

# FORUM 8

Volume 74, No. 4

Eighth Judicial Circuit Bar Association, Inc.

December 2014

## President's Message



### Events, and More Events

*By Ray Brady*

The EJCBA has held a number of successful events so far this Fall. First, lawyers and judges met with physicians, residents and medical students associated with the Alachua County Medical Society for a social hour, dinner and a panel

discussion. The event was held at the UF Hilton on October 14<sup>th</sup>. There were more than 130 attendees. We shared perspectives on medical-legal issues in a very collegial atmosphere. The ACMS reports that their members enjoyed the meeting with us, and now they are hoping to make this into an annual event with the EJCBA. In addition, the ACMS is looking for other ways to work with us to further educate the members of the medical community on medical-legal matters. Contact me if you would like to work on these ongoing projects with the ACMS.

On October 16<sup>th</sup>, we held our annual Jimmy Adkins Cedar Key Dinner. It was a beautiful evening, with a cloudless sky and spectacular sunset. More than 70 EJCBA members and judges attended. The seafood served by Steamers was arguably the best we have enjoyed in years (thanks in part to Norm Fugate's special attention to the menu). And the raffle gifts, once again, were varied, with some of great value. Many of our members took the bus to Cedar Key, provided at no cost by the EJCBA. They enjoyed the

camaraderie and the relaxation of letting someone else handle the driving.

The EJCBA's first social of the year (our Fall Social) was held on October 21<sup>st</sup> at a new venue, Blue Gill Quality Foods. Approximately 65 members, guests and judges attended the free event. The drinks and food were outstanding, and the space there is large and easily accommodated our event. The EJCBA socials provide a wonderful opportunity to catch up with old friends and to meet new ones.



In December we will have the Annual Holiday Project. The EJCBA will be working with the Alachua County Head Start Program to provide toys for their students. This year, we will have the support again of the EJCBA YLD. In addition, both the Adkins Inn and the Bennett Inn of Court will be "raising" toys through their "AmazInn Race" event, which was held on November 6<sup>th</sup>. Please give a gift of books, toys, or a monetary donation, to bring joy to those in need in our community during this holiday season. If you wish to make a donation, please contact Anne Rush, who chairs this project.

The EJCBA's December luncheon will be on Friday, December 12<sup>th</sup>, beginning at 11:45 at The Woolly. Our speaker will be Dr. Robert Knight, who is the Executive Director of the Howard T. Odum Florida Springs Institute. Dr. Knight will speak to us on the topic of "The State of Our Springs." Arguably there are not many environmental issues that can be more important to Floridians than the

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## 2014-2015 EJCBA Officers

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

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

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

**Stephanie Marchman**  
President-Elect Designate  
200 E University Ave, Ste 425  
Gainesville, FL 32601  
(352) 334-5011  
(352) 334-2229 (fax)  
[marchmansm@cityofgainesville.org](mailto:marchmansm@cityofgainesville.org)

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

**Leslie Smith Haswell**  
Secretary  
2830 NW 41 St, Ste K  
Gainesville, FL 32606  
(352) 377-3800  
(352) 377-8991 (fax)  
[leslie.haswell@gainesvillefamilylawyer.com](mailto:leslie.haswell@gainesvillefamilylawyer.com)

## Members at Large

**Marilyn C. Belo**  
5745 SW 75th Street #363  
Gainesville, FL 32608  
(352) 448-4500  
(352) 448-4510 (fax)  
[lynn@beloandpaul.com](mailto:lynn@beloandpaul.com)

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

**Richard H. Fabiani**  
P.O. Box 5877  
Gainesville, FL 32627  
(352) 376-5226  
[rfabiani@chandlerlang.com](mailto:rfabiani@chandlerlang.com)

**Norm Fugate**  
PO Box 98  
Williston, FL 32696  
(352) 528-0019  
(352) 528-4919 (fax)  
[norm@normfugatepa.com](mailto:norm@normfugatepa.com)

**Courtney Johnson**  
115 NW 34th St  
Gainesville, FL 32607  
(352) 372-1282  
(352) 375-9960 (fax)  
[courtney@foldsandwalker.com](mailto:courtney@foldsandwalker.com)

**Diana M. Johnson**  
18 NW 33rd Ct  
Gainesville, FL 32607  
(352) 376-4694  
(352) 371-7366 (fax)  
[djohnson@clayton-johnston.com](mailto:djohnson@clayton-johnston.com)

**Philip Kabler**  
2700 NW 43rd Street, Ste C  
Gainesville, FL 32608  
(352) 332-7688  
(352) 332-7692 (fax)  
[pkabler@boginmunns.com](mailto:pkabler@boginmunns.com)

**Hoa T. Lee**  
2830 NW 41st Street, Bldg M  
Gainesville, FL 32627  
(352) 375-5602  
(352) 373-7292 (fax)  
[tee.lee@swansonlawcenter.com](mailto:tee.lee@swansonlawcenter.com)

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

**James H. (Mac) McCarty, Jr.**  
4131 NW 28th Ln, Ste 7  
Gainesville, FL 32606  
(352) 240-1226  
(352) 240-1228 (fax)  
[mac@lawgators.com](mailto:mac@lawgators.com)

