

FORUM 8

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Eighth Judicial Circuit Bar Association, Inc.

May 2014

President's Message



By Nancy T. Baldwin

Salt cowrie shells on a string
giraffe tails nails cocoa beans
whale teeth beads

Million (6 zeroes) billion
(9 zeroes) trillion (12 zeroes)
quadrillion (15 zeroes) quintillion
(18 zeroes).

Years ago a millionaire was someone special, someone financially successful or a "robber baron." Fifty years ago the World Book Encyclopedia stated that a billion one dollar bills laid end to end would go around the world four times, buy 100,000 houses costing \$10,000 each or buy 500,000 new automobiles, each costing \$2,000. Further, it would take almost two thousand years to spend one billion dollars at the rate of one dollar per minute.

The unique status of the millionaire has radically diminished in the 21st century; the purchasing power of a million dollars is significantly less; "stars" make that much for a performance; homes for more than three million dollars are advertised in The Nation and the New York Times. The internet search tells us there are many people with assets of more than one-half billion dollars and quite a few billionaires.

The national debt is \$17,559,030,801,000 trillion.

Students often graduate from law school with a crushing debt burden of more than a quarter of a million dollars. Seniors and the unsuspecting are scammed with ponzi schemes and promises of wealth and prizes and needed repairs. Gore Vidal cynically stated "it is not enough to succeed, others must fail."

Some persons contribute millions to political

campaigns; although fewer than 700 people were impacted by the limitation of contributions, the U.S. Supreme Court recently decided 5-4 a campaign finance case - *McCutcheon v. Federal Election Commission*. It is said now that money talks – that the spending of money for political campaigns should not be limited – that the contribution to political campaigns is a free speech issue, a First Amendment right; money equals speech. It is feared that a moneyed few will have the ability to control the government.

I began traveling to Warsaw, Poland for an educational exchange back in 1971. Each trip I would return home with unspent zlotys.

The numbers on the bills grew larger and larger – I now had 1,000, 5,000 and 10,000 zloty bills and more tucked away in the bottom of my desk drawer. I was saving to buy something very polish – something very special – crystal, amber, an icon. But I did not ever spend the zlotys. As the trips increased, the stack of bills grew and grew. Finally last year, 2013, I would redeem my zlotys – I envisioned myself having a significant treasure. Early on a wintery

Friday morning I carefully wrapped my stack of money in tissue, placed the package in a brown paper bag and walked cautiously across the city to the federal bank where one could redeem currency. When I presented my money, the clerk snickered "you are six months late," he said – "the old zlotys were to be turned in six months ago. Would you like to know the present value of your zlotys?" He took my money, tissue and brown paper bag and entered a back office. Some fifteen minutes later he returned and in his

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Contribute to Your Newsletter!

From The Editor

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

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

Social Networking and Settlement Agreements



By Paul Donnelly & Christopher Deem, Donnelly + Gross

A great deal of civil litigation, including employment litigation, ends in settlement agreements, not a trial. While a great deal of effort is often put into negotiating the dollars involved in the settlement agreement, an identical amount of attention must be placed on the so-called “boilerplate” provisions.

In the age of social networking, the boilerplate confidentiality provisions are increasingly important.

Gulliver Schools, Inc. v. Snay, 39 Fla. L. Weekly D457, 2014 WL 769030 (Fla. 3d DCA Feb. 26, 2014) shows how confidentiality provisions can have more bite due to the widespread use of social networking websites, such as Facebook. The Plaintiff in the case, Patrick Snay, was a headmaster at Gulliver. When Snay’s 2010-2011 contract was not renewed, he filed a complaint alleging age discrimination and retaliation. Pursuant to a settlement agreement negotiated in November, 2011, Snay was to receive \$10,000 in back pay and \$80,000 as an additional payment. In addition to the payment, the settlement agreement had a confidentiality provision that required the “disgorgement of the Plaintiffs’ portion of the settlement proceeds” if there was any communication “directly or indirectly” regarding “the existence or terms of the Agreement.” *Id.* at 1.

Four days after the agreement was signed, Gulliver notified Snay of a breach based on the following post of Snay’s daughter, “Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT.” Snay’s daughter had 1200 Facebook friends, many of them current or past Gulliver students. Due to the breach, Gulliver refused to pay the \$80,000 to Snay, and an action was later brought to enforce the agreement. While this case received a great deal of attention in the media, left unremarked is that when Gulliver notified Snay of the breach, Snay still had three days to unilaterally revoke the settlement agreement, but chose not to do so. *Id.*

There were factual disputes about the extent of the information divulged, and the truthfulness of the daughter’s post. The Court noted that Snay’s position was that “he never told the daughter that he had ‘won’ the case and the daughter did not go to Europe that summer, nor had she planned to do so.” *Id.* at *1 n.2. The Third District Court of Appeals, however, found these

facts did not change the analysis, as revealing the settlement agreement to the daughter breached the clear language of the settlement agreement. This breach “advertise[d] to the Gulliver community that Snay had been successful in his ... case against the school,” the exact thing the confidentiality agreement had been designed to prevent. *Id.* at *2.



