

# FORUM 8

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Eighth Judicial Circuit Bar Association, Inc.

December 2011

## President's Letter



By Mac McCarty

(Impending) Holiday Greetings to all of you taking the time to read this! Coming from the month of November into December, I want to take the time to look back as well as forward.

Our association's November started with the Annual Jimmy C. Adkins Cedar Key Dinner at Steamers. For the 100+ of you who were in attendance—thank you. I hope you enjoyed it as much as I did. We were blessed with a glorious clear fall evening, good food, and cold beverages. Best of all was the time we were able to spend together in an informal atmosphere. A special thank you goes out to the members of the judiciary who attended from the United States District Court, the District Court of Appeal, First District of Florida, and the Eighth Judicial Circuit, as well as to the Honorable Stacy A. Scott, Public Defender for the Eighth Judicial Circuit. Sharing their time with our members in a unique setting adds in a meaningful way to the dinner each year. If you didn't attend this year, I sincerely hope you can make it next year. For those young attorneys attending your first Cedar Key dinner—come back again! I promise that as you get to know more of the local bar members, Cedar Key becomes more rewarding and enjoyable.

The end of November meant a Thanksgiving Day for our members and their families. Hopefully it gave us all a time for reflection and relaxation—and not just planning time for Black Friday shopping!

But it's not looking backward that is the focus of

this brief column, it's looking forward. In December, we are accustomed to a festive holiday season. This is true whether you celebrate it through your participation in an organized religion, or whether you simply enjoy the spirit of giving that emerges in December. As attorneys, we are more fortunate than many of our local citizenry. Educationally and financially, we are above the norm.

However, not all are as fortunate as we are, particularly in these trying economic times. Today,

I am asking you—as members of our local bar association—to expand your spirit of giving to encompass some of those in our Circuit who need help. While we all have been affected one way or another by the difficult economy, I would posit to you that what we may have experienced is, when compared to what many have endured, merely minor blips on our radars.

Because of the economic downturn, nationwide hundreds, if not thousands, of charities have gone out of business. Recently, Angel Food Ministries—a supplier of low cost food—closed its doors, leaving many families without a means to secure enough food. There are a myriad of other examples as well. Charitable giving has fallen precipitously as incomes have decreased.

During December, please keep your eyes open for association initiatives to provide help for those less fortunate in our communities. Collecting food donations at our luncheons this fall is one project in process, and the Board of Directors of the EJCHA



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**The officers of the Eighth Judicial Circuit Bar Association for the year 2011-2012 are:**

**James H. (Mac) McCarty, Jr.**  
*President*  
926 NW 13th Street  
Gainesville, FL 32601  
(352) 336-0800  
(352) 336-0505 (fax)  
[mmccarty@nflalaw.com](mailto:mmccarty@nflalaw.com)

**Elizabeth Collins Plummer**  
*Past-President*  
4510 NW 6th Place, 3d Floor  
Gainesville, FL 32607  
(352) 374-4007  
(352) 337-8340 (fax)  
[Elizabeth@gloriafletcherpa.com](mailto:Elizabeth@gloriafletcherpa.com)

**Dawn M. Vallejos-Nichols**  
*President-Elect/Editor*  
2814 SW 13th Street  
Gainesville, FL 32608  
(352) 372-9999  
(352) 375-2526 (fax)  
[dvallejos-nichols@avera.com](mailto:dvallejos-nichols@avera.com)

**Members at Large**

**Jan Bendik**  
901 NW 8th Ave., Ste. D5  
Gainesville, FL 32601  
(352) 372-0519  
(352) 375-1631 (fax)  
[jan.bendik@trls.org](mailto:jan.bendik@trls.org)

**Robert Birrenkott**  
P.O. Box 117630  
Gainesville, FL 32611  
(352) 273-0860  
(352) 392-4640 (fax)  
[rbirrenkott@law.ufl.edu](mailto:rbirrenkott@law.ufl.edu)

**Raymond Brady**  
2790 NW 43rd St., Ste. 200  
Gainesville, FL 32606  
(352) 373-4141  
(352) 372-0770 (fax)  
[rbrady1959@gmail.com](mailto:rbrady1959@gmail.com)

**Deborah E. Cupples**  
2841 SW 13th St, Apt. G327  
Gainesville, FL 32608  
(352) 271-9498  
(352) 392-8727 (fax)  
[dcupples@cox.net](mailto:dcupples@cox.net)

**Philip N. Kabler**  
240 NW 76th Dr., Ste. D  
Gainesville, FL 32607  
(352) 332-4422  
(352) 332-4462 (fax)  
[pnkabler@kmcllp.com](mailto:pnkabler@kmcllp.com)

**Sheree Lancaster**  
P.O. Box 1000  
Trenton, FL 32693  
(352) 463-1000  
(352) 463-2939 (fax)  
[shlpa@bellsouth.net](mailto:shlpa@bellsouth.net)

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

**Nancy T. Baldwin**  
*President-Elect Designate*  
309 NE 1st Street  
Gainesville, FL 32601  
(352) 376-7034  
(352) 372-3464 (fax)  
[baldwinnt@cox.net](mailto:baldwinnt@cox.net)

**Sharon Sperling**  
*Treasurer*  
2830 NW 41st St., Ste. C  
Gainesville, FL 32606-6667  
(352) 371-3117  
(352) 377-6324 (fax)  
[sharon@sharonsperling.com](mailto:sharon@sharonsperling.com)

