FORUM 8

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President's Letter

By Mac McCarty

By the time you read this column, my term of office as the President of your Association will be at an end. As I indicated when I started in May, 2011, it was humbling when I reviewed the list of Past Presidents. I am proud to now count myself as a part of that list. I thank you for the opportunity to serve during the last year and hope that I may continue to be some small part of the ongoing success of this Association.

How did things go over the last year? You are the ultimate judge of that, but self-analysis (second-guessing) may have some value. I'll briefly look at three categories: what went well, what went less well, and what the Association can do to be better in the future. My comments about what we could do better are in no way meant as criticism of the wonderful efforts of this year's Board of Directors, who all put forth great effort to make our programs positive and successful.

What went well?

Outreach/Community Service: Significant steps were taken to enhance our public outreach programs and to give back to the public. The Law in the Library Program has completed four programs and will start back up with monthly presentations in August. In my opinion, there's no better way to create a positive and helpful image of our profession than to volunteer time for the public to enhance their understanding about a particular area of the law. A second speaking program, this one at Oak Hammock, will begin in early 2013 and focus on topics of interest for residents of the retirement community. The programs related to Law Day, including multiple presentations to local schools, articles written for local publications, radio spots, and a panel discussion at Eastside High School focusing on the Law Day theme—No Courts, No Justice, No Freedom—each gave back to our community and presented the legal profession in a positive light.

Diversity Programs: For the second consecutive year, the Association received a diversity grant from The Florida Bar. This year, the grant was used in part for sponsoring the April EJCBA luncheon, which hosted Mr. Eugene Pettis, President Elect Designate of The Florida Bar, who will become the first African-American President of The Florida Bar. Additionally, the grant will be used to prepare and advertise a CLE seminar later this year focusing on diversity issues.

Golf Tournament: This was the fourth year of the resurrected EJCBA Golf Tournament. From a participation and financial standpoint, it was the most successful. Over the four years, the EJCBA's contribution to charity has grown from $3,000, to $5,000, to $5,500, and finally to this year's total of $7,000 for The Guardian Foundation, Inc., benefitting the Guardian ad

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Circuit Notes

Ryan T. Hulslander was recently named Associate General Counsel for Cochlear Americas, the world leader in advanced hearing solutions, and will be moving to their U.S. headquarters in Centennial, Colorado.

Jack Bovay, Managing Shareholder of Dean, Mead & Bovay, received the Professional Advisor Legacy Award from the Gainesville Community Foundation in partnership with the North Central Florida Estate Planning Council. The award recognizes service, expertise, and outstanding work by a Professional Advisor in helping his or her client complete a satisfying and transformative charitable gift.

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

Common Exemptions For Salaried Employees

2nd in a 3-Part Series on the Fair Labor Standards Act

By Paul Donnelly

Certain employees, under the federal Fair Labor Standards Act (FLSA), are exempt from minimum wage and/or overtime requirements. The most common exemptions apply to executive, administrative, professional and outside sales employees who meet certain salary, duties and responsibilities requirements. These are commonly referred to as the "white collar" exemptions.

With the exception of certain employees, including outside sales employees, most employees must be paid a minimum salary of $455 per week to be exempt. Salaried employees must generally be paid their full salary regardless of the hours they work. And, these employees' salaries must not be subject to reduction based on the quantity or quality of work.

Although it is a common misconception that employees are exempt from overtime if they are paid a salary, placing an employee on a fixed salary is not enough. In addition to the salary test, employees must meet the duties test to qualify for one of the common white collar exemptions.

The executive exemption applies to management level employees with the primary duty of managing the enterprise, its department or subdivision. These employees customarily and regularly direct the work of two or more other employees. And, they must either have the actual authority to hire or fire, or their recommendations as to hiring, firing or other types of significant employment actions must be given "particular weight."

The administrative exemption applies to employees whose primary duty consists of performing office or non-manual work directly related to management policies or general operations of the business or the business's customers. Administrative employees must exercise discretion and independent judgment with respect to matters of significance. Insurance claims adjusters, financial analysts, administrative assistants to business owners and human resources managers will generally qualify for this exemption under the duties test.

The most common type of professional exemption applies to employees who primarily perform work requiring advanced knowledge of science or learning – referred to as "learned professionals." These employees are registered or certified medical technologists, registered nurses, dental hygienists, physician assistants, and certified public accountants to name a few – in addition to lawyers, doctors or teachers who do not need to meet the salary test. There is also an exemption for creative professionals and computer professionals.

For the outside sales exemption, employees must have the primary duty of making sales or obtaining orders or contracts for services or for the use of facilities. These employees customarily and regularly perform their duties away from the employer's places of business.

Finally, there is a special category of exemption for highly compensated employees – those whose annual compensation is at least $100,000. These employees are deemed exempt provided they customarily and regularly perform any one or more of the exempt duties and perform office or non-manual work.