While this case generated a fair amount of media coverage, it is not remarkable, but a straight-forward application of contract law to the facts. The lesson for attorneys is that with social networking sites so prevalent today, clients need to be counseled carefully about all of the terms of the settlement agreement. Twenty years ago, Snay’s daughter likely would not have had a platform to broadcast the information, and any communications would not have been permanent. Further, settlement agreements must be scrutinized carefully for language that reflects the will of the parties, because settlement agreements are contracts that will be construed as written.



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Alternative Dispute Resolution

Greatest Legal Movies of All Time

By Chester B. Chance and Charles B. Carter



The American Bar Association actually has a link on its web page listing the 25 Greatest Legal Movies of All Time.

“In a town built on copyrights and cosmetic surgery, lawyers have done far more than pen the small print in studio contracts or post-bail for hollow-eyed stars on the way to and from rehab.”

To the contrary, the ABA suggests lawyers have provided some of Hollywood’s most memorable movie heroes and some of its most thoughtful films.

Your reporters have been discussing the topic of the greatest legal movies of all time and many fellow lawyers consistently name movies that are on the ABA’s top 25 list. Interestingly, and in a gratifying sense, many of the lawyers we have spoken to refer to some of these movies as inspiring and motivational.

The top 10 greatest legal movies of all time were determined to be:

- *To Kill a Mockingbird* (1962) A quote: “Stand up. Your father’s passing.”
- *12 Angry Men* (1957)
- *My Cousin Vinny* (1992) A quote: “Everything that guy just said is bullshit. Thank you.”
- *Anatomy of a Murder* (1959)
- *Inherit the Wind* (1960)
- *Witness for the Prosecution* (1957)
- *Breaker Morant* (1980)
- *Philadelphia* (1993)
- *Erin Brokovich* (2000) A quote: “Are you a lawyer?” “Hell, no. I hate lawyers. I just work for them.”
- *The Verdict* (1982) A quote: “You are the law. Not some book. Not the lawyers. Not a marble statue or the trappings of the court. Those are just symbols of our desire to be just.”

Films 11-25 include:

- *Presumed Innocent* (1990)
- *Judgment at Nuremberg* (1961)
- *A Man for All Seasons* (1966) (One of your reporter’s all-time favorites.)
- *A Few Good Men* (1992) A quote: “You can’t

handle the truth.”

- *Chicago* (2010)
- *Kramer v. Kramer* (1979)
- *The Paper Chase* (1973) A quote: “Mr. Hart, here is a dime. Call your mother. Tell her there is serious doubt about your becoming a lawyer.”
- *And Justice for All* (1979)
- *A Civil Action* (1998) A quote: “The chances of a plaintiff’s lawyer winning in court are 2-1 against...your odds of surviving a game of Russian roulette are better than your odds at trial.”
- *Amistad* (1997).
- *Miracle on 34th Street*



Runners-up include:

- *The Accused*
- *Adam’s Rib* (Your reporter would have moved this up the list.)
- *The Caine Mutiny*
- *The Client*
- *The Court-Martial of Billy Mitchell*
- *The Pelican Brief*
- *The People v. Larry Flint.*

Legal movies which did not make the list include:

- *The Marketable Record Title Act v. Godzilla*
- *The Fertile Octogenarian Does Dallas*
- *Lawyers on Ice*
- *The Billable Hour*
- *Patent Law: Where No Man Has Gone Before*
- *The Judge of Oz*
- *One Flew Over the Courthouse*
- *Gone With the Evidence*
- *The Sound of Torts*
- *2001, A Billing Odyssey*
- *A Streetcar Named: Been Injured?*

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Florida Bar Board of Governors Report

By Carl Schwait



The Florida Bar Board of Governors met on March 28, 2014. The major actions of the Board and reports received included:

With the 2014 legislative session nearing the halfway mark, The Florida Bar continues to advocate for court funding, including requests for staff pay and retention as well as district and trial courts' maintenance/repair and technology needs. Initial budgets released by the House and Senate are good starting points. [An April 1 Florida Bar News article provides additional court system budget request details](#). Both houses have approved civil legal assistance funding -- \$2 million in the Senate and \$1 million in the House and advocates are working to educate the governor's office on the importance of the program. Bills that would exempt certain activities from criminal penalties for the unlicensed practice of law are being opposed by the Bar. For weekly summaries of legislative activities related to bills being tracked by The Florida Bar, please visit www.floridabar.org/session.