**Audrie Harris**  
*Secretary*  
P.O. Box 358595  
Gainesville, FL 32635  
(352) 443-0594  
(352) 226-8698 (fax)  
[audrie.harris@yahoo.com](mailto:audrie.harris@yahoo.com)

**Michael Massey**  
855 E. University Ave.  
Gainesville, FL 32601  
(352) 374-0877  
(352) 414-5488 (fax)  
[masseylaw@gmail.com](mailto:masseylaw@gmail.com)

**Michael Pierce**  
203 NE 1st Street  
Gainesville, FL 32601  
(352) 372-4381  
(352) 376-7415 (fax)  
[mpierce@dellgraham.com](mailto:mpierce@dellgraham.com)

**Anne Rush**  
35 N. Main Street  
Gainesville, FL 32601  
(352) 338-7370  
[rusha@pdo8.org](mailto:rusha@pdo8.org)

**Anthony Salzman**  
500 E. University Avenue, Suite A  
Gainesville, FL 32601  
(352) 373-6791  
(352) 377-2861 (fax)  
[tony@moodysalzman.com](mailto:tony@moodysalzman.com)

**Carol Alesch Scholl**  
1200 NE 55th Blvd.  
Gainesville, FL 32641  
(352) 264-8240  
(352) 264-8306 (fax)  
[carol\\_scholl@dcf.state.fl.us](mailto:carol_scholl@dcf.state.fl.us)

**Gloria Walker**  
901 NW 8th Ave., Ste. D5  
Gainesville, FL 32601  
(352) 372-0519  
(352) 375-1631 (fax)  
[gloria.walker@trls.org](mailto:gloria.walker@trls.org)

**Contribute to Your Newsletter!**

**From The Editor**

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

**EJCBA Luncheon has Moved!**

The monthly EJCBA luncheon will now be held at Jolie - 6 West University Avenue, Gainesville.

**About This Newsletter**

This newsletter is published monthly, except in July and August, by:

Eighth Judicial Circuit Bar Association, Inc.  
P.O. Box 13924  
Gainesville, FL 32604

Phone: (352) 380-0333 Fax: (866) 436-5944

Any and all opinions expressed by the Editor, the President, other officers and members of the Eighth Judicial Circuit Bar Association, and authors of articles are their own and do not necessarily represent the views of the Association.

News, articles, announcements, advertisements and Letters to the Editor should be submitted to the **Editor** or **Executive Director** by Email, or on a CD or CD-R labeled with your name. Also, please send or email a photograph with your name written on the back. Diskettes and photographs will be returned. Files should be saved in any version of MS Word, WordPerfect, or ASCII text.

**Judy Padgett**  
*Executive Director*

P.O. Box 13924  
Gainesville, FL 32604  
(352) 380-0333  
(866) 436-5944 (fax)  
[execdir@8jcba.org](mailto:execdir@8jcba.org)

**Dawn Vallejos-Nichols**  
*Editor*

2814 SW 13 St  
Gainesville, FL 32608  
(352) 372-9999  
(352) 375-2526 (fax)  
[dvallejos-nichols@avera.com](mailto:dvallejos-nichols@avera.com)

**Deadline is the 5th of the preceding month**

# Alternative Dispute Resolution

## Yes, Virginia, There Is A Confidentiality Clause



By Chester B. Chance and Charles B. Carter

We take pleasure in plagiarizing the Christmas article from The New York Sun (December 1897).

### Dear Mediator:

*I am 40 years old and admitted to The Florida Bar.*

*Some of my attorney friends say there is no such thing as a Confidentiality Clause. My senior partner says, "If you see it in the Bar Newsletter, it's so." Please tell the truth, is there such a thing as an effective Confidentiality Clause? - Virginia O'Hanlon*

### Virginia,

Your attorney friends are wrong. They have been affected by the skepticism of a skeptical age. They do not believe except [what] they see. They think that nothing can be which is not comprehensible by their boilerplate language or answers to interrogatories. All minds, Virginia, whether they be lawyers or judges, are little. In this great universe of ours, a lawyer is a mere insect, an ant, in his intellect as compared with the boundless world about him, as measured by the intelligence capable of grasping the whole of truth and knowledge.

Yes, Virginia, there is a Confidentiality Clause. It exists as certainly as contingency agreements and deductible business expenses exist, and as you know they abound and give to your life its highest beauty and joy. Alas! How chaotic would be the world if there were no Confidentiality Clauses! It would be as chaotic as if there were no attorneys. There would be no childlike faith in contracts, no incomprehensible Latin phrases, no hourly billing to make tolerable this existence. We should have no enjoyment, except incense and incite. The external light with which legalese fills the world would be extinguished.

Not believe in Confidentiality Clauses! You might as well not believe in the Rule in Shelley's case or the fertile octogenarian. You might get your senior partner to hire surveillance investigators to watch all the courthouses on Christmas Eve to catch a lawsuit involving a breach of a Confidentiality Clause, but even if they did not see litigation involving a confidentiality clause, what would that prove? Nobody understands a confidentiality clause, but, that is no sign that there is no such thing. The most real things in the world

are those that neither judges nor jury can see. Did you ever see a lawyer cutting her fee? Of course not, but that is no proof that it doesn't happen. Nobody can conceive or imagine all the wonders there are unseen and unseeable in the world.

