FORUM 8

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# President's Letter

## Invitation To Comment…

*By Mac McCarty*

As we enter 2012, the Board of Directors of the EJCBA will be considering a number of options concerning the future path of our circuit's bar association. I want to invite you—our members—to comment on a number of discussion points that will be presented to the Board of Directors in the course of the next few months. Your feedback will be critical in helping the Board avoid both shortsightedness and tunnel vision: shortsightedness in not perceiving some of the long range impacts of possible changes; tunnel vision in choosing courses of action based upon an insufficient number of considered options. You can help avoid these problems by sending in ideas and comments. To facilitate your anticipated responses, a special email address has been created just for your thoughts and suggestions: EighthBar@gmail.com.

For a number of years, our association has maintained a certain *status quo*. During that time, the overall population of our circuit has increased along with a concomitant increase in the number of lawyers in our circuit. Based upon research of other voluntary associations from around the United States, our circuit is large enough to support more services and initiatives generated by the EJCBA. On the other hand, not all associations from similarly sized judicial and population areas do more than we do. In fact, some do less. Maintaining the *status quo* may be just what our members want from our association, but one of the goals for the association during my term as President is to take a good hard look at the *status quo*, ask hard questions about the direction of the association, and construct a master strategic plan for the future. The strategic plan may end up only documenting the *status quo*—and there's not necessarily anything wrong with that result as long as other options are reviewed as well.

So I ask you to take a few minutes to review the discussion points below and, if you have an opinion to share, fire off an email to the special address above. Don't be shy!! If you think some of the ideas below are just plain stupid—tell us. If you believe there are options we are missing—fill us in. If you like the *status quo*—confirm that in an email. This is not a poll—just an invitation to comment. The Board will hold a mid-year retreat on February 1, 2012, to consider the strategic plan. I hope you will participate by sharing your thoughts before then.

- Given the geographic breadth of the Eighth Circuit, should the association as it now exists be abandoned in favor of single or dual county associations where there may be more community of interest and geographic proximity?
- As an alternative, should each county have a sub-association (some may already exist) that work in conjunction with an "umbrella" EJCBA?

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## Contribute to Your Newsletter!

### From The Editor

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

## 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:
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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**

# Happy New Year!

*By Marcia Green*

As I write this article, I'm wondering where 2011 went! It was a roller-coaster and tough year. Program-wide, 14 staff members have left Three Rivers Legal Services and many cannot be replaced. Our client population has grown, the number of people, and especially children, living in poverty is rising and resources are becoming scarcer. There seems to be good news on the horizon but that will not cover the resources lost from state and local grants that have been reduced or no longer exist.

I try to make it a rule not to complain, at least not *too* much, even when I really want to. I look at 2011 with some frustration but I am grateful for so many things. Fourteen new Eighth Judicial Circuit attorneys signed up to volunteer with our program and we successfully created CLE seminars and webinars with the help of local attorneys who donated their time and expertise. We initiated a Helpline unit to enable clients to get direct access to telephone advice program-wide and our staff and volunteer attorneys have had numerous successes on behalf of our clients.

This is also the time of year when the temperatures start to fall and the cranes return to the prairie. It is in the late fall/early winter when I get to go through my pro bono files and determine who to nominate for the Florida Bar President's Pro Bono Service Awards. While doing so, I find myself very impressed with the work of our volunteer attorneys.

Three Rivers extends a very grateful *thank you* to the following attorneys of the Eighth Judicial Circuit who have made themselves available to handle cases, have donated their time and who have donated money to support the work of our program. Without you, we could not provide the services that we do!

In 2011, we said our farewells to long-time staff and family law attorney Staci Chisholm who moved to the Tampa area where her husband relocated and we congratulate our domestic violence attorney, Summer Griggs, on the wedding bells that took her to South Florida. Hao "Tee" Ho, one of our AmeriCorps Equal Justice Works attorneys, is now working with Gainesville attorney Stephen Johnson and Lake City staff attorney Losmin Jimenez, a Gainesville resident and member of the Josiah T. Walls Bar Association, has relocated to work with Americans for Immigrant Justice, formerly known as FIAC. These are exciting changes and though we miss them, we are happy for each one.

We are fortunate to welcome two new AmeriCorps Equal Justice Works attorneys, Megan Rosenfeld, who has returned to handle our domestic violence unit, and Charles "Cary" David who is specializing in housing. Former AmeriCorps attorney Nery Alonso has stepped into the family law attorney position. That's two new attorneys to cover the work of three who left the Gainesville office, but remember, I won't complain. Our losses came with the loss of grants and reduced funding from the Legal Services Corporation and the struggling Florida Bar Foundation.

Again, thank you to all of the attorneys who make themselves available and help us stretch our resources to help the ever growing poor population. We look to 2012 with hope!

Amy Abernethy
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Maritza T. Arroyo
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## Three Rivers

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** Deceased*

# The Florida False Claims Act: A Private Action Against Those Who Cheat the State

*By Siegel, Hughes & Ross*

Florida law creates a private civil action for individuals to sue on behalf of the state if a person or business has taken advantage of or fraudulently obtained money from the state (“qui tam plaintiff”). These actions are generally known as *qui tam* actions, are brought under the Florida False Claims Act, and can be quite lucrative for the qui tam Plaintiff. *See* §§ 68.081-68.09, *Fla. Stat*.