**Peg O'Connor**  
102 NW 2d Avenue  
Gainesville, FL 32601  
(352) 372-4263  
(352) 375-5365 (fax)  
[peg@turnerlawpartners.com](mailto:peg@turnerlawpartners.com)

**Monica Perez- McMillen**  
101 NW 75th St, Ste 1  
Gainesville, FL 32607  
(352) 335-2393  
(352) 375-0104 (fax)  
[m.perez@foryourlaw.com](mailto:m.perez@foryourlaw.com)

**Meshon Trinette Rawls**  
PO Box 117626  
Gainesville, FL 32611-7626  
(352) 273-0800  
(352) 392-0414 (fax)  
[rawls@law.ufl.edu](mailto:rawls@law.ufl.edu)

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

**Margaret M. Stack**  
PO Box 552  
Alachua, FL 32616  
(352) 222-3220  
[mmstack@att.net](mailto:mmstack@att.net)

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

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

## Contribute to Your Newsletter!

### From The Editor

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

### About This Newsletter

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

Eighth Judicial Circuit Bar Association, Inc.  
P.O. Box 13924  
Gainesville, FL 32604  
Phone: (352) 380-0333 Fax: (866) 436-5944

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

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

### Judy Padgett

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

### Dawn Vallejos-Nichols

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

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

## Reserve Now for the EJCBA December 2014 Luncheon



**WHEN:** Friday, December 12, 2014 – 11:45 a.m.  
**WHERE:** The Woolly – 20 N. Main Street, Gainesville, FL 32601  
**PROGRAM:** Dr. Robert Knight, Executive Director of the Howard T. Odum Florida Springs Institute—"The State of our Springs"  
**COST:** **Members: \$17.00, Non-Members: \$25.00\***  
Chef's choice luncheon buffet, including meat or vegetarian entrees, seasonal sides, and dessert  
**DEADLINE:** Register on or before **Monday, December 8<sup>th</sup> at Noon at <http://8jcba.dev.acceleration.net/event-registration/december-2014-luncheon/>**

**\*\$20.00 for members and \$25.00 for non-members, not having made prior reservations.** If you are reserving at the last minute, or need to change your reservation, email Judy Padgett at [execdir@8jcba.org](mailto:execdir@8jcba.org) or call (352) 380-0333. Note, however, that after the deadline, EJCBA is obligated to pay for your reserved meal and we make the same obligation of you. Thank you for your support.

### Mark Your Calendars for Upcoming Events

EJCBA Spring Fling Party/Social—Evening of Friday, March 6, 2015 at The Thomas Center grounds (a new EJCBA event!)

EJCBA Charity Golf Tournament benefiting the Guardian ad Litem Program—Friday March 20, 2015

### Holiday Toy Drive

The EJCBA will be conducting a holiday toy drive, in conjunction with the Adkins and Bennett Inns for collecting toys via their "AmazInn Race" event and continued support of the EJCBA YLD, to benefit the Alachua County Head Start Program at the December luncheon. Please bring unwrapped, new toys for 3-5 year olds. Age appropriate books are strongly encouraged.

## Professionalism Seminar – SAVE THE DATE

### Inexpensive (CHEAP) CLE Credits

*By Ray Brady*

Mark your calendars now for the annual Professionalism Seminar. This year the seminar will be held on Friday, April 17, 2015 from 8:30 AM until Noon at the UF Levin College of Law, speaker TBA.

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

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

Please join us for a retirement celebration honoring

**Phyllis M. Rosier**  
Circuit Judge  
Eighth Judicial Circuit of  
Florida

Friday, December 5, 2014  
Reception 3:00 p.m. – 5:00 p.m.  
Remarks 3:30 p.m.

Alachua County Criminal Justice Center  
Jury Assembly Room  
220 South Main Street  
Gainesville, Florida 32601



## President's Message *Continued from page 1*

health of our water and springs. Dr. Knight is another speaker who is participating in the EJCBA's "Building Bridges" luncheon series this year, in which we seek to foster collaborations between our legal community and the various community and civic organizations that are essential to the clients that we serve in the 8<sup>th</sup> Judicial Circuit.

Finally, here are a few upcoming dates that you should save on your calendar for special events provided to you by your EJCBA: Immediately following the EJCBA luncheon on Friday, January 9<sup>th</sup> (at which the "State of the Circuit" address will be given by Chief Judge Robert Roundtree), we will have a CLE event titled "View from the Bench," where a panel of judges will discuss topics relating to law and litigation. On the evening of Friday, March 6<sup>th</sup>, we will have the "Spring Fling," our new party/social on the grounds of the Thomas Center. Music will be provided by Bruce Brashear's band, "Squid Love." On the afternoon of March 20<sup>th</sup>, the annual EJCBA Golf Tournament will be held to benefit the Guardian Ad Litem Program. On April 10<sup>th</sup> following the EJCBA luncheon, we will offer the Leadership Roundtable 2015, which is a major CLE event that will focus on issues of inclusion and diversity, with a reception to follow. The Annual Professionalism Seminar will be held on Friday, April 17, 2015, from 9 a.m. to noon, at the UF College of Law. And we are exploring Thursday, June 18, 2015, as a possible date to hold the EJCBA Annual Dinner, which will be held again this year at the Sweetwater Branch Inn.

