FORUM 8

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President's Letter

By Elizabeth Collins

I choose to believe that most people do not intend to lie. Certainly, in the courtroom, where the stakes are high, the incentive to lie may be greater. Some people will flat out lie to your face whenever it benefits them. Most will tell the occasional "white lie" to spare the feelings of another or may bluff during a negotiation.

However, I think I became a better lawyer (and a happier person), when I came to the realization that although their statements may be factually inaccurate, many "liars" truly believe what they are saying. Presuming the worst, *i.e.* presuming that the other party is deliberately making an untrue statement with the intent to deceive, may not get you very far. As Judge Chance and Charles Carter pointed out in their October column in the *Forum 8*, "calling someone a fake or a liar may enflame the other side so much that an impasse results." I think the reason such accusations can be so inflammatory is because the person accused of the falsehood often believes he or she is telling the truth.

Memory is merely a reconstruction of an event by one who experienced or observed it. It is not a perfect and linear recording of an event that can be replayed at will. People may make empirically false statements without any guile whatsoever. Psychology texts and even pop culture are replete with explanations for the phenomenon, including, but not limited to:

Beneffectance - perceiving yourself as responsible for desirable outcomes, but not responsible for undesirable ones

Consistency bias - incorrectly remembering past attitudes and behavior as more similar to present attitudes and behavior

Confirmation bias - the tendency to look for or interpret information in a way that confirms beliefs

Egocentric bias - recalling the past in a self-serving manner

False memory - a distortion of an actual experience or a confabulation of an imagined one

Hindsight bias - filtering memory of past events through present knowledge, so that those events look more predictable than they actually were, *i.e.* "I knew it all along"

Revisionist Romance Disorder a/k/a 20/20 Blindsight - (a term coined by Greg Behrendt and Amiira Ruotola-Behrendt) an inability to see the past as it actually happened, which results in people remembering events in a romantic relationship to match the feelings they want to have about it.

Selective Memory and **selective reporting Suggestibility** - a form of misattribution where ideas suggested by another are mistaken for memory

And, of course, there are simple mistakes in perception. We have all seen experiments which demonstrate how unreliable eyewitness testimony can be.

Is there a benefit in mediation, depositions, or the courtroom (or in life) in proving that someone is a "liar"? Should we strive for those Perry Mason moments where a stellar cross-examination includes impeaching the witness with undisputed proof

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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

Unclaimed Class Action Settlement Money is Good News for Three Rivers Legal Services!

By Marcia Green

The term *cy pres doctrine* comes from Anglo-French, meaning "as near as may be." According to the MerriamWebster Online Dictionary, it is "a rule providing for the interpretation of instruments in equity as nearly as possible in conformity to the intention of the testator when literal construction is illegal, impracticable, or impossible —called also *cy pres* doctrine." For Three Rivers Legal Services, it simply means GOOD NEWS!

When a class action suit is settled, full restitution to all of the plaintiffs is sometimes impossible, e.g., when the award is large but the individual damage amount is insignificant enough that distribution to the class members does not make sense.

According to the Florida Bar Foundation, "under *cy pres*, the courts can approve a charitable donation out of unclaimed class action funds, or a direct grant in lieu of damages to an organization that could vindicate class member rights in the future. In practice, *cy pres* prevents a windfall to the defendant while serving to deter future violations."

This year, Three Rivers has been the recipient of two *cy pres* awards that together total more than $32,000. Most recently, Three Rivers received a check from Schad, Diamond and Shedden, P.C., a Chicago area law firm that focuses on consumer protection and complex commercial litigation. Their nationwide class action, *Miller v. Royal Maccabees Life Insurance Co.*, resulted in a $93 million settlement in 2008; $3.62 million remained unclaimed in 2009. A proposal was later accepted by the presiding Judge allowing those unclaimed funds to be dispersed to 111 legal aid programs throughout the country. While the bulk of the money remained in Chicago and Illinois, Three Rivers received $27,718 of the $166,308 distributed to Florida programs.

The earlier, smaller distribution award came from a class action brought by Ft. Lauderdale attorney Robert W. Murphy who practices in the area of consumer litigation.

"What a complete gift to our organization," states Allison Thompson, Executive Director of Three Rivers Legal Services. "This couldn't come at a better time. It certainly provides a small relief to our very stretched budget."

Although the courts make a determination of the fairness or reasonableness of an award, attorneys for both the plaintiff and defense can help play a pivotal role in urging the direction taken by the court in making such an award. For indigent clients and the legal aid providers, it's a win-win solution.

EJCBA Holiday Food Drive

The Eighth Judicial Circuit Bar Association is conducting a holiday food drive to benefit needy families in our circuit. Please bring non-perishable food items (canned goods, boxed macaroni and cheese, peanut butter, etc.) to the Bar Luncheons at Ti Amo! on November 19th and December 9th. Thank you, as always, for your generosity.