The purpose of the Florida False Claims Act is to act as a deterrent to persons who may knowingly cause or who may assist in causing the state of Florida to make payment on false or fraudulent claims. *See*. § 68.081, *Fla. Stat*. In bringing one of these actions, the burden of proof lies on the qui tam plaintiff and all elements must be shown by a preponderance of the evidence. § 68.09, *Fla. Stat*. The Florida False Claims Act allows for both treble damages and civil penalties. § 68.081, *Fla. Stat*.

Civil actions brought under the Florida False claims Act must follow a very specific, statutorily mandated procedure and are governed by the Florida Rules of Civil Procedure. *See* § 68.083, *Fla. Stat*. Although a qui tam plaintiff may initially file the qui tam action against persons who have submitted false or fraudulent claims to the state of Florida, the action must be brought in the name of the state of Florida (sometimes referred to as the “state”). *Id.* The complaint must initially be filed under seal and may only be filed in the Circuit

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Brent Siegel, Charles Hughes & Jack Ross

# Alternative Dispute Resolution

## Answers To Questions About Mediation

*By Chester B. Chance and Charles B. Carter*

We have received several questions from attorneys about mediation situations. Here are some we would like to share with the readers:

**Question 1:** How effective are power point presentations during a mediation?" Attorney Mac Intosh, Ocala.

**Answer:** People who use power point think it is an excellent audio/visual tool, and they are correct. People who don't use power point say it is easier to doodle on a legal pad, and, not those short ones with white paper, but, the long legal size pads with yellow paper, the kind real lawyers used before everything got so freakin' technical with computers and emails and fax machines and electronic discovery and . . . .

**Question 2:** How many mediators does it take to change a light bulb?" Bar Exam Question, 2009.

**Answer:** We can't tell you; everything at mediation is confidential. We *can* tell you it takes a long time and the insurance company may not pay the entire cost.

**Question 3:** Why don't mediators have valet parking?" Fishing Guide C. B. Chance, Steinhatchee.

**Answer:** Would you trust one with your car? Most mediators would be stuck in neutral.

**Question 4:** My client is crazy and will look like an idiot at mediation, not to mention in front of a jury. How do I handle a mediation so the other side will not notice my client should be Baker Acted? Attorney Amby Chaser, Gainesville.

**Answer:** At the start of the mediation, turn off all the lights in the room, go to a power point presentation (see Question 1, supra) and at the end of the power point, send your client to the restroom and tell the client to remain there until the case settles or impasses or someone needs to use the restroom. Tell the other side your client suffers from PTSD and this increases case value. Pray a lot.

**Question 5:** Can I bring a pet to a mediation, and, if so, is my pet subject to the confidentiality provisions? Attorney A. S. Peaseay, Gainesville.

**Answer:** No; and, yes.

**Question 6:** Why hasn't mediation resolved the Middle East crisis? J. C., Plains, GA

**Answer:** Several possible reasons: (1) poor power points; (2) lack of preparation including failure to ascertain third party liens; (3) perhaps the next mediator should provide lunch.

**Question 7:** Can I tell my wife what I ate for lunch at a mediation?

**Answer:** Pursuant to Section 44.403(1), Florida Statutes, a "mediation communication" means oral or written statements or non-verbal conduct intended to make a statement by or to a mediation participant. Therefore, if you had a nice Pinot Noir and filet mignon and did so intending to make a statement you cannot tell your wife because the statement is confidential (unless it was a dissolution mediation and your wife was the opposing party).

**Question 8:** What attire is appropriate for mediation? Attorney R. Blackwell, Micanopy.

**Answer:** Dress for success comes to mind. This also raises the age-old question "boxers or briefs"?

**Question 9:** What aphorism comes up most at mediation?

**Answer: "**Facts do not cease to exist because they are ignored." Aldous Huxley.

**Question 10:** Should I tip the mediator after the mediation, and, if so, how much? E. Scrooge, Esq.

**Answer:** No. Most mediation invoices say "service included," or, in Italy, "servizio incluso." Tipping appears to also involve ethical ramifications, although there may be a 20% charge for parties of eight or more, if bread is included.

Thank you for your questions. We have answered those that were sent with no postage due.

## False Claims Act

*Continued from page 4*

Court of the Second Judicial Circuit, in Leon County. *Id.* The fact that it is a qui tam action must be clearly identified on its face. *Id.* After filing the complaint under seal, prior to serving it on the defendant, a copy of the complaint and all material evidence and information that the qui tam plaintiff has must be served on the Attorney General (as head of the Department of Legal Affairs) and on the Chief Financial Officer (as head of the Department of Financial Services), by registered mail, return receipt requested. *Id*. This is to give the state an opportunity to review and evaluate whether or not it is a case that the state would like to take over and prosecute.

After reviewing the complaint and the evidence, the state decides whether or not to take over the case. If so, the Department of Legal Affairs will intervene and proceed with the action on behalf of the state. *Id*. The state must make the decision whether or not to take over the case within sixty (60) days of receiving a copy of the complaint and evidence. *Id.* If the Department of Legal Affairs does not take the case, it must notify the court that it will not be taking over the action, and then the action will proceed by the qui tam plaintiff. *Id*. However, even when the state chooses not to intervene initially, it may do so later "upon showing of good cause." § 68.084, *Fla. Stat*.