In the next issue, I will discuss a hot topic: employees whose pay includes tips.

Alternative Dispute Resolution

Data, Statistics and ADR

By Chester B. Chance and Charles B. Carter

Statistics are an important part of ADR analysis. According to the State of Florida, approximately 85% of all mediated cases are resolved at mediation. Now, on to more interesting statistics.

Data relating to the law:

- Most hours billed by a lawyer in a single day: 1000 hours. (The attorney, since disciplined, performed one task and had his secretary bill it at .2 hour to each of 5000 cases in an asbestos litigation. (Hey, would you rather have the defense attorney take 7 hours for a 1-hour deposition?)
- Most hours billed by a lawyer in a single year: 5,471 hours. James Spiotto, a Chicago lawyer, billed 15 hours a day every day and pulled 52 all-nighters according to the Washington Post, 3/22/98.
- Percentage of lawyers who believe their colleagues pad hours: 92% (The Ethics of Hourly Billing by Attorneys, Rutgers Law Review)
- Ratio of Lawyers to population:
  - U.S.: 1 for every 274 people
  - Japan: 1 for every 6737 people
  - Washington D.C.: 1 for every 14 people
  - Arkansas (1 for every 539 people) (after Bill Clinton lost his license)
  - Cases in which judges decided guilt or innocence by flipping a coin: 2 (In re: Daniels, 340 So. 2d 300 (La. 1976))
- Number of times a plaintiff attorney argues evidence, which is harmful to their case, is 'prejudicial': every time.
- State with the most billboards: Florida (Miami Herald, 7/8/04)
- State with the most lawyer billboards: (No data, but, take a wild guess)
- Chance that at any given moment your lawyer is correct: 1 out of 2.
- Chance that you will be billed for bad advice by your lawyer: 100% (Hence the old joke: "Did your lawyer give you some bad advice?" "No, she billed me for it."

Apologies are often an important part of mediation. More data:

- Number of times the average woman offers some type of apology each day: 5.2
- Number of times the average man offers some type of apology each day: 3.6 (although studies show men are more likely to apologize to a woman than to another man)
- Odds that a medical malpractice plaintiff would not have sued if their doctor had apologized: 1 in 3
- Odds that an apology may not work at mediation: 100% if it is the following: "Yes, I was wrong, but I didn't kill anybody." (Latrell Sprewell, after choking his coach in 1999)

Speaking of medicine:

- Treatment for asthma, according to an 1899 medical reference book: cigarettes
- Treatment for acne according to an 1899 medical reference book: arsenic (The book: the Merck Manual, which also prescribed arsenic for baldness, sucking an orange to treat alcoholism, coffee for insomnia, asparagus for rabies, and turpentine for impotence) (Sometimes even an apology doesn't help).

Speaking of attention deficit disorder:

- Odds that a person at a meeting doesn't know why they're there: 1 in 3
- Odds that a person at a mediation doesn't know why they're there: Is a mediation a meeting?

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Data, Statistics and ADR *Continued from page 4*

Things we fear:

- Annual risk of being murdered: 1 in 15,440
- Risk of being killed in a car accident: 1 in 3,014
- Amount by which the likelihood of getting into a car accident at 35 mph exceeds car accidents at 65 mph: 500%
- Risk of being killed by a shark: 1 in 264 million
- Americans killed by flying cows: 3 (on three separate occasions and all died when a cow hit by another car was propelled through a windshield)
- Risk of being killed by a shark at a mediation: 1 in 2 (see ratio of lawyers above)
- Risk of being killed by a flying cow at mediation: 1 in 6 (we are making this up, but, it will encourage you to be alert at joint conferences)
- Pets having constitutional rights: Zero; see prior articles on Corky the Orca v. SeaWorld

Things we can relate to as lawyers:

- World insect population: 1 billion billion
- Number of Lawyers in the U.S.: 1,084,000
- Most recent instance of a rat coming out of a home toilet: Boston, Mass., Oct 15, 2004
- Odds of finding a [sic] accident attorney business card if a rat comes out of a home toilet: 1 in 4
- Number of times per day a rat will have sex: 20
- Number of times per day an attorney will have sex: ibid
- Number of times per day an attorney will bill for having sex: 6752 while still working on an asbestos litigation.

All of the above data, other than what we made up, comes from Vital Statistics by Paul Grobman. Some of the above data is only remotely related to ADR, but, this is the last article for the year and we were out of ideas. O.K., maybe we had a beer or two and then wrote the article. Have a good summer. As always, special thanks to Dawn Vallejos-Nichols for all her hard work putting the newsletter together. Much, much appreciated!

