FORUM 8

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President's Letter

By Elizabeth Collins

"In great attempts, it is glorious even to fail," the tiny slip of paper read. Mind you, I do not believe that fortune cookies are a source of profound wisdom. (Moreover, I am aware that this particular quote is often attributed to Cassius Longinus who conspired against Julius Caesar and, according to Dante, is eternally damned to the lowest level of Hell.) Nonetheless, this concept resonated with me. Are we, as lawyers, too afraid to fail?

I have often contemplated how the fear of failure hinders our ability to succeed. Have we become so risk averse that we are unwilling to take a chance? Have the current state of the economy, our clients' inflated expectations, and our personal definitions of failure paralyzed us? How can we possibly grow as individual lawyers and as a profession in a culture that does not allow us any room for anything except a complete "success"?

We have all heard versions of the theme that you learn more from your failures than your successes. We have all heard variations of the concept, "Nothing ventured, nothing gained." However, do we consider these phrases as mere platitudes? Do we only console ourselves with them when we are Monday morning quarterbacking our unsuccessful decisions?

At the risk of sounding like Tony Robbins, I wonder, have you embraced a personal philosophy or created a corporate culture which allows you and your colleagues the freedom to succeed? You should not say, "yes," unless you have also allowed the freedom to fail.

David Pottruck, a former CEO of the financial services firm, Charles Schwab, is often quoted for stating, "The idea that failure is okay is ridiculous. I am not going to go around the company and reward someone for failing. But here at Schwab we differentiate between ***noble*** failure and ***stupid*** failure." Charles Schwab has a set of criteria for defining noble failure. Noble failure occurs when:

- the project had a good plan, the project team knew what it was doing, everything was thought through carefully, and the project implementation imposed adequate management discipline;
- the project had a reasonable contingency plan to deal with any initial failure and, if necessary, the contingency plan was implemented;
- reasons as to why the failure occurred were determined and disseminated to the organization, so others could learn from the experience; and
- in retrospect, an outsider would conclude that the project was thoughtfully implemented

As lawyers, we tend to be perfectionists. Our clients want results. But, in my humble opinion, in order to achieve the greatest results, both the lawyer and the client need to allow for a "noble failure." Consider the following approach:

- Regularly read the Florida Law Weekly and professional journals to see new and developing trends in the law

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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

Three Rivers Adds Two New AmeriCorps Attorneys and Receives Foreclosure Prevention Grant

By Marcia Green

Three Rivers Legal Services is pleased to announce the continuation of our AmeriCorps grants and welcomes two new attorneys to our staff.

Nery Luz Alonso is a graduate of Stetson University College of Law with an undergraduate degree in criminology and psychology from University of South Florida. She became a member of the Florida Bar in April 2010. Prior to accepting the position with Three Rivers, she volunteered as a pro bono attorney in our pro se family law clinics. She will be working in our domestic violence project and family law pro se clinics.

Hoa Thuy "Tee" Ho graduated from the University of Florida Levin College of Law with an undergraduate degree in Classics from College of Charleston in South Carolina. While in law school, she volunteered at Three Rivers in the pro se clinics. Also becoming a member of the Florida Bar in April 2010, her position will focus on homeless prevention, working with our foreclosure defense unit as well as assisting clients in landlord/tenant disputes and evictions.

AmeriCorps provides funds to agencies, such as Three Rivers, who address critical community needs. After completion of their term of service, AmeriCorps members earn a Segal AmeriCorps Education Award that can be used to repay qualified student loans. Full-time AmeriCorps members receive a modest living allowance and health care benefits.

Former AmeriCorps attorneys, Jorge Tormes and Patricia Antonucci, completed their two-year commitments earlier this summer.

In an exciting new development, Three Rivers Legal Services is one of the recipients of a regional Foreclosure Prevention Grant through the Florida Access to Civil Legal Assistance program administered by the Florida Bar Foundation.

This grant is to help clients whose income is at or below 150% of poverty to help prevent foreclosure through mediation, litigation and/or assistance in applying for federal programs aimed at preventing foreclosure. The approximately $45,000 grant is clearly not enough to cover all of the need in Three Rivers' 17-county service area, but it is certainly a boost to what is available for our client community and the difficulties they face.

*** Three Rivers Legal Services, Inc. is an affiliate of United Way of North Central Florida; donations to United Way can be designated to Three Rivers Legal Services.*

RESERVE NOW FOR THE ANNUAL EJCBA JIMMY ADKINS CEDAR KEY DINNER

WHEN: Thursday, October 14, 2010 beginning at 6:00 p.m.

WHERE: Frog's Landing: 490 Dock Street, Cedar Key, Florida

COST: $40.00*

DEADLINE: Please register on or before Friday, October 8, 2010

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P .O. Box 127
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*$45.00 at the door for attendees not having made prior reservations. If you are reserving at the last minute, or need to change your reservation, please contact Judy via fax at (866) 436-5944, email jpadgett@8jcba.org, or call (352) 380-0333.

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Alternative Dispute Resolution

Good Faith Bargaining

By Chester B. Chance and Charles B. Carter

Often during mediation one side looks at the mediator and complains the other side is not only wasting their time but "negotiating in bad faith." This leads to a discussion of exactly what is good faith and bad faith at a mediation.

In *Lawyer Negotiation* by Folberg and Golann, the authors discuss "good faith bargaining." The authors raise the question whether courts, when ordering parties to mediate, should order the parties to satisfy a minimum standard of conduct. They note as of 2006 some 22 states have "good faith bargaining" requirements for mediation and that 21 federal courts and 17 state courts have local rules imposing such duties at mediation.