President Pettis announced [his appointment of a task force](#) to bolster diversity among Florida's judges and members of Judicial Nominating Commissions (JNCs). The task force's recommendations will also assist the governor in implementing F.S. 43.291(4): In making an appointment, the Governor shall seek to ensure that, to the extent possible, the membership of the commission reflects the racial, ethnic, and gender diversity, as well as the geographic distribution, of the population within the territorial jurisdiction of the court for which nominations will be considered. The Governor shall also consider the adequacy of representation of each county within the judicial circuit. In May, The Florida Bar will be nominating slates of three candidates for two vacancies on each JNC, and sending those slates to Gov. Rick Scott for appointments. The Bar received 679 applications with approximately 45 percent falling into a category for diversity: women, Hispanics, African Americans and Asians.

[Lawyer Referral Service rules amendments were approved by the board](#) and will now be submitted to the Supreme Court. The lawyer

referral service rule amendments are a multi-year effort that began with the Special Committee on Lawyer Referral Services. Among the changes are: requiring lawyers who belong to lawyer referral services to report their participation to the Bar; requiring that clients make the initial contact after being referred to a lawyer; and strictures against suggesting a referred client use other services provided by the referral service — such as medical treatment — unless the lawyer is satisfied that the referral is in the client's best interest and the client gives written confirmation that he or she has been told about the potential conflict. [Proposed new amendments to trust account rules](#) were also approved for submission to the court.

A new policy regarding advertising filing fees was approved. Any change of any kind to an advertisement renders the ad a new ad with a new filing fee of \$150 per timely filed ad and \$250 per untimely filed ad. The only exception is a revision to an existing ad that is solely to comply with a bar opinion that the ad does not comply with the lawyer advertising rules, for which no additional fee will be charged. The Board of Governors also directed staff to monitor the cost of program administration compared with fees and report back whether a reduction in filing fees is warranted. The new fees will be effective July 1. More information will be posted on the [Advertising Rules webpage](#).

The Communications Committee of the board received approval to expand the Bar's social media use to include LinkedIn, Google+, YouTube and Pinterest. In addition to posting timely announcements and the weekly tech tips, The Florida Bar's current [Facebook page](#) – which now has almost 1,800 likes – will include a daily summary of news articles from around the state, section/division and voluntary bar information and court system, law school and national news. All Facebook posts will be [tweeted](#). Communications also reported that a best practices manual for effective electronic communication is being developed to address e-etiquette issues. The Standing Committee on Professionalism is being asked to review all current professionalism guidelines and to amend them as necessary to include electronic communications.

The 2014-15 budget was approved with no

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Criminal Law



By William Cervone

This month I bring you news and notes from Tallahassee, the land of the bizarre, as the 2014 legislative session inexorably lurches forward. By now the committee process is all but done and all that remains is the formality of the House and

Senate meeting in full session to consider what the various committees have processed. That and the secret part where they work out the details out of public view, at least to the extent that they haven't already done that.

First, bills concerning the Gunshine State, as Florida is becoming. There have been many. For the most part when the gun lobby says jump the legislature asks how high. I say this knowing that it puts me at risk of the wrath of the gun lobby, but that's nothing new. With them no matter how strongly you support the 2nd Amendment (for the record, I do; I just happen to think that reasonable regulation is a good idea given the carnage I regularly see when the wrong people have guns and use them the wrong way. I guess I'm old fashioned that way) you're a bad person if you don't get in step. Nothing is going to pass that significantly affects Stand Your Ground. Something may pass saying that people can fire warning shots in self-defense. That's ironic in that most law enforcement agencies don't allow warning shots by their officers for the simple reason that what goes up must come down, i.e., those warning shot bullets land somewhere, now and then in some innocent person's head. It's also in my view unnecessary because it's always been a part of legitimate self-defense anyhow, but so be it. Something else is going to pass that lets people carry concealed firearms without a concealed carry permit in times of declared emergency. The emergency could be a hurricane evacuation order, civil unrest or riot, or anything else declared to be so. Interestingly, a National Guard member spoke on his own against this, expressing a concern that the last thing people like him really needed during such an emergency was to deal with the prospect that anyone and everyone was packing. Especially during a riot. Reliable stories have it that he was promptly chastised by higher ups at

the direct order of someone in the government food chain, and for sure National Guard higher ups appeared at a subsequent hearing and sheepishly contradicted his testimony. That's how it goes in Tallahassee, where they like the public appearance that everyone is happily on the same smiling page. But so be it as we become increasingly an armed encampment. Well, not an encampment exactly since the guns are hardly limited to a specific camp.

But enough about that. Other areas of interest exist for those of us in the criminal courts. For example, still under debate but likely to pass in some fashion is a new hearsay exception recognizing a statement describing an act of domestic violence made to enable law enforcement to respond to an ongoing emergency. This means 911 calls. The law enforcement side of the issue, of course, is all for this and in actuality it is no more than a codification of existing law stemming from the United States Supreme Court's *Crawford* decision and its progeny. The defense side is, predictably, distinctly unhappy and is pursuing various amendments that would complicate the process, requiring all sorts of hearings and findings such as already exist with the child hearsay exception, for example. You can't, I suppose, have too many impediments to efficiency or common sense and I don't mean that entirely with tongue in cheek. Stay tuned as this is likely coming in some form or other.