EJCBA President Mac McCarty, EJCBA President-Elect Dawn Vallejos-Nichols and Florida Bar President-Elect Designate Eugene Pettis at the April luncheon

Some Last Thoughts Before "The Summer Break" from a Florida Bar Foundation Board Member

By Philip N. Kabler

The Florida Bar Foundation receives the funding for its grants from several sources – interest from IOTA accounts, Fellows pledges, NOW Campaign contributions, Legacy for Justice gifts, *cy pres* awards. And one more substantial source – funds from the Florida Access to Civil Legal Assistance Act.

"FACLA" funds are used to help low-income Floridians with civil legal needs, such as protection from domestic violence, elder and child abuse, and entitlement to federal benefits, including veterans' benefits.

Past FACLA appropriations have ranged from $1 million to $5 million per year. This year, the Florida Legislature negotiated a $2 million appropriation for FACLA funds. That effort was led by Rep Rich Glorioso (R – Plant City, Chair of the House Justice Appropriations Subcommittee), Sen. Ellyn Bogdanoff (R – Ft. Lauderdale, Chair of the Senate Criminal and Civil Justice Appropriations Subcommittee), Sen. Mike Fasano (R – New Port Richey, predecessor to Sen. Bogdanoff as Chair of Senate Subcommittee), and House Speaker Dean Cannon (R – Winter Park).

That FACLA appropriation was vetoed by Governor Scott on April 17. Foundation President Michele Kane Cummings commented on that veto as follows,

> "We are deeply disappointed that Gov. Scott did not recognize the tremendous return on investment FACLA funding provides. Based on a recent study The Florida Bar Foundation commissioned from Florida TaxWatch, 2008-09 FACLA funding of $1 million created 170 non-legal aid jobs in the state economy, produced $13 million of economic output, provided $22 million of disposable income, and generated $13.86 of economic impact for every $1 spent on legal aid by the state for FACLA funding. That's a pretty good return."

On a couple of "*bright notes*"—The Florida Bar's Trial Lawyers Section and Family Law Section each gave

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Sharing Information with Your Adversary: Common Interest Litigation Agreements

By Siegel, Hughes & Ross

Every litigation attorney is familiar with the attorney-client and work product privileges, and, perhaps more importantly, the rules pertaining to waiver of these privileges. The voluntary sharing of information or documents subject to one or both of these privileges generally operates as a waiver of the privilege(s). *See, Visual Scene, Inc. v. Pilkington Bros, PLC.*, 508 So.2d 437, 439 (Fla. 2d DCA 1987). However, there exists an important exception to this general waiver rule, called the "common interests" or "joint defense" exception. *See id.* This exception enables litigants who share common interests to exchange privileged information to adequately prepare their cases without losing the protection afforded by the privilege. *See id.*

Before sharing information with another party to litigation, it is important to understand the parameters of, and limitations on, the common interest litigation privilege. The common interest litigation privilege finds its most frequent application among co-parties. *See, Visual Scene*, at fn. 2. For example co-defendants who share a common defense theory may wish to freely exchange information in furtherance of their shared defense. *See, e.g., Developers Surety and Indemnity Co. v. Harding Village Ltd.*, 2007 WL 2021939 at *1 (S.D. Fla. 2007) (applying Florida law). The rationale behind this rule is simple: "persons with common litigation interests are likely to have an equally strong interest in keeping confidential [the] exchanged information." *Visual Scene* at 440. Therefore, "the common interests exception to waiver is entirely consistent with the policy underlying the privilege, that is, to allow clients to communicate freely and in confidence when seeking legal advice." *Id.*

A different set of concerns arises, however, when there is an agreement to keep confidential communications, strategy and other work product between litigants on opposite sides of the "v." *See, generally, Visual Scene* at 440-41. In *Visual Scene,* the Third DCA was presented with precisely such a scenario. *See id.* In that case, the plaintiff VSI, a producer of sunglasses, sued defendants Metro Corp., Pilkington, and Chance on claims related to

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allegedly defective glass. *See id.* at 439. Pilkington and its wholly owned subsidiary, Chance, were accused of supplying the defective glass, while Metro was accused of negligently processing the glass. *See id.* Predictably, Pilkington and Chance (hereinafter collectively "Chance") asserted that the glass they supplied was not defective, but that Metro was responsible for any defects as a result of negligent processing, a problem which they alleged was exacerbated by VSI's improper handling of the finished sunglasses. *See id.* For its part, Metro maintained that it was not negligent, and that the glass supplied by Chance was defective. *See id.* VSI and Metro were therefore united on the limited issue that the glass supplied by Chance was defective. *See id.*

VSI and Metro entered into an agreement to share information concerning their claims that the glass supplied by Chance was defective, but to keep this information confidential from the rest of the world. *See id* at 441. When Chance sought discovery of this information, VSI and Metro objected by claiming that the documents were protected from discovery by the attorney-client and work product privileges under a "joint defense" privilege theory. *See id.* The trial court ruled in Chance's favor, compelling production of the documents sought under the rationale that no theory of the "joint defense" privilege could apply to communications between VSI, the *plaintiff* and its adversary Metro, the *defendant. See id.* In fact, at that time, no court had extended the joint defense or common interest privilege to protect communications between a *plaintiff* and a *defendant. See id.* at 440.