The authors note virtually none of the rules define what constitutes "good faith." One commentator noted good faith obligations can include:

1. Failure to attend mediation at all.
2. Failure to send a representative with adequate settlement authority.
3. Failure to submit a required memoranda or documents.
4. Failure to make a suitable offer or otherwise participate in bargaining.
5. Failure to sign an agreement.

Folberg and Golann comment courts have found it easiest to sanction objective conduct such as failure to appear or file a statement. It is much more difficult to deal with subjective matters such as making a suitable offer.

To regulate a party's conduct during mediation, the authors suggest the court first has to define good faith. Then the court would have to hear evidence about what took place at the mediation, thus putting confidentiality at issue. Moreover: ". . . many argue that good faith bargaining requirements are in conflict with the concept of self determination, a central value of mediation." To put it bluntly: If parties have the right to make their own decisions at mediation, how can any specific level of participation in the process be required?

How could an Offer of Judgment be viable but the same offer in mediation be bad faith? Quite the conundrum.

On the other hand, others suggest if parties are ordered to mediation by the court and one party extends a lot of resources to comply, should the adversary be permitted to nullify the process by failing to prepare or refusing to bargain? (See, p. 427 of text).

Parties often argue the other side is guilty of bad faith at mediation by refusing to negotiate in a manner the first party finds reasonable. For instance:

The plaintiff in caucus with the mediator says she will settle for $750,000. Later the plaintiff says she will not make any further concessions until the defense puts a "significant offer" on the board. The defense says it will not make any offer because the plaintiff's demand is from outer space and tells the mediator to bring the plaintiff into reality world. Is either party guilty of bad faith in Florida?

If the plaintiff offers a bracket suggesting it will go from $750,000 to $400,000 if the defense goes to $300,000, is that bad faith?

A plaintiff demands $110,000 prior to mediation and without any factual or legal change in the case demands $200,000 at mediation? Is that bad faith?

Florida law only requires the party and its attorney attend mediation. If there is an insurer, a representative of the insurer must come with authority up to the policy limits or the last demand, whichever is less. Rule 1.720(b). From the above list of 5 potential bad faith scenarios, Florida only recognizes #1 and #2. Negotiating in bad or good faith is in the eye of the beholder. What many term bad faith in reality may be frustrating, may be time consuming, and may result in impasse, but, arguably in Florida, does not constitute bad faith. Bad faith is failure to show up or not showing up with authority.

Sometimes during the orientation session (joint conference) one side presents the issues in a no-holds-barred manner. The attorney may not say the opposing party made a mistake, rather,

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Are you interested in working on an EJCBA Committee? Yes / No

Arizona's Litmus Test

By Stephen N. Bernstein

Few of us would happily endure living near a porous border with a Mexican state that has failed in some certain lawless regions full of drug gangs, human traffickers, roving vigilantes, and desperate migrants who sometimes don't survive the crossing. We need effective border enforcement and we need a guest-worker program that permits an orderly, regulated flow of temporary migrant laborers, allowing border authorities to focus on more urgent crimes than those resulting from the desire to provide for one's family. Still, chaos at the border is not a justification for states to take control of American immigration policy.

American states have broad powers, but they are not permitted their own foreign or immigration policy. One reason is that immigration law concerns not only treatment of illegal immigrants, but also treatment of American citizens. Here, the Arizona law fails miserably.

Under the law, police must make a "reasonable attempt" to verify immigration status of people they encounter when there is a "reasonable suspicion" they might be illegal. Those whose citizenship can't be verified can be arrested. But how is such reasonable suspicion aroused? The law forbids the use of race or ethnicity as the "sole" basis for questioning. So what are the telltale indicators? Try to come up with anything that is not racial stereotyping.

This law creates a suspect class, based in part on ethnicity, considered guilty until they prove themselves innocent. It does make it harder for illegal immigrants to live without scrutiny but it also makes it harder for some American citizens to live without suspicion and humiliation.

This is simply a bad idea for Arizona and everyone else.

Criminal Law

By William Cervone

Well, what the heck. Here it is only the second issue of the new publishing year and I've decided to go all legal on you. I imagine some of you might actually appreciate that.

Over the last 18 months there have been a series of cases from the United States Supreme Court dealing with confessions that have been interesting on many levels.

First among these is Montejo v Louisiana, decided in May of 2009. Montejo (why do I constantly want to call him Mojito?) was a garden variety murderer who, like so many of his peers, couldn't follow the simple "SHUT UP!!!!" instruction that I'm sure his court appointed attorney gave him immediately upon meeting him. Instead, after being appointed counsel and invoking his 6th Amendment rights at what sounds like Louisiana's version of a 1st Appearance hearing, he proceeded to make a variety of incriminating statements to cops who dropped by his cell for a chat after court. Overturning precedent that has been with us for over 20 years, the Supreme Court ruled that even after such an invocation it was fine for the police to act as they had in visiting him, and that it was up to Montejo to tell them to go away. So much for all the times I've told inquiring detectives that they had to stay away from a defendant after 1st Appearances.

(A caveat here: at least one DCA has called into question Florida's obligation to follow Montejo and certified that question to the Florida Supreme Court.)