There is a veil covering the unseen world which not even a Super Lawyer nor event the united power of all the Super Lawyers in Florida that ever lived could tear apart. Only writs, injunctions and 57.105 motions could push aside that curtain and view the supernal beauty and glory of the Confidentiality Clause. Is it all real? Ah, Virginia, in all this world there is nothing else so real and abiding. No Confidentiality Clause! Thank goodness it exists and will exist forever. A thousand years from now Virginia, nay 10 times 10,000 years from now it will continue to make glad hearts of lawyers.



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## Administrative Order 4.960

Chief Judge Martha Ann Lott signed Administrative Order No. 4.960, Distribution of Funds Received by Department of Corrections in Criminal Cases, on November 3, 2011.

Administrative Order 4.960 and all current administrative orders can be found on the circuit's website at <http://circuit8.org/administrative-orders>. If you have any questions or concerns about this administrative order, please contact the office of the court administrator at (352) 374-3648.

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## Canned & Non-Perishable Food Drive Continues

This is a reminder to bring with you to the December EJCBA luncheon any canned foods and/or non-perishable food items you can to help those less fortunate than ourselves have a great holiday. All items will go to Bread of the Mighty Food Bank, which for 24 years has served as our community's dependable source for local non-profit agencies serving the hungry.

THANK YOU FOR YOUR GENEROSITY!!



# Probate Section Report



By Larry E. Ciesla

The October meeting of the Probate Section was held on October 12, 2011. I wish to thank Peter Ward for chairing the September meeting during my absence. The section also wishes to welcome new members Marilyn Belo, Richard Withers and Lauren Richardson. Marilyn, who was formerly associated with Howard Rosenblatt's office, is now on her own, sharing space with Judy Paul. Richard is an LLM with the firm of Dean Mead. He has been with Dean Mead for four years and recently transferred to Dean Mead's Gainesville office, where he practices estate planning with Jack Bovay and Julie Cook. Lauren Richardson recently joined Rick Knellinger's office. She has previously worked for Clayton Johnston and also had her own private practice. Best wishes to all three new members. The section also wishes to welcome a new staff attorney, Nadine David, who recently assumed responsibility for Alachua County probate cases. Her phone number is 364-6895 and her email is [davidn@circuit8.org](mailto:davidn@circuit8.org). Welcome and best wishes to Nadine.

The October meeting began with a discussion led by Jean Sperbeck regarding what documents or portions thereof are and are not "protected" or "confidential" when filed with the clerk of court. Jean circulated a list of 20 categories of confidential records prepared by the Supreme Court of Florida and found in Rule 2.420, Florida Rules of Judicial Administration. Jean then cautioned that in determining whether a particular document is confidential, reference should be made to the underlying statute, not simply to the Supreme Court's list. One specific item discussed was social security numbers (item #3 on the Supreme Court's list). Reference should be made to Section 119.0714, Florida Statutes, which mandates that clerks treat Social Security Numbers as confidential after 01/01/12. Before 01/01/12, redaction can be requested. As a practical alternative, most practitioners have decided to simply redact all or part of a social security number prior to filing a document such as a death certificate or a petition for administration in a probate action. This works fine in Alachua County, but not in all counties. Some clerks, including Pinellas County, are rejecting this self-help tactic and are requiring that the SSN be set out in full, with a separate request for redaction.

The next item discussed was documents filed in incapacity and guardianship cases. As a general rule, documents filed in incapacity and guardianship cases are not protected or confidential, specifically including the examining committee reports. Although records of Medicaid treatment are generally protected, a court mandated evaluation is not considered as treatment; therefore, confidentiality does not apply. Guardianship plans were also discussed. An annual guardianship plan is confidential, including the statutorily required physician's written evaluation, which is by law a part of the annual plan. Jean indicated that problems have been encountered in situations where practitioners fail to file the physician's report simultaneously with the annual plan; rather, they file it separately, with a "Notice of Filing." Jean stated that this is an ongoing problem in that the clerk's system is set up such that when a document is filed with a Notice of Filing attached, the clerk inputs the document as a Notice of Filing, as opposed to whatever the document is substantively. Since a Notice of Filing is not a confidential document, the underlying document, if confidential, is not treated as such by the clerk. Jean stressed that this procedure should not be used with regard to confidential documents, which should be filed on a "stand alone" basis, to ensure that the clerk inputs the document correctly and protects its confidentiality. Accountings filed in guardianships and estates are confidential, but the clerk's audit of an accounting is not. A probate inventory is confidential, but a safe deposit box inventory is not. If confidentiality is desired for a safe deposit box inventory, it should be attached to the main inventory as an exhibit.

An award was presented by Jean, on behalf of Buddy Irby, to Monica Brasington, recognizing her as having been the first lawyer to take advantage of the availability of e-filing. Jean indicated that the trial e-filing program for the probate division has been expanded to all circuit civil cases. She also explained the importance of entering data in the specific manner required by the e-filing system. For example, the case number must be entered in exactly the following format: 012011CP123456xxxxxx, followed by hitting the tab key. 01 is the county code for Alachua County. 2011 is for the year. CP is for probate. The case number must be six digits in total,

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## Probate Section

*Continued from page 4*

followed by six x's. Zeros must be added as needed at the front end of the case number so as to bring the total number of digits to six. Jean also briefly discussed e-filing of proposed orders. At this point the clerk's system is not set up to handle electronic orders. Until this issue is resolved, practitioners should do it the old-fashioned way: submit a paper original, with copies and envelopes, although an electronic order may be submitted initially for staff attorney review.