In a well-reasoned opinion, the Third DCA quashed the order compelling discovery, holding that the common interest privilege can apply to protect communications between adversaries. *See id.* Citing to several federal cases, the Court concluded that the *sine qua non* to the common interest privilege is, of course, that the parties share some common interest in the litigation. *See id.* at 441. "[N]o privilege attaches 'where the parties' are *completely* adverse and it is clear that the statements were not made in the expectation that the relationship was confidential.'" *Id.* (quoting *Eisenberg v. Gagnon*, 766 F.2d 770, 778 (3d Cir. 1985)). The Court extrapolated from the language of these federal cases that the threshold issues it must answer in determining whether there is a common interest privilege among adversaries is "whether the communication was 'made and maintained in confidence under circumstances where it is reasonable to assume that disclosure to third parties was not intended,'" and "whether the information was exchanged 'for the limited purpose of assisting their common cause.'" *Id.* (quoting *In re LTV Securities Litigation*, 89 F.R.D. 595, 603-4 (N.D. Tex 1981)).

In *Visual Scene,* VSI and Metro's agreement evidenced their intent to maintain confidentiality and to use the information only to prepare for trial on the issues common to both. *Id.* Thus, the Court found that the communications between VSI and Metro were protected by the attorney-client privileges insofar as they were shared in furtherance of their common interest. *Id.* at 442.

The Court went on to explain that the common interest privilege also relates to work product information. *See id.* To determine whether the sharing of work product information with one's adversary is protected, the Court looked to the rationale behind the work product privilege. The Court found the following language of *United States v. American Telephone & Telegraph Co.,* 642 F.2d. 1285, 1299-1300 (D.C. Cir. 1980) persuasive:

> "[the common interest privilege] should not be construed as narrowly limited to co-parties. So long as transferor and transferee anticipate litigation against a common adversary on the same issue or issues, they have strong common interests in sharing the fruit of the trial preparation efforts. Moreover, with common interests on a particular issue against a common adversary, the transferee is not at all likely to disclose the work product material to the adversary. When the transfer to a party

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President's Letter

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Litem Program in our circuit. The number of players over the four years has jumped from 34 to 84.

Social Events: Particular effort was put forth this year to create opportunities for members (and non-members) to socialize and network with one another. We held three "meet and greet" type of social events (not including the monthly luncheons and the Annual Meeting and Reception). Two of the three were well attended by our members, and all of the events were well attended by members of the judiciary, who took the time to visit with our group in a casual setting. It was clear that successful social events could be held both downtown and in other locations around Gainesville. In addition, the Jimmy C. Adkins Cedar Key Dinner was well attended. Seemingly, a good time was had by all. The food and ambiance of the new restaurant hosting the event by most accounts was an upgrade over some previous years.

Professionalism Seminar: Yet again, the EJCBA Professionalism Committee, working in conjunction with the University of Florida's Levin College of Law, presented an excellent and well-attended CLE. The discussion on difficult and timely topics was spirited and thought provoking.

What went less well?

Local Rules Initiative: One of my goals as incoming President was to work towards a set of "local rules" for litigators in this circuit. Despite interest from local litigators, cooperation from the bench and the outstanding effort from our committee, there either isn't an appropriate framework to create such rules, either through the official rulemaking authority of the Supreme Court or through administrative order, or alternatively there simply isn't sufficient political will to go through the process at this time. Either way, it didn't happen.

Charitable Foundation: I had hoped that our Association would embrace the concept of a 501(c)(3) charitable foundation and create one or more goals that the foundation would support. A number of voluntary bar associations have created such foundations and used them to fund scholarships or association facilities, to name but a couple. It didn't happen this year, but I hope the Association will consider it in the future.

Long Range Strategic Plan: Despite discussion in a mid-year retreat about creating a plan, and the diligent efforts of a group of law students to research other associations' plans and goals, there was no mandate from this year's Board of Directors to move forward. A Long Range Planning Committee was formed but thus far has been inactive (my fault).

Website and Social Media: Between a website, Facebook, Twitter, blogs, and listservs, I had hoped that the Association could provide platforms both to inform and give outlets to our members to discuss relevant legal topics. Special positive nods are directed toward Past President Elizabeth Collins Plummer for her efforts with Facebook, and Frank Maloney, Leonard Grill, and Lua Mellman Lepianka for photographing our events. A lot of work remains to be done, however, before the full potential of these social media tools can be attained.

What can the Association do to improve?

Provide more services to its members: Particularly in this economy, it's hard for many to justify the cost of membership in the EJCBA unless the return warrants the investment. It's the responsibility of the Association to continue to try to enhance the value of membership. What additional or enhanced services could be beneficial? There's a wide range of opportunities, from providing more low cost CLE seminars, to jobs boards, to the aforementioned blogs and listservs, to better and more cost effective luncheons, to additional advertising opportunities in the Forum 8 newsletter.