Next came Maryland v Shatzer, decided in February of 2010. Shatzer sexually abused his son. He was initially questioned in 2003 but invoked and that was, seemingly, the end of that. An enterprising detective, however, decided to take another stab at him in 2006, and, wouldn't you know it, this time he spilled his guts, proving that "SHUT UP!!!!" cannot be repeated too many times by defense counsel. Be that as it may, the Supreme Court apparently figured that it would be best if the road headed down in Montejo had a defined starting point and held that if there was a break of 14 days between an invocation and the re-initiation of questioning by the police, then everything was fine (assuming, of course, a waiver at that point). The Court noted its departure from its usual disdain for black and white rules like this, but said it was for the best of all concerned to have a reliable and fixed

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Clerk's Corner

By J.K. "Buddy" Irby, Clerk of Court

In March of 2010, the Florida Supreme Court amended Florida Rule of Judicial Administration 2.420, which governs access to court records. One of the most significant revisions to the rule takes effect October 1. As of that date, each party filing documents with the Clerk of Court is responsible, with limited exceptions, for notifying the Clerk if any of the documents are confidential.

The rule will primarily affect documents from confidential case types that are filed in other cases. Confidential case types are chapter 39 dependency proceedings, chapter 984 juvenile delinquency and family services for children proceedings, adoptions, petitions by minor for waiver of parental notice when seeking to terminate pregnancy, and chapter 904 grand jury proceedings, The Clerk's Office will continue to automatically protect all documents filed in these case types, as well as unexecuted search warrants and arrest warrants.

In non-confidential case types, a party wishing to have documents protected must file a form titled Notice of Confidential Information within Court Filing. Upon receipt of such a form, the Clerk's Office can automatically protect from public disclosure documents that fall within any of 19 categories listed in the rule. The categories are:

- Chapter 39 records relating to dependency matters, termination of parental rights, guardians ad litem, child abuse, neglect, and abandonment. § 39.0132(3), Fla. Stat.
- Adoption records. § 63.162, Fla. Stat.
- Social Security, bank account, charge, debit, and credit card numbers in court records. § 119.0714(1)(i)-(j), (2)(a)-(e), Fla. Stat. (Unless redaction is requested pursuant to § 119.0714(2), this information is exempt only as of January 1, 2011.)
- HIV test results and patient identity within the HIV test results. § 381.004(3)(e), Fla. Stat.
- Sexually transmitted diseases -- test results and identity within the test results when provided by the Department of Health or the department's authorized representative. § 384.29, Fla. Stat.
- Birth and death certificates, including court-issued delayed birth certificates and fetal death certificates. §§ 382.008(6), 382.025(1)(a), Fla. Stat.
- Identifying information in petition by minor for waiver of parental notice when seeking to terminate pregnancy. § 390.01116, Fla. Stat.
- Identifying information in clinical mental health records under the Baker Act. §394.4615(7), Fla. Stat.
- Records of substance abuse service providers which pertain to the identity, diagnosis, prognosis and provision of service provision to individuals who have received services from substance abuse service providers. § 397.501(7), Fla. Stat.
- Identifying information in clinical records of detained criminal defendants found incompetent to proceed or acquitted by reason of insanity. § 916.107(8), Fla. Stat.
- Estate inventories and accountings. § 733.604(1), Fla. Stat.
- Victim's address in domestic violence action on petitioner's request. § 741.30(3)(b), Fla. Stat.
- Information identifying victims of sexual offenses, including child sexual abuse. §§ 119.071(2)(h), 119.0714(1)(h), Fla. Stat.
- Gestational surrogacy records. § 742.16(9), Fla. Stat.
- Guardianship reports and orders appointing court monitors in guardianship cases. §§ 744.1076, 744.3701, Fla. Stat.
- Grand jury records. Ch. 905, Fla. Stat.
- Information acquired by courts and law enforcement regarding family services for children. § 984.06(3)-(4), Fla. Stat.
- Juvenile delinquency records. §§ 985.04(1), 985.045(2), Fla. Stat.
- Information disclosing the identity of persons subject to tuberculosis proceedings and records of the Department of Health in suspected tuberculosis cases. §§ 392.545, 392.65, Fla. Stat.

The Notice of Confidential Information within Court Filing form can be found on the Clerk's website at www.alachuaclerk.org in the Forms section. A party can ask the court to find records outside the 19 specified categories confidential by filing a motion and following the procedures set forth in rule 2.420. If you have questions about whether a document you are filing falls within one of the listed categories, feel free to contact the Clerk's office for clarification.

Enforcing Secured Debts Against A Guarantor

By Siegel, Hughes & Ross

A suit for default on a promissory note secured by a mortgage and a guaranty is a common subject of commercial litigation. The common practice for an attorney representing a client who wishes to sue for default of such a note has been to first pursue foreclosure of the mortgage and look to the guarantor only when the value of the property was insufficient to satisfy the debt. *See, e.g., LPP Mortg. Ltd. v. Cacciamani*, 924 So. 2d 930 (Fla. 3d DCA 2006). In such a case the plaintiff-mortgagee has the burden of moving for and proving there is a deficiency after the sale of the mortgaged premises. *See, Edwards v. F.D.I.C.*, 746 So. 2d 1157 (Fla. 4th DCA 1999).

However, with the recent decline in real estate values a different approach may be required when the debt is unconditionally guaranteed by a solvent guarantor. The better option may be to pursue judgment on the guaranty prior to foreclosure of the mortgage. As discussed more fully below, this can be a more attractive option because it affords the mortgagee the right to pursue foreclosure if the guarantor does not pay the judgment without the burden of moving for and establishing a deficiency.

Florida's courts have long recognized a plaintiff's ability to pursue multiple remedies when any given remedy does not fully satisfy the indebtedness owed to the plaintiff. In *Junction Bit & Tool Co. v. Village Apartments, Inc.*, 262 So.