Alternative Dispute Resolution

Mediating The UF-FSU Series

By Chester B. Chance and Charles B. Carter

The Gators and Noles started playing football in 1958. Many fans are unaware of the mediation between representatives of the two schools which led to the first scheduled game between the *Fighting Gators* and Florida State College for Women. Interestingly, we obtained a transcript of the mediation (the mediation took place before the confidentiality statute) and we thought it would be interesting to share the transcript. The coaches' names have not been changed.

MEDIATOR: I'm glad you folks agreed to mediate the issue of whether the Gators and Noles will meet on the gridiron. This is a new process and I'm not quite sure how to proceed. Perhaps the representative of FSCW could begin by presenting the Noles' position.

V.

COACH NUGENT: First, we are not FSCW. We stopped being an-all-girls-school in 1947 and established a football team that same year.

COACH WOODRUFF: Aren't your school colors pink and champagne?

MEDIATOR: They were originally garnet and gold. I think their uniforms faded. This process is supposed to facilitate resolution. Snide remarks are unacceptable and counter-productive.

COACH NUGENT: Three years ago in 1955, a bill was drafted in the Florida Legislature requiring UF to play FSU in football but the bill was not passed. It failed on a 19 - 15 vote but Governor Collins is interested in the two teams playing. I believe several state leaders feel the time is right for the two schools to play football against one another and we feel 1958 should be the start of a yearly series.

COACH WOODRUFF: The University of Florida would be pleased to play FSCW in football. Of course there are some conditions. First, all games need to be played in Gainesville. Second, no FSCW fans can attend the games. Third, the FSCW team shall refrain from utilizing the forward pass during the game. Finally, we will use SEC officials for all games.

MEDIATOR: Would the ladies from FSCW like to respond?

COACH NUGENT: First, stop calling us FSCW. As I said, since 1947 we have been FSU. More importantly, UF is engaging in what I would call bad faith negotiation. The Gators are way out of line. We refuse to discuss this matter any further.

MEDIATOR: Would the Noles be willing to just make an offer, as UF did, to see if we can get things rolling. It's too early for frustration. I predict one day 85% of mediations will result in a mutually acceptable agreement.

I also have a feeling 80% of the movement in a negotiation occurs in the last 10% of the time. Please try and respond.

COACH NUGENT: We will play at a neutral site. Our fans must be allowed to attend – both of them – and be allowed to dress up as Seminoles. We need to throw the ball as we won't have a decent running game for over 30 years. And, we need to alternate between SEC and independent officials. The independent officials use a whistle with a long echo.

COACH WOODRUFF: We can't agree to a neutral site. It's Gainesville or nothing. Okay, we will agree to let their two fans attend, but they have to park their pick-ups off campus and they can only do that chant thing one time per game and no tom-toms. They can pass the ball in the first half. But, we have to use SEC officials. Those independent refs are almost as bad as using, say, ACC refs.

MEDIATOR: Good, we are making headway. Would anyone like a snack?

COACH WOODRUFF: Speaking of snacks, we keep all profits from concessions.

COACH NUGENT: You can keep profits from the concessions but we can't agree to play in

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Family Law Section

By Cynthia Stump Swanson

In my last column, I wrote about some changes that the Legislature made in its last session which affect family law. Today, I'm writing about two recent court decisions which will have a great impact on Florida family law.

First, I suspect pretty much everybody has heard about the Third DCA opinion holding that Florida's ban on adoptions by homosexuals is unconstitutional in In Re: Matter of The Adoption of X.X.G. and N.R.G., Case No.: 3D08-3044, which can be found at: www.3dca.flcourts.org/Opinions/3D08-3044.pdf. The Court ruled that Florida Statutes §63.042(3) is unconstitutional because the statute discriminates against a class of persons with no rational basis for such discrimination. There were 12 amicus briefs filed in this case on behalf of 28 individuals and organizations, if I counted correctly, including The Center for Adoption Policy; The Child Welfare League of America; The Florida Chapter of the American Academy of Pediatrics; The Foster Care Alumni of America; The Foster Children's Project of the Legal Aid Society of Palm Beach County; The National Association of Social Workers ("NASW") and The Florida Chapter of the NASW; The National Center for Adoption Law and Policy; The National Center for Youth Law; The North American Council on Adoptable Children, and so on and so on. There was also an amicus brief filed by the Family Law Section of the Florida Bar and one by a dissenting member of the same section.