In conclusion, I wish you all a happy, healthy and relaxing Holiday Season!



EJCBA President-Elect Rob Birrenkott, President Ray Brady and Board Member Jan Bendik at the November luncheon

## Mary Jane Gets Busted at Work



*By Laura Gross*

While Florida's proposed Constitutional Amendment 2 would have allowed the production, possession and use of marijuana for certain medical purposes, it did not require accommodations for Aunt Mary at work. How this might have played out for Florida businesses is still pretty hazy.

Florida employers are generally required by federal, state, and even local ordinances to provide reasonable accommodations for employees who are disabled. Reasonable accommodations may include allowing an employee to use prescription medicine that is otherwise prohibited by an employer's drug free workplace. Amendment 2 would have made medical marijuana a constitutional right that ends at the doorway to the workplace. It stated:

Nothing in this section shall require any accommodation of any on-site medical use of marijuana in any place of education or employment, or of smoking marijuana in any public place.

Moreover, despite the proposed creation of a state constitutional right, marijuana remains illegal under federal law and a Schedule 1 narcotic. Employers still must conduct their businesses in compliance with federal law.

The result of states legalizing medical marijuana, according to a recent article in the New York Times, "is a clash between a culture that increasingly accepts marijuana and companies that will fire employees who use it." With this kind of potential for conflict, it is important for employers to stay informed about the state of the law and update current policies accordingly.

# Alternative Dispute Resolution

## Clients and Settlement Satisfaction

By Chester B. Chance and Charles B. Carter



We have often cited the book Lawyer Negotiation: Theory, Practice, and Law, by Folberg and Golann. We believe the book is the bible with respect to negotiation in the legal context.

The new edition of the referenced book includes some concepts we found interesting.

Folberg and Golann suggest attorneys might at least consider protecting themselves from negotiation/settlement malpractice claims by using a form entitled "Pre-Settlement Statements of Client's Case" which the client signs before any settlement. The authors suggest the form memorialize all the facts, assessments, and advice that were considered to decide upon settlement. The form notes "your attorney may use this document as a defense in a malpractice claim if permitted by law."

However, the authors acknowledge such a form may or may not be an effective protection and also question whether it's the way we wish to conduct the practice of law. The authors suggest lawyers should take solace in the fact malpractice verdicts against lawyers for good-faith efforts in negotiating on behalf of clients appear to be rare. "Keeping clients informed is the best prevention."

Therefore, although a client may be bound to an agreement when the client tries to set it aside, the client may have recourse against the attorney if there was malpractice involved with respect to entry into the decision to reach a settlement.

"Lawyers owe their clients the duty to know the law and properly advise clients about how law and practice effect their situation. Accurate information is necessary for clients to make informed decisions about settlement. The test for purposes of malpractice is commonly stated as whether the attorney exercised that degree of skill, prudence and diligence in investigating facts and legal research and in giving legal advice that lawyers of ordinary skill and capacity would do

in similar situations." Lawyer Negotiation Theory, Practice and Law, Second Edition, Folberg and Golann (2011).



Commentators such as Folberg and Golann cited above from the book Lawyer Negotiation note the obvious:

only disappointed clients sue their lawyers. The cited authors note family law is an area of legal practice in which client expectations are often unrealistically high together with high client emotions. The resulting remorse following a settlement may lead to claims against lawyers.

Folberg and Golann also have an interesting chapter in the latest edition of their book raising the following subject: a new role for lawyers – settlement counsel.

The concept is mainly in the context of corporations hiring settlement counsel to assist trial counsel. The reason? It has been suggested that trial lawyers often put so much focus on winning they start to lose objective evaluation ability. Often demonization of the other side becomes a self-fulfilling prophecy according to Folberg and Golann. In other words, the authors suggest the motivation and the interest of the trial attorneys may be in conflict with the pursuit of settlement. Consideration of insulating the role of the trial attorneys during the settlement process raises the concept of the "settlement counsel." Folberg and Golann state that in England solicitors traditionally handle settlement negotiations and call in a barrister as needed for trial. "This allows the solicitor and the barrister to focus on their separately defined roles of negotiation and trial...."

We could write lengthy articles on both of the above concepts, i.e., the concept of potential settlement negotiation malpractice and the concept of settlement counsel. Our intention is only to keep you, the readers, abreast of trends in alternative dispute resolution. Many of our ideas come from your emails to us and those emails and ideas are always appreciated.

# 2014 EJCBA Holiday Project

By Anne Rush

The holiday season is fast approaching, and as that time of year rolls around again I hope that our members' thoughts turn again to the EJCBA's Annual Holiday Project. This year we will again be working with the Alachua County Head Start Program to provide toys for their students. Last year we were able to provide toys for over 300 students and had more than 175 attend a toy distribution party at Rawlings Elementary! This year I hope to be able to reach even more children as we join forces with both the Adkins and Bennett Inns for collecting toys via their "AmazInn Race" event (see article in this issue) and continue to have the support of the EJCBA YLD.

