

# FORUM 8

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Eighth Judicial Circuit Bar Association, Inc.

April 2012

## EJCBA Launches New “Law in the Library” Series

*By Rob Birrenkott*

The EJCBA recently launched the “Law in the Library” series in partnership with the Alachua County Library District. The series presents an opportunity for members of the legal community to share their knowledge on a legal topic with the public. All sessions are free and open to the public and take place on the last Monday of the month at 6 p.m. at the Downtown Library.

The first topic, “Residential Foreclosure Legal Issues” was delivered by Mac McCarty on Monday, February 27<sup>th</sup>. The event was well attended and the EJCBA received positive feedback from the audience members. McCarty gave a brief overview of the origins of the housing crisis followed by

an outline of options available to underwater homeowners and the ramifications associated with pursuing those courses of action. Audience participation was encouraged and many of the attendees took advantage of the opportunity to ask questions.

The anticipated future topics are “Elder Law Legal Issues” and “Landlord Tenant/Public Housing Legal Issues” which are scheduled to be delivered in March and April, respectively. Based upon the initial positive response from the public and the generosity of attorneys volunteering to speak, the Law and the Library series is off to a promising start toward advancing public knowledge of the legal system.



Mac McCarty, President of EJCBA, speaks on residential foreclosures at the first Law in the Library presentation

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## Classified Ads

Class A office space for lease in Meridien Center, 2790 NW 43<sup>rd</sup> Street, approximately 3000 square feet. Please contact Marilyn at 373-4141 for details.

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Daniel L. Hightower, P.A. is seeking exp. trial lawyer of 5-10 yrs to assist with personal injury and wrongful death cases. References required; excellent salary & benefits. Submit resume in confidence by mail, email or fax to: Legal Administrator, P.O. Box 700, Ocala, FL 34478-0700; fax (352) 629-6431; email [robin@danhightower.com](mailto:robin@danhightower.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**

## Clerk's Corner



By J. K. "Buddy" Irby

Electronic filing of court documents was implemented in Alachua County last November. Currently, documents may be e-filed in Probate, County Civil and Circuit Civil cases. During the first three months after the e-filing system came on line, attorneys were required to also submit each e-filed document to the Clerk in paper form. A similar procedure was required when the Florida Supreme Court authorized facsimile filing of court documents some years ago.

We are happy to report that implementation of the e-filing process has gone smoothly, and the Florida Courts Technology Commission has approved our request to discontinue the follow-up filings. Therefore, attorneys utilizing the e-filing system are no longer required to submit the e-filed documents to the Clerk in paper form. However, pursuant to the Rules of Judicial Administration, documents such as wills may still be submitted in paper form if required by statute, rule or court order.

Please be aware that "e-filing" does not mean "e-mail". All documents electronically transmitted to the Clerk's Office for inclusion in a court file must be received through the statewide E-Filing Court Records Portal developed by the Florida Association of Court Clerks. Our electronic filing system is compatible with the statewide portal. We are not authorized to accept e-mailed documents for filing in a court case.

Also note that on-line disclosure of electronically filed documents is governed by the Florida Supreme Court's opinion In re: Revised Interim Policy on Electronic Release of Court Records, AOSC07-49 (Fla. Sept. 7, 2007). This means that electronic document images will be available for on-line viewing by attorneys who subscribe to the Clerk's Office LINDAS image access system. However, some document images must be redacted pursuant to Section 119.0714, Florida Statutes, and Rule 2.420, Florida Rules of Judicial Administration. Un-redacted versions of these images will only be viewable by attorneys of record in each case. Section 119.0714 prohibits disclosure of Social Security, bank account and credit card numbers contained in court records. Rule 2.420 requires the Clerk to automatically keep information such as adoption records, juvenile delinquency records and guardianship reports confidential.

E-filing is still available only to attorneys. However, attorneys can authorize their assistants to file for them. To register for e-Filing, use the following link: <https://www.myflcourtaaccess.com/>. Create a user account by clicking the "Register Now" option. After completing the registration process, you will move to a filing options page. At the bottom of the main page, click on "Filer Documentation" to access a user manual for the e-Filing portal, or go to [https://www.myflcourtaaccess.com/Docs/Filer\\_06072011.pdf](https://www.myflcourtaaccess.com/Docs/Filer_06072011.pdf).

When e-Filing documents, you will be asked to select the type of court, county and division. Select "Trial" for Type of Court and "Alachua" for County. Under Division, the drop-down menu will include only the divisions in which e-filing is available here. For new filings or those requiring a filing or service fee, that fee is paid through the e-Portal. Credit card companies assess a fee of 3% of the total charge for payments made by credit card. VISA is not accepted. The fee for making an ACH transfer through your checking account is a flat \$3.00.