This case came to the appellate court with 56 factual stipulations which are set out in the appendix to the 42 page long opinion. The State of Florida, through its Department of Children and Families, stipulated that the prospective adoptive father "provides a safe, healthy, stable, and nurturing home for the children meeting their physical, emotional, social and educational needs." Nevertheless, the State recommended against the adoption being finalized because the prospective adoptive father is a homosexual.

The appellate court upheld the trial court's ruling that "It is clear to this Court that [the prospective adoptive father] is an exceptional parent to [the two children] who have healed in his care and are now thriving." The prospective adoptive father argued that the statute impermissibly denies him equal protection of the law because it creates an absolute ban on adoption by homosexuals while allowing adoption by others, for example, with criminal or substance abuse histories if considered on a case-by-case basis.

Under the rational basis test, a court must uphold a statute if the classification bears a rational relationship to a legitimate governmental objective. The classification must be based on a real difference which is reasonably related to the subject and purpose of the regulation. The Court examined the treatment of other classes of persons, such as disabled persons, chronically ill persons, persons with criminal backgrounds, and so on, and pointed out that the statute and the rules adopted by the Department of Children and Families allows the consideration of those classes of persons on an individual basis. Only homosexuals are completely excluded as a class from any consideration whatsoever.

The Court also analyzed statutes regarding the class of unmarried persons, rules regarding the placement of children with homosexual foster parents, the allowance of homosexuals to be appointed as guardians for children. The Court reviewed the extensive evidence presented in the trial court, including ten experts in the fields of social work, statistics, psychology, and medicine and concluded that there is no rational basis for the discrimination against homosexuals as a class in the adoption statute. The Court stated: "The reason for the equal protection clause was to assure that there would be no second class citizens." Ostendorf v. Turner, 426 So.2d 539, 545-46 (Fla. 1982).

I would point out that this ruling only upheld the adoption application of a single homosexual person, not a homosexual couple. While in this case, the adoptive father does have a homosexual partner, only the one man petitioned to adopt. At this time, Florida does not sanction marriages between persons of the same gender, and Florida law does not allow two unmarried persons to adopt together.

Another very recent Florida Supreme Court case will change the way we look at the equitable distribution of the passive appreciation in value of a non-marital asset. In today's real estate market, where depreciation is more likely, this case may not

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Forrest Gump Meet Joe the Plumber

By Stephen N. Bernstein

Forrest Gump, from the 1986 novel with the same name, is an accidental "someone" - a sweet "uncomplicated" young man utterly without guile or malice who somehow manages to stumble from one record-setting success to another. From war hero to world ping pong champion to entrepreneur, Gump boggles all minds but his own, busy as it is considering the existential mysteries contained in a box of chocolates.

A few years earlier, Chauncy Gardiner was an unlikely hero in Jerzy Kosinski's book, "Being There." Subsequently made into a movie by the same name, "Being There" is the tall tale of a gardener who became a favorite to run for US president following an unlikely series of misunderstandings. He was first turned out of the mansion where he had lived and gardened his whole life. When someone asked his name, "Chance the Gardener" is heard as "Chauncy Gardiner." Thereafter, everyone he meets projects his or her own needs and expectations on this empty headed "nobody". In their minds, he was the wealthy aristocrat they needed him to be, his ordinary observations became sublime metaphors filled with wit and wisdom.

This sets the stage for the real life story of Alvin Green. Do you know who Alvin Green is? He is currently the Democratic party's nominee for the US senate in South Carolina. He was an unemployed veteran who lived with his father in Manning, South Carolina, a town of about 4,000. He was virtually unknown until over 100,000 of his fellow citizens voted for him. He defeated Vic Rawl, a judge and former state representative whose name apparently also failed to ring a bell. It seems in South Carolina, when in doubt vote alphabetically. He did this with no campaign, no ads, no yard signs, no website and no money except the $10,000 he managed to put up for the filing fee. He never made a speech until after he won the nomination when he finally spoke to a crowd of 500 people and was rewarded with a standing ovation. He didn't say very much but the people heard what they needed to hear. One of the things he did say was he wanted to "reclaim our country from the terrorists and the communists, and get us back on

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Criminal Law

By William Cervone

Apparently I need an avatar. Not a copy of the movie, an avatar of my own. This is because without an avatar I am missing out on Second Life. It may be that I need to be an avatar rather than to have an avatar. Those are distinctions I cannot figure out yet. But apparently I need one.

I discovered this a few weeks ago at a Rotary meeting. So you think that Rotary is a staid, sterile, stuffy old fashioned organization? Not so! It is through Rotary, or more precisely a Rotary speaker, I have been told I need an avatar to join and explore the Second Life.