Monica Brasington initiated a discussion regarding a recent addition to the court's checklist of requirements when reviewing a petition for a summary administration, as regards the Florida Agency for Health Care Administration (AHCA)/Florida Medicaid. For decedents over age 55, proof of service of formal notice of the petition upon AHCA's agent, ACS, is now being required. As an alternative, an affidavit from all persons signing the petition stating he/she/they has/have contacted AHCA/ACS and has/have been advised that the decedent was not receiving Florida Medicaid benefits may be filed.

The Probate Section continues to meet on the second Wednesday of each month at 4:30 p.m. in the fourth floor meeting room in the civil courthouse. All interested practitioners, including paralegals and bank and trust officers, are welcome to attend.

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## President's Letter

*Continued from page 1*

has been participating in and promoting a number of other local projects. I know many of our members are stepping out and trying to assist those in need.

This year, because of the downturn we have experienced, I am asking you to try to step out a little farther. Try to do a little more. Try to participate with some organization that you have not participated with in the past. Perhaps you've heard the saying "give 'til it hurts". This year would be a time to give 'til it hurts. If you see a family in need, be an anonymous "Santa Claus." Write the extra check when you read or hear about a special holiday need. As a group when working toward a common goal, the members of our association can be a powerful force for good.

I hope you will take these suggestions in the spirit they are offered. More importantly, I hope that you will actually do something—rather than just think about doing something—and try to help those who are less fortunate than we are this December.

## Professionalism Seminar

### Inexpensive (CHEAP) CLE Credits

*By Ray Brady*

Mark your calendars now for the annual Professionalism Seminar. This year the seminar will be held on Friday, April 6, 2012 from 8:30 AM until Noon, at the University of Florida. The keynote speaker and topic are to be announced.

We expect to be approved, once again, for 3.5 General CLE hours, which includes 2.0 ethics hours and 1.5 professionalism hours.

Watch the newsletter for further information and look in your mail for an EJCBA reservation card in early March. Questions may be directed to the EJCBA Professionalism Committee chairman, Ray Brady, Esq., at 373-4141.

## Florida Bar President Scott Hawkins To Speak At December Bar Luncheon

Please plan to attend the December 16, 2011 bar luncheon at Jolie (6 W. University Avenue) when President Scott Hawkins of The Florida Bar will be our guest speaker. President Hawkins, an active alumnus of the University of Florida, is Vice-Chair of Jones, Foster, Johnston & Stubbs, P.A. in West Palm Beach and is Florida Bar Board Certified in Business Litigation. President Hawkins has made adequate and stable funding for Florida courts the #1 goal of The Florida Bar, and he is dedicated to improving Bar communications between members and leadership. I know it is a busy time of year and you will have your choice of events to attend but please do your best to attend this luncheon. His topic: Judicial Funding and the Merit Retention Challenge.

# Family Law

## Update on Parental Alienation



By Cynthia Stump Swanson

The Family Law Section was greatly honored to have a first class presentation at its last meeting by Dr. Deborah Day, a clinical and forensic psychologist from Winter Park. She drove up to Gainesville just to talk with us, and to present some new materials she has developed as an update

on parental alienation studies. To start off, she told us that parental alienation is usually found where there is a persistent and unreasonable negative attitude toward one parent by a child, which is disproportionate to the child's actual experience with that parent.

As with most things, there is a range of attitudes and behaviors on an attachment spectrum. At one end are children who have strong positive attachments to both parents. Moving closer to the middle might be a child who has a greater affinity for one parent, but evidences no rejection of the other parent and is actually attached to both parents. In the middle of the attachment spectrum is a child who is aligned with one parent for realistic reasons (the favored parent), but who will still have some positive contact with the other parent. Moving toward the other end of the spectrum is the child who evidences a justified rejection of the other parent, usually for reasons of abuse or neglect. At the far other end of the spectrum is a child who completely or nearly completely rejects a parent for reasons which are disproportionate and unrelated to the child's actual experiences with that parent. This is the child who may be called alienated.

An alienated child is defined by some of the premier researchers in this field as "A child who freely and persistently expresses unreasonable negative feelings and beliefs (such as anger, hatred, rejection, and/or fear) toward a parent that are disproportionate to their actual experiences of that parent." Johnston & Kelly et.al. 2001. Another well respected author calls irrational or pathological alienation "a disturbance in which children, usually in the context of sharing a parent's negative attitudes, suffer unreasonable aversion to a person or persons with whom they formerly enjoyed normal relationships or with who they would normally develop affectionate relationships." Warshak (2001, 2006)

Other researchers have identified alienation by an abusive parent, usually a father, who creates fear of the other parent in the children. This has been called sabotage or pathological bonding by Dozd & Olesen and

Johnston. Those three researchers have also discussed "protective parenting," which, when justified (because of actual abuse by the other parent) can also look like alienation. A less benign type of protective parenting is where the allegations of abuse by the other parent are false and the protective parent is only feigning protection as part of the act of alienation.