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## Circuit Notes

Chester B. Chance has been named Chairman-elect of the Alternative Dispute Section of The Florida Bar Association. The Alternative Dispute Section represents more than 800 Florida lawyers who practice mediation and arbitration in the State of Florida.

Cynthia Stump Swanson received The Florida Bar Board Certification in Adoption Law. Ms. Swanson is one of only 17 lawyers in the state to be certified in this field and the only attorney in the Eighth Judicial Circuit. Florida's adoption certification program is the first such program in the United States.

Shannon M. Miller received her Florida Bar Board Certification in Elder Law. Ms. Miller is the only attorney residing and practicing in the Eighth Judicial Circuit (six counties) certified in Elder Law.

Best Lawyers, the oldest and most respected peer-review publication in the legal profession, has named Robert S. Griscti as the "Jacksonville Best Lawyers Criminal Defense: White-Collar Lawyer of the Year" for 2012.

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*Circuit Notes is a new feature of the Forum 8 designed to highlight the noteworthy accomplishments of our attorneys and judges. Please email your submissions to [dvallej@os-nichols@avera.com](mailto:dvallej@os-nichols@avera.com).*

# Alternative Dispute Resolution

## Free Willy II: The Court Rules



By Chester B. Chance and Charles B. Carter

Last month we wrote an article about the PETA lawsuit against SeaWorld to establish constitutional rights for orcas. The “Plaintiffs” in that lawsuit included Corky, the killer whale, and four other killer whales. William Cervone informed us of the court’s ruling in early February in this interesting California (where else?) case. We appreciate Mr. Cervone’s legal research.

How does this relate to ADR, you ask? At mediation the goal is to obtain a mutually acceptable agreement. Mediation is the only litigation forum where that can happen. At trials or hearings there is no mutually acceptable anything: either one party finds the court result acceptable and the other does not, or, both find the result unacceptable. Corky the Orca has learned this lesson the hard way. Corky, if only you had taken the opportunity to seek alternative dispute resolution.

The Federal District Court judge granted SeaWorld’s motion to dismiss the lawsuit.

It is not known whether Corky signed/finned a contingency contract, or is paying his attorney on an hourly basis in mackerel. Since this case sought to determine civil rights violations against Corky, it is assumed had he prevailed he would have been entitled to attorney’s fees. (Think about it.) We are monitoring this case to see if SeaWorld receives attorney’s fees pursuant to Rule 11, Rules of Federal Procedure.

None of the orca Plaintiffs were available for comment, but we can assume there may have been some wailing and gnashing of teeth. It should be noted one of the killer whales, Tilikum, was involved in the death of a trainer two years ago. Tilikum snatched his trainer, dragged her under water and thrashed her to death in front of a horrified crowd. It was the third time Tilikum had been involved in the death of a human. It is assumed Tilikum was seeking to establish his constitutional rights to be free from cruel and unusual punishment and unlawful searches and seizures.

Obviously, PETA may appeal this decision,

which means this dispute may not be over and thus, ADR may yet come to the rescue.

This case also illustrates the mediation maxim: no matter how thin you slice the anchovy there are always two sides. Following the court’s ruling dismissing the case, both sides claimed victory. Ah, you ask, how does a lawyer whose case was dismissed at its inception claim victory?

“In what will now stand as the case that future generations will look back on as the one that broke legal ground for animals, captive Orcas were represented in a U.S. Federal Court lawsuit that PETA filed against SeaWorld seeking to establish that five wild-caught Orcas deserved protection under the Constitution’s Thirteenth Amendment, which prohibits slavery.” (SeaWorld website, February 9, 2012). PETA then acknowledged that the preceding day, February 8, 2012, Federal District Judge Miller ruled that the Thirteenth Amendment does not apply to non-humans. (PETA’s position that the dismissal of its case is a victory is akin to a condemned prisoner bragging how good his final meal was just prior to his execution.)

PETA notes: “This historic first case for the Orca’s right to be free under the Thirteenth Amendment is one more step towards the inevitable day when all animals will be free from enslavement for human entertainment. Judge Miller’s opinion does not change the fact the Orcas who once lived naturally, wild and free, are today kept as slaves by SeaWorld. PETA will continue to pursue every available avenue to fight for these animals.”

PETA takes the position that the dismissal of its lawsuit means the empty Orca’s litigation glass is half-full. SeaWorld took a different approach calling the lawsuit “baseless and a waste of the court’s time and money.” (The Washington Post, February 8, 2012). SeaWorld noted “we cannot hope that this is PETA’s last publicity stunt but we can now refocus our energy in more positive and constructive ways: delivering high-quality education experiences to our guests, and



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# EJCBA Charity Golf Tournament

## Benefiting the Guardian ad Litem Program



**Mark Bostick Golf Course  
at the University of Florida**  
2800 SW 2<sup>nd</sup> Avenue  
Gainesville, FL 32607  
Phone: 352-375-4866

**Friday, April 13, 2012**  
**Cost: \$100 per player**  
**Register & Eat: 11:30am**  
**Tee-time: 1:00pm**  
**Reception following round**

To help us properly plan for this event, please pre-register by going to <http://8jcba.org/events.aspx> or return this form with payment.