An avatar, it seems, is an animated persona. It is not real. A friend who is significantly younger than me described it this way: "Imagine a mask party. Everyone dresses up in what they want. Except their identities are hidden. And oh yeah, fat people can be skinny. Etc." This means, I believe, that my avatar will have the hair I had when I was 25. When I was a kid this was described as having an imaginary friend and I don't think it was viewed as necessarily being a good thing, especially if your imaginary friend began to consume your existence. I've thought about this and decided that an avatar is a cartoon me. Not exactly a caricature but more of a cartoon. Best I can figure.

Second Life is a bit more confusing to me. Again best I can figure, and this is a quote but I'm still trying to figure out what it means, it's "a virtual world that allows users to enter and network with other avatars in 3-D worlds." This is why I get confused. I thought I already lived in a 3-D world. While some of you are occasionally flat in affect, you pretty much all have dimension, sometimes lots of dimension.

I haven't been able to really find out much more about Second Life because when I tried to research it on the Internet (See, I <u>am</u> modern!) the County system that I was using told me in no uncertain terms that I had "ACCESS DENIED" because my request had a "content characterization: games." This is apparently bad, or at least bad for me, or so the County computer believes.

But I ramble. This is pertinent to a legal journal such as our newsletter because co-incidental with the aforesaid (always use words like "aforesaid" if you're doing a legal thing) Rotary speech I happened to pick up the magazine that the UF Law School puts out.

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North Central Florida Chapter of the Federal Bar Association

By Sarah Casey, Law Student Representative for the FBA

The North Central Florida Chapter of the Federal Bar Association hosted its annual meeting and officer elections on September 29th at the Ti Amo! restaurant in downtown Gainesville. This year's Board of Directors includes:

Officers:

Judge Gary R. Jones, President
Gil Schaffnit, President-Elect
Peg O'Connor, Secretary
Rebekah M. Kurdziel, Treasurer
Margaret Stack, Membership Chair

General Board Members:

Stephanie Marchman
John Fuller
Neil Chonin
Rob Griscti
David Wilson

Law School Liaison:

Rob Birrenkott, UF Law Assistant Director for Career Development

Law Student representatives:

Ajay Singh
Jamie Shideler
Zane Altman
Sarah Casey

Peg O'Connor gave a touching speech in honor of Judge Allan Kornblum, who passed away earlier this year. John Fuller recapped the events of the past year, and recognized Rob Griscti, Stephanie Marchman, and Dean Jerry for their outstanding work in organizing the FBA dinner event, where Justice Clarence Thomas spoke and entertained questions from local practitioners and law students. He also recognized Gil Schaffnit and the Board members for their service over the past year. President Judge Jones spoke about his ideas for the upcoming year, including "brown bag" lunches with judges, increasing membership, and instituting a mentoring program with the law school. The Board would like to thank outgoing President John Fuller for a wonderful year of service, and we look forward to another successful year under Judge Jones.

Wine and hors d'oeuvres were generously provided by:

Ayres, Cluster, Curry, McCall, Collins & Fuller, P.A.
Blanchard, Merriam, Adel & Kirkland, P.A.
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Thank you to these sponsors for helping to make this a successful event.

John Fuller, outgoing FBA President, awarding Judge Gary R. Jones, incoming President, a certificate for his service to the FBA

New Administrative Order

Administrative Order 5.280(A) Juvenile Detention Hearing Procedures was signed by Chief Judge Lott on September 23, 2010. This Administrative Order outlines the procedures governing juvenile detention during the week, weekends and holidays for all juveniles appearing before the court. This includes the process on the weekend and holidays for juveniles appearing before the court charged with offenses in the Third Judicial Circuit.

To read the new administrative order in its entirety, go to http://circuit8.org/ao/index.html.

From the Desk of Chief Judge Lott

By Martha Ann Lott, Chief Judge

Dear Members of the Bar:

As you are all aware, the current economic climate has created an increased need for legal services among the neediest in our community. Three Rivers Legal Services has experienced a dramatic increase in the number of clients who need assistance.

As Chief Judge of the 8th Judicial Circuit, I urge each of you to help manage this crisis by taking on a pro bono case. We thank the members of the legal community who have already volunteered to manage this overflow by taking on pro bono clients. The One Campaign (one attorney, one client, one promise) has been launched to recruit additional lawyers to represent indigent clients.

Remember Rule 6.1 of the Florida Rules of Professional Conduct provides that:

> *Each member of the Florida Bar in good standing, as part of the member's professional responsibility should (1) render pro bono legal services to the poor, and (2) participate, to the extent possible, in other pro bono service activities that directly relate to the legal needs of the poor.*

Rule 6.1 urges members of the Florida Bar to volunteer at least 20 hours of pro bono legal assistance to the poor, or alternatively, to make an annual contribution of at least $350 to a legal aid organization. Unfortunately, the need for pro bono lawyers cannot be fixed by donations alone. The numerous legal aid and pro bono organizations around the state need many more volunteer attorneys to help and you are qualified to assist.