Decide whether to take the EJCBA to the next level of voluntary bar associations: With over four hundred members, there is no doubt in my mind that the EJCBA can accomplish more than it did this year to benefit both its members and the public. However, to do so the Association would need to restructure its operations and fund-raising. It is easier to do nothing, but perhaps the Long Range Planning Committee can be instrumental in the future to at least provide additional continuity for successful programs and to stretch the goals of the EJCBA.

Again, I'm proud to have been your President. I've enjoyed my term in office. I'd encourage others to find the time to serve our voluntary bar association because you can make a difference. Thank you.

Criminal Law

By William Cervone

For decades I've thought that I should keep a notebook on all of the absurd things that happen, mostly just because. I never have and now the absurdities of the 70s and 80s are mostly lost to me. In that vein, and since I have nothing else to write about at the end of the publishing year, and to tie up loose ends, and because summer can indeed be the season of the absurd and we might as well start now, I offer the following.

From the legislature, and as promised from April's discussion of The Graham Dilemma, Part Two, here's The Graham Dilemma, Part Three. You'll recall, maybe, that this problem is the inability of the legislature to get around to fixing the mess that at least some juvenile sentencing is in as a result of the Supreme Court's ruling in 2010 that juveniles could not receive a life sentence for a non-homicide crime. Despite debate, compromise, sound and fury, this year's legislature did exactly what its predecessors did: nothing. Although it survived until the very end, a bill that would have provided that any qualified juvenile would be eligible for re-sentencing after 20 years died without action. The result is that the trial courts will continue to do as they have, which is impose wildly disparate sentences on essentially the same facts, and the appellate courts will continue to issue opinions affirming or striking those sentences on whatever basis they see fit to use. So it goes in Tallahassee. Next year, I suppose, The Graham Dilemma, Part Four. For those of you who recall how long it took for Meg The Goat to get vindication through the passage of a bestiality statute a while ago, I suppose there is the hope that sooner or later something might get done. Just not now when the legislature has more important things to do like gerrymandering re-apportioned districts so that they don't look too much like they've been gerrymandered.

Then there is the Innocence Commission. Since I last wrote about its doings in December, several sessions have occurred. At the first, a proposal was made to require a pre-trial hearing and ruling on the admissibility of testimony from a snitch. The hearing would essentially have allowed a judge to weigh and determine credibility of such a witness. Many of you, like me, will immediately recall from law school that weighing the credibility of witnesses is the role of the jury. Regardless, after much debate about the wisdom of opening this particular barn door, that idea was scrapped. Similar to this, and much more realistically, the idea of a special jury instruction giving jurors some guidance on how to evaluate that kind of testimony was discussed and ultimately referred to the standard jury instructions committee for further debate and possible drafting. A second meeting proposed various changes to the discovery rules to require more specific disclosure by the State when a snitch is being used. That, of course, must be vetted through the entire rules and court processes for such changes as well. One final meeting focused on professional responsibility is scheduled before the Commission is slated to expire.

Finally, so that I won't be accused of boring everyone with all this formal law stuff, I cannot let you go on vacation without passing on the latest California lawsuit that I saw press coverage about. It appears that a mother of two, joined by something called the Center For Science In The Public Interest, tried to file a class action lawsuit against McDonald's on the theory that providing a toy in a Happy Meal violated some consumer protection or other and exploited children because the toy lured the kids into eating unhealthy food, leading to a life of obesity. Really? Fortunately a judge tossed the case. The judge may or may not have done so for the reasons I would recite, including that if a kid can't have a cheap plastic toy then what has this world come to? I mean really. Together with the PETA people suing for whale's rights at Seaworld, as Mr. Carter has recently written about, these folks need to get a life.

Clearly I need a vacation. Enjoy yours!

Attendees at the April EJCBA luncheon at Jolie

My Favorite Lawyer Movies

by Cynthia Stump Swanson

By the time you read this, you should be knee deep in summer. If it's not already, it will soon be too hot to do much outside during your days off. Thus, I offer a list of some favorite lawyer and law-related books and movies, and some back stories, which you might find interesting to watch and read in the air conditioning.

To Kill A Mockingbird, Pulitzer Prize winning (and only) novel published by Harper Lee in 1960. Lee was born in 1926 in Alabama. Her father was a lawyer, a member of the Alabama state legislature, and also owned part of the local newspaper. Lee started law school while still an undergraduate student (as was allowed at that time at the University of Alabama), but eventually dropped out to become a writer. She had been childhood friends with Truman Capote, and helped him write an article for The New Yorker, which would later evolve into his best known work, "In Cold Blood." She traveled with Capote to Kansas to interview townspeople, friends and family of the deceased, and the investigators working to solve the crime. Serving as Capote's research assistant, Lee helped with the interviews, eventually winning over some of the locals with her easygoing, unpretentious manner. Capote, with his flamboyant personality and style, had a hard time initially getting himself into his subjects' good graces. She continued to aide him in writing his novel, but meanwhile, "To Kill a Mockingbird" was published to great success, including winning the Pulitzer Prize in 1961, with a very well known movie of the novel coming out the following year. The movie received eight Academy Award nominations, and won four Oscars, including Best Actor for Gregory Peck's portrayal of Atticus Finch.