The Florida False Claims Act defines one specific instance in which the Department of Financial Services, not the Department of Legal Affairs, has the option to intervene in the action. *See* § 68.083, *Fla. Stat*. The Department of Financial Services may opt to take over the case if the action is based upon underlying facts of a pending investigation by the Department of Financial Services. *Id*. If the Department of Financial Services elects to intervene, it must provide written notice to the Department of Legal Affairs within twenty (20) days after the action has been filed that the Department of Financial Services has already been conducting an investigation of the facts cited in the action and that it will be taking over the case. *Id*. If the Department of Financial Services has already been investigating the matter cited in the complaint, wishes to intervene, and provides such notice to the Department of Legal Affairs, then it is the Department of Financial Services who will take over the action on the state's behalf.

Once it becomes clear who will be prosecuting the action, the qui tam plaintiff, the Department of Legal Affairs, or the Department of Financial Services (jointly the "Department"), the complaint is unsealed and can then be served upon the defendant. *Id*. Once served with the complaint, the defendant has twenty (20) days to respond. *Id*.

The Florida False Claims Act can be lucrative for the plaintiff. The statute provides for specific awards to the qui tam plaintiffs. If the Department does not intervene and the action is brought solely by the qui tam plaintiff, then the qui tam plaintiff is entitled to an amount that the court deems reasonable, which shall be at least 25% but not more than 30% of the proceeds recovered in a judgment or settlement. § 68.085, *Fla. Stat*.

Even if the state takes over the case from the qui tam plaintiff through the process mentioned above, there is still a financial incentive for a private citizen to bring a qui tam action. In a case in which the state has intervened and prevailed, the qui tam plaintiff is entitled to receive at least 15% but not more than 25% of any settlement or judgment obtained. § 68.085, *Fla. Stat*. However, if the state conducts the case and the court finds that the action is based primarily on information that was not provided by the qui tam plaintiff, then the court may award the qui tam plaintiff a discretionary amount that is not to exceed 10% percent of either the settlement or judgment. *Id*. In using its discretion, the court is to consider how significant a role the qui tam plaintiff played in the action. *Id*

Notably, the Florida False Claims Act provides for the recovery of attorneys' fees and costs. § 68.086, *Fla. Stat*. The statute allows for an award of reasonable attorney's fees and costs to come out of any proceeds recovered in the action. *Id.* It allows the State to recover for its fees and costs if the state intervened and took over the case. *Id.* If the state did in fact take over the case, the qui tam plaintiff still may be able to recover fees and costs if the court ultimately awards the person a portion of the recovery. *Id.*

Caution should be taken in making the initial decision on whether or not to file a qui tam action because if the state does not intervene in the action, and the person that brings the claim does not prevail, the court may award reasonable attorney's fees and costs to the defendant. *Id.*

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## False Claims Act

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In order to do so, the Court must find that the claim was clearly "frivolous, clearly vexatious, or brought primarily for purposes of harassment." *Id.* Under no circumstances can the state be held liable for attorney's fees and costs if the defendant prevails. *Id.* This is true even if the state intervenes and takes over the case. *Id.*

Several exemptions to the Florida False Claims Act exist. Courts do not have jurisdiction: 1) in actions against legislators, judges, and senior executive branch officials; 2) in actions based upon allegations or transactions that are the subject of a civil action or an administrative proceeding in which the agency is already a party; and 3) where the action is based on public disclosures and the person is not an original source. § 68.087, *Fla. Stat*. Furthermore, the Florida False Claims Act prohibits actions:

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Boxes to be stuffed with toys by EJCBA members and their firms for Head Start kids in our circuit

Florida Bar President Scott Hawkins and friends at December's bar luncheon

Attendees of the November 18 EJCBA bar luncheon at Jolie

Florida Bar President Scott Hawkins speaking at the December EJCBA lunch

# New Rule on Appearance at Mediation

**Florida Supreme Court Amends Rule 1.720, Fla.R.Civ.P., Mediation Procedures.**

*By Bob Stripling*

*"An ounce of mediation is worth a pound of arbitration or a ton of litigation!" Joseph Grynbaum*

The Florida Supreme Court recently adopted an amendment to the Mediation Procedure Rules dealing with who must appear at a mediation conference. The new rule is effective January 1, 2012. (See , Opinion No. SC10-2329, November 3, 2011, amending Rule 1.720, Fla. R. Civ. P.). Before the rule changed, subsection (b) required attendance at mediation by a representative of a party having "full authority to settle," but the rule was somewhat ambiguous and lacked teeth. Subsection (b) now requires essentially the same people to be physically present at the mediation conference, but makes it clear that all of these individuals must be present unless otherwise permitted to be absent by court order or through stipulation of counsel in writing. The new subsection (b) now uses the following language to define who must attend:

1. The party or a party representative having full authority to settle without further consultation; and
2. The party's counsel of record, if any; and
3. A representative of the insurance carrier for any insured party who is not such carrier's outside counsel and who has full authority to settle in an amount up to the amount of the plaintiff's last demand or policy limits, whichever is less, without further consultation.

The subsequent sections of the rule are where the real changes are made. New subsection (c) attempts to define what is meant by a representative having "full authority to settle," and requires the attendance of the "final decision maker" with respect to all issues in the case, and one who has the legal capacity to bind the party. In subsection (d) a public entity is required to have the physical presence of a representative with full authority to negotiate and recommend settlement to the appropriate decision-making body of the entity. Obviously, this provision attempts to accommodate governmental bodies whose boards or commissions are required to give final approval.

