

FORUM 8

Volume 72, No.2

Eighth Judicial Circuit Bar Association, Inc.

October 2012

President's Message



By Dawn M. Vallejos-Nichols

Welcome New Members!! At least I hope we are reaching new members this month as our 2012-2013 membership drive began last month! I encourage each and every one of you to become involved in our Bar Association. Your involvement can be as simple as becoming a member and

attending the monthly luncheons (at the Paramount Plaza Hotel), attending the free social to be held at Ballyhoo's on October 4, contributing to your monthly newsletter, or serving on a committee or participating in a project.

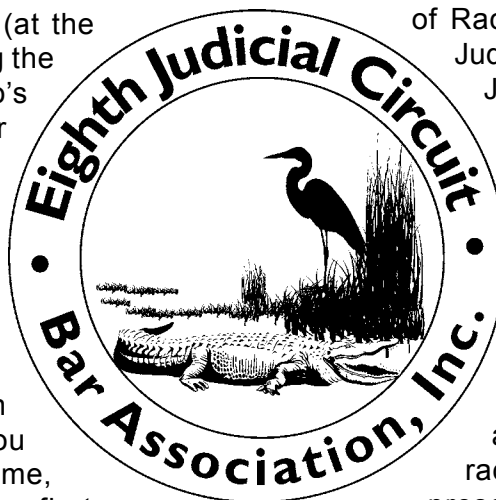
If you were already a member of the EJCBA and have renewed your membership for 2012-2013 – thank you! I want to encourage your involvement in our activities just as much as if you were a new member. By press time, we will already have enjoyed our first luncheon of the year at our new venue – the Paramount Plaza Hotel – I hope you were able to attend to connect with your colleagues and also to learn a little something – did you notice that it was a CLE opportunity? One of our goals this year is to provide our members with more CLE opportunities – take advantage of them!

As mentioned briefly above, the EJCBA is holding its first Social of the year at Ballyhoo's on Thursday, October 4 at 5:30 p.m. We encourage all of our members, new and returning, to attend and get to know one another in a very relaxed setting.

Last year we had a great turnout of our judges at all of our socials and hope to welcome them again this year! Attendees are provided with free drink tickets as well as yummy appetizers!

Of significant importance this month is the "Leadership and Law Seminar" to be held on October 12 in conjunction with events at the University of Florida Levin College of Law celebrating UF's Black Alumni Weekend. This is a joint initiative of the University of Florida Levin College of Law's Center for the Study of Race and Race Relations, the Eighth Judicial Circuit Bar Association, and the Josiah T. Walls Bar Association. The purpose of this program is to explore the relationship between race and professional legal organizations in the past, the present, and in the future. The UF Law Center for the Study of Race and Race Relations will moderate a panel discussion consisting of leaders from national, state, and local bar associations who will touch upon how race has and will influence the past, present, and future of their respective organization and have a dialogue on avenues for leadership and joint initiatives. I hope to see a lot of you there. A meet and greet (with appetizers) will begin at noon; the panel discussion will follow at 1 p.m. All parking restrictions at the law school have been waived for this event.

Always exciting to both new and returning members is our members-only annual James C. Adkins, Jr. Cedar Key Dinner which is scheduled for Thursday, November 8 at Steamers Clam Bar



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Classified Ads

Very experienced (25 years) general practitioner relocating to Gainesville seeking employment, of-counsel or otherwise, with a Gainesville law firm. Experience includes Commercial litigation, collections, family law, wills, estates, landlord tenant, traffic, et al. Please reply by e-mail to Michael S. Mersky, Esq. at amyedit@aol.com.

The Gainesville Office of Bogin, Munns & Munns, P.A., seeks an attorney experienced in family law to join the firm as an associate or 'of counsel'. Other practice area experiences a plus. Creative compensation packages available with benefits. Send resume in confidence to: atipton@boginmunns.com or fax to 352-332-7692.

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

Private Sector Bias Charges with Equal Employment Opportunity Commission Hit All Time High



1st Article in a Multi-Part Series on the Increase in Private Sector Bias EEOC Charges

By Paul Donnelly & Laura Gross

Earlier this year, the Equal Employment Opportunity Commission (EEOC) released a statement noting that in 2011 it received a record 99,947 charges of employment discrimination. The agency is responsible for enforcing Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Equal Pay Act, the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act.

“For the second year in a row, the EEOC received a record number of new charges of discrimination,” said EEOC Chair Jacqueline Berrien.

The agency stated it also obtained \$455.6 million total in relief through its administrative program and litigation, a more than \$51 million increase from 2010. The EEOC filed 300 lawsuits in 2011, and its litigation efforts alone resulted in \$91 million of relief, representing the third year in a row that the relief obtained was greater than the preceding year.

Filing a charge of discrimination with the EEOC is a very simple process and comes at no cost to the employee, consisting merely of a one-page form that starts the agency’s investigation into the business or employer. There is little to lose on the employee’s part by filing a charge, but the process of adequately responding can prove to be very costly and time-intensive for the employer. The employer’s response to the charge is critical and plays a key role in the agency’s determination of whether discrimination occurred and whether or not the charge should move forward to court.

Charges alleging retaliation were the most numerous in 2011, representing 37.4 percent of all charges, closely followed by charges claiming race discrimination, representing 35.4 percent. Charges involving alleged disability discrimination (25.8 percent) and age discrimination (23.5 percent) were also two of the most frequently cited allegations.

The EEOC’s enforcement of the Americans with Disabilities Act (ADA) produced the highest

increase in monetary relief, increasing by almost 35.9 percent to \$103.4 million in 2011 from \$76.1 million in 2010.

In the next installment, we will discuss ways for businesses and employers to avoid EEOC discrimination charges against them.



The North Central Florida Chapter of the Federal Bar Association Presents:

“A Toast To Judge Hodges”

An Event Honoring Senior United States District Judge William Terrell Hodges’ Forty Years (and Counting) of Federal Judicial Service.