We are also expanding the project this year by having professional photos with Santa for the children. Carl Schwait has again made arrangements for Santa to give gifts to the children at the party and Stacey Steinberg of Stacey Steinberg Photography is donating her photography services. <http://www.staceysteinbergphotography.com/> The EJCBA will provide a photo for each child of their visit with Santa as part of our gift to them.

Donation boxes for you or your firm are still available for pick up by making arrangements with Anne Rush ([anne@robertarushpa.com](mailto:anne@robertarushpa.com)). If you don't want to take an entire box, donation boxes are available at the Alachua County Clerk's Office at both the Civil and Criminal Courthouses. If you don't want to buy gifts but still want to support the project, you may make a check out to the EJCBA Holiday Project and give it to Judy Padgett when you check in at the December luncheon, or mail a check to EJCBA, PO Box 13924, Gainesville, FL 32604.

Toys should be for ages 3-5yo, new and unwrapped. If toys require batteries, we encourage the donation of those along with the toy. Age appropriate books are STRONGLY encouraged!

If you have any questions about the program this year, please contact Anne Rush at [anne@robertarushpa.com](mailto:anne@robertarushpa.com).

We hope you will join us again in bringing joy to those in need in our community this holiday season!

Your EJCBA Holiday Project Committee,  
Anne Rush  
Dawn Vallejos-Nichols  
Diana Johnson  
Hoa T. Lee  
Nancy Baldwin  
Monica Perez-McMillen

## Save the Date!

Please note and calendar the date of March 20, 2015 for the EJCBA Annual Charity Golf Tournament to benefit the Guardian Ad Litem program. Watch this newsletter for future announcements and registration information.



Three Rivers Legal Services, Inc.

chico's

Come prepare your holiday wardrobe and support Three Rivers Legal Services!

*10% of each sale between 9:00 a.m and noon will be donated to TRLS.*

Saturday, December 6  
3842 West Newberry Road, Gainesville  
9:00 a.m. - Noon

For questions, please call Chico's at 352-381-8300

# Criminal Law



By William Cervone

He sees you when you're sleeping.

He knows when you're awake.

He knows if you've been bad or good, so be good for goodness sake!

Oh, you better watch out...

Ah, yes, one of the all-time Christmas classics. Not just a musical tribute to Santa's omniscient ability to know who gets presents and who gets lumps of coal, and no longer just the idle threat of exasperated parents who for at least the few weeks leading up to December 25th feel like they have something to control their kids with. Not even just an apocryphal summary of the also classic novel *1984* by George Orwell, which when written in 1949 seemed impossible or at least unlikely while the adjective Orwellian has become a part of the lexicon signifying at least in part official deception and secret surveillance.

Of course, it's more true now than ever that Big Brother is watching. And he's not the only one. Ask Pedro Bravo. Pedro, you'll recall, will be spending the rest of his life in prison for killing his friend Christian Aguillar over a girl, right here in River City. Among the mountain of evidence against Pedro: Wal-Mart parking lot security videos on which his car is clearly seen, likely even as he was killing Christian, more store video of him buying the shovel used to bury Christian, video of him at a car wash where he unsuccessfully attempted to wash off incriminating evidence linking him to the burial site, video of him coming and going from his apartment complex at times that contradicted his attempts at an alibi, and the now ubiquitous cell phone tower data tracking his motions throughout the relevant times. Armed with those clues, as they say, law enforcement built a pretty good case.

Of course, law enforcement is not immune to the effect of a good video or two. In South Carolina a few months ago a trooper made a traffic stop, ordered the unarmed driver to produce his license, and then shot him as he reached into his car for what turned out to be his wallet. Thank you, dashboard cam. No

doubt the trooper will claim his fear that the soon to be shot driver was reaching for a gun. Where that gets him in the face of the video remains to be seen.

As for the videos, well, are you going to believe me or your lying eyes? Remember Rodney King, beaten badly by Los Angeles police in 1991 on video? Yep, acquittals. Or again right here in River City back in 2001 the shooting of a fleeing DUI suspect? Acquittal again.

Let's face it: we are under surveillance almost everywhere out in public. And while subject to multiple legal controls, it's even possible that we are under surveillance inside the privacy of our homes.

Not everyone is offended by this, at least not when it happens in the public realm. Some, such as a letter writer to the Gainesville Sun earlier this Fall, feel that the increased surveillance actually provides some protection. As the theory goes, both criminal behavior and bad cop behavior might be deterred by the knowledge that someone other than Santa is watching. As the letter writer said it, "When I pump gas at my local gas station and see the blinking light on its security camera, it gives me a secure feeling." To comply with my requirement that this column have something to do with criminal law, mindful readers should be aware that the courts, high and low, are continuously grasping with technology and how law enforcement can do it, largely by requiring probable cause-based warrants in a variety of applications. But that is a story for another day.

Unrelated to this but reasonably seasonal, I've discovered the answer to the age old question of how many angels can dance on the head of a pin, a question I've now and then posed in these columns. While there used to be no limit on the number of dancing angels, OSHA has now adopted Angel Safety Regulations, and under those policies only 4 angels may dance on the head of a pin at a time. The pin, incidentally, is required to have passed an annual safety inspection for structural defects before anyone, angel or not, is allowed to dance on it.