The new subsection (e) makes a very significant change by requiring each party to file with the court a "Certification of Authority" to be served on opposing parties at least 10 days prior to mediation. The Certification must identify the persons who will be attending the mediation conference as a party representative or insurance carrier representative. It must also confirm that each such person has full authority to settle.

New subsection (f) is the sanctions provision of the rule, and is much the same as the old subsection (b) regarding sanctions. It allows a party to seek sanctions from the court against an opposing party for failure to "appear" at mediation within the meaning of the rule. Upon a showing of lack of good cause, the court shall impose sanctions, including mediation fees, attorney's fees and costs. It is specifically provided that failure to file the "Certificate of Authority" required by subsection (e) creates a rebuttable presumption of non-appearance by that party. The remaining provisions, (g) through (k), although re-lettered to accommodate the sections which were added, remain basically unchanged.

The Committee Notes to the amended rules are informative in that they make it clear that the mediator should not become involved in the enforcement process and is not required to disclose confidential mediation communications. This is a recognition of the role of the mediator as a neutral facilitator in the process. The Committee Notes also recognize that the parties have a "free choice in structuring and organizing their mediation sessions." In other words, the parties may stipulate who shall be required to attend and whether attendance will be in person or electronically.

The very important addition to the new rule requiring a Certificate of Authority to be filed appears to have been taken from the Supreme Court's Administrative Order in Residential Mortgage Foreclosure Mediation (RMFM) cases by requesting certification similar to "Form A" required of the lending institution in these cases. (See, Administrative Order No. AOSC 09-54, Appendix A, Model Administrative Order, paragraphs 13 and 14.) "Form A" requires the bank representative with full settlement authority to be disclosed before a foreclosure mediation.

In conclusion, the new rule change follows a recent 5th District Opinion in the case of *Mash v. Lugo*, et. al., 49 So. 3rd 829 (Fla. 5th DCA 2010). In

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## President's Letter

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- Should the association have one or more full-time staffers?
- If staffed, should the association rent (or buy) space for an office?
    - If the association is going to be staffed with a location, revenue would need to be increased. Currently, an overwhelming percentage of the association's gross revenue comes from member dues. What do you think of these additional revenue sources, which are being used by other associations, such as:
    - Taking over from the Florida Bar the lawyer referral service for this area?
    - If it remains in existence, bidding on the foreclosure mediation contract?
    - Given the percentage of our revenue from members, should the association allow additional membership categories, such as paralegals, legal assistants, court reporters, and other legal vendors?
    - Increasing the advertising (including type, content, and quantity) in the newsletter?
    - Allowing advertising on the website?
    - Increasing the type and nature of CLE offerings?
    - Soliciting additional sponsorships?
    - Soliciting vendors to become association "partners"?
- Should the association create a separate 501(c)(3) foundation for charitable purposes?
- If a foundation is created, what goals should be pursued:
    - Building a scholarship fund?
    - Purchase a building that can be used for public charitable as well as association functions?
    - Create an endowment over time to fund various legal-related causes (similar to the association's support of the Guardian Ad Litem Program's foundation with proceeds from the golf tournament)?
- Should monthly luncheons be modified or abandoned in favor of some other model, such as:
    - Bimonthly or quarterly luncheons?
    - No luncheons at all, but more frequent social events?
    - Reduced luncheons but semi-annual dinners?
    - To reduce cost, have some luncheons be "sandwich specials" with more social and fewer speakers?
- Currently, the lead time for newsletter articles is roughly three to four weeks in order to allow time for editing and layout. Should the newsletter be changed from this model to an all electronic version driven from the website and Facebook, which could still create a monthly version to be emailed to members, but would allow for reduced lead time in order to increase currency of each issue?
- Should the website allow and create multiple practice area blogs for sharing ideas and comments by our members?
- Should the website create a "job board" for both positions available and those interested in changing jobs?
- Are there other ideas we're missing?

Please let us hear from you.

## 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 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.

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.

# Everything I Know About Playing Tennis I Learned from Practicing Law

*By Cynthia Swanson*

Now that my daughter is an adult, I have a little more free time. So, I started playing tennis a few years ago. I played when I was a kid, but that was long before Title IX and there were no school-connected sports activities for girls. Plus I had three brothers who got all my parents' sports related attention. So, I just went out to hit with them or my dad sometimes and got to take some private lessons one summer when I was in high school. Also, in college, we had to take some P.E. classes, and I chose tennis when I could. I played a lot when I was at FSU, but really just instead of going to classes, not like on a team or anything. In fact, they had no varsity tennis team for girls then, just a tennis club. So, I had very little tennis background when I started playing here at Westside Park. I thought it would be fun and some good exercise.

Well, let me tell you, it's not all fun and games. People around here take their tennis very seriously. My college and law school studies of history and political science, and my practice of law have stood me in good stead for my tennis experiences.

First of all, tennis is not a democracy. The teams have captains who have absolute authority over rosters and lineups. But the captains answer to the Local League Coordinators, who really have authority and can actually move players off of one team and put them on another team (with the consent of the affected players and captains). Then, there are the owners or directors of the various tennis facilities who make time available (or don't) for their various teams to have practice time and for matches.