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Brent Siegel, Charles Hughes & Jack Ross

Criminal Law

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breaking point.

Also decided in February of 2010 was Florida v Powell, which features a robber from Tampa. Powell, apparently being less than clear in thought and speech, confessed despite the cops having simply told him that he had a right to an attorney, not specifically that he had a right to an attorney at the very moment he was confessing. The Florida Supreme Court found this to be an important distinction and tossed the confession, but the big Supremes felt otherwise and ruled that a general advisement ought to be good enough to tell your average criminal that his right to an attorney meant then and there, not just in some abstract concept of time and space that only Carl Sagan or Stephen Hawking would understand.

Finally, in June of 2010, came Berghuis v Thompkins. Thompkins, another murderer, elected to sit silently for three hours or so while police talked to him. For unknown reasons, after about three hours he decided to utter the simple but deadly to him word "Yes" to some incriminating question or other, starting him down the road to the Michigan State Penitentiary. Despite his claims from prison that his silence (until the fateful "yes") was an invocation, the Supremes held that sitting mute is nothing, legally speaking, and that police may talk as long as they want to when someone doesn't talk back to them.

Now, admittedly, I am taking liberties in condensing these important cases that go on for many pages each to one paragraph summaries, and for sure you should read them entirely yourselves. But even in broad strokes they do leave some interesting generalities for consideration. First, has the Supreme Court finally gotten tired of endless debates about how many angels can dance on the head of a pin? Has the endless progression of clever lawyering with both sides making minute distinctions driven the Court to the point where we can expect more black and white lines like in Shatzer? Are we finally at the point where there are so many exceptions to the rule that there is no rule? Do the justices see growing crime, especially of the horrible kind, as such a threat to the fabric of society that police need a wee bit more flexibility? Have so many opinions been written by so many courts that we now concede that it's impossible to reconcile all of them? Has the NRA begun lobbying courts and not just legislatures?

I certainly don't know the answers to these questions but I do know a trend when I see one. I leave it to each of you to debate what that trend is and what it means.

Probate Section Report

By Larry E. Ciesla

The Probate Section continued to meet during the summer months. Following is a summary of matters discussed at the August meeting. The meeting began with a discussion of the status of the new power of attorney law. The Real Property Probate and Trust Law Section of the Florida Bar (usually referred to as the RPPTL or Reptile Section) has undertaken a substantial rewrite of Chapter 709, Florida Statutes. I believe there was some effort to have it considered during the last legislative session, however, for whatever reason, it was not passed. It is anticipated it will be passed next year. Copies of this extensive bill are available from my office.

The meeting next proceeded to a discussion of the newly enacted local rule #3.0954 of the Eighth Judicial Circuit regarding residential mortgage foreclosure procedure, the full title of which is: Administrative Order for Case Management of Residential Mortgage Foreclosure Cases and Mandatory Referral of Mortgage Foreclosure Cases Involving Homestead Residences to Mediation. This 83-page order is a must read for all practitioners handling residential foreclosures, whether on the plaintiff or defendant side. The order addresses many of the problems previously encountered in defending these suits, such as who owns the note and who has the authority to make decisions regarding reinstatement of the note on a compromise basis. Some of the high points are as follows. Plaintiff must pay an additional fee of $400.00 at the time of filing suit to help fund this new program. If the foreclosure involves a homestead, an additional fee of $350.00 is also required. A new form must be filed indicating who owns the note; whether it involves a residential property; whether it is a homestead; and the name of a representative of the plaintiff with settlement authority. For homesteads, mediation is mandatory within 90 days of filing suit. Plaintiff may not be granted a summary judgment until after the mediation has occurred. Plaintiff must bring a representative with settlement authority to mediation. A staff attorney, Jennifer Jones, has been assigned to work on these cases. In addition, Paul Silverman has been named as a General Magistrate to work on these cases.

Jay Donohoe then explained the workings of a little-known group named Seniors vs. Crime, for which Jay is a volunteer. This is a not for profit Florida corporation which bills itself as a project of the Attorney General's Office. The group has an office in the Alachua County Sheriff's complex on Hawthorne Road. They are open 11:00 am to 3:00 pm, Wednesdays and Thursdays. It is staffed by volunteers. They try to help seniors who have been victimized by, in most cases, financial scams. They will typically contact the alleged wrongdoer and try to persuade him/her/it to make things right with the "victim". If they are unable to do so, they refer the "victim" to other resources, such as law enforcement or Three Rivers Legal Services. Their phone number is 367-4023. Jay indicated that the term "seniors" is very broadly defined and there is no strict age limit for seeking their services. As an example of their good work, I know of a case where Jay's group successfully persuaded a person to return a substantial amount of funds which were alleged to have been improperly removed from a so-called joint bank account owned by a senior. There is no cost for their help.

The ongoing issue of e-filing for probate cases locally was then discussed. The Supreme Court recently approved e-filing and the clerks of court and court administration people have been working out the details. Buddy Irby indicated to me that he expects the program will go live early next year. When implemented, e-filing will be optional. Mr. Irby stated that as initially proposed, the program would have required hundreds of different input items, such that it was unlikely that anyone would choose e-filing. The program has since been modified so that only a few inputs are required, making it much more user friendly.

It was reported that Chief Judge Lott is working on updating the list of approved doctors for service on the examining committee for incapacity cases. It is anticipated that a new administrative order in this regard will be forthcoming. Any psychiatrist wishing to be on the list should contact staff attorney Amy Tully.

