginning of a new year to reconsider something else President Kennedy said: "Ask not what your country can do for you, ask what you can do for your country." Or state, town, neighborhood or even Bar Association.

Correction

Astute reader Al Bacharach caught an error in the December edition of Criminal Law by William Cervone. He noted that Judge John J Crews would "go ballistic" if he knew that a period (".") had been put after the J, as the correct spelling is as listed herein, and not as "John J. Crews" as printed on page 8 of last months' article. He also feared that Judge Crews was "rolling over" in his grave due to this punctuation error. When contacted, author Cervone graciously acknowledged that Mr. Bacharach's memory was correct, and heartily agreed to this printed correction so that Judge John J Crews could once again be at rest.

Family Law: Bankruptcy Laws and Divorce

By Cynthia Stump Swanson

At the Gainesville Family Law Section meeting on November 17, 2009, Gainesville attorney Sharon T. Sperling educated our group on bankruptcy laws, and particularly how they affect families just before and after a divorce. First, she reminded us that a Chapter 7 bankruptcy is commonly known as a "liquidation," and it includes a complete discharge of responsibility for debt, and can also involve the surrender of property in exchange for the discharge of the debt. The discharge under Chapter 13 is commonly known as a "reorganization," and will usually result in a restructuring of debt over a longer time period, perhaps an adjustment in an interest rate, and so on, to allow the debtor to eventually pay off debts that are owed over a longer time period. The term of such payment is usually between three and five years. Under this plan, a debtor would make a payment to the bankruptcy trustee, who then pays the creditors the agreed-upon amount.

Even in Chapter 7 bankruptcy, certain items of property are exempt from having to be surrendered. These include the debtor's homestead up to one-half acre inside a municipality, and up to 160 acres outside a municipality, along with a $1,000 motor vehicle exemption, and an additional $4,000 wild card exemption if the debtor does not own a homestead. There is an unlimited exemption for the debtor's retirement account, as long as the debtor has regularly contributed to the retirement account. For example, a debtor could not obtain a new credit card, take out the maximum cash advance on the card, put the cash into a retirement account, and then attempt to discharge that credit card debt.

Sharon suggested that if the parties are considering a bankruptcy, it is almost always more advantageous for the husband and wife to file a joint bankruptcy while they are still married. Their bankruptcy petition must be filed together before either one of them files the petition for dissolution of marriage. However, they can file the petition for dissolution of marriage right after they file the bankruptcy petition; they just have to be married when they file the joint bankruptcy petition.

Sharon also pointed out that a few years ago, the bankruptcy laws changed to provide that debtors must pass a "means" test in order to take advantage of the Chapter 7 liquidation form of bankruptcy. If the debtor's household income is below the median household income for a state, then the Chapter 7 liquidation process is available to that debtor. However, if the debtor's household income is above the median household income, then a bankruptcy court will look at the debtor's overall expenses and determine if the debtor does have the "means" to pay at least some of the debt.

In addition, bankruptcy laws were changed to provide that equitable distribution awards at the time of the divorce are no longer dischargeable. It has always been the case that alimony and other support awards were not dischargeable, but in the past, equitable distribution awards were considered differently by the bankruptcy court. However, now there is no distinction between property and support awards, and neither is dischargeable in a Chapter 7 bankruptcy.

Sharon also provided some advice to lawyers who want to protect a payee spouse. She suggests requiring an income deduction order, and also attempting to obtain some collateral to secure the payment of the obligation owed by the payor spouse. One of her greatest concerns is where the husband, for example, conveys his interest in the marital home to the wife, with the provision that when she sells the property, he will receive a certain sum of money. If the wife does not give the husband a mortgage for that sum, the husband may be left with no real means to enforce the payment of that debt.

The section thanks Sharon for her education of us, and I want to say that if there are any errors in what I've written here, they are mine and not Sharon's. If you have further questions on this, please call Sharon Sperling at 371-3117.

The section was also reminded that when a creditor is suing to collect a debt, the original "media," which is the promissory note or credit card application or other promise to pay a debt, must be filed with the complaint. If it is not, the case should be dismissed. Gary Moody pointed out that many financial institutions have scanned and then shredded original promissory notes and other promises to pay, and they cannot produce the original media. He pointed out that Florida law has not kept up with the electronic progress made by institutions in this regard. At the moment, this can work to the benefit of debtors.