Merry Christmas to all!



# Prejudgment Attachment: A Powerful Tool For The Careful Creditor

By Siegel Hughes & Ross

Much to the dismay of creditors, a plaintiff is not entitled to an injunction freezing the assets of a debtor simply because the plaintiff fears that once a judgment has been obtained, there will be no fund or assets from which the judgment could be collectible. *St. Lawrence Co., N.V. v. Alkow Realty, Inc.*, 453 So.2d 514 (Fla. 4<sup>th</sup> DCA 1984). However, the Florida Statutes provide that in certain circumstances, a creditor may obtain a prejudgment writ of attachment, the express purpose of which is to serve as a lien upon the debtor's property that may later be used to satisfy a judgment. See *Gen. Elec. Co. v. Chuly Intern., LLC*, 118 So.3d 325, 328 (Fla. 3<sup>rd</sup> DCA 2013); *Cerna v. Swiss Bank Corp. (Overseas), S.A.*, 503 So.2d 1297, 1299 (Fla. 3<sup>rd</sup> DCA 1987) (Attachment is available to enforce a creditor's rights against the goods, chattels, lands and tenements of a debtor; the appropriate writ against money is a writ of garnishment. See *In re Emerald Plaza West, Inc.*, 47 B.R. 590, 591 (Bankr. S.D. Fla. 1985)). The procedures for obtaining a prejudgment writ of attachment are subject to the strictures of due process, and the statutes governing those procedures must be strictly construed. *Connecticut v. Doehr*, 501 U.S. 1, 12 (1991); *Future Tech Intern., Inc. v. Tae Il Media, Ltd.*, 944 F.Supp. 1538, 1554 (S.D. Fla. 1996).

Chapter 76, *Fla. Stat.*, governs the procedures for obtaining a prejudgment writ of attachment and sets forth those limited, specified circumstances in which a creditor can secure a prejudgment writ of attachment. A writ of attachment may be issued by the court when a plaintiff files a motion, accompanied by a separate affidavit of the plaintiff, setting forth specific facts upon which the plaintiff seeks the attachment. §76.08, *Fla. Stat.* The plaintiff must also file an affidavit—other than his or her own—that provides satisfactory proof of the existence of

the specific grounds upon which the plaintiff seeks the prejudgment attachment. §76.10, *Fla. Stat.* An attachment on real property does not operate to transfer possession of the property, but simply binds the property against subsequent creditors or purchasers from the time the Clerk records a notice of the levy of the writ of attachment. §76.14, *Fla. Stat.*

The grounds upon which a prejudgment attachment can be based are very limited. If the debt is already due, the creditor may have an attachment when the debtor:

1. Will fraudulently part with the property before judgment can be obtained against him or her;
2. Is actually removing the property out of the state;
3. Is about to remove the property out of the state;
4. Resides out of the state;
5. Is actually moving himself or herself out of the state;
6. Is about to move himself or herself out of the state;
7. Is absconding;
8. Is concealing himself or herself;
9. Is secreting the property;
10. Is fraudulently disposing of the property;
11. Is actually removing himself or herself beyond the limits of the judicial circuit in which he or she resides; or
12. Is about to remove himself or herself out of the limits of such judicial circuit.

§76.04, *Fla. Stat.*

If the debt is not yet due, then the circumstances in which a creditor can obtain a prejudgment attachment are even more limited. In that case, the creditor may have attachment only when the debtor:

1. Is actually removing the property out of the state;
2. Is fraudulently disposing of the property to avoid the payment of his or her debts; or
3. Is fraudulently secreting the property to avoid payment of his or her debts.

§76.05, *Fla. Stat.*

However, a creditor-plaintiff must do more than simply allege the existence of one or more of these

*Continued on page 9*





circumstances. The creditor must have proof that the debtor is taking one or more of these actions. Subjective belief or hearsay is not sufficient. *Frasher v. Fox Distrib. of S.W. Florida, Inc.*, 813 So.2d 1017, 1020 (Fla. 2<sup>nd</sup> DCA 2002). In *Frasher*, the Court noted that the plaintiff's allegation in its affidavit that it "believes" the defendant "might" abscond with the property "is exactly the type of conclusory allegation found unconstitutional." *Id.* The due process clause of the U.S. Constitution forbids the issuance of a prejudgment writ of attachment where the plaintiff's request is based upon unverified, conclusory allegations. *ITI Holdings, Inc. v. Prof'l Scuba Ass'n Intern., LLC*, 5:06-CV-85-OC-10GRJ, 2007 WL 914073 (M.D. Fla. 2007).

Furthermore, in order to obtain a prejudgment writ of attachment, a plaintiff must make a bond with surety to be approved by the Clerk, payable to the defendant, in at least double the debt demanded, conditioned to pay all costs and damages that the defendant might sustain in consequence of the plaintiff improperly suing out the attachment. §76.12, *Fla. Stat.* The plain language of the statute requires that the bond be in place *before* the writ is issued. *Id.* Accordingly, some courts have denied a motion for writ of attachment at least in part because the creditor-plaintiff had failed to demonstrate that the bond was in place. See *Future Tech* at 1554.