Finally, Amy Tully reports that the current assignments for staff attorneys are as follows: Bridget Baker---Alachua County guardianships; Amy Tully—Alachua County probates; Troy Patten—Baker, Bradford and Union Counties; and Jennifer Kerkhoff—Levy and Gilchrist Counties.

The probate section continues to meet on the second Wednesday of each month at 4:30 pm in the fourth floor meeting room of the civil courthouse. Contact me if you wish to be added to the email list for meeting announcements.

A Self-Regulated Bar Needs Participation

By Marion J. Radson

The legal profession is unique in Florida because it is the only profession that is not directly regulated by the Florida legislature or the Florida Department of Business Regulation. The Florida Constitution places the practice of law under the jurisdiction of the Supreme Court of Florida.

The Florida Bar is an official arm of the Supreme Court. The Board of Bar Governors is the governing body of The Florida Bar. The Board consists of 52 members, all of whom are attorneys with the exception of 2 residents of the State of Florida. As members of The Florida Bar, attorneys have the privilege of participating in the governance of our profession by serving on the board itself, or as members of a Section, a Committee, or a special task force. Yet many attorneys are not willing to take the time to help regulate our profession, improve the practice of law and the delivery of professional service to our clients.

As you should be aware, Carl Schwait is our elected representative to the Board of Bar Governors. Service on the Board of Bar Governors demands the dedication of time and personal resources. The governors are not compensated for their travel or expenses, and the Board travels out of state as well as staying at some very nice establishments within Florida. To be effective and responsible, governors must review long agendas every quarter and participate in committee meetings. They regularly discipline errant lawyers and try to deal with the problems that face our ever-changing profession.

Last year, I served as a member of the Bar's Attorney-Client Privilege Task Force. I had the pleasure of working with Carl on two substantive matters that required action by the Board of Bar Governors. On both occasions, Carl shepherded me through the Board's unique process.

On one of these matters, the Board of Bar Governors considered the recommendation of the Task Force to enhance the attorney-client privilege in the public sector. The recommendation included proposed revisions to the Government-in-the Sunshine Law and the Public Records Law. Any revisions to these laws tend to be controversial and The Florida Bar is no exception. As a strong proponent of protecting the attorney-client privilege, Carl provided me some friendly advice reminding me to speak to the governors in plain and simple terms, like arguing a case before a jury or a city commission. To my delight, the governors last spring approved the recommended bill that is now part of The Bar's official legislative position.

Now, unexpectedly I find myself back before the Board on a second matter challenging a proposed ethics opinion that would change the application of the "no-contact" rule for government and possibly all corporate entities. As before, Carl has met and discussed this matter with me on more than one occasion. He has carefully reviewed the documents offered in support of the appeal, and is actively involved in seeking a resolution of the issues in contention. This proposed Opinion will affect the practice of law in every state and local government office.

While working on this Opinion, I have learned that Carl is now busy with referrals by the Supreme Court of Florida to The Florida Bar relating to the complex issue of regulating advertising rules. Carl, who serves as the Chair of the Board Review Committee of the Board of Bar Governors, will now be devoting his time to addressing this and related issues that directly impact our profession.

A self-regulated Bar is only as good as the participation of its members. Carl is a role model for each of us to emulate in the practice of law. Tell Carl that you appreciate his hard work, and offer to assist him by serving on Bar Committees and participating in Section activities.

Alternative Dispute

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they characterize the party as "lying". Or one side says the other side is faking or their testimony constitutes fraud rather than the more tactful suggestion the other party may not be injured as bad as they claim or pre-existing medical records may call into question the nature of the injury. At this point the other side claims "bad faith".

Calling someone a fake or a liar may enflame the other side so much that an impasse results, but is it bad faith or simply poor negotiation technique?

If good faith negotiation is required in Florida, we suggest it would lead to a plethora of lawsuits over this subjective requirement.

Maybe we just believe mediation works so well the vast majority of the time and the act of mediating is subject to so few litigated issues, it would be a shame to tinker with something which seems to work so well.

A Gathering of Random Thoughts from a Florida Bar Foundation Board Member

By Phil Kabler

As we know in the Eighth Judicial Circuit, with the exception of the greater UF and SFC areas, the grand bulk of our counties and communities are rural. One of the challenges of living in a bucolic region as ours is the effective inaccessibility of local legal services. In order for an individual or family living "in the country" to obtain the assistance of a lawyer, they must travel to where the lawyers are located, which can be difficult given the distance and time involved, especially if the clientele must take off work time to travel, and even more for impoverished clientele.

The Florida Bar Foundation has made a concerted effort to address the needs of people who have difficulty accessing legal assistance through its pilot pro bono grant program. (Here is the link - www.flabarfndn.org/grant-programs/lap/pilot-pro.aspx.) The local provider under that grant program is Three Rivers Legal Services through its "Rural Pro Bono Participation through Remote Skills Training and Support" initiative.

The grant to TRLS, which was in the amount of $34,460 for each of the initial 2009-2010 and renewal 2010-2011 periods, has the goals of increasing the number of clients served by pro bono attorneys and the number of attorneys willing to accept pro bono cases in both the 8th and 3rd Judicial Circuits, particularly in the substantive areas of family law and wills and probate.