When: Friday, November 2, 2012, from 6:00 pm to 9:00 pm

Where: The Historic Thomas Center, 302 Northeast Sixth Avenue, Gainesville, Florida

Program: Come raise a glass to honor Judge Hodges and enjoy an evening with friends and colleagues.

The evening will include: a “Roast and Toast” delivered by Eleventh Circuit Judge Gerald Bard Tjoflat; a collection of wines for toasting and tasting; and awards for those able to appreciate Judge Hodges’ “taste”.

RSVP: attendance to Jamie Shideler at jamie_shideler@yahoo.com by October 19, 2012. Sponsorships Available: Supreme (\$500) Circuit (\$250) District (\$100)

Contact Robert Griscti about sponsorships at 352-256-8268 or robert.griscti@grisctilaw.com.

Florida Bar Board Of Governors Report



By Carl Schwait

Please find an overview of some of the major actions of the Florida Bar Board of Governors for 2011-2012:

Approved, upon the recommendation of the Legislation Committee, allowing the Legal Needs of Children Committee to advocate for legislation allowing children

sentenced in adult criminal court for more than 10 years to have a meaningful opportunity for early release based on demonstrated maturity and rehabilitation.

Approved, upon the recommendation of the Board Review Committee on Professional Ethics expressing concerns to the ABA on changes to two preliminary proposals from the ABA Commission on Ethics 2020 affecting outsourcing of legal services and on technology, largely because the suggested changes were less strict than current Supreme Court rules. Upon recommendation of the Standing Committee on the Unlicensed Practice of Law the board voted to object to three proposed changes from the ABA ethics commission. Those are to allow attorneys from other states to practice for a certain amount of time, to be determined by the Supreme Court, either as attorneys or authorized house counsel while their petition to join The Florida Bar or to become an authorized house counsel is pending; to allow a lawyer licensed in another country to appear pro hac vice in Florida; and to allow attorneys licensed in other countries to become authorized house counsel in Florida. The board, on the recommendation of the Standing Committee on UPL, voted to support the ABA ethics commission's recommendation that attorneys from other countries can engage in limited and temporary practice in Florida, since that tracks the Supreme Court's rule on multijurisdictional practice.

Received a report from Board of Governors Communications Committee that the committee is working at improving all levels of Bar communications. A video from the Bar President to all members is planned at least quarterly. The committee is looking at how to effectively communicate both with Bar members and board members during legislative sessions, and with Bar committees, sections, and divisions and with local bars.

Heard Executive Director John F. Harkness, Jr., report that 3,500 people – the largest number ever –

were taking the next bar exam. He said typically 75 to 78 percent pass and become Bar members. He added that the Bar used to get around 2,000 new members annually, but that is now running 2,500 and is combined with another trend of fewer older lawyers choosing to retire, leading to a rapid growth in Bar membership.

Approved a communications plan to help keep Bar members informed about Bar-related legislative activities which calls for a communication from the Bar president to all members before the start of a legislative session. The letter, which will be printed in the Bar News, sent electronically to all members, and posted on the Bar's website, will explain what the Bar can and cannot do legislatively and have a general discussion of what the Bar expects to happen in the session. During the session, there will be a page on the Bar's website updated every Friday on what is happening in the session.

Approved, on the recommendation of the Board of Governors Budget Committee, the hiring of a new disciplinary staff counsel to work on mortgage related grievance cases including work on foreclosure loan modification, mortgage fraud, and mortgage foreclosure related cases.

The Board Audit Committee reported that the Bar received a clean audit with "no difficulties and no issues" for the 2010-11 fiscal year.

The Member Benefits Committee Reviewed approval for four new services for the Bar's Member Benefits program. They are: Association Benefits International, which will help Bar members with their online marketing; US Legal's Formspass, which offers more than 7,000 legal forms – for both Florida and multi-state use; AtHomeNet, which offers website design, hosting, and maintenance services; and FTD Flowers Online which will provide discounts similar to the ABA's FTD program.

An updated strategic plan for The Florida Bar was approved for 2012-2015 that includes five objectives: (1) Ensure the Judicial System, a Coequal Branch of Government, is Fair, Impartial, Adequately Funded and Open to All; (2) Enhance the Legal Profession and the Public's Trust and Confidence in Attorneys and the Justice System; (3) Strive for Equal Access to and Availability of Legal Services; (4) Enhance and Improve the Value of Florida Bar Membership and the Bar's Relationship with its Members; and (5) Continue

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Alternative Dispute Resolution

Lawyer Olympics

By Chester B. Chance and Charles B. Carter

The recent Olympic Games in London reminded us of the little known Lawyer Olympics, which will also take place this year. If you are aware of a local attorney who will be competing, let us know so we can acknowledge them in a future article. The Lawyer Olympic Games includes several well-known events.

The Ambulance Chasing Sprint requires the speed of Jamaican sprinter Usain Bolt. The world record time is 9.02 seconds (time from accident to arrival of first attorney at scene). 3,429 lawyers from Manhattan, 3 from Miami, and 1 from Mt. Pilot, N.C, jointly hold the record. New this year is the **Ambulance Chasing Marathon**. Lawyers run a 26.2-mile course (the distance from the L.A. Courthouse to Cedars of Lebanon Hospital) carrying three business cards and a cell phone.

Lawyers from Georgia have dominated **Synchronized Appellate Argument** for the last 12 years. During appellate argument, lawyers synchronize their argument as well as movements to and from the podium, drinking water, opening briefcases, and turning pages of their briefs. This requires hours and hours of practice, all billable.

The Briefcase Toss involves taking a trial briefcase loaded down with ten Southern Reporters and throwing it for distance. The world record is held by New Jersey attorney Harriet "Biceps" Johnston who reached 49 yds, 2 ft., 4 inches in 1998, although the 1994 former record holder, Ed "Terminator" Gladstone, is appealing the new record on the basis it was wind-aided.