- Longest Putt Contest
- Men and Women Longest Drive
- Closest to the Pin Challenge
- "Mulligans for Kids" for sale

### *2-Person Scramble*



This year's event will be held **Friday, April 13<sup>th</sup>, 2012**, at the beautiful Mark Bostick Golf Course at the University of Florida in Gainesville, Florida. Registration and lunch begin at 11:30am, with shotgun start at 1:00pm. Post-round reception immediately following golf.

The cost for this event is **\$100** per golfer. This price includes 18 holes of golf, riding cart, lunch, reception and various awards and/or prizes. All net proceeds of this charity tournament will benefit the Guardian ad Litem Program of the 8<sup>th</sup> Circuit through the Guardian Foundation, Inc.

A Guardian ad Litem is a volunteer appointed by the court to protect the rights and advocate the best interests of a child involved in a court proceeding. Currently, the Florida GAL Program represents close to 27,000 abused and neglected children, but more than 4,600 children are still in need of a voice in court. Additional funding to the GAL Program provides invaluable financial support for the volunteers.

ENTRY FEE: \$100 per golfer

**SIGN-UP DEADLINE**  
**APRIL 6<sup>TH</sup>**

**FOR MORE INFORMATION,  
CONTACT MIKE PIERCE**

**DELL GRAHAM**  
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_____	_____
Address	Partner's Address
_____	_____
Phone Number	Partner's Phone Number
_____	_____
Email Address	Partner's Email Address

Make checks payable to James H. McCarty, Jr., P.A., Trust Account

# Social Security Disability Determinations: Trends & Hearings

By Emory Springfield



According to the Social Security Administration over the ten years between 2001 and 2010, applications for Social Security disability benefits increased 250%. The percentage of favorable awards of disability benefits over that same time declined from 46.1% to 35.7% (as a percent of all applications). The last five years has seen a 28% increase in applications and an acceptance rate decline to 33%. The Congressional Budget Office (“CBO”) attributes the increase in applications to characteristics of the population, federal policies, and declining opportunities for employment. The CBO further reports that of the applications received for disability benefits in 2005 that were rejected, appeals were filed in one-third of those cases. In three-quarters of the cases appealed, the initial decisions were reversed. CBO also reports that the number of beneficiaries tends to increase even after the economy begins to recover from downturns. You can expect to get calls, or continue to get calls, concerning the Social Security disability appeals process.

Under the Social Security Act, “disability” means the “inability to engage in **any** substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or has lasted or can be expected to last for a continuous period of not less than twelve (12) months.” There are five major types of Social Security disability benefits. Calls concerning Social Security Disability Insurance benefit are the most common (“SSDI”). It is paid to individuals who have worked in the recent past (5 out of the last 10 years in most cases) who are now disabled. The other income benefit commonly asked about is Supplemental Security Income benefits (“SSI”). These benefits are paid to individuals who are poor and who are disabled. Both these disability benefits are increasingly applied for online in addition to being applied for in person at a local Social Security field office or by mailing the application to a local office. Unless the disability is catastrophic, such as terminal cancer, a heart condition that is so

bad that you are on a heart transplant waiting list, or total paralysis of both legs, there is no easy way for the lawyer or client to know whether an applicant will be found disabled by Social Security. The decision of whether or not to appeal a denial of disability benefits should be based upon whether or not the applicant genuinely feels that he or she cannot engage in *any* substantial gainful activity.

Only about 27% of Social Security applications are approved upon the initial application level in Florida. The first review of a denial is done by the Social Security Administration and is obtained by requesting a “reconsideration.” Only about 9% of the reconsideration requests filed in Florida are won. If the claim is denied on reconsideration, the next level of review is performed by an administrative law judge who will conduct a “non-adversarial” hearing where the applicant testifies. Currently, a little over half of the hearings result in a favorable award of benefits. In my experience, there is a large measure of subjectivity to these decisions. Within the Jacksonville, Florida regional office where most of the cases from the Gainesville area are decided, there is a judge with a favorable award rate consistently around 85% while another’s is consistently around 15%. Similar examples exist in the Orlando and Tampa regional offices. Hearings are fairly informal. Applicants are entitled to a live hearing, however, with consent they are sometimes done remotely via video-conference. The only people present are the applicant/claimant, the judge, a person operating a recording device, a vocational expert and or a medical advisor, and the claimant’s representative. Most of the judges in my experience begin to get impatient with claimant’s representatives if you take more than 45 to 60 minutes to question the claimant and discourage calling witnesses other than the claimant.