Dr. Day discussed the multitude of negative effects on children of alienation, which can include some or all of the following: Loss of half their family (parent, grandparents, aunts, uncles, cousins, and so on); feelings of guilt and shame for their own behavior toward the rejected parent; behavioral disturbances, such as aggression, conduct disorders, disregard for social norms and authority, poor impulse control; or, on the other side, emotional constriction, passivity, dependence. Alienated children also suffer role confusion, poor boundaries, an enmeshed relationship with the favored parent; an inability to develop and sustain healthy relationships because they are often lacking in empathy, tolerance, give and take, and have unrealistic expectations of others. Importantly, alienated children often suffer distorted perceptions of reality and develop information processing problems.

Yet another researcher has shown that young adults who were alienated as children suffer higher rates of depression, relationship difficulties, and substance abuse. Overall, they have lower self esteem and they internalize the negative perception of the rejected parent; they often become alienated from their own children and usually develop conflict with the favored parent. They often feel guilt for abandoning their younger siblings, and frequently say they wish somebody had "called their bluff," that is, that somebody would have figured out that they did not mean what they said when they rejected their parent. (Baker, 2007)

A few studies have tracked the "spontaneous" reconciliation of alienated children with the rejected parents. In one study, of 27 families where alienated children reconciled with rejected parents, only 9 sustained positive relationships. (Darnall & Steinberg 2008) In another study, researchers were able to follow children for 15 - 20 years. Of these, one-third achieved some reconciliation. All of these children had had counseling for an average of 10 years and were the subjects of court orders for contact. Most of them initiated contact with the rejected parent in their late teens or early 20's, and most came to have at least some positive feelings for both parents, although 20% continued to have negative

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feelings or refused continued contact with the rejected parent. (Johnston & Goldman 2010)

Dr. Day emphasized that early identification and intervention is imperative. She pointed out that you can't know in advance which cases will become severe, so all situations must be treated immediately. The red flags are allegations of alienation or abuse, a request to stop or restrict access by other parent or by children; a request to give the child "space" or a cooling off period. While this is often recommended by therapists, teachers, physicians, lawyers, and the favored parent, it undervalues the importance of the child's relationship with the other parent and extended family. The longer the absence and alienation last, the worse it gets. It reinforces the rejection with nothing to counterbalance an unjustified rejection. If the rejected parent agrees to the cooling off time, it can be perceived by the child as "walking away" and, even if it seems the child is asking for it, is still perceived as abandonment of the child. These feelings are very likely to impact possible reconciliation at a later time.

It is imperative that the question be asked: Irrespective of the cause of the child's alienation, is contact with the rejected parent in the child's best interests?

Dr. Day was very clear on one particular tenet of her presentation: Involvement of the court is absolutely necessary. The court must take charge, and direct and monitor the treatment and contact with both parents. Alienating parents have a high rate of personality disorders and mental illness, noncompliance is very common, and a failure to enforce contact orders only reinforces the parent's sense of power, disregard for authority, and narcissism.

She recommends frequent case management or status conferences, scheduled reviews, pre-scheduled return dates, and continuity with one judge with family law expertise. Sanctions for noncompliance need to be unambiguous in the order. Sanctions can be an important deterrent and work best when parents know in advance what the sanctions will be for what behavior. The contempt power of the court must be used, but with a clear opportunity for the parent to purge his or her contempt.

Dr. Day provided a chart with recommendations for approaches in assessing and intervening in situations where it appears a child is becoming alienated. Severe cases are described as including ones where the alienating parent identifies his or her actions as protecting the rights of the child, despite lack of any evidence of risk of harm to the child by the rejected parent; where the child exhibits rigid and extreme reactions to the rejected parent; where there is no or very infrequent contact between the children and the rejected parent; where there

is chronic disruption of any such contact by the alienating parent; where there is a refusal of treatment; and where there is a disregard for court orders. In these extreme situations, the recommendations are for strong sanctions for noncompliance, including the possibility of transfer of custody to the rejected parent with an interruption of contact with the favored parent for at least three months; with return to the favored parent only if there is a demonstration of an absence of alienating behaviors.

In milder situations, recommendations for court action include a very detailed parenting plan, including specific parenting time with the rejected parent, but primary residence with the favored parent; early and frequent case management conferences; referral to parenting education and counseling; and sanctions for noncompliance with parenting plan and counseling orders.

In all these cases, Dr. Day recommends that therapists be ordered to report back to the court when the therapist becomes aware of violations of the court orders, including the parenting plans and treatment orders and agreements.

In my personal experience, much of this is very hard for judges to do. They are trained and applauded for listening to both sides of every story. Alienating parents (as are most people with personality disorders) can be very charming; their concern for the children is palpable. It's very hard to imagine that the parent who comes to court and pleads that he or she is doing everything he or she can do to nurture a good relationship with the other parent, but that the children themselves are afraid of the other parent. . . it's very hard to imagine that that charming, concerned, nurturing parent is actually the one who is the "bad guy." And for the attorney representing the rejected parent – it's very hard to "prove a negative." "No, I have never abused my children. No, I never hit or rejected them. Yes, they had a wonderful relationship with me before this."

The lessons from Dr. Day's presentations are these: When your client brings up that timesharing is being missed, that the children seem to be saying things that are not true, if the children are starting to say or act like they are scared of your client, and so on – and where there is no reason for this to be so – it's important to take swift action. Get into court as soon as possible. Prepare your case with witnesses who can testify that your client had a good, close relationship with the children before separation. In more extreme cases, you can consider asking your client to take a polygraph exam, to be evaluated for other physical and sexual abuse characteristics, and so on. As I said, it's very hard to

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prove a negative. But if you can convince the judge that there is no basis for the child's rejecting behaviors, then hopefully you can get the judge to set up and to enforce substantial timesharing. If you believe that your judge may not be experienced in alienation, and if your client can afford it, try to get an expert witness to come talk about alienation and educate your judge. Request a Fla. Stat. §61.20 social investigation which includes a psychological evaluation.