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Probate Section Report

By Larry E. Ciesla

A regular monthly meeting of the Probate Section was held on November 18, 2009 in the fourth floor meeting room in the civil courthouse. Richard White began the meeting by distributing a draft for the new Notice of Administration form which is in the process of being revised for publication by FLSSI, the entity which produces the so-called "Bar Forms" for probate and guardianship. The form is being revised to more strictly comply with subsections 733.212(2)(d) & (e), F.S., governing the required content for the Notice. This revision is the product of the thinking of some prominent probate practitioners who believe the current form, which has been used by virtually all probate lawyers for the past few years, is deficient in its failure to set forth in the body of the notice the specific timeframes within which to file a petition for exempt property and an election to take elective share. Anyone not present at the meeting who would like to obtain a copy of the new form may send me an email (lciesla@larryciesla-law.com) and I will be happy to forward same.

The meeting next proceeded with an announcement that Judge Monaco is rotating out of circuit civil as of Feb. 1, 2010. His new assignment will be family law in Alachua County and Bradford County circuit cases, including probate. Other new judicial assignments effective Feb. 1 include: Alachua County circuit civil, including probate and guardianship-TBD (probably one of the two new judges, whose identities are not known as of the time of this writing); AND Judge Rosier-Baker County-all cases. Judge Griffis will remain in Levy & Gilchrist Counties handling civil cases, including probate and guardianship. A discussion then ensued regarding the handling of income tax returns in connection with probate administration. Virginia Griffis inquired as to the propriety of having someone other than a personal representative sign a decedent's final 1040 income tax return. It was the consensus of the group that IRS regulations allow for a surviving spouse or other person in possession of a decedent's assets to sign the return. Wharton Cole then explained that in order to minimize the chance of problems with a decedent's income taxes, he is in the habit of filing an IRS Form 56 (Notice of Fiduciary Relationship) as soon as the personal representative is appointed. Once it has been entered into the IRS computer system, he requests a transcript or a copy of the entire return for the last few years of the decedent's life. In this manner, he is able to learn whether all required returns have been filed and the sources of decedent's income. To also minimize possible liability for the personal representative, Wharton emphasized that it is necessary to properly file a final return and to request "prompt determination", which limits to 18 months the statute of limitations for an IRS audit. As is authorized by Rule 5.400(b)(5)(D), it can also be a good idea to keep several thousand dollars in trust for 18 months, as a reserve in the event of an audit. Larry Ciesla pointed out that Wharton's procedures are all good and well; however, as an alternative, counsel for the personal representative may wish to advise the client to retain a tax professional to take full responsibility for all tax-related matters. Of course, in such event, it is a good idea to have something in writing confirming the foregoing.

The meeting next proceeded with a discussion regarding the three new staff attorneys who recently came on board in our circuit. It is the understanding of Mary Ellen Cross, who does not guarantee 100% accuracy, that one of the new attorneys will be handling civil cases in Levy County, including probate and guardianship; that another will be handling civil cases in Baker, Bradford and Union Counties, including probate and guardianship; and that the third assignment will be criminal cases in Alachua County. Mary Ellen further indicated, again without warranty, that Amy Tully, an existing staff attorney, will now be handling probate and guardianship cases in Alachua County.

The meeting concluded with a lengthy discussion regarding the merits of utilization of the so-called convenience account, under Section 655.80 F.S., in estate planning. This issue had originally been brought up by Peter Ward at the prior month's meeting. Virginia Griffis requested that the matter be analyzed in further detail. Virginia indicated that the convenience account authorized under F.S. 655.80 could be construed as a type of agency or limited power of attorney. F.S. 655.80 expressly allows the agent to continue to sign checks after the death of the principal/account owner, subject only to responsibility to the personal representative. Virginia then pointed out that under