If the trial court issues the writ of attachment, the debtor may still move to dissolve the writ. §76.24, *Fla. Stat.*; *Marshall-Shaw v. Ford*, 755 So.2d 162, 164 (Fla. 4<sup>th</sup> DCA 2000). At that juncture, the plaintiff must prove the grounds on which the writ was issued, as well as a reasonable probability of obtaining a final judgment in his or her favor. *Id.*

These restrictions and requirements combine to create interesting situations in which the writ will or will not be allowed. In *Am. Ass'n For Advancement of Sci. v. Periodicals Publicacoes Tecnicas*, 581 F. Supp. 2d 1248, 1249 (S.D. Fla. 2008), the plaintiffs filed an *ex parte* Motion for Prejudgment Writ of Attachment, seeking to attach a condominium in which the defendants operated a journal subscription scheme that defrauded the plaintiffs. The court granted the plaintiffs' *ex parte* Motion. *Id.* The defendants sought dissolution of the writ of attachment, alleging that because the claimed debt was an unliquidated damage, the writ was improper and further alleging that the plaintiffs failed to present evidence establishing any of the grounds set forth in §76.04 *Fla. Stat.* *Id.* at 1249-

1250. The court noted that although there is authority for the proposition that writs of attachment do not lie for unliquidated debts, this rule does not apply in situations of wrongful conversion where the value of the converted property can be fairly approximated. *Id.* at 1250. The court found that the plaintiffs were able to establish a "fairly approximated debt due" based upon the evidence and testimony presented. *Id.* The court also found that the defendants' use of false names and addresses, along with the other alleged fraud presented at the hearing was sufficient to meet the grounds set forth in §76.04, *Fla. Stat.* *Id.* The Court therefore denied the defendants' motion to dissolve the writ. *Id.*

Similarly, in *Marshall-Shaw*, the Court rejected the defendant's argument that prejudgment attachment and garnishment cannot be based on an action sounding in tort. *Marshall-Shaw* at 165. The plaintiff in *Marshall-Shaw* had filed suit sounding in conversion, civil theft, conspiracy, unjust enrichment and trespass. *Id.* at 164. The Court stated that "where the defendant has appropriated the plaintiff's money, or has taken his property and sold it, a quasi-contract count will lie for money had and received to the plaintiff's use, through the fiction of an implied promise to repay." *Id.* at 165. Therefore, the plaintiff's claims of conversion and unjust enrichment could form the basis for writs of attachment and garnishment, so long as the amounts claimed due can be determined by simple computation or reference to market price. *Id.*

In *Cerna v. Swiss Bank Corp. (Overseas), S.A.*, 503 So.2d 1297, 1299 (Fla. 3<sup>rd</sup> DCA 1987), the Third District partially quashed a writ of attachment to the extent that it related to the debtor's books and personal financial and property records. In so doing, the Court noted that because of the extraordinary nature of attachment proceedings, the statutes must be narrowly construed. *Id.* As such, the books and records that had no inherent value did not fall within the statutory definition of "goods and chattels, lands and tenements." *Id.* Essentially, Chapter 76 could not be used as a discovery tool. *Id.*

The prejudgment writ of attachment can be a powerful tool for a plaintiff, provided that the statutory requirements can be met. The plaintiff—and the plaintiff's attorney—must be careful to strictly comply with those statutory requirements. The unwary plaintiff could all too easily be caught out and left hoping that there will be collectible assets after the judgment is eventually entered.

# The Amazing “AmazInn Race”

The AmazInn Race was a joint meeting of the Adkins and Bennett Inn of Court with the purpose of bringing the two Inns together in a fun and collaborative environment that tested Inn members’ legal, physical, and mental skills. The Race also served as a fundraiser for the two Inns and all items collected as the entry fee will be donated to the Eighth Judicial Circuit Bar Association to be added to the holiday toys collected for certain school programs serving underprivileged children in our community.

Members that signed up to participate in the AmazInn Race were placed into diverse teams (a mix of Adkins members with Bennett members, inexperienced attorneys with more experienced attorneys, and “more fit” members with “less fit” members). Each team competed in a series of challenges located in locations around downtown Gainesville. At the starting line, teams were given a clue that they must solve in order to determine the location of the first challenge. Team members then walked/ran to that location. Once all team members arrived at the sight of the first challenge, one team member completed a physical, mental or legal challenge before the team could receive a clue to determine where the next challenge was located. Rules ensured that each team member completed one or more of the challenges. At the conclusion of the race, all the teams reconvened at 101 Downtown for prizes and a social.

Congratulations to the 1<sup>st</sup> place team – Andy Ingram, Tom Daniel, Matt Lastinger (law student) and Katherine Mockler.



The first place team – Andy Ingram, Tom Daniel, Matt Lastinger and Katherine Mockler

## Circuit Notes

**Susan Miller-Jones**, former General Magistrate for the Eighth Judicial Circuit, was appointed on November 14, 2014 to the Alachua County Court by Governor Rick Scott. Judge Miller-Jones fills the vacancy left by Judge David Kreider following his appointment to the Circuit bench. Judge Miller-Jones has been assigned to Alachua County Court, Civil Division IV, and she will begin her duties on December 1, 2014.