If you want something from a captain, a facility director, or a league coordinator, you need all your powers of persuasion and the ability to negotiate. When one team doesn't have enough players to cover all the courts at the appointed hour, negotiations for a continuance are epic, often resulting in 59 emails back and forth trying to find an acceptable new date, with a final stress-releasing tantrum with both captains saying, "Oh, let's just exchange lineups and let the players figure out when they're going to play, and leave us out of the middle of this!" I know some tennis players who have changed their email addresses in order to avoid the onslaught of "I can play on Saturday afternoon, but not on Sunday" emails.

In doubles play, the servers' job is to get the ball in play - sort of like filing a complaint or a petition. It starts the action. If it is a good, hard serve, it's like a well written petition that carefully sets out a cause of action. On the other side of the net, the returning player's job is to keep the ball in play - like filing an answer to the petition. If you have a strong return that can put the serving team on defense, it's like having some great affirmative defenses. You're saying to the server (petitioner) "OK, go ahead, do your best. We have an excellent defense." If your return of serve is really strong, it can actually move the returning team from playing defense to playing offense. That's like filing a counterpetition.

Now, let me talk about "day league." This is just for ladies, who are mostly presumed not to work and thus have their days free to play tennis. You know, kind of like a "country club league." I have tried to play day league, but court (you know, the real kind of court) keeps getting in the way. It's really hard to say, "No, I can't schedule a hearing on that day, it's my tennis match day." But I do play when I can.

Day league is akin to what I imagine government not in the sunshine is like. You know, secret meetings of faceless people behind closed doors, making decisions that affect all the players. It's also like the manual is secret, so nobody really knows what the rules are. Protests are lodged by anonymous players about other players; nobody really knows who rules on the protests, or what rules are applied to the protest. Then, all of a sudden, the protest will be resolved in some fashion, and you never really know exactly how or why. There are supposedly some By-Laws, but I've never seen them.

What about bad line calls? In both day league and USTA (United States Tennis Association) league play, players are charged with the duty of calling balls in or out on their side of the court There are no umpires. Everybody does the best they can. But, some people are notorious for making bad calls. You really wonder if they have bad eyesight (but then how do they manage to hit that flying yellow ball), or if they really are cheaters. When a player has had enough of bad line calls, the player can

*Continued on page 11*

call the team captain and request some line judges. This is nearly akin to a Congressional impeachment process - quite a scandal!

So, what happens is that one person is designated by the captain of each team to go stand by the tennis court and watch the balls and the line calls. The players still make their own calls, and only if the line judges disagree with the call do they say anything. Sort of like having a Republican and a Democrat watching the polls to be sure the voting process is fair.

And talk about backroom politics – the telephone calls just don't stop. And I don't just mean run of the mill gossip, like, "Can you believe that tennis outfit she was wearing?" I mean calls trying to get players to jump teams; pre-emptive calls trying to get players to switch teams, before it's even time to register for teams; spreading rumors that So-and-So is going to be playing for this team or that team, before So-and-So has even decided to play at all. Plus, trying to figure out the lineup the opposing team will put in for the upcoming match - will they sandbag? Should we sandbag? What if they sandbag and we sandbag, then it'll be like we played it straight up, only on different numbered courts.

And there is always talk about whether a player is appropriately rated. Players are rated by the mythical USTA computer from 2.5 to 7.0. I think maybe Rafael Nadal is a 7.0. Most club players fall in the 3.0, 3.5, and 4.0 divisions. And, boy, there is nothing better than bringing in a 4.0 who just got down-rated to play on a 3.5 team and everybody has a cow because you've got a ringer in the lineup.

Protecting your rating is more important than protecting your credit identity to most tennis players. They would rather shout out their social security numbers to the world than have their rating drop. The USTA computer somehow takes into account who you played and who your partners were if you played doubles - and how good they all are – as well as your actual match scores, in determining your rating. Players hate to be paired with players they perceive as "less worthy" than themselves, for fear of losing a match and thus ratings points. On the other hand, they jockey like crazy to be paired with a better player to get a certain win in order to gain ratings points. The moaning and groaning about lineups is worse than the protests of the Tea Partiers against a tax raise.

Captains vie to get the best players on their teams, because if the team wins – no, they don't go play at Wimbledon; no, there is no monetary prize; no, there is no trophy. That's right, there is NOTHING. But, good gosh, you would think that millions of dollars are at stake. At most, you get to go to Daytona Beach to play against other local winners in a two or three day tournament, where, if you win, you get – NOTHING. Well, the USTA does give out promotional stuff like caps, visors, mugs, and so on. But, hey - the trip to Daytona Beach cost you way more than the value of that cap you got. And you had to take a day off from work, to boot.

Tennis playing also requires a lot of good strategizing, discerning other players' weaknesses, disguising your own weaknesses. Isn't that EXACTLY what a trial is all about?

I know several other lawyers who have played or currently play in our local USTA leagues. Kathleen Fox captains multiple teams at DB Racquet Club and probably uses a more complex data base and communications system for managing those teams than she does for her law office. Ray Brady is another serial-captain. I'm not sure his professionalism is tested quite as much captaining men's teams - I think men are just easier to captain. Am I right, Ray? I've seen Maura McGuigan out at Westside Park taking clinics; I know Edith Richman has been playing on a league at Westside Park. Robin Davis plays at the relatively new Jonesville Tennis Center. Alison Gerenscer is an active player at The 300 Club. Zelda Hawk is a very dangerous tennis player - sheesh, you do not want to be on the other side of the tennis court from her! Mike Weiss is out taking lessons at Westside quite a bit. I saw Carl Schwait there once or twice - are you playing much, Carl? Ann Winney plays at Gainesville Country Club and Westside Park. Lynn Schakow plays out of DB. Well, you get the picture.