Atticus Finch is widely cited by lawyers and lay persons alike as the model of professionalism and integrity. He represented a black man accused of raping a white woman in a racially divided south. He was a single father raising his two children in a small town when he was appointed to this case. He explained to his daughter, Scout, why he took this very unpopular case on: "I wanted you to see what courage is, instead of getting the idea that courage is a man with a gun in his hand. It's when you know you're licked before you begin but you begin anyway and you see it through no matter what. You rarely win, but sometimes you do."

Go to youtube.com and search for "to kill a mockingbird your father's passing" to see the one minute scene that chokes me up every time I even THINK about this move.

A Civil Action by Jonathan Harr. Based on a true story which seems like it's a typical David and Goliath yarn, instead this is really about a hotshot lawyer who discovers that his passion and courtroom skills can take him only so far in a system where the deck is stacked against those of limited means, where litigation is a game of financial chicken in which whoever blinks first loses. This really is a compelling book to read. It was made into a movie in 1998, starring John Travolta, Robert Duvall, Kathleen Quinlan, and William H. Macy. I thought the movie was good, but as is so often the case, I found the book much more fulfilling.

My Cousin Vinny. I'm not sure there IS any book related to this movie. And if you haven't already seen it four or five times, you may be the only person on the planet who hasn't. It is certainly a broad comedy – can you forget the scene with Marisa Tomei pounding her foot rhythmically on the floor while declaiming, "My biological clock is TICKING!" And actor Fred Gwynne's judge character making fun of Vinny's accent, clothes, everything . . . "Youts? What's a yout?" And when Vinny calls his girlfriend to testify, he asks the Judge if he may treat her as a hostile witness, and she says, "You think I'm hostile now, wait 'til you see me tonight." The judge asks if the two know each other, and Vinny answers that she is his fiancee. The judge sardonically notes, "Well, that would certainly explain the hostility."

But here's at least one fun lesson of this movie: Vinny's cross examination of the eye witnesses was very effective, because he had talked to the witnesses before court, and he had gone to the scene of the crime and gone to the witnesses' homes near the scene of the crime to talk to them. So, he could see for himself what they could (and couldn't) see. Good tips!!

12 Angry Men. The defense and the prosecution have rested and the jury is filing into the jury room to decide if a young Hispanic man is guilty of murdering his father. Other than just a few minutes, this entire movie takes place in a very hot jury room, with 12 people reviewing the evidence and using their common sense, as well as examining their own prejudices, to determine whether to convict or acquit

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the young man. With an all-star cast including Henry Fonda, Lee J. Cobb, Ed Begley, E.G. Marshall, Jack Warden, Martin Balsam, and Jack Klugman, one dissenting juror in a murder trial slowly manages to convince the others that the case is not as obviously clear as it seemed in court.

This is a lesson, even to family lawyers like me who don't do jury trials, of how important it is for the lawyer to keep an open mind, to look at and listen to the evidence as objectively as possible - not just through your own client's eyes. The movie shows how important it may be to visit the "scene of the crime." For family lawyers, that might mean it's important to obtain photos of households, vehicles, children, and so on. I'm not an advocate of personally going to your client's house or of talking to your client's children. But having visual information is very important.

This movie also shows the importance of asking follow up questions, and how dangerous it is to make assumptions. And how dangerous it is to assume even that the point you wanted to make has been made. As a lawyer questioning a witness, you have to always walk a fine line between asking the same question so many times that you are perceived as beating a dead horse, and in failing to ask enough questions to even be sure your horse is recognizable as a horse. You don't want to get the judge fed up with hearing the same information over and over again, but you also don't want to realize later in reading a judgment that the judge did not get what you were talking about.

Of course, this movie also examines personal prejudices and biases, and demonstrates what a huge impact those have on court proceedings. For a movie that has the same 12 actors sitting in one small room for 99% of the time, it's the opposite of boring.

A Time To Kill (1996) made Matthew McConnaughey a star playing a lawyer with much more richness and character than most of his more recent throw-away movie roles. And it has both Keifer and Donald Sutherland - what else can you ask for? Go to youtube.com and search under "a time to kill closing argument" for an eight minute clip of a closing argument which makes up for all this inexperienced lawyer's faults and tells a spell binding story to the jury.