Lawyers make their living with words so many enjoy watching the **Speed Talking** competition. Attorneys see who can cite the most cases in a 90 second timed event. The record: 88 cases, including 3 federal case cites, by attorney Brian "Wingtips" Bartholomew of

New Orleans.

Trial by Combat is a Triathlon event involving boxing, Greco-roman wrestling, and thumb wrestling. No attorney has ever won this event as all participants since this competition was added in 1902 have been disqualified for various reasons too numerous to mention. Many observers feel Edna "Mother Teresa" Antwerp may break away from the pack this year. Her ethics are unquestioned, but, since her other nickname is 'The Fertile Octogenarian' many question her endurance.

Objection Fencing matches lawyers who shout objections at each other while attempting to score points with laser pointers. Each laser hit to the eye is worth 3 points; each sustained objection is worth 2 points. Mathew 'Rapier' Skunke of North Dakota has won gold three times in this event and specializes in shouting, "asked and answered!" while destroying the cornea of many an attorney.

Jerk and Attorney is a weightlifting event where the winner is the lawyer who clears and jerks the most Pacific Reporters. The record: 216 reporter volumes by an unknown lawyer from Ask Gary.

Billable Hours

Dressage: Lawyers, wearing wigs and gowns, try and bill as many hours as possible while riding sidesaddle. This is the original Lawyer Olympic event and dates back to the Greek Legal Olympics where lawyers entered time on clay tablets while driving a chariot. The advent of hand-held digital dictation devices has led to records only dreamt of during the days of older, wired dictating equipment. Olympic record: 23.2 hours in a 6-minute period. World Record: 314 hours in a 6-minute period.

Judicial Run for Office: open to judges who were elected to office rather than appointed, this event requires the judiciary to run 10

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Some Remarkably Brief Remarks from a Florida Bar Foundation Board Member



By Philip N. Kabler

Who in the EJCBA does not get enough newsletters, magazines, journals, and other communications -- whether hardcopy, electronic, or otherwise? {...*Not quite sure what other forms there are, but surely there are some very smart people "out there" creating them...*} Speaking just for your reporter, I get plenty. *Plenty.* (Delete, delete. Recycle.)

One of which I do take ready notice, however (other than *Forum 8*, of course [!]), is The Florida Bar Foundation's *Speaking of Justice*, which is an electronic publication -- circulated "seasonally" and of approximately the same length as *Forum 8*, so as not to be overwhelming to the recipients. (*And...it is remarkably well-written, too!*)

While *SOJ* is available at no charge on The Foundation's website to all, it is circulated (again seasonally) by e-mail to Foundation Fellows {... *somewhat subtle hint...*}, grantees, the media, and other statewide stakeholders.

In the Summer 2012 issue of *SOJ*, the following topics, among others, were addressed:

"Headline article -- Federal judge orders state of Florida to cover autism therapy"

Florida Bar Section donations to The Foundation -- Please see last month's *Forum 8* issue for the details

The first non-lawyer President of The Foundation takes office

Here is a link to *SOJ*: www.flabarfdn.org/about/news-publications/newsletter/soj-summer-2012.aspx

There are, of course, more articles, but in keeping with the covenant above about being "remarkably brief," you are invited to visit *SOJ* online to see the other topics. *QED.*

For information on becoming a Fellow or participating in the NOW Campaign, or 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 Facebook fan at www.facebook.com/TheFloridaBarFoundation.

Tips for an Effective and Engaging Appellate Oral Argument



By Audrie Harris

Last month we reviewed some tips to help make your appellate brief easy to read and engaging for the appellate judge. This month, we will review some tips to enhance your oral argument. While I believe that the brief is the most important part of the appeal, oral argument can help you bring the win home. If you do have oral argument in your appeal, here are some tips:

Don't read from a script like a parrot. Prepare a simple reference sheet of bullet points, to refresh your memory if you get off track, and **converse** with the judges. Know your argument well enough that you can talk about your position without having to constantly refer to your notes. Also be flexible enough in your presentation to answer questions and respond to the opposing party's argument. Oral argument is not for your benefit. It is intended to help the judges understand your argument. You are there for them. Engage in a conversation -- answer their questions and use that time to gauge their concerns about your argument. You may have to completely disregard your prepared points in order to respond to comments made by opposing counsel or concerns raised by the judges. You need to pay attention to the comments made and the judges' body language and reactions. Observe and listen. Make eye contact. The key word here is "conversation." Converse with them. You are there to educate them on your position and resolve their concerns. Don't get defensive or offended by their questions. Educate them on why you have the winning position.

Be honest and knowledgeable about the applicable law. If there is contrary law to your position, don't hide from it. Admit it, discuss it, and explain why it is distinguishable. You will gain credibility and then you will have time to move forward to discuss the law that will cancel out the negative. You need to be well-versed in the applicable law and present yourself as a

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Mediation: The Importance of Neutrality



“Trust resides squarely between faith and doubt.” *Warren Bennis*

By Bob Stripling

Mediators are governed by certain rules promulgated by the Florida Supreme Court known as the “Florida Rules for Certified and Court-Appointed Mediators.” The cornerstone of mediation is the neutrality and impartiality of the mediator. In order for the mediator to be effective, he must gain the trust of the parties. This trust, once established, will be quickly lost if the mediator exhibits a bias in favor of one side or the other.

Rules 10.300 through 10.370 deal with the conduct of a mediator, and require impartiality and the avoidance of coercion, improper influence and conflicts of interest. The mediator is responsible for maintaining the appropriate demeanor, preserving confidentiality and adopting practices which reflect fairness, integrity and impartiality. The Mediator Qualifications Board (MQB) is empowered with the responsibility of enforcing these rules by conducting hearings on complaints and imposing sanctions for violations. The findings of the MQB are reviewable only by the Chief Justice of the Florida Supreme Court, or his designee. (Rule 10.880).