Yes, the local tennis scene is full of backroom politics, negotiations, jockeying for position, and bad line calls. But it's also really a ton of fun, good exercise, and the creator of a lot of great friendships. When was the last time you could say that about a contested hearing?

The Family Law Section meets the third Tuesday of every month except December and during the summer. The meetings are at 4:00 pm in the Chief Judge's Conference Room in the Alachua County Family and Civil Justice Center. If you would like to be added to or deleted from a loosely kept mailing list to remind you about the meetings, please email me at cynthia.swanson@swansonlawcenter.com.

# Criminal Law

*By William Cervone*

Last month I wrote about the subject of eyewitness identifications and the shifting judicial landscape surrounding them. Hardly Christmas time reading, I know, but this is an important and developing issue in the criminal courts. This month I want to follow up on the general information I shared about what New Jersey has done through its Supreme Court.

Some of you may have pulled and read *New Jersey v Henderson*, the case that underlies this article. For those of you who have not, I'll try to summarize it. Whether Florida goes down this same path or not is unknown, but the debate is one that will surely happen.

In any event, the New Jersey Supreme Court articulated two principal changes that it felt were needed. First, they called for a revised framework that would allow all "relevant system and estimator variables" to be weighed pre-trial. Second, they want better jury instructions for evaluating eyewitness identification evidence. The court recognized that any process must guarantee a fair trial to defendants as well as protect the State's interest in presenting critical evidence.

To accomplish this, the court has required that a defendant carry the initial burden of showing some evidence of suggestiveness that could lead to a mistaken identification, generally tied to a system variable. If that happens, the State must then offer proof to show that the identification is reliable, accounting for both system and estimator variables. The ultimate burden remains on the defendant to prove a very substantial likelihood of "irreparable misidentification." If the defendant does so, suppression lies. If not, the evidence is admitted but with an appropriate and tailored jury instruction.

The court provided a non-exclusive list of nine "system variables." These are factors within the control of the criminal justice system and are whether the identification was through blind administration, what pre-identification instructions were given, how the photo array or lineup at issue was constructed, whether the witness received any feedback before, during or after the process, whether any statement of confidence from the witness was recorded prior to any confirmatory feedback, whether there were multiple viewings, whether a show-up was delayed for more than two hours, whether the witness had interacted with anyone else, and whether the witness initially made no choice or chose a different suspect or filler photo.

Estimator variables are factors related to the witness, the perpetrator, or the event over which the legal system has no control. Not surprisingly, at least to me, an even longer list of 13 such factors was set out: the level of stress in the event, whether a visible weapon was used in a short duration event, how much time did the witness have to observe the event, distance and lighting, whether the witness was affected by alcohol, drugs, age or similar factors, whether the perpetrator was disguised or had changed facial features, how much time elapsed between the event and the identification, whether a cross-race identification was involved, the opportunity to view the criminal at the time, the degree of attention paid by the witness, the accuracy of descriptions given by the witness, the level of certainty demonstrated, and the time between the crime and the confrontation, by which I assume the court means however an identification is made. To me, there is duplication in this list, but so be it. There is also nothing here that is not the stuff of basic cross-examination of a witness involved in an identification, but so be that as well.

So there you have it: the groundwork upon which New Jersey will conduct mini-trials before deciding on the admissibility of eyewitness identifications. Should an identification be admitted into evidence, there will, of course, be a re-trial of the same issues before a jury. Just like with our no longer new self-defense law, the defendant gets two bites of the same apple. And to follow up on all of this, the court has directed the development of new jury instructions to guide jurors about these various factors, those to be given during trial if warranted and in the final charge, of course. As an aside, the court noted that expert testimony might also be introduced, but for some reason believes that improved jury instructions will result in less need for that. Personally, I dread the expansion of yet another cottage industry full of experts and the time and expense that could result.

This is obviously a lot to absorb. To me, while I can't really quibble with much of it I do think we risk much in trying to insure scientific certainty in a process that simply cannot deliver that. I rather think that we already vet identifications pretty exhaustively in Florida through the combined work of police, prosecutors, defense attorneys, courts, and juries. How much any of this might add and at what price (not meaning just dollars) remains to be seen, as does where Florida chooses to go.

# The Florida Supreme Court is Asked to Clarify the Test for Harmless Error Analysis in Civil Cases

*By Audrie M. Harris, Esq.*

While affirming the trial court's judgment in favor of the defendants/appellees and finding that the trial court's decision to limit the cross-examination of one of the defendants' expert witnesses was harmless, the Fourth District Court of Appeal, *en banc*, reconsidered other decisions of the court describing the harmless error test in civil cases and certified a question of great public importance to the Florida Supreme Court.[1] The Fourth District Court of Appeal held that its history of using an outcome determinative, "but-for" test for harmless error was contrary to the Florida Supreme Court's interpretation of the harmless error statute. Accordingly, the court receded from its history and adopted the following standard for harmless error in civil cases: ***To avoid a new trial, the beneficiary of the error in the trial court must show on appeal that it is more likely than not that the error did not influence the trier of fact and thereby contribute to the verdict.***[2]