Then there is the latest effort to rein in the dangerous effects of texting and driving. Bound to pass is legislation specifying that causing death by using a wireless communication device while driving will be a second degree felony, or, if the defendant knew or should have known that an accident occurred and did not stop to give aid and information, a first degree felony. This was probably already Vehicular Homicide but in Tallahassee they do like to make new laws so that no one can possibly know all of the laws. I have in my office a set of 1920 statutes that consumed three volumes, one being the index, and another set from 1959 that was still three volumes including an index. Clearly we need many more laws than that now.

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Board of Governors

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fee increase for the 13th year in a row. Fees for active members will remain at \$265 and for inactive members will stay at \$175. Membership fees represent approximately 65 percent of the total revenues and continue to increase approximately two percent per year reflecting the increase in the number of members. Operating expenses are budgeted for approximately \$41.7 million. The regulation of the practice of law accounts for 43 percent of expenses and administrative expenses continue to be under 10 percent. The budget, which now goes to the Supreme Court for approval, will be published in the [April 15 issue of The Florida Bar News](#).

The board voted to oppose [a petition by Bar members](#) asking the Supreme Court to amend bar rules to allow for annual membership fees to be increased by up to \$100 to fund legal aid for the poor to ameliorate the current funding crisis. Instead, the board committed to finding alternative and more cost effective ways of delivering legal services to the under-served. President Eugene Pettis said the effort will be broad-based, involving many interests including the courts, the Bar, the Florida Bar Foundation, court clerks who work with pro se litigants, the business community, legislators and others. Bar rules required that the petition be filed with the board before it is submitted to the court.

Special Appointments Schedule: Please see the [special appointments schedule on the website](#) for more information, terms and the application for the following appointments to be made at the May 23 meeting. The deadline was April 25 to apply for: two lawyers to the ABA House of Delegates (includes under 35 delegates), five lawyers for the Florida Legal Services, Inc.'s board, three lawyers for Florida Lawyers Assistance Inc.'s board, one lawyer to the Medical Malpractice Joint Underwriting Association and one lawyer to the Supreme Court's Judicial Ethics Advisory Committee.

Please note that President-elect Coleman has appointed me to oversee the selection of 3 nominees for a position on the Florida Board of Bar Examiners to be sent to the Florida Supreme Court. I am also on the committee choosing nominees for the JNC for the First District Court of Appeal and for each circuit within the First District.

I continue to appreciate the honor of representing the Eighth Judicial Circuit on the Board of Governors.

Nominees Sought For 2014 James L. Tomlinson Professionalism Award

Nominees are being sought for the recipient of the 2014 James L. Tomlinson Professionalism Award. The award will be given to the Eighth Judicial Circuit lawyer who has demonstrated consistent dedication to the pursuit and practice of the highest ideals and tenets of the legal profession. The nominee must be a member in good standing of The Florida Bar who resides or regularly practices law within this circuit. If you wish to nominate someone, please complete a nomination form describing the nominee's qualifications and achievements and submit it to Raymond F. Brady, Esq., 2790 NW 43rd Street, Suite 200, Gainesville, FL 32606. Nominations must be received in Mr. Brady's office by Friday, May 9, 2014 in order to be considered. The award recipient will be selected by a committee comprised of leaders in the local voluntary bar association and practice sections.

James L. Tomlinson Professionalism Award Nomination Form

Name of Nominee: _____

Nominee's Business Address: _____

County in which Nominee Resides: _____

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

Name of Nominator: _____

Signature: _____

Probate Section Report



By *Larry E. Ciesla*

The Probate Section continues to meet on the second Wednesday of every month beginning at 4:30 p.m. in the third floor meeting room in the criminal courthouse at 220 South Main Street. There is abundant free parking in the lot immediately south

of the courthouse, very conveniently located near the attorneys' private entrance door on the south side of the building.

The following matters were discussed during the February and March 2014 Section meetings.

Carla Adams was introduced as the new staff attorney for probate and guardianship cases in Bradford, Union and Baker Counties. Ms. Adams holds an LLM in estate planning and elder law. She previously worked in private practice in Jacksonville handling primarily family and criminal cases. Her office is in the criminal courthouse; her phone number is (352) 374-7025; and her e-mail address is adamsc@circuit8.org. The Section welcomes Ms. Adams to the local bar, and we look forward to working with her.

David Altman has taken the place of Katherine Mockler handling probates in Alachua County, as well as probates and guardianships in Levy and Gilchrist Counties. Ms. Mockler is moving to family law. A new staff attorney will be hired in the very near future and will be assigned to take over guardianships in Alachua County, as well as probates and guardianships in Levy and Gilchrist Counties. Until then, Ms. Mockler and Mr. Altman will share responsibilities for Alachua County guardianships.