Thank you for your willingness to consider this request and for your willingness to assist those less fortunate. Please contact Marcia Green, Three Rivers Legal Services, Inc., (352) 372-0519 for information regarding the One Campaign and to volunteer.

Criminal Law

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Wouldn't you know, there was an article trumpeting new things at the law school, including a course called "Criminal Law In The Virtual Context." Apparently, one can (with your avatar, I assume) enter the law school's virtual world, as opposed to its real world, and have virtual (again, not real) classrooms, podiums, presentations, and even seats for your virtual self's avatar. All without the unseemly necessity of actual human contact or interaction. Apparently.

Now, as another friend pointed out with regards to himself but fully applicable to me, I am no world expert on the computer. I do like my e-mail, however, and I do get it with regards to the ease of accessing information on the Internet, even given the relatively high likelihood that much of that information is totally bogus. I'm not a total technophobe. But I do have concerns about having an avatar, the concept of virtual context criminals, and Second Life.

If, suppose for an instant, one commits a virtual crime, does one go to real prison? Or to a virtual prison? Is the next big thing in criminal justice theory, only one step removed from ankle bracelets and promising the judge at sentencing that you'll be good in the future, virtual time for your real crime? Can you send your avatar to Florida State Prison for you?

There is probably at least some applicability here to other areas and professions as well. All of this virtual stuff may well explain the current economic mess we have. I have long suspected that the federal government dealt with virtual money, not the real thing. How else do you explain budgets so far in the red that the deficit could swallow a continent? And maybe even more to the point, the confusion so many innocent bankers and lenders inadvertently created by making loans no one could conceivably have thought could ever be re-paid is now clear: those contracts needed to explicitly say that virtual re-payment just wouldn't do. I'm sure everything would have been fine then.

As for Second Life, I must admit that I'm struggling. I have a life. I suppose it's my First Life. I'm not sure I can handle a second one. And I'm not sure that living in Fantasyland is such a swell idea. I am starting to be sure that we have created a society where there simply isn't enough real work, real interaction, real anything to go around. Why else are people so anxious for all this make believe? It's not lost on me that the County computer thinks Second Life is a game. I'm afraid, though, that a lot of people have lost the distinction between the real world and the rest of what's going on.

demonstrating that the witness's statement is false and concludes with a proclamation to the jury that the witness is a liar?

In a negotiation, even if you can prove something is false, does it mean the other party is lying? Not necessarily. The party may wholeheartedly believe what he or she is saying. And, even if he or she is deliberately lying, does accusing the other party of lying yield any benefit? It may be cathartic to the opposing party or give his or her counsel an opportunity to put on an ostensible show of strength. Admittedly, given the competitive nature of most lawyers, proving someone else wrong can even be fun and there can be a sense of great personal satisfaction. But, which is more important: achieving an end result that is beneficial to your client or having that fleeting moment of triumph? I submit to you that, more likely than not, a direct accusation of lying will just result in the other side becoming even more defensive, angry, and unwilling to resolve the dispute.

At trial, do you need the jury to believe a witness is a liar to prove your case? Or, is your goal to discredit the reliability of the testimony? Does it matter whether the jurors believe that the witness was lying or merely mistaken? Do you care why the jurors disregard testimony, so long as they disregard it? Do you come across as a bully or a badgerer when you directly accuse a witness (particularly a sympathetic witness) of lying? Even in the case of a blatant lie, I suggest to you that it may be better to chip away at a witness's credibility and let the jurors reach their own conclusion, *i.e.* they may be more likely to accept the conclusion if they are the ones who formed it.

Attorneys Alison Thompson, Gloria Walker and Margaret Stack at the October EJCBA luncheon

Outside of our law practice, I respectfully submit that when confronted with the "truth" and given the opportunity to gracefully step back from a position, some employers/supervisors, colleagues, husbands, wives, children, friends, etc., may willingly acknowledge a mistake. Other times, you may never get a direct concession of a fact or a point, but suddenly and "mysteriously" a disputed issue suddenly fades to the background and you begin to get your way.

Simply put, I believe that more often than not, you do not need to prove that someone else is lying to prove your point or to be successful. You merely need to demonstrate that the other person is mistaken.

As a "life philosophy," although I have been accused of being overly optimistic (or even naïve) in the past, I believe that I am a healthier and happier person for believing that most "lies" are a result of honest mistakes, errors in perception and memory, or an unconscious shading based on personal feelings and biases, rather than deliberate falsehoods. The difference between the truth and a lie can simply be the difference in a point of view.