The methods employed by TRLS in support of that purpose include:

- Providing an extensive in-person CLE program about the fundamentals of family law, followed by webinars on "Basic Tax Issues in Family Law" and "Equitable Distribution" {N.B. The training events were recorded and are available to view on the TRLS website - http://trls.org/calendar.html [go to the bottom of the page]}
- Hosting CLE programs on wills and probate and webinars on domestic violence, adoption, special needs trusts, guardian advocate proceedings, the use of trusts and wills, and consumer law
- Giving private attorneys opportunities to volunteer at clinics, mentor other attorneys, and co-counsel on cases with TRLS staff attorneys
- Holding pro bono family law clinics in the Gainesville and Lake City offices, and scheduling clinics regarding advance directives to be held at senior service centers

The outcomes produced during the first eight months of the 2009-2010 grant period include:

- 67 private attorneys have been recruited to accept cases, work with clinics and/or co-counsel in a total of 122 cases
- 14 attorneys in the 8th Circuit have accepted 18 cases in the areas of family law and wills/ probate law
- Four new attorneys in the 8th Circuit have provided services during pro se clinics
- The number of attorneys willing to accept pro bono referrals of family law cases in the 8th and 3rd Circuits increased from nine to 22, for an increase of 244% {N.B. *And please note* – most attorneys volunteering in the areas served are either sole practitioners or in small firms}
- The number of attorneys willing to accept pro bono referrals of elder law (wills/ probate/ advance directives) cases in the 8th and 3rd Circuits increased from nine to 24, for an increase of 266% {N.B. Ditto}

And those results are just from the first eight months of a single pilot grant program! Hopefully you will agree that The Florida Bar Foundation attempts to make effective and efficient use of its grants in support of legal service, both locally and statewide. An important reminder – the funds that underwrite The Foundation's grants are derived from IOTA accounts, cy pres awards, and personal donations (such as the Fellows and Legacy for Justice programs).

If you have questions about The Florida Bar Foundation's grant programs 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.

The Florida Bar Board of Governors Report

By Carl Schwait

Please note below the major actions of the Board of Governors for 2009-2010:

- Approved the "judicial candidate voluntary self-disclosure statement" as proposed by the Judicial Administration and Evaluation Committee. The statement form will be provided to all trial court candidates in future elections and their answers posted on the Bar's website. The approval included providing copies of the self-disclosure statement to candidates in Creole and Spanish, but it will be up to candidates to provide translations of their answers.
- Endorsed, on the recommendation of the Legislation Committee, the ABA position opposing the Federal Trade Commission's efforts to include lawyers and law firms in its Red Flag regulations requiring extra efforts by creditors to protect debtors from identity theft. The ABA argues that existing ethical rules protect client information and that providing legal services to clients does not make lawyers creditors.
- Approved recommendations by the Communications Committee for improvements to the Bar's Web site, including conducting a formal usability study and adding an improved Google-based search engine, a "quick links" function on the homepage, an expanded member search function, a v-card and a new career resource center to help connect lawyers looking for jobs and firms with openings.
- Approved a rule change that adds new requirements for lawyers suspended or ineligible to practice for three years or longer and seeking reinstatement. These include that the lawyers must complete 10 hours of CLE for each year or part of a year they are ineligible to practice and those ineligible to practice for five years or longer must retake the Florida section of the bar exam.
- Approved the Bar strategic plan for 2008-11, setting as the Bar's top goals protecting the judiciary, promoting the legal profession, ensuring access to the courts and the legal system, and enhancing Bar services for its members.
- Approved a motion to support a petition filed at the Florida Supreme Court asking the court to establish an Innocence Commission to explore reasons for a large number of exonerations in first degree murder and other crimes in recent years.
- Voted to revamp the Bar's Legal Publications office, including reducing the staff size and having Lexis/Nexis take over more of the production work of producing legal handbooks. The action also divides into separate operations the office's duties of producing legal publications and staffing procedural rules committees.
- Approved a request from the Criminal Law Section that the board adopt a Bar legislative position opposing any legislation that would reduce pay or benefits for assistant public defenders, assistant state attorneys, and assistant attorney generals. The position also "urges that the Justice Administration Commission (JAC) is adequately funded for all costs and fees associated with criminal justice matters."
- Approved a revision to the Bar's annual membership fee statement, to clarify the trust account certificate adding a new category for judges, government attorneys, and others to report that they do not handle trust funds and are not required to have a trust account.
- Approved proposed amendments for advertising rules governing attorney and law firm websites, as ordered by the Supreme Court including requesting a delay on the July 1 effective date on website rules until the court acts on the amendments. The proposed amendments require website visitors to take an affirmative action by clicking a link or similar action before they can view sections of the websites that contain testimonials, refer to past results, or characterize the quality of the lawyer or firm's legal services, or otherwise do not comply with lawyer advertising rules.
- Approved a proposed rule change regarding a law firm's hiring of another law firm to resolve medical liens in personal injury cases. The change would allow hiring such firms in some cases, but the fees paid would still be limited by contingency fee restrictions in Rule 4-1.5 and

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Board of Governors

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referral fees could not be paid by the firm hired.

- Approved, as amended, a Standing Board Policy on public reprimands. The policy says that all reprimands do not have to be administered in person, but those that are will be done by the Bar President at Board of Governors meetings. The designated reviewer in the case, with advice from Bar staff, will decide which reprimands will be personally administered.
- Approved a rule amendment (to be sent to the Supreme Court) prohibiting: attorneys from signing blank trust account checks; non-lawyers from signing trust account checks; or using a signature stamp on trust account checks. Board members acknowledged the rule could pose problems for small and solo firms, but said those would be no more difficult than complying with other rules that require lawyers to personally sign pleadings, motions, or other legal documents. They also said the benefits of the improved check procedures would outweigh the drawbacks.
- Requested the Professional Ethics Committee to prepare an ethics opinion on the proper ways to handle hard drives from discarded computer equipment to protect confidential client information.
- Approved several rule and regulation changes for the Clients' Security Fund including allowing the fund to compensate a client when a partner of the client's lawyer has stolen from the client and the client has no other way to recover the loss.
- Approved a resolution that the Bar strongly supports the implementation of a mandatory e-filing system for state courts.
- Approved as new Member Benefits an agreement with Affiniscape Merchant Solutions, which provides credit card services for law firms and discounted property insurance coverage for law offices, including offices in low-lying coastal areas.