In the case of *In Re: Jason T. Banks*, Case Number: MQB 2010-001, the mediator was found guilty of violating the prohibition against conflicts of interest due to his friendship with one of the

participants in the mediation, and because he assumed an adversarial position to the other participant. He continued to advise and counsel the participant with whom he had the friendship after the conclusion of the mediation. The result was a de-certification of the mediator, who was also barred from serving as a certified mediator in Florida.

In the recent case of *In Re: William J. Jatczak*, Case Number: MQB 2010-010, the Mediator Qualifications Board found that the mediator did not maintain the appropriate demeanor during mediation by virtue of comments to one of the litigants about her appearance and her jewelry. The comments were also considered to violate Rule 10.350, requiring the mediation to be conducted in a dignified and courteous manner. The offending mediator was sanctioned for failing to conduct a balanced process, with lack of dignity, and giving the appearance of partiality to one party and insensitivity towards the other.

The mediator should discuss his role as a neutral facilitator during the orientation session. However, he should also explain that each party should expect to be asked the “tough questions” about his case during the separate caucuses. If the parties are prepared for this, the mediator’s role of neutral facilitator will not be undercut unless he goes too far and exhibits a bias in favor of one of the parties. When this occurs, the trust factor is lost and the mediation will be doomed to failure.

Lawyer Olympics

Continued from page 5

miles, swim 10 miles, and cycle 10 miles while avoiding questions about their position on legal issues. Many feel this event should be open to judges who were appointed, as that would allow federal judges to compete. Others feel the federal judiciary, especially U.S. Supreme Court justices, would dominate this event.

Rule Against Perpetuities Long Jump: Gold Medal to a lawyer who can recite the rule so that a delegation of 10 random citizens from Thailand can understand it. Oddly, no long jump is required unless the condition precedent is certain to be satisfied or becomes impossible to satisfy no later than 21 years after the death of an individual then alive.

Curling: While law clerks polish the surface

with Pledge, attorneys slide a briefcase along a judge’s conference table; the winner is the attorney who scores the most ‘hangers’, i.e., a briefcase partly on and partly off the table.

Beach Plea Bargaining: Spike a plea to a lesser offense and score in this classic originating in Southern California. If the state aces a conviction it could be all over, lots of sand in loafers and pumps.

Of course there are many other Lawyer Olympic events which many of you take time to watch during the Court TV telecast of this year’s Games from the new First DCA courthouse in Tallahassee. Please write to us and tell us of your favorite event if we’ve failed to mention it.

2013 Judicial Assignments

CHIEF JUDGE	Judge Robert E. Roundtree, Jr.	Alachua Juvenile Delinquency and Division "W" (Special Writs)
CIRCUIT CIVIL JUDGES	Judge Toby S. Monaco <i>Administrative Judge</i>	Alachua Circuit Civil (1/2 split)
	Judge Victor L. Hulslander	Alachua Circuit Civil (1/2 split)
	Judge Mary Day Coker	Union Family/Civil/Juvenile and Alachua Probate, Guardianship, Adoptions, Child Support, Mortgage Foreclosure and Mental Health Cases
CIRCUIT FAMILY JUDGES	Judge James P. Nilon <i>Administrative Judge</i>	Alachua Family (1/3 split) and Juvenile Dependency
	Judge William E. Davis	Alachua Family (1/3 split) and Domestic Violence or Pro-Se Cases and Simplified Dissolutions
	Judge Robert K. Groeb	Alachua Family (1/3 split) and Domestic Violence or Pro-Se Cases and Simplified Dissolutions
REGIONAL CIRCUIT JUDGES	Judge Ysleta McDonald <i>Regional Circuit Administrative Judge</i>	Gilchrist and Levy Civil/Family, Gilchrist Juvenile
	Judge Phyllis M. Rosier	Baker and Bradford Civil/Family/Juvenile
CIRCUIT CRIMINAL JUDGES	Judge David A. Glant <i>Administrative Judge</i>	Alachua Felony (1/4 split), Bradford and Union Felony
	Judge Stanley H. Griffis, III	Alachua Felony (1/4 split), Gilchrist and Levy Felony
	Judge Martha Ann Lott	Alachua Felony (1/4 split), Division V (Forensics), Alachua Felony Adult Drug Court & Monday Jury Selection, Circuit-wide Jimmy Ryce Cases
	Judge Mark W. Moseley	Alachua Felony (1/4 split), Baker Felony and Circuit-wide Post Conviction Relief Cases
ALACHUA COUNTY COURT JUDGES	Judge Denise R. Ferrero <i>Administrative Judge</i>	County Civil V, Misdemeanor Mental Health Court, Weeks 2 & 4 Circuit-wide Back-up
	Judge Phillip A. Pena	County Civil IV, Weeks 1 & 3 Circuit-wide Back-up
	Judge Thomas M. Jaworski	County Criminal I
	Judge David P. Kreider	County Criminal II
	Judge Walter M. Green	County Criminal III, Felony Adult Drug Court
REGIONAL COUNTY COURT JUDGES	Judge James "Tim" Browning <i>Administrative Judge</i>	All Levy County Court Matters and Levy County Juvenile Dependency & Delinquency
	Judge Johnny R. Hobbs, Jr.	All Bradford County Court Matters
	Judge Joseph M. Williams	All Baker County Court Matters
	Judge Sheree Lancaster	All Gilchrist County Court Matters
	Judge TBD	All Union County Court Matters

Eighth Judicial Circuit Bar Association, Inc.

Mission Statement:

The mission of the Eighth Judicial Circuit Bar Association is to assist attorneys in the practice of law and in their service to the judicial system and to their clients and the community.

Please send a check payable to EJCBA in one of the following amounts:

- \$55 For lawyers with less than 5 years experience; lawyers with the State Attorney's Office, Public Defender's Office and Legal Aid with 10 years of experience or less; retired members of the Florida Bar pursuant to Florida Bar Rule 1-3.5.
- \$75 For all other lawyers and members of the Judiciary
- 1 year free membership for members in their first year of practice (in any jurisdiction). Free membership does NOT include cost of lunches.