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Probate Section

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Ch. 709, F.S., the authority of an attorney-in-fact terminates upon the death of the principal. Does this not present a conflict between the two laws? Peter Ward argued that Ch. 709 is the general rule and FS 655.80 is the specific rule, and under our rules of statutory construction, the specific would prevail over the general. Virginia argued that in any case, she could see the potential for problems in common situations, for example, where the agent writes a check to the funeral home and the amount exceeds the $6,000.00 limit of Section 733.707(1)(b), F.S., and the estate then runs short of assets to pay all creditors. Or, the agent writes a check to a party who simply was not entitled to be paid. In such a situation, the agent is exposed to liability to the personal representative, as is specifically contemplated in FS 655.80. The bottom line for Virginia is that she is not comfortable with the whole idea of using a convenience account. Peter Ward remains steadfast in his belief that the convenience account is a useful tool. For example, Peter points out that use of a convenience account can in some cases save a client the cost of paying a lawyer for preparation of a power of attorney. Regardless of your view on the efficacy of the convenience account, here is a practice tip from your author, based on a lot of years of experience, including more than one case which has gone to trial on this issue. Whenever I am discussing bank accounts with a client in an estate planning context, I urge the client, when opening an account, or when reviewing existing accounts, to go to their financial institutions; sit down with their banking person; and put in writing on the account paperwork whether the account is intended to be a convenience account; a pay on death account; or a joint account with right of survivorship. This is the best way to avoid litigation among personal representatives and persons listed on accounts. If litigation is initiated, this written evidence will usually be dispositive. This is particularly important for checking accounts, which are most commonly the subject of a convenience account. Many bank employees are less than totally diligent when setting up such an account. The account holder may intend to set up a convenience account and direct the bank employee to "add my son/daughter to my account". The bank employee, not bothering to ascertain the true intent, sets up a joint account with right of survivorship. The checking account ends up containing $100,000 or more on the date of death. Son/daughter comes into a windfall, while the other beneficiaries in the will get the shaft. Thus, a lawsuit is born. Clients will be well advised to strive for clarity in titling all bank accounts.

The Probate Section continues to meet on the second Wednesday of each month commencing at 4:30 in the fourth floor meeting room in the civil courthouse. All interested practitioners are welcome to attend. There are no dues and roll is never taken.

"Fraud"

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2. Is proof of constructive fraud sufficient to present the issue of punitive damages to the jury?

   A prima facie case of actual fraud justifies presenting the issue of punitive damages. *First Interstate Development Corp. v. Ablanedo*, 511 So.2d 536 (Fla. 1987). Will a prima facie case of constructive fraud also always justify a claim of punitive damages? The Supreme Court has stated that constructive fraud is a wrong that has "the same or similar effects as those which follow from actual fraud, and for which it gives the same or similar relief as that granted in cases of real fraud." *Douglas v. Ogle, supra* at 45 (underlining added).

One question that has been answered by the legislature is the appropriate statute of limitations. FLA. STAT., § 935.031(2), provides, "An action founded upon fraud under s. 95.11(3), including constructive fraud, must be begun within the period prescribed in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in s. 95.11(3), but in any event an action for fraud under s. 95.11(3) must be begun within 12 years after the date of the commission of the alleged fraud, regardless of the date the fraud was or should have been discovered." (underlining added). Thus, like actual fraud, the statute of limitations on constructive fraud is four years from the time the plaintiff knew or should have known of the facts giving rise to the fraud with a twelve year statute of repose.

Constructive fraud may be a means to obtain redress for inequitable conduct in situations in which more traditional remedies may not be adequate.

Don't Shoot The Messenger

By Stephen N. Bernstein

The state attorney in Cook County Illinois has served student journalists in the Medill Innocence Project with subpoenas to compel them to hand over information from their investigation of the incarceration of an Illinois man for a thirty-one year period. This subpoena is not limited to the notes from off the record or unpublished interviews, but also includes the class syllabus, grade and e-mail communications of the students as well as reimbursement records for travel expenses. This seems to me to be an astounding over reach by law enforcement.

This battle centers around the case of Anthony McKinney. On September 15, 1978, a security guard was shot while sitting in his car in a Chicago suburb. The police questioned Mr. McKinney after they saw him running near the crime scene. He was released but brought in again when another witness claimed he was the triggerman and he ultimately signed a confession after a lengthy interrogation.

The Medill Innocence Project looked into the matter at the request of the defendant's brother in 2003. Over the next three years, nine teams of student journalists at the direction of Professor David Proteff, interviewed witnesses and followed leads. They tracked down a man who had confessed his involvement in the crime to neighborhood residents and during an interview by the Medill reporters, he provided a video taped statement that he was at the murder scene with two other men who he claims were responsible and that Mr. McKinney wasn't there. The students located one of these men who denied being responsible and the second refused to talk with them.