A Few Good Men (1992) has a completely riveting courtroom scene with Tom Cruise having to make a decision in one moment of whether to just give up on his cross-examination of the formidable Marine Colonel played by Jack Nicholson when it doesn't seem to be going well, or whether to go for the killer questions, even though if his tactic doesn't work, it probably means the end of his own Navy JAG career.

Adam's Rib (1949). Tracy and Hepburn as married lawyers on opposite sides of a criminal trial. Enough said.

Anatomy of a Murder (1959). Jimmy Stewart coaches (or does he) his client on creating an insanity defense to the charge of the murder of his wife.

Inherit the Wind (1960) Spencer Tracy again. Two great lawyers argue the case for and against a science teacher accused of the crime of teaching evolution. The judge rules that scientific experts cannot testify about things like archaeology, geology, and so on. Spencer Tracy then asks to present an expert on the Bible, which the judge allows. He calls the prosecutor to the stand, who was only too happy to testify, and who did consider himself an expert on the Bible.

The movie shows a very effective technique useful for cross-examining an expert: Get him to concede a seemingly small point, which then can eventually lead to the erosion of the foundation of all his testimony (pun intended). Go to youtube.com and search for "inherit the wind age of rocks."

Erin Brockavich (2000) based on the true story of a legal assistant who was substantially responsible for the largest direct action lawsuit of its kind as a result of which Pacific Gas & Electric was forced to pay out the largest toxic tort injury settlement in US history at that time (1996): $333 million in damages to more than 600 residents of Hinckley, California. On her website, Erin Brockavich says that yes, she dresses like Julia Roberts did in the movie (because it's fun), and yes, she has a potty mouth like Julia Roberts did in the movie.

Kramer vs. Kramer (1979). Most of the movie is about how Dustin Hoffman learns to be a good single dad to his little boy, but it's the last third of the film, which contains the custody battle that gives the movie its title, that's the real gutpuncher. In the courtroom, exwife Meryl Streep's lawyer successfully smears the responsible dad we've seen Hoffman become, painting him instead as a reckless cad. The moral: No one's really a winner in a legal system that only amplifies the bitterness that tears families apart.

Philadelphia (1993). The first mainstream Hollywood movie to address AIDS and the prejudices surrounding it, this movie uses the courtroom as a forum to ask viewers to look beyond those prejudices to see issues of basic fairness. As a sick lawyer

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Family Law

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wrongfully fired from his own law firm, Tom Hanks is really a little too saintly and perfect, but as the "everyman" learning to look past Hanks' sexual orientation and disease to see a man worthy of respect and justice, Denzel Washington gives one of the best and most human performances of his career.

Presumed Innocent - by Scott Turow. Made into a movie in 1990 with Harrison Ford, this is another one where the movie is good, but the book is so much better. Prosecutor Harrison Ford is accused of the murder of a colleague with whom he also had something of an affair. No one does righteous, wounded anger like Ford, but here, his usual slow burn becomes a slow dawning of horror as he gradually discovers over the course of the film what really happened, forcing him to learn new meanings for words like "guilt" and "punishment."

The Accused (1988). If you can get past the big 1980's hair, you can see why Jodie Foster won her first Oscar for this drama (loosely based on a true story) about a gangrape victim who finds her own behavior and sexual history put on trial. She's a revelation as a slutty character who is nobody's role model, but who learns (with the help of lawyer Kelly McGillis) to stand up for herself as she defends the right of all women not to be raped.

In one of my favorite movies, and the only one to beat out "To Kill A Mockingbird" on any list of best lawyer movies, Paul Newman gives the best performance of his later career in The Verdict (1982). He plays an alcoholic attorney who sees in a medical malpractice case against a Catholic hospital his last, best shot at redemption. Arrayed against him is wily old litigator James Mason, the Boston Archdiocese, the Boston medical/educational establishment, and the city's backroom power structure, all of whom have no compunction about playing dirty to win. And yet this movie does posit that the justice system can, when we all take our parts seriously, reflect our highest aspirations.

Finally, I thought I would mention Hot Coffee, a "documentary feature film" which has won many film awards, about the so-called seeking of "jackpot justice." Remember the famous McDonald's lawsuit widely touted as a symbol for the need for tort reform? Remember that supposedly a woman filed a frivolous lawsuit against McDonald's because she spilled some hot coffee in her lap? What a crock, right? Not. One tag line for this film is "Going to court to justice is heroic."

Happy summer reading and watching!! Stay cool and don't eat too much popcorn.

Sharing Information

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> with such common interests is conducted under a guarantee of confidentiality, the case against waiver is even stronger." *Id.* at 442-43.

Because VSI and Metro agreed to keep confidential the information they shared for the joint trial preparation efforts against Chance, the Court found that such information was also privileged as work product. *See id.* at 443.