Please send your check, along with your completed application to:

Eighth Judicial Circuit
Bar Association, Inc.
P. O. Box 13924
Gainesville, FL 32604
Email: execdir@8jcba.org

Voting Members: This category is open to any active member in good standing of the Florida Bar who resides or regularly practices law within the Eighth Judicial Circuit of Florida.

Non Voting members: This category of membership is open to any active or inactive member in good standing of the Bar of any state or country who resides within the Eighth Judicial Circuit of Florida, or to any member of the faculty of the University of Florida College of Law.

EJCBA

Renewal/Application for Membership

Membership Year: 2012 - 2013

Check one: Renewal New Membership

First Name: _____ MI: _____

Last Name: _____

Firm Name: _____

Title: _____

Street Address: _____

City, State, Zip: _____

Eighth Judicial Circuit Bar Association, Inc.

Telephone No: (_____) _____ - _____

Fax No: (_____) _____ - _____

Email Address: _____

Bar Number: _____

List two (2) Areas of Practice:

Number of years in practice: _____

Are you interested in working on an EJCBA

Committee? Yes No

Standing to Challenge Fraudulent Transfers

By Siegel, Hughes & Ross

The Florida Uniform Fraudulent Transfers Act (“FUFTA”), Chapter 726, Florida Statutes, provides remedies to creditors who have been deprived of the ability to collect a debt by the transfer of property to “hinder, delay or defraud creditors.” Are all creditors able to challenge all transfers, or are some transfers beyond the reach of certain creditors? Understandably, the law is clear that transfers of exempt property, such as homestead property, may not be considered fraudulent as to creditors. *Dean v. Heimbach*, 409 So.2d 157 (Fla. 1st DCA 1982); *Volpitta v. Fields*, 369 So.2d 367 (Fla. 4th DCA 1979). Since homesteads are exempt from creditors, the law, reasonably, presumes their transfer is not for the purpose of defrauding creditors. However, some property, such as entireties property may be reached by some creditors, but not others. Under these circumstances, does FUFTA provide a remedy to all creditors or only to those who could have reached the transferred property prior to its transfer?

Older Supreme Court cases are explicit that any creditor may attach a fraudulent transfer. “[I]t need not be alleged specifically that the conveyance was made with the intent to defraud the complainant personally, if it is alleged that it was made with intent to defraud creditors, generally.” *Godard v. Crenshaw*, 186 So. 822, 824-25 (Fla. 1938); *Also, Taylor v. Jones*, 150 So. 254, 255 (Fla. 1933). The language of the statute indicates FUFTA was intended to continue the prior law. The statute provides that:

(1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, ...if the debtor made the transfer or incurred the obligation:

(a) With actual intent to hinder, delay or defraud any creditor;

Fla. Stat., §726.105(1), (underlining added).

The only cases located which were decided after the effective date of the statute are bankruptcy cases which construe the statute consistently with the prior law. *In re Delson*, 247

B.R. 873 (S.D. Fla. 2000); *In re Mizrahi*, 179 B.R. 322 (M.D. Fla.). Applying FUFTA, both cases hold that a fraudulent transfer of entireties property may be set aside if there are any joint creditors. Thus, they confirm that a transfer may be attacked by any creditor if it is fraudulent as to a creditor. This interpretation is consistent with the intent of the statute, which is to prevent fraudulent transfers; it focuses on the intent of the transferor/debtor. If there are no joint creditors, the entireties property is like homestead property. It may not be reached by creditors and, therefore, there is no motive for the debtor to transfer the property to defraud creditors. However, if there are any joint creditors that can reach the entireties property, the fraudulent motive does exist and the transaction may be attacked by any creditor if it can prove the illicit intent.

Nevertheless, in *dicta* two Florida cases suggest that a creditor may only attack a transfer of property “which could have been applicable to payment of the debt due.” *Nationsbank N.A. v. Coastal Utilities, Inc.*, 814 So.2d 1227, 1229 (Fla. 4th DCA 2002); *Also, Steinberg v. Barclay’s Nominees Ltd.*, 2008 WL 4601042 (S.D. Fla. 2008). Neither case addresses the specific question addressed in this article: whether a transfer must be intended to defraud the specific plaintiff or only to defraud creditors in general. It is unlikely that either the Fourth District Court of Appeal or the federal district court would intend to depart from Supreme Court precedent by mere *dicta* without any analysis or justification. Therefore, it seems most probable that if a court were to address this issue it would follow the pre-statute Supreme Court and the post-statute bankruptcy court decisions.



Criminal Law



By William Cervone

This month's column is for all of my defense attorney friends and colleagues who think they have it bad and that the rules are skewed for the prosecution. As a lesson in reality, I will share some What I Did On My Summer Vacation perspective.

Last May at the invitation of our own Frank Maloney I participated in a comparative American and British criminal law panel for a Florida Bar seminar. Frank wrote about the seminar in last month's newsletter. That the seminar, a/k/a boondoggle to the cynics of the world, took place in London allowed me the opportunity to prepare by sitting in on some criminal proceedings at Old Bailey. To say that it was enlightening would be an understatement. In fact, it was a positive gobsmack moment for me. Gobsmack, for you who don't know, is a British term meaning completely dumbfounded or shocked. I may submit gobsmack to next year's Word of the Year competition.

Anyhow, as I watched motion hearings during the middle of a drug trial I was struck by several things. First, the wigs are not a good look for too many of them. The robes, however, work for the most part. Second, calling the judge "Lord" or "Your Lordship" is not something I'm willing to do, although I can only imagine how the late Judge Tench, who I loved precisely because of his aristocratic UVA tendencies, would have appreciated that. But mostly it was the prosecutor's request for admission of the defendant's prior criminal history on the sole basis of propensity that got my attention.