A discussion was held regarding the best way to handle submission of proposed orders in probate and guardianships cases. Although it is permissible to e-mail proposed orders directly to the responsible staff attorney, due to the sometimes fluid nature of which staff attorney is responsible for a particular case at any given moment, the preferred method is to submit proposed orders to the two respective proposed order e-mail addresses so as to enable easy access by all staff attorneys. These e-mail addresses are as follows: probate-orders@circuit8.org and guardianship-orders@circuit8.org.

Peter Enwall initiated a discussion regarding the best way to handle estate planning for IRA and other retirement accounts so as to best take advantage of the IRS stretch rules where multiple beneficiaries are involved. Naming each individual beneficiary to receive his or her share of the account outright was discussed, as

was naming a trust as beneficiary to prevent an individual beneficiary from obtaining immediate access to withdraw the entirety of his or her share of the account.

Two types of trusts were discussed in this regard. A so-called conduit trust may be employed whereby the trustee withdraws the required minimum mandatory distribution amount on an annual basis and makes distribution thereof to the individual beneficiary or beneficiaries. Under IRS rules, a trust can qualify to take advantage of the stretch rules. If the trust has more than one beneficiary, the life expectancy of the oldest possible beneficiary is used as the measuring life for purposes of determining the minimum mandatory distribution amount. A so-called accumulation trust was also discussed. This is designed to be used in cases involving spendthrift beneficiaries or beneficiaries of tender years. The minimum mandatory distribution amount is withdrawn from the IRA but, rather than distributing this amount to the individual beneficiary or beneficiaries, the trustee accumulates the withdrawn amount and maintains it in trust until future dates designated for distribution by the grantor of the trust (account owner).

Ellen Gershow advised the group that there are a number of people in Congress who are working to eliminate the availability of the IRS stretch rules and to replace them with a maximum five-year withdrawal period. Apparently their thinking is that the IRS stretch rules are way too favorable to taxpayers (account beneficiaries). The intention of the legislation authorizing retirement accounts to grow on a tax-deferred basis was to allow individuals to provide for themselves in their retirement years. The intention was never to allow account owners to accumulate massive amounts, tax-free, and to then pass those amounts on to their chosen heirs, allowing the heirs to continue to grow these accounts on a tax-deferred basis for the better part of the lifetime of the heir. In addition, the federal government is at all times in need of more money to remain in business.

It was pointed out by a thrifty section member that some law books, such as the annual Florida Rules of Court book, can be obtained used online at amazon.com at prices substantially below the normal price when such a book is purchased new. I tried it and obtained a very slightly used copy of the Rules of Court for something like \$8.00.

All interested parties are invited to participate in Probate Section meetings. Please contact my office if you wish to be added to the e-mail list to receive notice of future meetings (lciesla@larryciesla-law.com).

State Agency Rule Challenges



By Jennifer B. Springfield and Alexander Boswell-Ebersole

Numerous executive branch agencies in Florida promulgate a vast array of rules that implement powers delegated to them through specific statutes enacted by the Legislature, many of which relate to natural resources and the environment. The Legislature relies on these agencies to administer and enforce the law because it lacks the expertise and resources to do so itself. At the same time, state agencies cannot act without delegation by the legislature because agencies lack their own inherent powers. In addition to giving power to these agencies through specific substantive statutes, the legislature has also enacted Florida's Administrative Procedure Act (APA) to prescribe both the general procedures agencies must follow when exercising their delegated powers and the procedures dictating how a party may challenge agency action.¹ Among the types of agency action that may be challenged, a party may challenge agencies' development and establishment of rules—often deemed agency “rulemaking”—and may also petition or challenge the actual rules themselves. The procedures for rulemaking and rule challenges compel agencies to follow certain steps intended to facilitate accountability, efficiency, and a streamlined process for resolving disputes. This article provides a brief introduction to the procedures applicable to rule challenge petitions. Agency rules represent agency action that applies generally, and rulemaking is not the same as an agency's application of a rule to a particular person or activity. Although an agency's application of a rule to a particular person/activity may also be challenged, separate procedures apply to that type of administrative challenge.

Under the APA, there are four types of rule challenges that can be brought.² These consist of challenges to: (1) agency statements defined as rules,³ (2) proposed rules,⁴ (3) existing rules,⁵ and (4) emergency rules.⁶ A challenge to an agency statement defined as a rule is a challenge based on an agency's failure to undergo the prescribed rulemaking procedures, despite the fact that the statement meets the APA's definition of a rule.⁷ As indicated by the respective names, challenges to proposed rules are to rules *proposed* by agencies and challenges to existing rules are to rules which agencies have already *adopted* through the rulemaking process. Finally,

challenges to emergency rules are to rules adopted under truncated procedures due to the existence of “emergency” circumstances.