In short, *Visual Scene* established the rule that the common interest privilege can apply to protect information shared between adversaries in litigation. *See id.* Notably, the privilege appears to include information shared between a party and his adversary's counsel, at least to the extent that it concerns the parties' common interest. *See, e.g., Asplundh Tree Expert Co. v. Barnes*, 689 So. 2d 1200 (Fla. 4th DCA 1997)

However, there are potential perils in sharing information with a co-party, and those perils are accentuated in the context of sharing information with an adversary. Several factors may affect a party's ability to share information with an adversary, and the desirability of so doing. For example, the *Visual Scene* Court expressly cautioned that a voluntary waiver will ordinarily occur when a member of the common interest group discloses information to a non-member. *See id.* at 440. Further, "[s] haring parties on opposite sides of litigation, being uncertain bedfellows, run a greater than usual risk that one may use the information against the other should subsequent litigation arise between them." *Id.* at 442. Thus, a careful litigation attorney should consider a written common interest confidentiality agreement that imposes penalties for disclosure to third parties, and, if practical, a prohibition or limitation on the use of shared information in subsequent litigation between the parties.

Another important limitation on the common interest privilege is that it applies to information shared in relation to litigation, only. *See, Infinite Energy, Inc. v. Econnergy Co.*, 2008 WL 2856719 (N.D. Fla. 2008). Citing to *Visual Scene,* the Gainesville Division of the Northern District Court of Florida cautioned that the privilege applies only when "persons share a common **legal** interest, not when the primary common interest is joint business strategy that happens to include a concern about litigation." *Id.* at *2 (emphasis in original). Although

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Some Last Thoughts *Continued from page 6*

$75,000 to the Children's Legal Services Grant Program to save the positions of legal aid attorneys focused on children's advocacy. And the Real Property, Probate and Trust Law Section has a campaign underway to raise funds from its members for Children's Legal Services grants. Finally, the NOW Campaign has raised more than $80,000. (For further information about the NOW Campaign, please visit www.floridabarfoundation.org/now.)

If you are open to becoming a Fellow or participating in the NOW Campaign, or 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.

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actual litigation need not be ongoing, the interest must **relate** to litigation for the privilege to apply. *Id.*

In sum, the common interest privilege allows "litigants who share unified interests to exchange […] privileged information to adequately prepare their cases without losing the protection afforded by the privilege," and for "persons with common litigation interests […] to communicate freely and in confidence when seeking legal advice." *Visual Scene,* at 440. It can, therefore, be a great tool for co-parties, and even adversaries, to share information and develop support and strategy for joint claims and defenses, or simply common issues. However, the information should be shared only after careful consideration of the limitations to the privilege and the potential perils of sharing information with a co-party, and especially, an adversary. *See id.* at 440, 442.

The Gerald T. Bennett American Inn of Court

By Anita McNulty

The Gerald T. Bennett American Inn of Court, of Gainesville, Florida, is dedicated to improving the skills, professionalism and ethics of the bench and bar through the assessment of cutting edge legal trends, innovation and technology. Established in the spring of 2011, the Bennett Inn has presented a variety of programs geared towards technology and the law.

The first program, presented in October 2011, explored the ethical obligations attorneys have when using online advertising and social networking sites. The Inn has also presented programs in the areas of e-discovery and the use of social media in trial preparation and presentation. With the rapid growth in modern technology, the Bennett Inn seeks to provide programs that explore the relationship between the law and current technology trends. The Bennett Inn has developed a concept of co-teaching with University of Florida law students. Law students serve on the board of directors of the Bennett Inn and are encouraged to participate in each program.

The Bennett Inn is also actively involved in the Gainesville community. The city of Gainesville and the University of Florida have afforded the Bennett Inn a unique opportunity to use both established and cutting edge legal knowledge to give back to the community through a partnership with Innovation Gainesville. Innovation Gainesville is a collaborative effort between the City of Gainesville Chamber of Commerce, the University of Florida, and Santa Fe College, designed to foster the development of innovative health, biotech, and green companies. These start-up companies need legal advice for everything from the proper designation of their companies and employment contracts to the latest regulations and case law regarding health and biotech research to patent applications. The Bennett Inn has offered the services of its lawyers and law students to assist the start-ups with their legal needs, with the goal that by investing our time and knowledge into these companies, jobs and resources will be poured back into our community. This partnership not only allows lawyers to give back to their community, it also provides a unique opportunity for law students to shadow these lawyers and learn first hand the unique legal issues facing these companies in their infancy. The Bennett Inn believes that by giving back to the community and supporting the economic growth of our community, the Bennett Inn is upholding not only our Inn's values, but also the values of the American Inns of Court.

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Have a great summer! Thank you contributors!
Thank you Darren Burgess, our layout genius! See you in September!

Professor Fletcher Baldwin speaks at the panel discussion on Florida's "Stand Your Ground" at the May EJCBA luncheon

Panel speaker Barbara Blount-Powell makes a point about Florida's Stand Your Ground law at the May EJCBA luncheon