So, I choose to believe that most people do not intend to lie. I know that does not mean that my belief is true, but I can hope.

Gene Shuey, member of executive counsel of the GPSSF and a member of EJCBA; Frank Maloney, board member of both GPSSF and EJCBA; and Rob Birrenkott, board member of EJCBA and UF faculty member on a recent law school visit to explain to law students the wonders of joining the law student sections of both organizations.

Alternative Dispute

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Gainesville every year. Also, our fans need to exhibit some school spirit so we insist on allowing them to do the chant. We still want to alternate the use of officials each year. [1]

MEDIATOR: Can you consider limiting the chant in any way, say, only if the game is played on Burt Reynolds' birthday?

COACH WOODRUFF: We'll let them use the chant and we will agree to alternate officials but the games must be played in Gainesville. [2]

COACH NUGENT: I think we can agree to those terms. How bad can SEC officials be? I mean would they intentionally call Lane Fenner out of bounds?

MEDIATOR: Coach Nugent, maybe playing in Gainesville is not too bad. The Noles can work out at Gainesville High School before the game if you are afraid of the players hearing the "gator bait" chant. (Note: The Seminoles arrived at Florida field in 1958 with a minute to go before kick-off after warming up at Gainesville High for this very reason.)

COACH NUGENT: We have a deal. I'm sure this is just temporary as we feel our application to join the SEC will be accepted soon. Can we wrap this us – I need to get some new shoes for our players.

MEDIATOR: I'm glad we could reach a mutually acceptable agreement. I think this will lead to a future filled with good sportsmanship which will epitomize the best of what college athletics has to offer. Coach Woodruff, if you would just sign this settlement agreement, and Coach Nugent if you would just put your "X" on the paper, preferably with a blue pen rather than your pink one.

(The authors apologize if you are unaware of names like Collins, Fenner, Woodruff and Nugent.)

1 FSU Athletic Director Vaughn Mancha once denied a sideline pass to Albert the alligator. Mancha said, "I just don't think we should have an alligator, whomever he happens to be, . . . within snipping distance of toes and fingers."

2 In 1964 Florida led the series 5-0-1 and the Gators taped the words "Never-FSU-Never" on their helmets and stitched "Go for 7" on their jerseys. Final in Tallahassee: FSU 16 - UF 7.

Cedar Key, 2010 (photo by Jennifer Biewend)

This Month's Collection of Random Thoughts from a Florida Bar Foundation Board Member

By Phil Kabler

Improving the condition of youth – *all youth* – has been among the highest priorities of our Eighth Judicial Circuit Bar Association for many years. That priority includes addressing the needs of delinquent youth.

On May 17, 2010 the U.S. Supreme Court decided Graham v. Florida, which held it is unconstitutional to sentence juveniles to life without parole for non-homicide crimes. Of the 109 juveniles sentenced nationally to life without parole for non-homicide offenses, 77 of them were sentenced in Florida.

This past August The Florida Bar Foundation provided $100,000 in funding, through the Improvements in the Administration of Justice (AOJ) Grant Program, for the creation at Barry University School of Law of the Juvenile Life Without Parole (JLWOP) Defense Resource Center. The JLWOP Resource Center is intended to address the legal and public policy questions raised by Graham, as well as to attend to individual client needs. It is anticipated that Barry University will make a subsequent request for a second year of funding to support this two-year project.

Senior Judge Emerson R. Thompson Jr., formerly of the Fifth District Court of Appeals, and a member of the Foundation's board, chairs the committee charged with reviewing AOJ grant applications. As Judge Thompson noted in response to Barry University's application,

The Supreme Court decided Graham and said juveniles are different and should be sentenced differently. The Foundation is funding this project to ensure that the sentence imposed at resentencing is fair to the juvenile and to the citizenry of Florida.

If you have questions about The Florida Bar Foundation's AOJ grant program or the Foundation in general, please feel free to call me at (352) 332-4422. And to get the latest news about the Foundation and its grantees, please become a "Fan" on Facebook by visiting www.facebook.com/TheFloridaBarFoundation.

Forrest Gump

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the right track." He wanted to create "green jobs" and suggested that manufacturing action figures of himself would be a real good idea.

William F. Buckley once said, to the cheers of his conservatives, that he would rather be governed by the first 2,000 names in the Boston phonebook then by the Harvard faculty. Today it seems that "ordinary" is the new cool - and know-nothingness is a badge of honor. When nearly everyone associated with the Obama administration is Harvard-groomed, Green is the anti-ivy. Buckley may have been sincere in his preference for everyday Americans over the elite, but H. L. Mencken may have been more on target in describing the All American story: "Democracy is the theory that common people know what they want, and deserve to get it good and hard." I'll be anxious to see who wins the senate seat in South Carolina, the only state I know of where the governor can sneak off to South America for a few days before anybody notices. In any event, Alvin Green is the first African American nominated to the US senate in South Carolina since Reconstruction. Since the original draft of this article, Alvin Green was indicted for a pornography offense and is currently represented by the public defender in Columbia, South Carolina.