Challenges to proposed and existing rules, which are petitions wherein substantially affected persons are seeking an *administrative determination* of the *invalidity* of a rule,⁸ make up the vast majority of rule challenges. When it comes to challenging proposed rules, timing is one of the most immediate and important considerations because the petition deadlines are jurisdictional, which means failure to challenge within the designated time constitutes a waiver of the right to challenge and is grounds for dismissal.⁹ Four timeframes generally apply to challenges to proposed rules.¹⁰ A notice of proposed rule initiates two 21-day time periods—one for requesting a public hearing¹¹ and the other for filing a formal request for an administrative hearing.¹² If an affected person requests a public hearing, which is not the same as a formal administrative hearing, or challenges a proposed rule, he/she must do so within 21 days of the agency's published notice of proposed rule. When a public hearing is held, a challenge to the proposed rule must be filed within 10 days.¹³ In certain instances, agencies must prepare a “statement of estimated regulatory costs,” and if an agency prepares such a statement, a challenge must be filed within 20 days of its availability.¹⁴ Finally, if agencies give notice of modifying or withdrawing a proposed rule, that triggers a 20-day timeframe within which to challenge the rule.¹⁵ Challenges to existing rules implicate no such time restrictions, as a party may initiate a challenge to existing rules any time during the existence of the rules;¹⁶ however, the standards and burdens of proof are higher for the challenger. Persons seeking to challenge either a proposed or existing rule must file the petition with the Division of Administrative Hearings as opposed to the agency involved.¹⁷

In addition to the issue of timing, persons considering a challenge to a proposed or existing rule must also evaluate *who* can challenge (i.e. standing) and on *what basis* they can challenge. The APA provides that any person substantially affected¹⁸ by an existing or proposed rule may challenge the rule on the grounds that the rule is an “invalid exercise of delegated legislative authority.”¹⁹ To be considered a “substantially affected person,” a petitioner must

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President's Message *Continued from page 1*

best English announced to me, "Your zlotys are now valued at fourteen American dollars." \$14.00! Time had shrunk the money saved so frugally for some forty years. My savings had been devalued. I carefully took my stack of zlotys. I will use them in playing monopoly or offer them at a flea market or garage sale.

The devaluing of money, whether thru purchases or through governments or financial disasters makes planning for the future difficult. The ten cent soup can now has fewer ounces and costs more than 10 times the former price. The retirement funds relied upon purchase less; the value of the stocks has plummeted; the bank accounts pay less than one percent interest. Jobs disappear. Not for profits suffer financially. The Florida Bar Foundation has a serious problem funding programs for children.

Recently I received a letter from Social Security. I was informed that I was now eligible for Social Security - I would begin receiving four dollars a month the first of April. Four dollars a month. What if I were a grandmother responsible for raising my grandchild - with four dollars a month??

A recent newspaper story told of elementary school children whose food on their lunch trays were thrown in the trash because their parents had not timely paid the lunch fees.

The gap between the haves and those who do not have enough, perhaps because they are unemployed or because they are employed at less than eight dollars an hour and frequently work less than 40 hours a week, and who cannot make the payments to avoid foreclosure has significantly increased.

The Chronicle reports that some attorneys bill at \$1,000 an hour.

Trade or bargaining was common historically. Bartering has returned. There are potential benefits with bartering – but many have skills that are not readily tradable at the time and place needed.

It is said that fifty years ago 90% of the expenses were paid for by checks or money orders. Today there are debit cards and credit cards and wire transfers, paypal, bartering and the Bitcoins. People have multiple credit cards, often maxed out, the minimum payment made each month. Individuals are surprised when an attorney does not accept credit cards for payment.

For years there has been a search for ways to transfer funds anonymously. In the past five years clever money managers have developed centralized virtual

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Greatest Legal Movies *Continued from page 4*

A favorite of your reporters is a somewhat weird movie from 1994 called "The Advocate." It takes place in The Middle Ages at a time when animals were held accountable to the law in the same way as humans. The animals could be brought into court, tried and sentenced. The opening scene involves a man and his donkey on a gallows after both were convicted of a crime against nature. There are a number of courtroom scenes in The Advocate and those scenes incorporate a lot of procedure and rules of evidence which are both peculiar, sometimes comical, and always interesting. The movie is a murder mystery and the main character, a lawyer who moves to the countryside from Paris, defends a variety of clients, including a Gypsy wench, a woman accused of witchcraft, a farmer accused of killing his wife's lover, a pig, and some rats. Dialogue includes discussion of contingency fees and law clerks. The pig was eventually freed when it was determined that although he looked guilty (as most pigs do) he was actually not guilty. On his release from custody the pig was heard to remark "to err is human, to forgive porcine." Critic Roger Ebert refers to the film as halfway between Monty Python and "Sommersby"; certainly quirky enough to avoid being on the list of the great legal film of all time, but, quirky is what attracts your intrepid reporters.