Two attorneys have joined the Gainesville office of GrayRobinson, P.A. **John F. DeStefano, Jr.** focuses his practice in the areas of corporate, securities, venture capital, estate planning, and taxation, with emphasis on entity formation and tax planning, angel and venture capital funding, intellectual property protection and licensing, and estate planning for individuals and business owners. **Maxwell Minch**, a registered patent attorney, focuses his practice on intellectual property and technology law dealing with patent drafting and prosecution, licensing and technology transfer as well as corporate formation and governance, contract drafting and negotiation, and federal contract and grant compliance.



The lawyers and law students who won Francesca’s gift cards for their participation in the AmazInn Race.

# Eminent Domain Law in Florida: An Overview

By Jennifer B. Springfield and Alexander Boswell-Ebersole



As an “inherent attribute of sovereignty,”<sup>1</sup> the government is empowered to “take” privately owned land. Such authority, known as “eminent domain” or “condemnation,” is restricted in several ways by both the United States and Florida constitutions.

The government may take private property by either initiating eminent domain proceedings so as to *intentionally* take the property or by *regulating* in a way that deprives a landowner of the use of his or her property.<sup>2</sup>

Takings can take the form of either a partial taking (e.g., a strip of land), a temporary taking (e.g., associated with the completion of a project on another property), an easement or right of way (e.g., for the use of part of a property for power lines), or a complete taking. Regulatory takings generally lead to “inverse condemnation” actions, in which a private landowner initiates an action based on a claim that government regulation has in effect resulted in a taking.

With a long tradition of private property rights in both Florida and the rest of the United States, the need for governments to use eminent domain power to address public needs often gives rise to impassioned disapproval from landowners and citizens. The use of this power can also result in significant financial and other personal consequences to those who are directly impacted. Nevertheless, whether representing private landowners or a condemning authority exercising the power of eminent domain, attorneys often find themselves in the midst of balancing between the public need for the use of certain property and the interests of private ownership.

The main restrictions in the U.S. Constitution on the government’s exercise of eminent domain authority are that the government may only take property for “public use” and that it must give “just compensation” for the property taken. The Florida Constitution spells-out similar requirements, except that Florida’s Constitution employs the terms “public purpose” and “full compensation.” Not surprisingly, a significant body of case law exists interpreting these terms.

The constitutional eminent domain restrictions are found in the Fifth Amendment to the U.S.

Constitution, which has been interpreted to apply to state and local governments through the Fourteenth Amendment.<sup>3</sup> Article X, § 6 of Florida’s Constitution contains the constitutional provisions specific to eminent domain in Florida, including the provision that “[n]o private property shall be taken except for a public purpose and with full compensation therefor . . . .”<sup>4</sup> By requiring “full compensation,” the Florida Constitution gives more protection to landowners than the Federal Constitution’s “just compensation” requirement because it requires the landowner to be made whole by such compensation, including the costs incurred before a taking occurs.<sup>5</sup> This requirement also gives rise to attorney’s fees and costs, which are generally not provided under federal law. The distinction between the U.S. Constitution’s “public use” and the Florida Constitution’s “public purpose” is not as clear.

A relatively recent amendment to Article X, § 6 further restricts the government’s exercise of eminent domain in Florida.<sup>6</sup> Florida citizens voted to approve an amendment in 2006 in response to a 2005 U.S. Supreme Court case. *Kelo v. City of New London* centered on the “public purpose” requirement and involved a group of homeowners that challenged the City’s use of eminent domain in an economically depressed area.<sup>7</sup> The City wanted to demolish a group of homes in order to give the land to a private developer in the name of economic development.<sup>8</sup> The Court found in favor of the City, thus paving the way for local governments to use eminent domain for the fairly broad purpose of economic development.<sup>9</sup> The *Kelo* decision triggered a public outcry among property rights’ advocates across the nation and caused many states to change their eminent domain laws. In Florida, the amendment included a provision prohibiting government from transferring property taken by eminent domain to natural persons or private entities, unless approved by a three-fifths majority of the Legislature.<sup>10</sup>

Although the term “government” as used when discussing inherent eminent domain power generally refers to federal, state and local governments, such governmental entities can delegate the power to other entities such as transportation departments, public utilities and even, in limited circumstances, to private corporations.<sup>11</sup> In Florida, several statutes grant eminent domain power

*Continued on page 12*



to such entities ranging from the Department of Corrections,<sup>12</sup> Department of Transportation,<sup>13</sup> and drainage<sup>14</sup> and watershed improvement<sup>15</sup> districts. Any entity exercising such delegated authority must abide by the same legal restrictions imposed upon federal, state and local governments. Follow-up articles will provide more detailed discussions of some specific aspects of eminent domain law, including the proper purposes for which the eminent domain power can be used, the general procedures associated with eminent domain, and Florida's rather robust provisions for attorney's fees and costs associated with such proceedings.

Note: An *inverse* condemnation action originates from a "taking," but it is a different process and will not be addressed in this series of articles.