Please note that President Mayanne Downs has appointed me Chair of the Board Review Committee on Professional Ethics of the Board of Governors. This committee, comprised of eight members, makes preliminary review of advisory ethics opinions to the Board of Governors from the Professional Ethics Committee and advisory advertising opinions appealed to the Board from the Standing Committee on Advertising. The committee votes to affirm, modify or withdraw the advisory opinions. The committee's decision is then reported to the full Board of Governors for approval or modification. I will also continue as a senior member of the Disciplinary Review Committee where I served as co-chair this past year.

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.

President's Letter

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- Start with the tried and true of what has worked in the past, but look at each case individually and as an opportunity to consider new possibilities.
- Generate as many ideas as possible regarding potential theories of liability and/or defenses, potential sources of information and discovery, and potential ways to resolve the dispute (whether inside or outside the context of litigation). At the preliminary stage, do not criticize or judge your ideas. No matter how far-fetched they are, just jot them down. Bounce your ideas off another attorney or an expert in a particular field.
- Allow yourself, your colleagues, your law clerks and staff the freedom to consider, research, and investigate the best of those new ideas, even if they might lead to dead ends.
- Make well-informed decisions regarding the viability of all your options.
- Do not just advise your clients of the safest and surest course of action. Let them consider all the viable options while clearly communicating the risks and benefits of each. To avoid having an angry client (or, worse, concerns of legal malpractice), put it in writing.
- Allow your client to fully participate in the decision making process and keep them informed at every step along the way. As the perceived risks and benefits of a particular approach change, communicate them to your client in writing.

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EJCBA Works to Hold Down Luncheon Costs

By *James H. (Mac) McCarty, Jr.*

Beginning in October, EJCBA members will be asked to pay $15 to reserve their spots at the association's 2010-2011 monthly luncheons. The minimal $1 change from last year's $14 fee is the positive result of negotiation after the EJCBA Luncheon Committee received unexpectedly high bids from venues in and around Gainesville. Extensive efforts were made to avoid any price increase, but the average bids to host the luncheon were $18 per head with a high of $25. These prices were deemed unacceptable to the EJCBA Board of Directors. Caterers and venue hosts cited rising food and service costs to explain the increased proposals, but the committee's analysis indicated the increase from previous years' pricing, as shown in the estimates, lies largely in the venue rental and service sector. For two venues, set-up and rental alone were estimated at more than $1,100 per luncheon for the two-hour slot.

In previous years, the association paid an average of only $13,000 for all luncheon expenses: venue, food, staffing, tax, etc. The lowest all-inclusive bid for this year's luncheons, a total of nine for the year beginning in September, came in at $1,500 per event, resulting in a total price of $13,500.

After in depth discussions with many vendors, the most reasonable bidder, Ti Amo Restaurant and Grill, located at 12 SE 2nd Ave., in downtown Gainesville, is the new happy home of the monthly events.

The EJCBA budget, which allotted a total of $13,500 to luncheon expenses for 2010-2011, requires that luncheon costs and revenues break even. The Ti Amo estimate, one of two to meet budget, averaged $1,867.83 less than the other six formal bids. Ti Amo was chosen over the other "budget-friendly" venue based on location, parking, and seating arrangement concerns. With Ti Amo, neither food quality nor selection was forfeited to reduce costs.

All local venues with a capacity of 120 or more were contacted.

The luncheons will be held on the second or third Friday of each month, September through May, with the exception of the December date, scheduled on Thursday, December 9th. They will run from 11:45 am to approximately 1:00 pm and will include short presentations by an array of distinguished guests.

Speakers for the luncheons include Justice R. Fred Lewis, founder of Florida's Justice Teaching Program, Florida Bar President Mayanne Downs and Justice Ricky Polston of the Florida Supreme Court. As always, our own Chief Judge, The Honorable Martha Lott, will present the State of the Circuit address in January, 2011.

Please remember that the EJCBA will enforce its long-standing policy that if you RSVP to the EJCBA luncheon, but do not attend, you must still pay for your lunch. You will receive a bill if you have not pre-paid. The EJCBA is obligated to pay for the lunches regardless of whether you attend or not and we will expect the same obligation of you.

Members will receive invitations via U.S. Postal Service and E-mail. Walk-ins are welcome for an additional fee, if seating and meals are available. Reserved members will receive priority in their meal selections. Reservations must be made a week in advance to lock in the lowest price and to guarantee your seat at the luncheon.

President's Letter

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- Define what will constitute a success. Other than a complete victory, what positive results can you hope to achieve? Be very specific. Communicate with your colleagues and your client and ensure that you are on the same page regarding potential outcomes.

Perhaps you consider me quixotic. Perhaps you view the concept of a "noble failure," in the same negative light, as so many warm and fuzzy business buzz words that we have heard over the years, ***ad nauseam***. However, history repeatedly has shown us that success ***and*** failure, together, lead to true innovation and achievement.

I am very mindful that there are some clients, some firms, and some people that will view anything outside of their comfort zone as a poor approach. I realize there are some that will consider novel ideas as a waste of money and time. I realize there are some that will judge anything less than a complete success, as they define it, as unacceptable. But, perhaps, choosing to leave those situations behind in order to take a chance on the unknown may be the noblest failure of all.