The harmless error rule can be found at Section 59.041, *Florida Statutes*, and provides that no judgment, civil or criminal, shall be set aside or reversed, or a new trial granted, unless, after a review of the entire record, the alleged error has resulted in a miscarriage of justice. The last sentence of the statute provides that "[t]his section shall be liberally construed." While the purpose of the harmless error statute is to enhance finality by limiting the granting of new trials, the statute allows for discretion and flexibility in its interpretation.[3]

After passage of the harmless error statute, the Florida Supreme Court used two tests to define a "miscarriage of justice": (1) a "but-for", "correct result" test that is centered on the outcome and (2) the more forgiving "effect on the fact-finder" test that is centered on the process.[4] The first test narrowed the class of cases that could be reversed by asking "would the result have been the same without the error?" or "but for the error, would the result have been different?"[5] The second test broadened the class of cases that could be reversed and asked "whether the error influenced the trier of fact and contributed to the judgment, not just whether it changed the result."[6] The purpose of utilizing the first test was to conserve judicial resources and was commonly applied to prevent reversal whenever errors would have not altered the outcome.[7] However, in other cases, wherein the second test was utilized, which focused less on the correctness of the outcome and more on whether the decision-making process was compromised, the court would examine the error in light of the entire record and whether the error had an adverse effect upon the jury's verdict.[8]

In 1986, the Florida Supreme Court, in *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986), firmly established the second test, the "effect on the fact-finder", as the harmless error test for criminal cases.[9] The Florida Supreme Court announced that even if, in the reviewing judge's opinion, the verdict would have been the same without the error, if it is reasonably possible that the error contributed to the verdict, then the verdict must be set aside. The error and its probable effects must be evaluated in light of all the evidence.[10] The purpose is not to retry the case without the error but to reconstruct the original trial to determine what role, if any, the error played in the judgment.[11] Because the focus is on the effect of the error on the trier-of-fact, the existence of abundant evidence in support of a verdict will not prevent reversal when the appellate court, after reviewing the entire record, is unable to say that there is "no reasonable probability that the error affected the verdict."[12] Due to the elevated burden of proof in criminal cases, the burden to show that the error was harmless is with the state.[13]

While the Florida Supreme Court has not explicitly adopted a harmless error standard in civil cases after *DiGuilio*, a couple cases utilized an "effect on the fact finder" test similar to the one applied in *DiGuilio*. In those cases, the court expressly placed the burden on the beneficiary of the error to demonstrate on appeal that the error was harmless and utilized an effect on the verdict analysis to determine whether the harmless error occurred.[14] Harmless error occurs in a civil case when it is more likely than not that the error did not contribute to the judgment.[15]

Absent specific guidance from the Florida Supreme Court, the district courts of appeal have drifted into different directions in applying the Section 59.04 harmless error test to civil cases.[16] Primarily variations of the outcome-oriented, "but for" analysis, these divergent tests can be classified into three (3) categories.[17] The most stringent test, primarily from the Fourth District Court of Appeal, asks whether the result would have been different but for the error.[18] Almost every error is characterized as harmless, encouraging evidentiary gambles on questionable evidence in the trial court

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# Something Good for the New Year from a Florida Bar Foundation Board Member

*By Phil Kabler*

Happy New Year! (*Almost*….) Month after month after month {*and so on*} I write articles about the programs and activities engaged in by The Florida Bar Foundation and its grantees. Hopefully those pieces have motivated you and your colleagues to participate in the Foundation and in local pro bono programs (through the "One" campaign or otherwise).

Today I ask you to take a step to recognize those lawyers and non-lawyers throughout our State who have demonstrated an exceptional commitment to public service within the legal realm. You can do so by nominating one or more for the Foundation's annual Medal of Honor Awards. The following is the "official" description of the Awards and nomination process:

- The Florida Bar Foundation is seeking nominees for its Medal of Honor Awards, the most prestigious recognition given by the organization. Nominations for the awards must be received by Wednesday, February 1, 2012. Foundation president Michele Kane Cummings is chairing the awards committee.
- Recipients of the Medal of Honor award will fall into one of two categories, either a member of The Florida Bar (including practicing lawyers, judges or teachers in the legal field), or a non-lawyer (including lawyers who are not currently practicing). All nominees must be Florida residents.
- Nominees for the first category must have a demonstrated dedication to the objectives of The Florida Bar, which strives to inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence.
- The 2011 Medal of Honor for the lawyer category was presented to Orlando attorney Bruce B. Blackwell for his professional leadership, his tireless work to secure funding for legal aid, and his extensive history of handling the most difficult pro bono cases. Past recipients of the award also include Joseph P. Milton of Jacksonville, Sylvia H. Walbolt of Tampa, and Terrence Russell of Ft. Lauderdale.
- Nominees in the non-lawyer category must have made an outstanding contribution to the improvement of the administration of justice in Florida through research, writing, or other deeds of significant character and quality.
- The 2011 Medal of Honor for the non-lawyer category was presented to Kathleen "Katie" Self for her pioneering work in the implementation of Teen Courts across Florida, the volunteering of her services in establishing the Teen Court of Sarasota, the State's first, and for her leadership in expanding the program to 50 Florida counties. Past recipients of the award include Elizabeth Lander "Budd" Bell, Dr. Walter F. Lambert, and Janet R. McAliley.
- Nominations for The Florida Bar Foundation's highest honor should describe the specific achievements that would qualify an individual for the Medal of Honor, and also should include a brief biographical sketch of the nominee. Nomination forms are available from the Foundation, or can be downloaded from the Foundation's website, www.floridabarfoundation.org, under: About Us > Awards and Recognition. Nominations should be sent to: The Florida Bar Foundation, Medal of Honor Awards Program, P.O. Box 1553, Orlando, FL 32802-1553. Nominations also may be faxed to (407) 839-0287, or e-mailed to cwherry@flabarfndn.org.
- Recipients will be notified by March 31, 2012, and the Medal of Honor awards will be presented at the annual dinner of the Foundation during The Florida Bar annual meeting on June 21, 2012, at the Gaylord Palms Resort.