Disability can result from a single medical or psychiatric problem or, as is often the case, from a combination of medical and or psychiatric problems. Medical documentation is essential to advancing a claim. At the initial stage of application, the Social Security Administration is supposed to gather all of the claimant’s medical records. However, I have found the completeness of this effort to be lacking, and a large part of my

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# Recovery Of Attorneys' Fees By The Non-Prevailing Party

By Siegel, Hughes & Ross

The Florida Probate Code contains an unusual provision which, under certain circumstances, entitles the non-prevailing party to recover its attorney's fees. Fla. Stat. §733.106(2) provides that, "A person nominated as personal representative, or any proponent of a will...if in good faith justified in offering the will in due form for probate, shall receive his or her costs and attorney's fees from the estate even though he or she is unsuccessful." (underlining added.) Thus, the unsuccessful proponent of a prior will may recover his costs and attorney's fees incurred in challenging a more recent will as long as the prior will is in "due form" and the proponent has a "good faith justification" for mounting the challenge.

As long ago as 1976 the Third District Court of Appeal held that an unsuccessful proponent of a will who acted in good faith could be awarded attorney's fees from the estate. *Weinstein v. Nash*, 339 So.2d 700 (Fla. 3<sup>rd</sup> DCA 1976) (citing to *Watts v. Newport*, 9 So.2d 417 (Fla. 1942)). In that case Nash submitted for probate the last will of Mayer Weinstein. Mr. Weinstein's children submitted a prior will alleging that Mr. Weinstein did not have testamentary capacity at the time he executed the Nash will. The trial court found that Mr. Weinstein did not have testamentary capacity at the time he executed the Nash will and denied probate. However, the trial court found that Ms. Nash was "justified in believing that the decedent had the mental capacity to make and execute the Last Will and Testament." It, therefore, awarded Ms. Nash her attorneys' fees from the estate. The Third DCA upheld the award stating:

First, there was no finding of undue influence, fraud or bad faith in the order denying Ms. Nash's petition for probate of

the will. Second, the probate judge in his order awarding attorney's fees, determined that as a matter of law Ms. Nash was justified in offering the May 29 will. There being substantial evidence to support this determination, we find no abuse of discretion. *Id.* at 701-702.

In *Nash* the unsuccessful proponent attempted to probate the "last known will" of the decedent. Prior to 2001 the right of an unsuccessful litigant to recover fees from the estate was limited to the proponent of the "last known will." At that time Fla. Stat. §733.106(2), read:

A person nominated as personal representative of the last known will, or any proponent of the will if the person so nominated does not act within a reasonable time, if in good faith justified in offering the will in due form for probate, shall receive his or her costs and attorney fees out of the estate even though he or she is unsuccessful.

Therefore, a party who challenged the decedent's last will and sought to probate a prior will was not entitled to the benefit of the statute.

In 2001 the legislature amended the statute to expand the right to recover fees from the estate to include proponents of prior wills who, in good faith, challenged the decedent's last will.

The statute was amended to read:

A person nominated as personal representative, or any proponent of a will if the person so nominated does not act within a reasonable time, if in good faith justified in offering the will in due form for probate, shall receive costs and attorney's fees from the estate even though probate is denied or revoked. Fla. Stat. §733.106(2)

Thus, the amended statute applied to a proponent of "a will" rather than "the last will." The requirements of "good faith" and "due form" remain.

The amendment reflects the growing concern that abuse of the elderly, particularly the abuse of



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## Recovery of Fees

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undue influence, was a matter of public concern. This same concern was reflected the following year by the amendment of the next section of the statute, Fla. Stat. §733.107(2), which reads, "The presumption of undue influence implements public policy against abuse of fiduciary or confidential relationships and is therefore a presumption shifting the burden of proof under ss. 90.301-90.304." By allowing a party who in good faith challenges a will to recover attorney's fees from the estate, even if unsuccessful, the legislature sought to more effectively implement the testator's true intent by removing one of the disincentives for a will contest.

The key limiting factor to the unsuccessful opponent's ability to recover fees is the good faith requirement. Prior to the 2001 amendment to the statute, the only party entitled to recover fees under the statute was the party offering the "last will." Therefore the only basis for denying probate of a last will which was in due form was lack of capacity or undue influence. Generally, when the unsuccessful party offering the will was involved in procuring the will, as is generally the case when probate is denied because of undue influence, the courts found a lack of good faith. *E.g., Estate of Hand*, 475 So.2d 1337 (Fla. 3<sup>rd</sup> DCA 1985). On the other hand, when the proponent of the will was not involved in procuring the rejected will, courts usually found good faith and awarded fees. *E.g., Estate of Gaspelin*, 542 So.2d 1023 (Fla. 2<sup>nd</sup> DCA 1989); *Estate of Weinstein*, 339 So.2d 700 (Fla. 3<sup>rd</sup> DCA 1976).