U.S. Senate Candidate Kendrick Meek with Mac McCarty, President-Elect and Elizabeth Collins, President, at the 10/8/10 EJCBA luncheon.

The Eighth Judicial Circuit Bar Association is a non-partisan organization that does not endorse any political candidate or party. All Florida candidates for the U.S. Senate were invited to attend and speak at our luncheon. We are honored whenever any candidate takes time out of his or her busy schedule to speak to us, regardless of party affiliation or platform.

The Florida Bar Board of Governors Report

By Carl Schwait

At its meeting in Sarasota, The Florida Bar Board of Governors:

- As Chairperson of the Board Review Committee on Professional Ethics, I reported that Proposed Advisory Opinion 09-1, addressing when lawyers may contact government officials who are represented by counsel, will be postponed until the board's December meeting to allow attorneys representing government entities more time to make suggestions.
- Approved a recommendation from the Board Review Committee on Professional Ethics to allow the Professional Ethics Committee to prepare an advisory opinion on the ethical obligations of a lawyer who is asked to disclose confidential information of a decedent by the personal representative of the decedent's estate.
- I reported that the Board Review Committee on Professional Ethics will attempt to complete the Supreme Court mandated review of Bar advertising and marketing rules and policies by the May 2011 meeting. On a related issue, I noted the U.S. 11th Circuit Court of Appeals had ruled in *Harrell & Harrell v. The Florida Bar*. The firm had claimed that five Bar advertising rules were unconstitutional. A district court judge ruled in favor of the Bar, but the circuit court found that four of the issues should have further proceedings at the district court.
- Heard President Mayanne Downs announce that immediate Past President Jesse Diner will head up a Bar effort to prevent the Legislature from adjusting pension benefits for judges. Twelfth Circuit Chief Judge Lee Haworth, appearing earlier in the meeting, asked for the Bar's help on the issue saying reducing benefits would make it harder to attract qualified lawyers, especially civil practitioners, to the bench.
- Approved an addition to Rule 4-1.5 governing the hiring of an outside law firm to negotiate the resolution of medical lien issues in a personal injury case.
- Voted to approve a recommendation from the Standing Committee on the Unlicensed Practice of Law to oppose suggested amendments to the ABA Model Rules that would allow attorneys licensed in foreign countries to register as authorized house counsel in Florida or to appear pro hac vice in the state. The committee said it would be hard to verify licensing standards in foreign jurisdictions.
- Approved the recommendation of the Program Evaluation Committee to create a new section on alternative dispute resolution.
- Approved the recommendation of the Program Evaluation Committee to create a nine-member committee to study mandatory regulation of paralegals. It was reported that paralegals have come to the Bar requesting that they be regulated by the Bar or the Supreme Court.
- Approved the Investment Committee's recommendation to hire five fund managers for expanded investments in the Bar's long-term investment portfolio and to reallocate investment targets for the new and existing investment categories.
- Discussed e-filing and e-service and related rules that will soon come to the board for its review and comment.
- Approved a recommendation from the Communications Committee to not list any ratings, including Martindale-Hubbell, on the expanded Bar member profile page on the Bar's website.
- Approved the sunsetting of the 2008-10 legislative positions of The Florida Bar and its committees and the rollover of selected 2008-10 positions requested by several sections for the 2010-12 biennium.

Please let me know if you have any questions or comments concerning The Florida Bar. I appreciate your confidence in my service as your representative on the Board of Governors.

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be your go-to case. But one day, the pendulum will swing the other way. In addition, a home which has been owned for a long time may have lost some appreciation in the last few years, but will still be worth more than it was, say, 27 years ago.

The Florida Supreme Court adopted the reasoning of the First District Court of Appeal in Kaaa v. Kaaa, Case No.: SC09-967, September 30, 2010, found at: http://www.floridasupremecourt.org/decisions/2010/sc09-967.pdf. There, the parties had been married 27 years. Before their marriage, the husband purchased a home for $36,000, making a down payment of $2,000 from his separate funds. The parties married soon thereafter. Although they refinanced the house several times, the wife's name was never added to the deed. They used marital funds to pay the mortgage payments throughout the marriage, and they also used marital funds to renovate their carport.