The defendant in question, one of three being tried together for some sort of drug deal, apparently maintained that he had simply been in the wrong place at the wrong time with two others who were the truly guilty parties. How familiar! In response, the prosecutor asked to tell the jury of the defendant's two prior drug convictions. The defendant had not and apparently was not going to testify, and regardless what the prosecutor wanted to introduce was not just the number of priors but also their nature.

I expected His Lordship to make short work of that request, and he did. After the defense

attorney more passively than not argued that the two priors were from the early 90s and thus quite remote, and that little was known about them from which any conclusion might be drawn, His Lordship summed things up. He said that the question he always asked himself when deciding on the admissibility of propensity evidence, which apparently is routine, was whether the jury would expect to have been told about it, and that obviously they would in this instance as it was quite relevant to rebut a claim of innocent behavior. After all, His Lordship said, there were two, not just one, prior drug deals on the defendant's record, making it all the more likely that he had dealt drugs this third time. So in the priors came. Like I said, gobsmack!

From talking to a British defense attorney at the boondoggle/seminar, I gather that this is a fairly new practice in English law. Needless to say, I admire it. Since we have taken so much of our jurisprudence from our British origins, I think we should strongly consider adopting this as well. It's not the only surprising thing I saw. Witnesses are routinely allowed to testify behind a curtain so that their identity is shielded from everyone. When witnesses refuse or don't bother to show up, whether it be due to intimidation or lack of interest, prior statements they might have made are routinely read to the jury, regardless of the circumstances under which they were given and without any of the torturous reliability tests we have developed as hearsay exceptions. Judges provide what amounts to a closing argument summing up the case and their opinion of it, allowing them to shape the outcome of a trial in ways I can only imagine. Some things weren't different: jailers looked bored and defendants seemed particularly disengaged, maybe because they were confined in the dock, which really is a glassed off area away from their lawyers and anyone else. There is probably more but I was only there for a day.

So, defense brethren, the next time you feel put upon as the State is presenting its case, remember a couple of things. First, all of our evidence really is intended to be prejudicial to your client. Second, you are fortunate that American criminal procedure is what it is.

Gobsmack!

Probate Section



By Larry E. Ciesla

The Probate Section wishes to welcome two new staff attorneys, Katherine Mockler and Erin Hunt. Ms. Mockler has recently taken charge of Alachua County probate cases and Ms. Hunt is now in charge of Alachua County guardianships.

Their email addresses are mocklerk@circuit8.org and hunte@circuit8.org, respectively. In addition, if my information is correct, a new division of the circuit court has been created, to become effective in January 2013. The new division will consist of all Alachua County probate, guardianship and foreclosure cases, to be presided over by Judge Mary Day Coker. Also, effective September 1, 2012, "GA" replaces "CP" in the case numbers of all Alachua County guardianships.

The remainder of this month's column is devoted to recent developments in the law which may be of interest to estate planning, probate, trust, and guardianship practitioners. Multiple revisions to Chapter 738, Principal and Income, become effective January 1, 2013. These revisions are contained in Chapter 2012-49, Law of Florida (CS for SB No. 1050). Of particular interest is the newly rewritten Section 738.801, Florida Statutes, dealing with apportionment of expenses as between a (life) tenant and a remainder person. In summary, any trust instrument dealing with this subject prevails over the statute. In the absence of a trust provision, ordinary repairs, taxes, insurance and (mortgage) interest are charged to the (life) tenant. The remainder person is charged with (mortgage) principal, lawsuits regarding title to the property and environmental matters. Extraordinary repairs are generally shared by the parties pursuant to a formula set forth in the statute, except if the improvement is not reasonably expected to outlast the duration of the (life) tenant's estate, in which case the cost is paid solely by the (life) tenant. Nothing in the statute prevents the parties from reaching their own agreement as to these matters.

A new statute, Section 732.703, Florida Statutes, which became effective July 1, 2012, deals with the effect of divorce on disposition of various assets. The new law basically nullifies the designation of an ex-spouse who was previously designated as a beneficiary on certain non-probate assets including life insurance, annuities, IRA's and pay-on-death designations. The surviving

ex-spouse is treated as having predeceased the decedent ex-spouse. Exceptions to application of the new law include cases where the divorce judgment required that an asset be held for the benefit of the ex-spouse or children and cases governed by the law of other jurisdictions (federal or state). This is a situation where the exception may swallow the rule, due to the fact that in many cases, perhaps even a majority of cases, the "fine print" of an insurance policy, annuity, bank/brokerage account customer agreement or IRA agreement will provide that the account shall be in all respects governed by the law of the state wherein the institution issuing the account is located. In such cases it is anticipated that Florida will rarely be the selected forum.

In a recent guardianship case of interest, the First District in *Faulkner v. Faulkner*, 65 So.3d 1167 (Fla. 1st DCA 2011), discussed at length the problem of who is responsible for payment of the examining committee's fees where a petition to determine incapacity is denied but is not found to have been filed in bad faith (in which case by statute the petitioner is responsible). The Court pointed out that a gap in Section 744.331(7), Florida Statutes, exists as to this point, and urged the legislature to address the matter. However, since an emergency temporary guardian was appointed (and later dismissed) in *Faulkner*, the Court held the fees could be assessed against the assets of the Ward.

In another guardianship decision, the Fifth District in *Hancock v. Share*, 67 So.3d 1075 (Fla. 5th DCA 2011), held that it was error for the trial court to refuse to approve a structured settlement annuity for a minor on the grounds that the minor would be unable to obtain the settlement funds upon attaining the age of 18 years. The DCA ruled that a structured settlement annuity is appropriate, so long as it is found to be in the best interest of the minor.