However, the 2001 amendment expanded those who may seek fees for an unsuccessful attempt to probate a will to the proponent of any will, not just the last will. Since claims for fees are now open to proponents of prior wills, more unsuccessful opponents will have had no involvement in procuring the will. Therefore, it has been suggested that a more stringent standard of "good faith" should be adopted. In the Florida Bar Journal article, "The Recovery of Attorneys' Fees and Costs for the Unsuccessful Offer of a Will for Probate," 76 Fla. B.J. 36 (Jan. 2002), Wallace suggests the new standard should require an unsuccessful proponent of a prior will to establish "a substantial basis for offering a prior will instead of the last will." *Id.* at 39. While no appellate decisions have been located which address the good faith standard after the amendment, Mr. Wallace's suggestion seems a logical approach which is consistent with the purpose of the statute.

## Social Security

*Continued from page 6*

time and effort is spent keeping up with where my clients are getting treatment and making sure these records are made a part of the Social Security Administration's file.

Applicants without access to medical care are at a serious disadvantage in proving disability. In addition to the medical issues, age, past work experience, and education are important factors in evaluating an applicant's disability claim. The disabling conditions that are the basis of the application need not be permanent, but applicants must have been disabled for one year or be expected to be disabled for at least one year, or have a condition that can be expected to result in death within one year.

The initial application typically takes three to four months to be reviewed. The reconsideration likewise takes three to four months. The processing time for a hearing in the Jacksonville office is currently reported to be 341 days. The Social Security Administration's website, [www.ssa.gov](http://www.ssa.gov), is a valuable internet resource as is the website created by the National Organization of Social Security Claimants' Representatives found at [www.nosscr.org](http://www.nosscr.org).

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## Free Willy II

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providing the highest possible standard of care to our animals," according to spokesman Dave Koontz of SeaWorld.

It is unknown whether PETA's comparison of captive orcas to human slavery will offend descendants of slaves. However, David Steinberg, Professor at the Thomas Jefferson School of Law in San Diego told Reuters when the lawsuit was filed in October that it was "demeaning (to) the integrity and humanity of people who were owned as slaves." Professor Steinberg definitely sees PETA's glass as a bit less than half-empty.

In a similar vein, it should be noted in 2003, the Anti-Defamation League accused PETA of trivializing the death of Jews in the Second World War with a campaign that compared the meat industry to the Holocaust. Little has been reported on whether there has been any accord reached between PETA and the Anti-Defamation League over this cow-holocaust controversy; however, we would remind both sides: to err is human, to forgive bovine.



# Florida Bar and Bar Foundation Presidents Appeal to Florida Lawyers to Help Alleviate Legal Aid Funding Crisis



Florida Bar President Scott Hawkins and Florida Bar Foundation President Michele Kane Cummings have issued a joint appeal to lawyers for charitable donations to the Bar Foundation to help minimize funding cuts local legal aid programs will experience in the next three years due to declining revenue from Florida's Interest

on Trust Accounts (IOTA) Program.

"Legal aid funding in Florida is headed off a cliff, and Florida's poor are going to pay the price – unless we act," Hawkins and Cummings wrote in an e-mail to all Florida Bar members.

They are requesting that Bar members contribute to the special "Now" fundraising initiative on The Florida Bar Foundation's website at [www.floridabarfoundation.org/now](http://www.floridabarfoundation.org/now).

Donations to the "Now" campaign can be made by credit card and paid over time. If each member of The Florida Bar were to contribute \$100 a year or more for the next few years until IOTA revenue increases, legal aid funding cuts could be reduced by \$9 million annually. The name of the campaign is meant to underscore the urgency of the funding crisis.

According to the Bar Foundation, an 88 percent drop in IOTA revenue since 2008 will require it to cut 71 percent of its legal aid funding by its 2014-15 grant year. The drop in IOTA revenue results from low bank interest rates since the recession. Historically, the Foundation has provided roughly a third of all legal aid funding in the state.

The Bar Foundation estimates that its funding cuts will cause layoffs of about 120 of the 410 legal aid lawyers at work in 2010. With the growth in Florida's poverty population since the recession, that would leave one legal aid attorney for every 10,700 people living in poverty in Florida. The Bar Foundation's

grantees have handled more than 100,000 cases a year in recent years. With the loss of IOTA revenue, as well as a decrease in federal funding from the Legal Services Corporation, the number of legal aid cases handled is expected to fall to roughly 70,000.