If you represent a parent who comes to you and says, "The children just don't want to see the other parent. I'm doing all I can, but they just don't want to," in my opinion, it is incumbent upon you to try to find out the factual basis for this. If there actually is one - such as neglect, abandonment, abuse - then you must prove that. Line up your witnesses, get documentary evidence of any prior investigations, and so on. But, if there is no such evidence, in my opinion, you should be very candid with your client, and point out the harm he or she might be doing to the children, and further point out that, eventually, this course of action will backfire on your client.

While we can't promise presentations every month of this caliber, the Family Law Section meets the third Tuesday of every month (except for December and the summer months) at 4:00 pm in the Chief Judge's Conference Room of the Alachua County Family and Civil Justice Center. We hope to see you there.

## The Florida Bar Board of Governors Report

By Carl Schwait



At its October 21, 2011 meeting in Charleston, SC, The Florida Bar Board of Governors:

- **A p p r o v e d** a communications plan to help keep Bar members informed about Bar-related legislative activities. The Communications Committee Chair said the plan calls for communication from

the Bar president to all members before the start of a legislative session. The letter, which will be printed in the Bar News, sent electronically to all members, and posted on the Bar's website, will explain what the Bar can and cannot do legislatively and have a general discussion of what the Bar expects to happen in the session. During the session, there will be a page on

Continued on page 10

## Two Important Ways to Help The Guardian Ad Litem Program

### Stand up for a Child

By Lynn Deen

Be a voice for an abused, abandoned, or neglected child. There are about 650 children in the 8<sup>th</sup> Judicial Circuit Dependency System. Sadly, only half have a volunteer guardian ad litem. Attorneys and their trained legal staff are a wonderful resource to the Guardian ad Litem program! You have the ability to serve as volunteer guardians assigned to a child or children and advocate his/her legal best interest or to serve as a pro bono attorney providing best interest legal representation through helping with motions, depositions, hearings, dependency trials and termination of parental rights trials. We have free training to familiarize you with dependency law. Many of our trainings are eligible for CLE credit and are free.



These children need and deserve advocates who will remain committed to them until permanency is reached. The work that attorneys and their staff can do for the Guardian Program is invaluable. If you are ready to make the difference in the life of a child, please contact Jennifer Meiselman Titus, the program's supervising attorney for more information at 548-3821 or [Jennifer.meiselmantitus@gal.fl.gov](mailto:Jennifer.meiselmantitus@gal.fl.gov). Our next training starts January 30, 2012. We are currently accepting applications.

### Be an Angel . . . Sponsor a Child for the Holidays

The Guardian ad Litem Foundation is looking for angels to sponsor a child. There are about 650 children in the Eighth Judicial Court system that have been abused, neglected or abandoned. There are countless others in our community who are at risk. Many of these children will not receive gifts without help from community businesses, churches, organizations and individuals who are willing to sponsor them.

Contact Laura at 384-3167 or [laura.northcutt@gal.fl.gov](mailto:laura.northcutt@gal.fl.gov) to bring joy and happiness to children who truly need to have someone care enough to make the holidays special.



# Criminal Law

By William Cervone



Most of you who practice in the criminal arena know at least something about Florida's Innocence Commission, established earlier this year by the legislature to examine the causes of wrongful convictions as well as approaches that might minimize the chance that something like that can happen. This month I'd like to address developments related to that.

As a predicate, I cannot state too strongly that no prosecutor who I know would ever countenance the thought of prosecuting an innocent person. That is anathema to what we do. As important as convicting the guilty is to us, exonerating the innocent is equally important and we strive to do so. You'll notice that I said "no prosecutor who I know;" that was advisedly so because I do not know the Duke lacrosse case prosecutor. Frankly, I do not want to know him. He has shamed all of us in my profession. But he was a renegade and one of a tiny number of exceptions.

That said, the Commission's first focus concerned what is by most accounts the leading cause of incorrect convictions: eyewitness identifications that are simply wrong. Both anecdotally and through proven situations in Florida and elsewhere, there are cases in which innocent people have been convicted on the basis of eyewitness identifications that later turned out to be wrong. Fortunately, the number is small, which I say with the acknowledgement that even one is too many.

So what to do about it? The Innocence Commission spent many hours over many days last winter and spring taking testimony from lawyers, law enforcement, experts, and others, the end result of which from what I heard was that there is no consensus in the scientific and legal communities as to how identification interviews can best be done. This was recognized by the Massachusetts Supreme Court, which issued an opinion in September (*Massachusetts v Walker*, 953 NE2d 195 (2011) if you're interested) that declined suppression of an identification based on the methodology used because it found insufficient authoritative evidence to favor either simultaneous or sequential line-up administration. Each method has its advantages and disadvantages. Lots of time and talk was also spent by the Commission on other things like blind or double blind administration of photo displays and the like. Given the great disagreement

over whether one methodology should be required over another, the Commission ultimately endorsed some proposals and the legislature also took some action, but it was largely symbolic and aspirational. The biggest result may have been that all law enforcement agencies in Florida have set about adopting firm procedures to govern identifications, each tailored to the agency's needs and resources.