In another interesting guardianship case, the Second District in *Long v. Willis*, ___ So.3d ___, 2011 WL 3587411 (August 17, 2011) held that a parent/natural guardian does not have the legal authority to "vote" on behalf of a minor child when selecting a personal representative, typically for the estate of the child's deceased parent. This can be a very important "vote," because in a wrongful death case, the personal representative is the one who has full legal authority to decide which attorney to hire to pursue the wrongful death claims

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Probate Section

Continued from page 12

of the estate and all survivors. Pursuant to Section 733.301(2), Florida Statutes, a guardian of the property must be appointed in order for a minor to legally “vote” for a person to be named as personal representative.

The Probate Section continues to meet on the second Wednesday of each month at 4:30 pm in the fourth floor meeting room in the civil courthouse. All interested persons are invited to attend. There are no dues and attendance is not monitored.

President's Message

Continued from page 1

& Grill. You will find a reservation card inside this newsletter and in your email or mail box shortly. Please reserve early. The Clara Gehan Association of Women Lawyers (CGAWL) will once again hold a dessert contest and endeavor to serve mouthwatering desserts for your delectation – if you would like to participate in the contest, please contact Anne Rush at arush@rtix.com.

Paul A. Remillard, Certified Mediator

Now available in Jacksonville, Pensacola, Gainesville and Panama City at no travel cost to the participants.

Recognized as one of the most experienced and successful mediators by the National Academy of Distinguished Neutrals, Mr. Remillard has mediated over 2,000 disputes.

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Remillard Law Firm, P.A.

Celebrate Pro Bono

By Marcia Green

The American Bar Association has designated October as Pro Bono Month. Throughout the country, attorneys are being recognized for their volunteer time and efforts on behalf of low income clients and families.

Once again, Three Rivers Legal Services is taking this opportunity to thank and celebrate the dedicated attorneys in the Eighth Judicial Circuit who give of their time and legal expertise to members of our community. Lives are changed when those in need or those who are vulnerable are able to gain access to the legal system.

Here are some examples of how local attorneys have assisted clients through referrals from Three Rivers:

- represented a poor, disabled woman in her dissolution of marriage which resulted in an award of alimony and equitable distribution of the parties' property
- represented a client in a successful unemployment compensation appeal insuring a household income until future employment could be obtained
- represented an elderly woman to secure a life estate in her home
- represented the maternal grandparents of two children in an adoption contested by their abusive father
- represented a couple in the guardian advocacy of their adopted, disabled adult children, allowing them to secure medical and other care as needed
- assisted a non-profit organization serving the low income community to secure tax exemption status resulting in eligibility for federal, state and other grants.

These are just a few examples of some of the work accomplished by local pro bono attorneys. Some cases take more time than others; some clients need only advice while others need an attorney to represent them in litigation.

As you know, the resources of Three Rivers Legal Services are stretched thin; in fact, thinner than ever. With the good work and gracious donations of time provided by volunteer attorneys, Three Rivers is able to expand our services to so many more low income members of our community.

Thank you to our volunteer attorneys. We couldn't do what we do without your help and we celebrate your work!!

RESERVE NOW FOR THE ANNUAL EJCBA JIMMY ADKINS CEDAR KEY DINNER

WHEN: Thursday, November 8, 2012 beginning at 6:00 p.m.

WHERE: Steamers: 420 Dock Street, Cedar Key, Florida

COST: \$40.00*

DEADLINE: Please register on or before **Thursday, November 1, 2012**

REMIT TO: EIGHTH JUDICIAL CIRCUIT BAR ASSOCIATION, INC.
P.O. Box 13924
Gainesville, FL 32604

Show off your culinary skills, bring a dessert and compete in CGAWL's "Hail to the Chief" dessert contest.

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



Cocktail hour sponsored by

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NAME(S): _____

PAID: Dinner: _____ Dues: _____ TOTAL: _____

NOTE: Attendance is limited to current members of the EJCBA and attorneys who are members' guests, but only if the guest attorney(s) would not otherwise be eligible for membership in the EJCBA. Visit www.8jcba.org/join.aspx for dues information and include your current dues, if not yet paid.

Appellate Argument *Continued from page 6*

reliable expert on the issue. Understand the policies behind the law. Your goal is to help give the appellate panel confidence in your position. The same is true of negative facts: admit them, discuss them, and explain why, despite such facts, you should still prevail.

Focus on and emphasize a theme for your position. Do not get up to the podium and simply reiterate the facts or background of your case. Start off strong with a theme that is accurate and memorable – a theme you should have used in your brief. You have limited time in oral argument so engage them from the beginning and spark their interest in what you have to say. Ask yourself, “why should the court rule in my favor?” Is there a substantial policy at stake? Why should your argument interest them? Oral argument is your last chance to make an impression. Make it count.

Lastly, if you are asked a question you simply cannot answer, don't hesitate to ask the court for permission to follow-up with a supplemental filing and, if granted permission, do so promptly while the argument is still fresh in their minds. The important thing to remember is that you should never dread the questions from the judges. You should invite and embrace

them as an opportunity to educate and persuade them to your position. Even if you don't win your appeal, these tips will help you obtain credibility with and respect from the court, which may prove invaluable the next time you are arguing a case before them.



UF Political Science Professor, Daniel A. Smith, Ph.D., speaking at the September EJCBA luncheon on whether our votes still count

to Encourage and Promote Diversity and Inclusion in All Aspects of the Profession and the Justice System.

The Special Committee to Study the Decline in Jury Trials presented its final report. Recommendations to counter the decline of civil and criminal jury trials in the state and federal courts are included. Concern is expressed in the report that fewer jury trials could undermine public confidence in the courts and have devastating impacts on the third branch of government.

The 2012 Legislative Session concluded with a \$446 million budget for the state courts system representing no reduction from the current year's funding. Further, to avoid a repeat of the cash-flow problems caused by insufficient filing fee revenue, the Legislature is funding the courts principally with general revenue. Funds have also been allocated to address the foreclosure backlog and for technology enhancements. President Scott Hawkins, in his March video message to the membership, thanked House Speaker Dean Cannon and Senators Ellyn Bogdanoff and David Simmons for their help with court funding and for increasing funds for civil legal assistance. For a summary of outcomes of other 2012 legislation monitored by The Florida Bar, visit www.floridabar.org/2012legislativesession.