The Bar Foundation's legal aid funding cuts will affect all of its 31 legal aid grantees across the state. Although the Foundation kept its legal aid funding at roughly its pre-recession levels through 2010 by using its reserves, it began cutting grants in 2011 as forecasts for higher short-term interest rates were pushed further into the future.

With the Jan. 24, 2012, announcement by the Federal Reserve that it expected to keep interest rates



at the current, near-zero levels through 2014, the Foundation now plans deeper cuts over the next three years in order to preserve as much of its remaining reserves as possible for its 2015 grant year.

"If you have given to The Florida Bar Foundation before, now is the time to increase your support," Hawkins

and Cummings wrote. "If you've never given before, now is the time to start. With your help, we can minimize the long-term damage to Florida's legal aid infrastructure between now and the time when interest rates return to pre-recession levels and the Foundation is able to restore legal aid funding."

A short note from Phil Kabler, a Florida Bar Foundation board member: If you have questions about The Florida Bar Foundation's grant programs, the Foundation in general, or the "Now" fundraising initiative in particular, 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).



# It's that time again!

The Eighth Judicial Circuit Bar Association Nominations Committee is seeking members for EJCBA Board positions for 2012-2013. Please consider giving a little time back to your bar association. Please complete the application below and return the completed application to EJCBA. The deadline for completed applications is **April 30, 2012.**

## Application for EJCBA Board Membership

Name: \_\_\_\_\_ Bar No. \_\_\_\_\_

Office Address: \_\_\_\_\_  
\_\_\_\_\_

Telephone Numbers: (Home) \_\_\_\_\_ (Office) \_\_\_\_\_  
(Fax) \_\_\_\_\_ (Cellular) \_\_\_\_\_  
(E-Mail) \_\_\_\_\_

Area of practice: \_\_\_\_\_ Years in practice: \_\_\_\_\_

Office of Interest: (Check all that apply)

Secretary  Treasurer   
Board member  Committee Member

Preferred Committee Interest: (Check all that apply)

<input type="checkbox"/> Advertising	<input type="checkbox"/> Lawyer Referral Services	<input type="checkbox"/> Publicity/Public Relations
<input type="checkbox"/> Annual James C. Adkins Dinner	<input type="checkbox"/> Luncheon/Speakers	<input type="checkbox"/> Social
<input type="checkbox"/> Annual Reception	<input type="checkbox"/> Member Survey	<input type="checkbox"/> Sponsorships
<input type="checkbox"/> CLE	<input type="checkbox"/> Membership	<input type="checkbox"/> UF Law Liaison
<input type="checkbox"/> Community Service	<input type="checkbox"/> Mentorship	<input type="checkbox"/> Website
<input type="checkbox"/> Golf Tournament	<input type="checkbox"/> Policies and Bylaws	<input type="checkbox"/> Young Lawyers Division Liaison
<input type="checkbox"/> Judicial Poll	<input type="checkbox"/> Pro Bono	<input type="checkbox"/> Other (Describe Below)
<input type="checkbox"/> Law Week	<input type="checkbox"/> Professionalism	_____

Briefly describe your contributions, if any, to date to EJCBA.

What new goals would you like to explore for our association?

How many hours per week can you devote to your EJCBA goals?

Return to: EJCBA – Nominations Committee  
P.O. Box 13924  
Gainesville, FL 32604

Or email completed application to: [execdir@8jcba.org](mailto:execdir@8jcba.org)

# Criminal Law



By William Cervone

This month, The *Graham Dilemma*, Part Two. You'll recall that I recently wrote about the mess that sentencing for juveniles who commit serious non-homicide crimes has become because of the United States Supreme Court

declaring that a life sentence without parole cannot result. And that the Florida legislature has, to date, done nothing to fix that problem. Now, just to avoid being left out and, in what with all due respect is to me blatant judicial legislating, I have a series of new cases to report.

In *Arrington v State*, issued on January 18<sup>th</sup>, the 2<sup>nd</sup> DCA held that felony Murder I was indeed a homicide crime and thus outside of the parameters mentioned above. So far, so good. The court also said that it very specifically was not declaring any Florida statute unconstitutional. Again, so far, so good. The court then, however, decided that if a juvenile was convicted of felony Murder I but was not the actual killer, a life sentence without parole might still constitute cruel and unusual punishment. The court further held that the sentencing judge in such circumstances must conduct a proportionality review to decide if this would be so under the facts at bar and if, as a result, some other sentence must be imposed.