- 1 See *Daniels v. State Road Dept.*, 170 So.2d 846 (Fla. 1964).
- 2 Under Florida law, the government is not required to provide "full compensation" to landowners for "damage" to property, but only for compensable "takings." See *Alizieri v. Manatee County*, 396 So.2d 240, 241 (Fla. 2d DCA 1981) (defining a taking as "entering upon private property and devoting it to public use or otherwise informally appropriating it, in such a way as substantially to oust the owner").
- 3 See U.S. Const. amend. V; U.S. Const. amend. XIV; see also *219 S. Atl. Blvd. Inc. v. City of Ft. Lauderdale, Fla.*, 239 F. Supp. 2d 1265 (S.D. Fla. 2002).
- 4 Fla. Const. Art X, § 6(a).
- 5 *Boulis v. Florida Dep't of Transp.*, 733 So. 2d 959 (Fla. 1999).
- 6 See Fla. Const. Art X, § 6(c).
- 7 See 545 U.S. 469 (2005).
- 8 See *id.*
- 9 See *id.*
- 10 See Fla. Const., art X, § 6(c); see also Ch. 2006-11, Laws of Fla. (amending several statutes to increase restrictions on transferring property gained through eminent domain to private parties, to prohibit the use of eminent domain to address "nuisance, slum, or blight conditions," and to otherwise restrict the use of eminent domain).
- 11 *Spafford v. Brevard Cnty.*, 110 So. 451 (1926) (relating to delegation in general); see also *Clark v. Gulf Power Co.*, 198 So. 2d 368 (Fla. 1st DCA 1967) (relating to delegation to private corporations).
- 12 See Fla. Stats. § 945.27(1).
- 13 See, e.g., Fla. Stats. § 334.044(6).
- 14 See Fla. Stats. § 298.22(7).
- 15 See Fla. Stats. § 582.43.

## The Florida Bar: Upcoming Appointments To JNCs

*By Greg Coleman, Florida Bar President*

The Florida Bar will have one lawyer vacancy on each of the 26 Judicial Nominating Commissions (JNCs) this coming year. We have the opportunity to nominate three lawyers for a total of three nominees for each JNC.

Each appointee serves a four-year term commencing July 1, 2015. All applicants must be engaged in the practice of law and a resident of the territorial jurisdiction of the respective JNC to which they are applying. Beginning December 1, a press release with a link to the application can be found on our homepage ([www.floridabar.org](http://www.floridabar.org)) and must be received by the Executive Director's Office no later than March 2, 2015 according to the delivery instructions on the application. For further assistance please contact Kristen Wilson at (850) 561-5757 or [kwilson@flabar.org](mailto:kwilson@flabar.org). On behalf of The Florida Bar's Board of Governors, I want to assure you that we are committed to seeking the most diverse pool of applicants possible. The membership on a JNC should be reflective of Florida's diversity in all forms, as well as from different geographical areas within the territory covered by the respective JNC.

I look forward to providing the Governor with a very qualified and diverse slate of nominees for these important openings on our JNCs.



Anne Rush speaks to November lunch attendees about the 2014 EJCBA Holiday Project

## December 2014 Calendar

- 3 EJCBA Board of Directors Meeting – 5:30 p.m., Gaineswood Clubhouse
- 5 Deadline for submission to January Forum 8
- 5 Retirement Celebration for Judge Phyllis M. Rosier, 3-5 p.m., Alachua County Criminal Justice Center, Jury Assembly Room
- 6 SEC Championship Game, Atlanta, GA – 4:00 p.m., CBS
- 10 Probate Section Meeting, 4:30 p.m., Chief Judge’s Conference Room, 4<sup>th</sup> Floor, Alachua County Family & Civil Justice Center
- 12 EJCBA Luncheon, Dr. Robert Knight, Ex. Dir. of the Howard T. Odum Florida Springs Institute, “The State of Our Springs,” The Woolly, 11:45 a.m.
- 16 Family Law Section Meeting, 4:00 p.m., Chief Judge’s Conference Room, Alachua County Family & Civil Justice Center
- 25 Christmas Day – County and Federal Courthouses closed
- 26 Friday after Christmas – County Courthouses closed

## January 2015 Calendar

- 1 New Year’s Day – County and Federal Courthouses closed
- 5 Deadline for submission to February Forum 8
- 7 EJCBA Board of Directors Meeting – 5:30 p.m., Gaineswood Clubhouse
- 9 EJCBA Luncheon, Chief Judge Robert E. Roundtree, Jr., “The State of the Circuit,” The Woolly, 11:45 a.m.
- 9 EJCBA CLE Panel Discussion, “View From the Bench,” The Woolly, 1:00 p.m.
- 13 EJCBA Winter Social, 5-7 pm, Location TBD
- 14 Probate Section Meeting, 4:30 p.m., Chief Judge’s Conference Room, 4<sup>th</sup> Floor, Alachua County Family & Civil Justice Center
- 19 Birthday of Martin Luther King, Jr. observed, County and Federal Courthouses closed
- 20 Family Law Section Meeting, 4:00 p.m., Chief Judge’s Conference Room, Alachua County Family & Civil Justice Center

Have an event coming up? Does your section or association hold monthly meetings? If so, please fax or email your meeting schedule to 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).