The Florida Bar will lead a statewide voter education program on merit retention in advance of the November 2012 election when three Supreme Court justices and 15 District Court of Appeal judges will be on the ballot. Themed "The Vote's in YOUR COURT. Judicial merit retention. Know the facts." The program will provide voters with information on the merit system and encourage their participation in the election. Research conducted for the program revealed that 90 percent of respondents did not know what the term merit retention meant. The Bar will employ multiple strategies to achieve the program objectives, including: printed materials and a dedicated webpage with public information and links to additional resources, distribution of a voters' guide with frequently asked questions, reporter briefings and editorial board meetings, presentations at civic and community groups and developing partnerships with other grassroots and advocacy groups.

Amendments to Rule 5-1.2 (b) and (c) on trust accounting records and procedures were approved. The proposed changes require law firms with two or more members to have a written trust account plan identifying which firm lawyers can sign trust account checks and reconcile trust accounts. The proposed

amendments also mandate that only a Florida Bar member can sign a trust account check and that Bar members may not sign blank trust account checks and will provide sample trust accounting forms and plans. The amendments will go to the Supreme Court this fall with the Bar's annual rules filing.

After considerable study of the issue, the Program Evaluation Committee concluded that adding a seat on the board for a nonvoting representative of government lawyers could best be addressed under existing Standing Board Policy which encourages "participation at board meetings by representatives of state or local bar associations or groups." The Bar president is empowered to carry out the intent of that policy, including the appointment of a nonvoting member to the board. Representatives of the Cuban American Bar Association, Florida Association for Women Lawyers and the Virgil Hawkins Chapter of the National Bar Association currently participate at all meetings of the Board of Governors.

The Commission on Review of the Discipline System presented its final report. Appointed in June 2011, the commission was charged with studying the Bar's regulation of lawyer conduct as it relates to the rapidly growing number of Bar members and in view of high-profile matters involving broad-scale misconduct. Rather than serving as an omnibus examination of the disciplinary system, as was conducted by another Bar commission from 2003-2005, the focus was on specific tasks which were undertaken by three subcommittees of the commission. The commission reviewed such issues as making greater use of the grievance diversion process, allowing lawyers with longer suspensions to apply for reinstatement before the suspension is over and dealing with problems faced by aging attorneys.

The board approved a social media policy for the Bar and Bar Sections and Divisions, presented by the board's Communications Committee, that will initially enable use of Facebook and Twitter as supplemental communications tools. In order to meet public records obligations -- The Florida Bar is part of the judicial branch of government and access to records of the judicial branch is governed by Florida Rules of Judicial Administration Rule 2.420 -- the Bar and the sections and divisions will employ a software program that will retain all postings as per the Bar's public records retention schedule.

Thank you for allowing me to serve as your representative this past year. I look forward to my service in the coming year.



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

October 2012 Calendar

- 3 EJCBA Board of Directors Meeting; Ayers Medical Plaza, 720 SW 2d Avenue, North Tower, Third Floor – 5:30 p.m.
- 4 EJCBA Fall Social, Location TBD, p.m.
- 5 Deadline for submission to November Forum 8
- 6 UF Football v. LSU, TBA
- 8 Columbus Day Holiday – Federal Courthouse closed
- 8 Law in the Library, Alachua County Public Library Headquarters, Collaborative Divorce: An Alternative to the Classroom, 6-7:00 p.m.
- 10 Probate Section Meeting, 4:30 p.m., 4th Floor, Family & Civil Courthouse
- 13 UF Football at Vanderbilt (Nashville, TN), TBA
- 16 Family Law Section Meeting, 4:00 p.m., Chief Judge’s Conference Room, Alachua County Family & Civil Justice Center
- 19 EJCBA Luncheon & CLE, Dr. Steven Noll, “Ditch of Dreams – The Cross Florida Barge Canal & The Struggle for Florida’s Future”, Paramount Plaza Hotel, 11:45 a.m.
- 20 UF Football v. South Carolina, TBA
- 27 UF Football v. Georgia (Jacksonville), 3:30 p.m.

November 2012 Calendar

- 2 “A Toast to Judge Hodges,” an event honoring Senior U.S. District Judge William Terrell Hodges, The Historic Thomas Center, 6-9 PM
- 3 UF Football v. Missouri, TBA
- 5 Deadline for submission to December Forum 8
- 5 Law in the Library, City of Alachua Branch Library, “Child Support and the Law,” 6:30 p.m.
- 7 EJCBA Board of Directors Meeting; Ayers Medical Plaza, 720 SW 2d Avenue, North Tower, Third Floor – 5:30 p.m.
- 8 ANNUAL CEDAR KEY DINNER , Steamers, 420 Dock Street, Cedar Key, 6-9 PM
- 10 UF Football v. Louisiana (Homecoming), TBA
- 12 Veteran’s Day – County & Federal Courthouses closed
- 14 Probate Section Meeting, 4:30 p.m., 4th Floor, Family & Civil Courthouse
- 15 Law in the Library, Tower Road Branch, “Legal Issues Impacting Social Security and Disability Benefits,” 6:00 p.m.
- 16 EJCBA Luncheon, Jane Curran, The Florida Bar Foundation, Paramount Plaza Hotel, 11:45 a.m.
- 17 UF Football v. Jacksonville State, TBA
- 20 Family Law Section Meeting, 4:00 p.m., Chief Judge’s Conference Room, Alachua County Family & Civil Justice Center
- 22 Thanksgiving Day – County & Federal Courthouses closed
- 23 Thanksgiving Holiday – County Courthouse closed
- 24 UF Football at Florida State, Tallahassee, TBA

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