One assumes that the mandate returning young Mr. Arrington, who was 15 when he committed felony Murder I, to the trial court for re-sentencing is basically directing something other than the life sentence he got if the judge finds that to have been disproportionate. For context, it appears that Arrington's role in the murder was to provide the gun used by a co-perpetrator to kill someone during a robbery they were both committing. The problem, however, is that even upon such a finding the judge will have no legal option but life without parole because that's all that Florida law allows. Either that or declare the applicable sentencing statute unconstitutional (at least as applied), something the 2<sup>nd</sup> DCA for whatever reason wouldn't do.

Simultaneous, as in on the very same day, with *Arrington*, the 2<sup>nd</sup> DCA issued *Washington v State* to the same effect. The only difference is that, as the court went to great lengths to outline,

Washington was nearly 18 when he participated in a brutal beating, kidnapping, and shooting of two people in which he was a significant actor although not the literal killer. By cross-referencing these two sets of facts, the court made it very clear, at least to me, what it thought the respective trial judges should do (i.e., fix something up for Arrington but don't touch Washington's sentence).

And just to further muddy the waters, in a third opinion released on the same day, *LaFountain v State*, the 2<sup>nd</sup> DCA considered a post-conviction plea from a 16 year old (at the time of his crime) serving life without parole for felony Murder I seeking some way out of his sentence. Deciding that it probably didn't have the authority to make what it was ordering in *Arrington* retroactive, the court simply told LaFountain that he was out of luck.

Several things come to mind. The first is the obvious advantage of what I understand Louisiana's system of law to be where you don't have to be bothered by things like precedent and can just rule as you think equity requires. (If I'm totally off base on that please don't tell me because I really like the concept.) The second is that it is to me inescapable that courts often legislate with their opinions, much to the consternation of legislatures which then re-legislate to overturn the courts. I get all of that. But this particular move seems particularly obvious to me, lacking wholly in any degree of subtlety. Perhaps that's warranted by the disarray in which the legislature has left juvenile sentencing for serious non-homicide crimes (which is one of the reasons Florida's prosecutors told the legislature last year that they had better do something before the courts did it for them). In that vein, as I write this there are still bills pending this session that would at least attempt to fix the mess, at least until judicial review and action. So stay tuned for The *Graham Dilemma*, Part Three.

A footnote, by the way, for those who are intensely interested in the entire mess and not just the above application of the mess: the 5<sup>th</sup> DCA recently held that aggregate sentences of 90 years for non-homicide crimes don't come within the *Graham* ruling even if they might be construed as a *de facto* life sentence. I suppose appeals will follow.



## Law Student Events Take Center Stage for the North Central Florida Chapter of the Federal Bar Association

*By Ajay K. Singh, Law Student Representative for the North Central Florida Chapter of the Federal Bar Association*

By the time this article is published, the North Central Florida Chapter of the Federal Bar Association will have held two events designed to help further the professional development of law students interested in federal practice.

The first event, a brown bag lunch with United States Magistrate Judge Gary Jones for law students at the University of Florida Levin College of Law, was held on March 15. This event provided an opportunity for Judge Jones to share his insights on a variety of topics, including career options and suggestions on how to transition between law school and future employment. The students had the ability to ask questions and speak directly with Judge Jones in a conversational setting. The lunch was held at the federal courthouse in downtown Gainesville.

The second event, the "Federal Judicial Law Clerk Roundtable," is an annual program organized by the law student members of the North Central Florida Chapter of the Federal Bar Association. This event is organized in conjunction with the Center for Career Development at the University of Florida Levin College of Law and gives law students with an interest in pursuing a federal judicial clerkship the opportunity to learn from the experience and advice of four current judicial law clerks. The clerks give students advice on topics ranging from the different types of judicial clerkships available to specific tips for the clerkship application process. This year the roundtable was held on March 27 at the University of Florida Levin College of Law.

To become involved with the North Central Florida Chapter of the Federal Bar Association, please contact the Chapter's Membership Chair, Stephanie Marchman, at 352-334-5011 or [marchmansm@cityofgainesville.org](mailto:marchmansm@cityofgainesville.org).

## Nominees Sought for 2012 James L. Tomlinson Professionalism Award

Nominees are being sought for the recipient of the 2012 James L. Tomlinson Professionalism Award. The award will be given to the Eighth Judicial Circuit lawyer who has demonstrated consistent dedication to the pursuit and practice of the highest ideals and tenets of the legal profession. The nominee must be a member in good standing of The Florida Bar who resides or regularly practices law within this circuit. If you wish to nominate someone, please complete a nomination form describing the nominee's qualifications and achievements and submit it to Raymond F. Brady, Esq., 2790 NW 43<sup>rd</sup> Street, Suite 200, Gainesville, FL 32606. Nominations must be received in Mr. Brady's office by Monday, April 30, 2012 in order to be considered. The award recipient will be selected by a committee comprised of leaders in the local voluntary bar association and practice sections.