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.

## Harmless Error

*Continued from page 13*

and placing a premium on winning at all costs because only the most egregious evidentiary errors will result in reversal.[19] Another group of cases, primarily from the first and third districts, lowers the bar and asks whether the result *may* have been different had the error not occurred.[20] The last group, primarily from the second district, asks whether it is reasonably probable that the appellant would have obtained a more favorable verdict without the error.[21]

In receding from its past line of cases, the Fourth District Court of Appeal found that because Section 59.041, *Florida Statute,* applies to both criminal and civil cases, the same "effect on the fact finder" analysis set forth in *DiGuilio* should be used in civil cases with an adjustment for a lower burden of proof. [22] The court reasoned that the lower burden in civil cases is consistent with the liberal construction of the statue mandated by the legislature and, further, it effectuates the statutory goal of enhancing finality in a way that recognizes that different stakes are involved in criminal and civil cases.[23] In general, society tolerates more mistakes in civil cases than in criminal cases, supporting the decision that, in civil cases, the appellee demonstrate that, more likely than not, the error had no such harmful effect.[24] Accordingly, the Fourth District Court of Appeal receded from its history of applying a strict, outcome determinative "but-for" test for harmless error and certified the following question to the Florida Supreme Court as being of great public importance: "In a civil appeal, shall error be held harmless where it is more likely than not that the error did not contribute to the judgment?"[25]

The Fourth District Court of Appeal's decision marks a turn in the court's precedent and opens the door for the Florida Supreme Court to clarify the harmless error analysis for civil cases and establish uniformity for this analysis among the various district courts of appeal. For now, it is important to recognize how the harmless error rule is analyzed by the various courts and the different burden of proof standard for criminal and civil cases. Stay tuned!

1 *Frank Special v. Ivo Baux, M.D., et al,* 2011 WL 5554531 (Fla. 4th DCA 11/16/11).
2 *Id.*
3 *Id.* at 5.
4 *Id.*
5 *Id.*
6 *Id.*
7 *Id.*
8 *Id.* at 6-7.
9 *Id.*
10 *DiGuilio,* 491 So. 2d at 1135.
11 *Id.*; *Special*, 2011 WL 5554531, at page 8.
12 *DiGuilio,* 491 So. 2d at 1139; *Special*, 2011 WL 5554531, at page 8.
13 *Special,* 2011 WL 5554531, at pages 8 & 12.
14 *Id.* 9-11, citing, *Gormley v. GTE Products Corp.*, 587 So. 2d 455 (Fla. 1991); *Sheffield v. Superior Insurance Co.*, 800 So. 2d 197 (Fla. 2000); *Linn v. Fossum*, 946 So. 2d 1032 (Fla. 2006).
15 *Id.* at 13.
16 *Id.* at 10.
17 *Id.* at 10-11.
18 *Id.*, fn 19.
19 *Id.* at 11.
20 *Id.*, fn 20.
21 *Id.*, fn 21. This test differs from the *DiGuilio* test in two ways: (a) requires a "reasonable probability" rather than a mere "reasonable possibility" and (b) it focuses on the possibility of a different outcome on retrial rather than the probability that the error contributed to the outcome in the actual trial.
22 *Id.* at 13.
23 *Id.*
24 *Id.*
25 *Id.* at 14.

## Mediation Appearance

*Continued from page 8*

*Mash*, the court granted sanctions for failure of a party having full settlement authority to attend an appellate mediation. The sanctioned party was required to pay mediator's fees, attorney's fees and costs under Rule 9.720(a), Fla. R. App. P., which is the appellate counterpart of Rule 1.720.

## False Claims Act

*Continued from page 7*

1) by attorneys for the state of Florida; 2) by current or former state employees who obtained the information through their employment; 3) by persons who obtained information from employees or former employees of the state who were not acting within the scope of their employment; and 4) brought against any county or municipality. *Id.*

Through the Florida False Claims Act, the legislature has offered private individuals an important remedy against those who misappropriate state funds. Now, recipients of state funds, such as state contractors and Medicaid providers, face liability not only to the state, but to private individuals.

FORUM 8

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

# 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., 4th 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

# February 2012 Calendar

1 EJCBA Board of Directors Meeting; Ayers Medical Plaza, 720 SW 2d Avenue, North Tower, Third Floor – Mid-Year Retreat 3-7 p.m.
2 CGAWL meeting, Manuel's Vintage Room, 5:45 p.m.
5 Deadline for submission of articles for March Forum 8
8 Probate Section Meeting, 4:30 p.m., 4th Floor, Family & Civil Courthouse
9 North Florida Area Real Estate Attorneys meeting, 5:30 p.m., TBA
10 EJCBA Luncheon, Lora Levett, Ph.D. Psychology of Jury Selection, Jolie, 11:45 a.m.
15 CGAWL lunch/business meeting, Fat Tuscan, 11:45 a.m.
20 President's Day, Federal Courthouse closed
28 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.