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show an immediate "injury in fact" within the "zone of interest" regulated or protected.²⁰ A proposed or existing rule meets the definition of an "invalid exercise of delegated legislative authority" if any one of six enumerated categories applies. These categories include: "The agency has exceeded its grant of rulemaking authority;" "the rule enlarges, modifies, or contravenes the specific provisions of law implemented;" or "the rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency."²¹

1 Florida's APA is codified as Fla. Stat., Chapter 120; also note that, in addition to the APA's requirements, provisions published in the Florida Administrative Code, some of which are generally applicable to the executive branch as a whole and others that are specific to particular agencies, also provide procedural requirements.

2 See Fla. Stat. § 120.56(1) (providing general procedures for challenging rules).

3 See Fla. Stat. § 120.56(4) (providing procedures specifically applicable to challenging agency statements defined as rules).

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It's that time again!

The Eighth Judicial Circuit Bar Association Nominations Committee is seeking members for EJCBA Board positions for 2014-2015. Please consider giving a little time back to your bar association. Please complete the application below and return the completed application to EJCBA. The deadline for completed applications is May 9, 2014.

Application for EJCBA Board Membership

Name: _____ Bar No. _____

Office Address: _____

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

Area of practice: _____ Years in practice: _____

Office of Interest: (Check all that apply)

Secretary _____ Treasurer _____
Board member _____ Committee Member _____

Preferred Committee Interest: (Check all that apply)

<input type="checkbox"/> Advertising	<input type="checkbox"/> Law Week	<input type="checkbox"/> Pro Bono
<input type="checkbox"/> Annual James C. Adkins Dinner	<input type="checkbox"/> Medical - Legal	<input type="checkbox"/> Professionalism
<input type="checkbox"/> Annual Reception	<input type="checkbox"/> Member Survey	<input type="checkbox"/> Social
<input type="checkbox"/> CLE	<input type="checkbox"/> Membership	<input type="checkbox"/> Sponsorships
<input type="checkbox"/> Community Service	<input type="checkbox"/> Mentorship	<input type="checkbox"/> Website
<input type="checkbox"/> Golf Tournament	<input type="checkbox"/> Oral History Project	<input type="checkbox"/> Other (Describe Below)
<input type="checkbox"/> Judicial Poll	<input type="checkbox"/> Policies & Bylaws	_____

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

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

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

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

Or email completed application to: execdir@8jcba.org

President's Message *Continued from page 10*

currencies. The Bitcoin is a peer to peer electronic cash system produced by “mining.” It is particularly attractive to money launderers. Creative financiers have utilized cryptocurrencies, a subcategory of virtual currencies. The coveted Bitcoin is the first cryptocurrency to gain public recognition. Information about the bitcoin is appearing in newspapers, magazines; the internet offers a cartoon to explain the Bitcoin to ones mother. Bitcoin is a revolutionary computer science breakthrough that has the potential to upend all sorts of established industries. It enables verified transactions without requiring a centralized third party to do the verification. It does utilize a distributed ledger. There are believed to be some 12 million Bitcoins in circulation with a market capitalization of more than \$8 billion dollars. Some reports say that the Bitcoin generated \$524 billion in revenue last year. The Bitcoin is not regulated or controlled by a central authority or bank. The tracking of the Bitcoin is complicated, if not impossible. Although virtual currencies do not have legal tender status in many jurisdictions, Germany has recognized Bitcoin as legal tender. In Germany the Bitcoin is subject to all the same regulations as regular currencies. The value of the cryptocurrencies are expected to rise to 1.1 trillion over the next decade. The Bitcoin is tinged with suspicious characteristics of scam and fraud and at the same time involves the necessity of trust.

My father used to gather us on the floor in front of the fireplace and tell us stories – the stories were usually about the family and our history. I asked for one story again and again.

He was a young man with a young wife and a new two story frame house that his father in law’s firm had constructed at the edge of the city. He was just beginning his practice and had many patients, but few with money; most paid with chicken dinners and church ice cream socials. His money was limited, very limited. He felt he had to go to the loan officer at his local federal savings and loan and offer to turn in his home; he was unable to make the monthly loan payments. The president and loan officer met with him; they encouraged him; they offered to hold the payments for the home in abeyance until he had the money to make the monthly loan payments. They trusted him; their encouraging response gave him confidence. Thirty years later we were all still living in that house. It had been paid off many years before – but for more than three years there were no threats, harassing letters, and no payments.

There is passion and enthusiasm for helping

others. Runs and benefits for programs raise large sums of money. There is financial and psychological support for those suffering from disasters.

The Eighth Judicial Circuit Bar raised more than \$10,000 for the Guardian ad Litem program at the recent annual Golf Tournament.

It would seem that Money – use of and lack of may determine who we are and where we are going.

Leadership, especially among attorneys, has been and still is needed to advocate a sacred respect and trust for the Constitution and Bill of Rights, to assure that money does not replace citizens, and to facilitate and maintain informed voters in our democracy.

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4 See Fla. Stat. § 120.56(2) (providing procedures specifically applicable to challenging proposed rules).