### ***James L. Tomlinson Professionalism Award Nomination Form***

Name of Nominee: \_\_\_\_\_

Nominee's Business Address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

County in which Nominee Resides: \_\_\_\_\_

The above named nominee exemplifies the ideals and goals of professionalism in the practice of law, reverence for the law, and adherence to honor, integrity, and fairness, as follows (attach additional pages as necessary):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Name of Nominator: \_\_\_\_\_

Signature: \_\_\_\_\_

**RESERVE NOW FOR THE 2012 PROFESSIONALISM SEMINAR!**

WHEN: Friday, April 6, 2012 – 9:00 a.m. – 12:00 NOON  
 WHERE: J. Wayne Reitz Union on UF Campus (Rion Ballroom)  
 PROGRAM: Our keynote speaker is Rob E. Atkinson, Jr., Ruden McClosky Professor of Law at the Florida State University College of Law, speaking on “The Amended Oath of Admission to the Bar: Why its New Civility Clause is Far Less Radical Than its Classical Republican Core”  
 COST: \$70.00 (Make checks payable to EJCBA) (3.5 Hours of CLE is expected)  
 REMIT TO: EIGHTH JUDICIAL CIRCUIT BAR ASSOCIATION, INC.  
 c/o Raymond F. Brady, Esquire  
 2790 NW43rd Street, Suite 200  
 Gainesville, FL 32606  
 RESERVE: **By Monday, April 2, 2012 – Remit payment with reservation to Raymond F. Brady, Esquire**

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

- Civil/Tort Law
- Family/Domestic Relations Law
- Criminal Law
- Estates & Trusts Law
- Business Law
- Government Lawyers
- Real Estate & Land Use Law

NAME: \_\_\_\_\_

EMAIL (Req. for parking pass): \_\_\_\_\_

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

Free parking will be provided for the Reitz Union parking garage. A parking pass will be emailed to you in advance.

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Remillard Law Firm, P.A.

**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 9:00 AM until Noon, at the University of Florida. Check-in/registration begins at 8:30 AM. The keynote address will be given by Rob E. Atkinson, Jr., who is the Ruden McClosky Professor of Law at the Florida State University College of Law. Professor Atkinson’s address is titled, “The Amended Oath of Admission to the Bar: Why its New Civility Clause is Far Less Radical than its Classical Republican Core.”

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

Fill out the EJCBA reservation card included in this newsletter or 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.



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

## April 2012 Calendar

- 5 CGAWL meeting, Manuel's Vintage Room, 5:45 p.m.
- 5 Deadline for submission of articles for May Forum 8
- 6 2012 Professionalism Seminar w/keynote speaker Rob E. Atkinson, Jr., Ruden McClosky Professor of Law at FSU College of Law; J. Wayne Reitz Union on UF Campus, 9-12 noon
- 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
- 13 EJCBA Charity Golf Tournament, UF Golf Course
- 18 CGAWL lunch/business meeting, Fat Tuscan, 11:45 a.m.
- 18 EJCBA Board of Directors Meeting; Ayers Medical Plaza, 720 SW 2d Avenue, North Tower, Third Floor – 5:30 p.m.
- 20 EJCBA Luncheon, Eugene Pettis, President Elect Designate of The Florida Bar, speaking on "Diversity: The Next Frontier," 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
- 30 Deadline for Nominees to be received for 2012 James L. Tomlinson Professionalism Award
- 30 Deadline for applications to 2012-2013 EJCBA Board of Directors

## May 2012 Calendar

- 3 CGAWL meeting, Manuel's Vintage Room, 5:45 p.m.
- 4 Deadline for submission of articles for June Forum 8
- 9 Probate Section Meeting, 4:30 p.m., 4<sup>th</sup> Floor, Family & Civil Courthouse
- 9 EJCBA Board of Directors Meeting; Ayers Medical Plaza, 720 SW 2d Avenue, North Tower, Third Floor – 5:30 p.m.
- 10 North Florida Area Real Estate Attorneys meeting, 5:30 p.m., TBA
- 11 EJCBA Luncheon, Speaker TBA, Jolie, 11:45 a.m.
- 16 CGAWL lunch/business meeting, Fat Tuscan, 11:45 a.m.
- 22 Family Law Section Meeting, 4:00 p.m., Chief Judge's Conference Room, Alachua County Family & Civil Justice Center
- 31 EJCBA Annual Meeting & Reception at The Thomas Center, 6-9 p.m.

Have an event coming up? Does your section or association hold monthly meetings? If so, please fax or email your meeting schedule let us know the particulars, so we can include it in the monthly calendar. Please let us know (quickly) the name of your group, the date and day (i.e. last Wednesday of the month), time and location of the meeting. Email to Dawn Vallejos-Nichols at [dvallejos-nichols@avera.com](mailto:dvallejos-nichols@avera.com).