At the time of their divorce, the Tampa trial court determined that the house, still titled only in the husband's name, was a non-marital asset, and that the wife was entitled to a one-half share only of the amount of the reduction in the mortgage balance and the value of the carport renovation, which was a total of $36,679. The husband was only ordered to pay to the wife the sum of $18,339, and the balance of the home's present value of $225,000 was awarded all to the husband. Upon appeal to the Second District Court of Florida, the award was affirmed. However, the District Court certified a conflict with a decision of the First District Court of Appeal, and the Florida Supreme Court undertook to resolve the conflict.

Florida Statutes §61.075(5)(a)(2) [since renumbered to §61.075(6)(a)(1)(b)] provides that "The enhancement in value and appreciation of nonmarital assets resulting either from the efforts of either party during the marriage or from the contribution to or expenditure thereon of marital funds or other forms of marital assets, or both..." is a marital asset. The Second District Court of Appeal, however, had considered that the use of marital funds to pay a mortgage which encumbers a nonmarital asset would mean that the increase in net value of the non-marital asset due to the reduction of the mortgage balance would be a marital asset, but NOT that any passive appreciation in value would become a marital asset.

In Kaaa, however, the Florida Supreme Court set out a five step test for a trial court to use to determine whether passive appreciation in value of the non-marital asset should be considered marital:

(1) Determine the overall fair market value of the home;

(2) Determine whether there has been any passive appreciation in value of the home;

(3) Determine whether the passive appreciation is a marital asset, which must include findings of fact by the trial court that marital funds were used to pay the mortgage and that the non-owner spouse made contributions to the property. Moreover, the trial court must determine to what extent the contributions of the non-owner spouse affected the appreciation of the property:

(4) Determine the value of the passive appreciation that accrued during the marriage and is subject to equitable distribution.

(5) Determine how the value is allocated. The Court specifically approved of the methodology espoused by the First District Court of Appeal in Stevens v. Stevens, 651 So. 2d 1306, 1307 (Fla. 1st DCA 1995): "...the portion of the appreciated value of a separate asset which should be treated as a marital asset will be the same as the fraction calculated by dividing the indebtedness with which the asset was encumbered at the time of the marriage by the value of the asset at the time of the marriage."

See also, Martin v. Martin, 923 So. 2d 1236 (Fla. 1st DCA 2006) and Strickland v. Strickland, 670 So. 2d 142, 143 (Fla. 1st DCA 1996), both cited with approval by the Florida Supreme Court.

Thus, if the balance of the mortgage encumbering a non-marital home at the time of the marriage was equal to 90% of the value of the home, then the portion of the passive appreciation in value (if the other steps are satisfied) which should be considered a marital asset is 90%. Although this case specifically dealt with a marital home, there is no language in the opinion which would restrict this reasoning only to a marital home.

The Family Law Section meeting is on the third Tuesday of each month at 4:00 pm in the Chief Judge's Conference Room in the Alachua County Civil and Family Justice Center. Please email me at cynthia.swanson@swansonlawcenter.com if you are not receiving reminder emails of these meetings and you want to, or if you are receiving them and you don't want to anymore. Also, please check out my blog at http://swansonlawcenter.blogspot.com/ for more family law related updates.

FORUM 8

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

November 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 December Forum 8
6 UF Football at Vanderbilt, Nashville, TBA
10 Probate Section Meeting, 4:30 p.m., 4th Floor, Family & Civil Courthouse
11 Veterans Day, County and Federal Courthouses closed
13 UF Football v. South Carolina, TBA
16 Family Law Section Meeting, 4:00 p.m., Chief Judge's Conference Room, Alachua County Family & Civil Justice Center
19 EJCBA Luncheon, Ti Amo!, Florida Bar President Mayanne Downs, 11:45 a.m.
20 UF Football v. Appalachian State, TBA
25 Thanksgiving Day, County and Federal Courthouses closed
26 Friday after Thanksgiving, County Courthouse closed
27 UF Football at Florida State University, Tallahassee, TBA

December 2010 Calendar

1 EJCBA Board of Directors Meeting; Ayers Medical Plaza, 720 SW 2d Avenue, North Tower, Third Floor – 5:30 p.m.
2 CGAWL meeting, Flying Biscuit Café, NW 43rd Street & 16th Ave., 7:45 a.m.
2 First Day of Hanukah
6 Deadline for submission to January Forum 8
8 Probate Section Meeting, 4:30 p.m., 4th Floor, Family & Civil Courthouse
9 EJCBA Luncheon, Ti Amo!, Gwen Roache, Division of Victims' Services, 11:45 a.m.
21 Family Law Section Meeting, 4:00 p.m., Chief Judge's Conference Room, Alachua County Family & Civil Justice Center
24 Christmas Holiday, County and Federal Courthouses closed
27 Monday after Christmas Holiday, Alachua County Courthouses closed
31 New Years Day 2011 (observed), Alachua County Courthouses closed

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.