5 See Fla. Stat. § 120.56(3) (providing procedures specifically applicable to challenging existing rules).

6 See Fla. Stat. § 120.56(5) (providing procedures specifically applicable to challenging emergency rules).

7 See Fla. Stat. § 120.56(4)(a); see also Fla. Stat. § 120.52(16) (providing the APA’s definition of “rule”).

8 See Fla. Stat. § 120.56(1)(a).

9 See, e.g., *State, Dept. of Health & Rehabilitative Services v. Alice P.*, 367 So.2d 1045 (Fla. 1st DCA 1979).

10 See Fla. Stat. § 120.54(3)(a) (requiring agencies to give notice of proposed rules by publishing proposed rules in the Florida Administrative Weekly, and including the both the full text and a summary of the rules proposed).

11 Fla. Stat. § 120.54(3)(c)1.

12 Fla. Stat. § 120.56(2)(a).

13 *Id.*

14 *Id.*

15 *Id.*

16 Fla. Stat. § 120.56(3)(a).

17 Fla. Stat. § 120.56(1)(c).

18 See Fla. Stat. § 120.52(14) (defining “person” to consist of a relatively broad variety of parties, including those parties listed in Fla. Stat. § 1.01—i.e., corporations, associations, and individuals—as well as units of government and certain state agencies).

19 Fla. Stat. § 120.56(1)(a).

20 See, e.g., *Lanoue v. Florida Dept. of Law Enforcement*, 751 So. 2d 94 (Fla. DCA 1st 1999).

21 See Fla. Stat. § 120.52(8) (defining “invalid delegation of legislative authority” as “action that goes beyond the powers, functions, and duties delegated by the [l]egislature,” and enumerating six categories where a proposed or existing rule amounts to such an action).



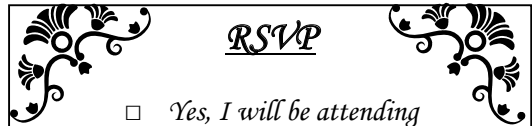
The Eighth Judicial Circuit Bar Association
invites you and your guests to join us for our

2014 Annual Dinner and Meeting
Thursday, June 12, 2014,
6:00 pm until 8:30 pm
at the
Sweetwater Branch Inn

Speaker:

**Dean Robert Jerry - "Lawyers, Leadership,
and Followership: Some Lessons from the
Last Three Decades"**

Reservations required
\$40 for members and non-lawyer guests
\$50 for non-members



Yes, I will be attending
I will be bringing _____ guests.

The following individuals will be
attending (please include yourself
and select meals for each):

Mr./Ms. _____

Meal: Beef ___ Chicken ___ Vegetarian ___

Mr./Ms. _____

Meal: Beef ___ Chicken ___ Vegetarian ___

I have enclosed \$ _____.

I will pay at the door.

Please RSVP by email to execdir@8jcba.org,
by fax to 866-436-5944 or mail to EJCBA,
P. O. Box 13924, Gainesville, FL 32604.
Must be received no later than June 6th

Criminal Law

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But I digress. Also under debate is a proposal that life felonies be tried by a jury of 12, not 6 as now happens. The irony of this is that as best I can determine some supporters of this change believe that had the infamous Trayvon Martin case been tried by a jury of 12 there would more likely have been a conviction. That logic stumps me but it's created some strange bedfellows. Others, of course, take the view that doubling the size of the jury doubles the chance of a hung jury, not to mention the additional time and expense involved. And still others have pragmatically noted that there are lots and lots of courtrooms in Florida that literally can't accommodate a bigger jury box. This isn't likely to pass but in Tallahassee one never knows.

There's more, of course, including, finally, the end of the line for juvenile murderers and life sentences, and it ranges from the sane to the arcane if not the insane. But I have gratefully filled my allotted space this month.



Carl Schwait lauds the Eighth Judicial Circuit's Pro Bono Award Winner, Nancy Wright at the April 11, 2014 EJCBA luncheon



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

May 2014 Calendar

- 5 Deadline for submission of articles for June Forum 8
- 7 EJCBA Board of Directors Meeting – 5:30 p.m., Room 350, Levin College of Law
- 14 Probate Section Meeting, 4:30 p.m., 3rd Floor Conference Room, Alachua County Criminal Justice Center
- 16 EJCBA Luncheon, Dr. Norman Levy on “ACMS – Over a Century of Dedication to the Health of Alachua County’s Citizens,” The Woolly, 11:45 a.m.
- 20 Family Law Section Meeting, 4:00 p.m., Chief Judge’s Conference Room, Alachua County Family & Civil Justice Center
- 26 Memorial Day, County & Federal Courthouses closed

June 2014 Calendar

- 11 Probate Section Meeting, 4:30 p.m., 3rd Floor Conference Room, Alachua County Criminal Justice Center
- 12 EJCBA Annual Dinner and Meeting, Keynote Speaker Dean Robert Jerry, “Lawyers, Leadership and Followership: Some Lessons from the Last Three Decades,” 6-8:30 p.m., Sweetwater Branch Inn

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.