All of the on-the-record interviews and video tapes were given to both the prosecutor and to the defendant's defense attorney in 2006. The professor posted the findings of the project on a website in 2008. The prosecution agreed to a post-conviction hearing for Mr. McKinney but instead of focusing on the credibility of the witnesses and the information they had previously relied upon, they began questioning the motivation of the student journalists. Now, they are demanding their grades, journals and notes to discover whether they fabricated the evidence to obtain good grades. This is an effort to make a side show become the main event.

This student project is housed at Northwestern University, and has helped free eleven men over the years. The previous Illinois Governor cited their work when he stopped all executions in Illinois in 2000 and again in 2003 when he granted clemency to everyone on death row. I think this is one of those situations where, as Shakespeare put it, "'The lady doth protest too much, methinks." *Hamlet (III, ii, 239).*

House Speaker Larry Cretul (R) speaks with Charlotte Weidner and Thomas MacNamara at the November 2009 Bar Luncheon

Rep. Larry Cretul (R), Elizabeth Collins, Sen. Steve Oelrich and Rebecca O'Neill.

Family Law

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Alachua County Assistant Court Director Nancy Moses asked me to remind attorneys that the Department of Vital Statistics has interactive forms available on its website for the Certified Statement of Final Decree of Adoption and Certified Statement of Paternity. These forms are very easy to complete on the website and then print out at your desk. The forms look neat and contain all the required information.

By the time you read this, Nancy will have attended the December meeting to talk about court filing fees; when and why a case that appears to us lawyers to be an open case is considered a closed case by the Clerk, thus requiring the payment of re-open fees; why there is sometimes a fee assessed for filing a counterpetition and sometimes there is not; and any other similar questions we thought to throw at her.

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. Our next meeting is January 19th. Hope to see you there.

Florida House Speaker Larry Cretul (R) at the November 2009 Bar Luncheon

President's Letter

Continued from page 1

- Guard your explanation of benefits (EOB). The EOB is the form you receive from your insurer which indicates whether the insurer paid or denied the health care services you received. Do not leave EOBs exposed on a car seat or laying around your office where wandering eyes can see them. Treat EOBs like you do your credit card statements.
- Counsel your loved ones (your beneficiaries) to guard this sensitive information.
- Review your EOB for accuracy. Verify that the date of service is correct and the health care services provided are accurate. If you notice something suspicious, investigate. Contact your insurance company and the provider.
- When ordering your credit report, check for medical liens.

If you believe you have been a victim of medical identity theft, contact law enforcement and file the requisite report. Obtain a copy of the report and send copies to your medical provider, insurer and the credit reporting agencies.

Additional information on health care identity theft can be found in a report issued by Booz Allen Hamilton (there's a joke in the name somewhere) at this link:

http://www.nachc.com/client/Medical%20Identity%20Theft%20Final%20Report-ONC.pdf

On another note, this year, EJCBA voted to add an In-House Counsel section. Interested In-House members can access the google group set up for your benefit at:

https://groups.google.com/group/EJCBAIH-C

To join, click the "Sign in" button on the top right corner. You will be prompted with instructions on how to join this Google Group. Non-Google account members will be prompted to open an account before joining this Group. Once you join, you will be sent emails about upcoming lunches and other events specific to In-House counsel members.

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.

FORUM 8

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January 2010 Calendar

1 New Year's Day – County & Federal Courthouses closed
5 Deadline for submission to February Forum 8
6 EJCBA Board of Directors Meeting; Ayers Medical Plaza, 720 SW 2d Avenue, North Tower, Third Floor – 5:30 p.m.
7 CGAWL meeting, Flying Biscuit Café, NW 43rd Street & 16th Ave., 7:45 a.m.
8 EJCBA Luncheon, Chief Judge Martha Ann Lott, Steve's Café, 11:45 a.m.
8 Bench Bar Committee Meeting, 1:00 p.m. immediately following Bar Luncheon
13 Probate Section Meeting, 4:30 p.m., 4th Floor, Family & Civil Courthouse
14 North Florida Association of Real Estate Attorneys meeting, 5:30 p.m.
18 Martin Luther King, Jr., Birthday Holiday – County & Federal Courthouses closed
19 Family Law Section Meeting, 4:00 p.m., Chief Judge's Conference Room, Alachua County Family & Civil Justice Center

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.
15 President's Day Holiday – Federal Courthouse closed
16 Family Law Section Meeting, 4:00 p.m., Chief Judge's Conference Room, County Family & Civil Justice Center
19 EJCBA Luncheon, Justice Jorge Labarga, Steve's Café, 11:45 a.m.

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.