2d 659 (Fla. 1972), the Supreme Court of Florida ruled that a plaintiff may sue on a note prior to any attempt at foreclosure. The reasoning behind this rule is simple: an election of remedies is of no consequence if no real remedy results. *Id.* It is clear that where a defendant promises to pay a certain amount he is liable for that amount whether the payment comes from property he has pledged to secure the debt or directly from his pocket.

A guaranty, however, involves a third-party and therefore can implicate considerations of whether and to what extent the guarantor may be pursued before exhausting remedies against the principal debtor(s). So long as the guaranty is unconditional or absolute in nature the obligee has no duty to first pursue the principal debtor(s) before resorting to the guarantor(s). *Mullins v. Sunshine State Service Corp.*, 540 So. 2d 222, 223 (Fla. 5th DCA 1989). Indeed, the distinguishing factor between an unconditional and conditional guaranty is that one who undertakes an unconditional guaranty is liable immediately upon default of the guaranteed obligation. *See Id.*

What is the effect, if any, of the fact that the same obligation is also secured by a mortgage? First, there is no effect on the creditor's right to pursue the guarantor before foreclosing the mortgage. *See, LPP Mortg.* at 931. "[A] suit on a guaranty and a foreclosure action are not inconsistent remedies, and therefore pursuit of either of those remedies without satisfaction is not a bar to pursuit of the other." *Id.* (quoting *Gottschamer v. August, Thompson, Sherr, Clark & Shafer, P.C.*, 438 So. 2d 408, 409 (Fla. 2d DCA 1983). Because the obligation is unconditional, it matters not that the guarantor might have had a subjective expectation that his obligation would be ameliorated somewhat by the value of the mortgaged premises, which he may have falsely assumed to be the "first-in-line" collateral. Rather, because of the unconditional nature of the guaranty, the guarantor is obligated just as if he were the principal obligor. *See, Gurlinger v. Goldome Realty Credit Corp.*, 593 So. 2d 1135, 1137 (Fla. 1st DCA 1992).

The benefit of obtaining a judgment against the guarantor before foreclosure is that it shifts to the guarantor the burden of moving for and proving that the value of the mortgaged property fully satisfies the judgment. *See, Edwards*, 746 So. 2d 1157. That is, it places the burden on the guarantor to move for and prove a set-off of the fair market value of property. *See Id.*; *see also Gottschamer* at 409. The mortgagee, having already obtained a judgment for the full indebtedness against the guarantor has no need to prove a deficiency. Instead, it is the guarantor who must take affirmative action to ameliorate his liability. *See, Edwards.*

Finally, an interesting, but perhaps unlikely, result of obtaining a judgment against the guarantor prior to foreclosure is that the guarantor may pay the judgment in full before the attempted foreclosure. In the scenarios discussed above it is clear that the guarantor has a right to set-off of the fair market value of the foreclosed premises which is presumed to be the foreclosure sale price absent other evidence. *See, Thunderbird v. Great American Ins. Co.*, 566 So. 2d 1296, 1299 (Fla. 1st DCA 1990). If the guarantor pays the judgment in full there is no set-off. Moreover, the guarantor cannot force the mortgagee to foreclose or otherwise control the conduct of the litigation. *See, Fegley v. Jennings,* 32 So. 873, 874 (Fla. 1902); *see also, Photomagic Industries, Inc. v. Broward Bank*, 526 So. 2d 136, 137 (Fla. 3d DCA 1988). What recourse, if any, does the guarantor have? When the guarantor pays the debt in full he steps into the shoes of the mortgagee and is therefore entitled to enforce the mortgage security to which he is subrogated. *Fegley,* at 874. Thus, in this instance the mortgagee is fully satisfied. The guarantor must pursue the principal debtor by foreclosure of the mortgage security. *See Id.*

The decision to pursue the guarantor prior to foreclosing a mortgage must be carefully considered. It is best to do so only where the guarantor's obligation is unconditional. One must carefully examine the guaranty to ascertain whether the mortgagee is required to pursue other remedies first. However, when one has an unconditional guaranty, obtaining a judgment against a guarantor shifts to the guarantor the obligation of either (1) paying the debt and subrogating himself to the mortgagee or (2) waiting for foreclosure and then moving for and proving a set-off. *See Fegley*; *see also*, *Edwards.* In either case, it is the guarantor, not the mortgagee, who is forced to act after judgment and/or the foreclosure sale.

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

October 2010 Calendar

1 NDBBA 2010 Annual Seminar, Tallahassee, FL
2 UF Football at Alabama, TBA
5 Deadline for submission to November 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, Ti Amo!, Dan Gelber, Democratic Candidate for Attorney General, 11:45 a.m.,
9 UF Football v. LSU, TBA
11 Columbus Day, Federal Courthouse closed
13 Probate Section Meeting, 4:30 p.m., 4th Floor, Family & Civil Courthouse
14 James C. Adkins Cedar Key Dinner at Frog's Landing, Cedar Key, 6:00 p,m.
16 UF Football v. Mississippi State (Homecoming), TBA
19 Family Law Section Meeting, 4:00 p.m., Chief Judge's Conference Room, Alachua County Family & Civil Justice Center
21 North Florida Area Real Estate Attorneys meeting, "Videos from Fund Assembly re Red Flags in Real Estate Transactions," Law Office of Ramona Chance, 4703 NW 53rd Avenue, Suite A-3, 5:30 p.m.
30 UF Football v. Georgia, Jacksonville, 3:30 p.m.

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

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.