Enter also into this discussion the New Jersey Supreme Court, which in August issued an opinion styled *New Jersey v Henderson*, (again, if you're interested, at 27 S3d 872). In that opinion, the New Jersey justices acknowledge a "troubling lack of reliability in eyewitness identifications." They recite precedent from the United States Supreme Court (*Manson v Brathwaite*, a 1977 decision) as well as from New Jersey cases setting up a test that basically requires their courts to first determine if police identification procedures were impermissibly suggestive and, if so, to next decide if a resulting identification is nonetheless admissible. The court went on to note that since *Manson* there has developed a body of research that was not available when that case was decided, and concluded that the current legal standard used in New Jersey had to be revised because it no longer offered an adequate measure of reliability, did not sufficiently deter inappropriate police conduct, and overstated the ability of a jury to evaluate identification evidence. The "body of research," of course, includes a growing cottage industry that may or may not serve anything other than the pocket books of those involved at the expense of litigants.

Important to me is the recognition that most misidentifications stem from the malleable nature of human memory and not from malice. That's pretty much a quote from one of these cases. I would add to that my own observation that the huge majority of law enforcement officers are not concerned with an arrest regardless of adequate proof of a suspect's guilt, although I hasten to add that only a fool would fail to acknowledge the no longer infrequent stories of police misconduct that we all see.

Where does this leave us? Without doubt, Florida is going to continue to deal with this issue and our courts and/or legislature may well follow what New Jersey has done in setting up required procedures. For that reason, and because space considerations preclude it now, next month I'll provide more information about the solution the New Jersey Supreme Court has crafted.

## A Nice Brief Update from a Florida Bar Foundation Board Member



By Philip N. Kabler

Every now and again it is a good idea to prepare an update on the status of a previously described project. In the October 2010 issue of *Forum* 8, I submitted a detailed report about Three Rivers Legal Services' "Rural Pro Bono Participation through Remote Skills Training and Support" initiative. Here is a link to that article: [www.8jcba.org/archives/2010Oct.pdf](http://www.8jcba.org/archives/2010Oct.pdf) (page 11).

That earlier article was written part-way through the initiative's first grant year, and the program is now through its first full year and into its second year. Florida Bar Foundation data shows that statewide there was a 17 percent increase in the number of lawyers providing pro bono services through organized pro bono programs from 2009 to 2010, as well as a 25 percent increase in hours donated during that period.

Sometimes it is useful to draw a simple, straightforward conclusion from data. In this case, one can readily conclude that the TRLS Pilot Pro Bono grants and the Foundation's support of the "One Campaign" were major contributors to the increase when considering that the numbers had been stagnant prior to the pilot program and grant. To those local EJCBA attorneys who participated in the initiative, *Thank You!* To those who are considering participating, come "*on board.*" (P.S. Please visit [www.onepromiseflorida.org](http://www.onepromiseflorida.org) - and turn on your speakers when you "go" there.)

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](http://www.facebook.com/TheFloridaBarFoundation).

## Governor's Report

*Continued from page 8*

the Bar's website updated every Friday on what is happening in the session.

- Heard a report from the Legislation Committee Chair that so far the Bar does not anticipate the wide ranging efforts to change the court system and the Supreme Court that occurred in the previous session. What is expected, though, is an effort to "reform" the judicial nominating process. Part of that reform could be an effort to remove the Bar from the process of appointing JNC members.

- Approved, on the recommendation of the Budget Committee, the hiring of a new disciplinary staff counsel to work on mortgage related grievance cases. The Budget Committee Chair said the new counsel will work on foreclosure loan modification, mortgage fraud, and mortgage foreclosure-related cases.

- Heard the Program Evaluation Committee Chair report that the committee will make a recommendation to the board at its December meeting on a non-voting board seat for a government lawyer.

- Approved the Program Evaluation Committee recommendation to change the name of the Judicial Independence Committee to the Constitutional Judiciary Committee. The change underscores that the judiciary is a constitutionally created branch of government.

- Recommended approval of an amendment to a form in the Juvenile Procedure Rules, out-of-cycle rule amendments for the Family Law rules that mirror changes made to civil procedure rules and a rule on mediations involving parties not represented by lawyers, and on changes recommended by the Traffic Court Rules Committee, Criminal Procedure Rules Committee, and Rules of Judicial Administration Committee on protecting confidential information, such as birthdays and Social Security numbers.

- Heard a report from the Lawyer Referral Service Special Committee Chair on the committee's activities, including two public hearings. Wells said much of the problems related to private referral services appear to be related to getting PIP benefits for people injured in auto accidents.

- Heard a report on electronic court filing activities. The Supreme Court had asked for and the FCTC had provided a suggested schedule for mandatory e-filing in Florida courts that would have mandatory filing of all civil cases no later than March 1, 2013, and mandatory filing for all criminal cases no later than September 30, 2013.

I look forward to continuing to report to you on the Board of Governors meetings and on the meetings of the Lawyer Referral Service Special Committee on which I serve as the co-chair of the personal injury aspect of the committee.

## Cedar Key Sponsors

### We Love You!

The EJCBA would like to thank its 2011 James C. Adkins Cedar Key Dinner sponsor and raffle contributors for their generous support and urge its members to patronize these establishments:

Attorneys' Title Fund Service, LLC  
Hippodrome  
La Di Da Salon  
LAE Beauty  
Peach Valley Café  
Renaissance Printing  
Simply Gorgeous  
Thornebrook Chocolates  
Vellos Brickstreet Grill

A very special thank you, as in years past, to Attorney's Title Fund Service, LLC and its local Fund Account Executive, Elizabeth Shade, for once again being our drink sponsor and joining in the festivities at Steamers on November 3. Thank you all for continuing to make Cedar Key such a special event!



First District Court of Appeal Judges Brad Thomas, Stephanie Ray and Lori Rowe; EJCBA President Mac McCarty at Cedar Key dinner on 11/3/11



Kristine Jatczak Van Vorst, Nancy Yenser, Lynn Shackow, Judge Nilon and David Delaney enjoying the good company at Steamers in Cedar Key

## Volunteer Arbitrators and Mediators Needed for Florida Bar Program

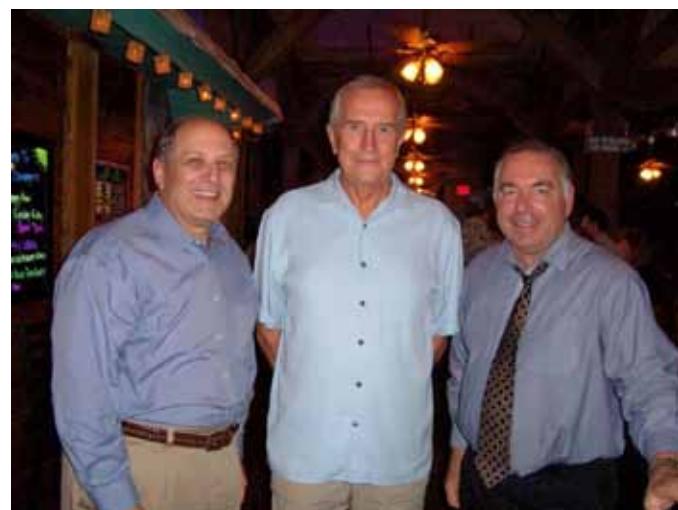
The Florida Bar's Grievance Mediation and Fee Arbitration program is seeking volunteer arbitrators and mediators. This program is offered by The Florida Bar as a public service to our members, clients, and the court system and attempts to resolve disputes between attorneys and clients or between attorneys. There is no charge for parties to engage in our program.

Arbitrations and mediations are conducted throughout the state of Florida and are held in the geographical location of the parties. A panel of 3 arbitrators is assigned to hear fee disputes over \$75,000. If the parties elect mediation, then the case will be assigned to a sole mediator.

Florida Bar members who participate as volunteer arbitrators and/or mediators as part of this program are eligible for CLE credit for an hour-for-hour basis, with a maximum of five (5) credit hours in the area of ethics for the 3-year reporting period.

Please refer to Chapter 14 of The Rules Regulating The Florida Bar for complete information on this program. Eligibility requirements for certification as program arbitrators and/or mediators can be found in the Procedural Rules of Chapter 14.

If you are interested in participating as a volunteer program arbitrator and/or mediator for the Florida Bar Grievance Mediation and Fee Arbitration Program, please contact Susan Austin, Program Administrator, The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-2300, (850) 561-5719, [saustin@flabar.org](mailto:saustin@flabar.org).



Tony Salzman, Judge Rick Smith (ret.) and Rob Lash at Steamers in Cedar Key





Eighth Judicial Circuit Bar Association, Inc.  
Post Office Box 13924  
Gainesville, FL 32604

## December 2011 Calendar

- 1 CGAWL meeting, Manuel's Vintage Room, 5:45 p.m.
- 5 Deadline for submission of articles for January Forum 8
- 7 EJCBA Board of Directors Meeting; Ayers Medical Plaza, 720 SW 2d Avenue, North Tower, Third Floor – 5:30 p.m.
- 8 North Florida Area Real Estate Attorneys meeting, 5:30 p.m., TBA
- 14 Probate Section Meeting, 4:30 p.m., 4<sup>th</sup> Floor, Family & Civil Courthouse
- 16 EJCBA Luncheon, Scott Hawkins, President, Florida Bar, Jolie, 11:45 a.m.
- 21 CGAWL lunch/business meeting, Fat Tuscan, 11:45 a.m.
- 26 Day after Christmas, County and Federal Courthouses closed

## January 2012 Calendar

- 2 New Year's Day (observed), County and Federal Courthouses closed
- 4 EJCBA Board of Directors Meeting; Ayers Medical Plaza, 720 SW 2d Avenue, North Tower, Third Floor – 5:30 p.m.
- 5 Deadline for submission of articles for February Forum 8
- 5 CGAWL meeting, Manuel's Vintage Room, 5:45 p.m.
- 11 Probate Section Meeting, 4:30 p.m., 4<sup>th</sup> Floor, Family & Civil Courthouse
- 12 North Florida Area Real Estate Attorneys meeting, 5:30 p.m., TBA
- 16 Martin Luther King, Jr. Birthday, County and Federal Courthouses closed
- 18 CGAWL lunch/business meeting, Fat Tuscan, 11:45 a.m.
- 20 EJCBA Luncheon, Chief Judge Martha Ann Lott, Jolie, 11:45 a.m.
- 24 Family Law Section Meeting, 4:00 p.m., Chief Judge's Conference Room, Alachua County Family & Civil Justice Center

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](mailto:dvallejos-nichols@avera.com).