

FORUM 8

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Eighth Judicial Circuit Bar Association, Inc.

November 2014

President's Message



Opportunities for You to be Involved

By Ray Brady

It looks as if the EJCBA's "Building Bridges" monthly luncheon series already is paying dividends. And this dividend is going to provide you with a new opportunity for meeting your annual *pro bono* service

requirements with The Florida Bar. You will recall that at the September luncheon, our speakers were Theresa Lowe, the Executive Director of the Alachua County Coalition for the Homeless and Hungry (which operates the new GRACE Marketplace), and Kirsten Clanton, Esq., who practices with Southern Legal Counsel. In their remarks, Ms. Lowe and Ms. Clanton described for us the problems that are faced by our circuit's homeless population, and the demographics of that diverse population. They also outlined the efforts that are in place locally for assisting the homeless in our circuit.

As a result of the brainstorming generated by that luncheon discussion, the EJCBA is now working to partner with the GRACE Marketplace, Three Rivers Legal Services (TRLS), and Southern Legal Counsel (SLC), to create an "Ask A Lawyer" program. The concept is that periodically (perhaps one Saturday morning every month or so), volunteer attorneys will set up at the GRACE Marketplace to assist their residents with basic legal problems and answer their questions. In exchange for providing these volunteer services, we lawyers will earn credits toward our annual *pro bono*

service requirements. TRLS and SLC are working with the EJCBA now to develop a training program for volunteer attorneys, and to develop a handbook/deskbook for attorneys to use in providing information on the various legal problems that we might encounter. "Ask a Lawyer" programs like this one already are in place and being operated by voluntary bar associations in other circuits throughout Florida. The EJCBA has created an ad hoc committee to develop the "Ask a Lawyer" program. The members of the committee are myself, Nancy Baldwin, Jan Bendik, Rob Birrenkott, Hoa T. Lee, Peg O'Connor, and Margaret Stack.

If you have any questions, or if you would like to assist us in the development of this worthy *pro bono* project, please contact me or one of the other members of this EJCBA committee.

Some of the other upcoming EJCBA events that we hope you will attend and support, are:

The November EJCBA

luncheon: On Friday, November

14, 2014, at noon at The Woolly, we will

hear from Tony Jones, the Chief of Police

of the Gainesville Police Department, on

the topic of "Initiatives to Keep Youth Out

of the Criminal Justice System." Chief Jones

will speak to us as part of the "Building Bridges" series, which seeks 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 8th Judicial Circuit.

The Annual Holiday Project: Again this year, the EJCBA will be working with the Alachua County Head Start Program to provide toys for their students. Last year, thanks to your support and commitment to this

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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

Eighth Judicial Circuit Bar Association, Inc.

Mission Statement:

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

To renew/apply for membership, please renew online at <http://8jcba.dev.acceleration.net/pay-dues/> or send a check payable to EJCBA in one of the following amounts:

- \$55 If, as of July 1, 2014, you are a lawyer licensed to practice law for five (5) years or less; lawyers with the State Attorney's Office, Public Defender's Office and Legal Aid with 10 years of experience or less; retired members of the Florida Bar pursuant to Florida Bar Rule 1-3.5.
- \$75 For all other lawyers and members of the Judiciary

Free If, as of July 1, 2014, you are a lawyers in your first year licensed to practice law following law school graduation. Free membership does NOT include cost of lunches.

*(YLD members can also include their yearly dues of \$25 for YLD membership if, as of July 1, 2014, you are an attorney under age 36 or a new Florida Bar member licensed to practice law for five (5) years or less)

You may pay your dues online at <http://8jcba.dev.acceleration.net/pay-dues/> or send a check, along with your completed application to:

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

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

EJCBA

Renewal/Application for Membership

Membership Year: 2014-2015

Check one: Renewal New Membership

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List two (2) Areas of Practice:

Number of years in practice: _____

Are you interested in working on an EJCBA

Committee? Yes No

President's Message *Continued from page 1*

event, we distributed toys to more than 300 students. We also joined in a successful toy distribution party at Rawlings Elementary (where Carl Schwait continued his performance as Santa). Kudos to event chair Anne Rush for her hard work on this annual event. 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 collecting toys through their "AmazInn Race" event on November 6, 2014. Donation boxes for you or your law firm will be available for pick up at the November EJCBA luncheon. Watch this Newsletter, and your email, for additional details on this annual EJCBA project.

The Spring Fling: The evening of Friday, March 6, 2015 has tentatively been set for this new EJCBA party/social! The venue we are exploring is the Thomas Center grounds. We should have perfect Spring weather, and the explosion of flowers should still be in full bloom. We will have a band, food, wine, craft beer, and other refreshments. So save this date on your 2015 calendar.

The "Law in the Library" Series: The EJCBA continues to present this popular series at the Downtown library, where we present speakers who address legal

topics and issues that are of importance to our citizens. This project is chaired by Jan Bendik. Watch your emails for the dates of these periodic public events.

Leadership Roundtable 2015: This CLE event will be held on Friday, April 10, 2015. The concept for the event will be essentially the same as it was last year, *i.e.*, the event will be held in conjunction with the April EJCBA luncheon and will present speaker/roundtable discussions that focus on issues of inclusion and diversity, with a reception to follow. Stephanie Marchman is chairing this very popular CLE event. Please contact Ms. Marchman if you have questions or would like to volunteer to assist with the Roundtable.

Some Other Dates to Save: Please mark your calendars to "save the date" of Friday, March 20, 2015 to attend the **EJCBA Golf Tournament**, which is chaired by Mac McCarty. Proceeds from the event go to the Guardian Ad Litem Program. The **Annual Professionalism Seminar** will be held on Friday, April 17, 2015 from 9 a.m. to noon, at the U.F. 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.

Domestic Violence Awareness at Work



By Laura Gross, Donnelly & Gross

Domestic violence is an epidemic in this country. It permeates every facet of our society including the NFL and federal judiciary. When domestic violence becomes a workplace issue, what's an employer to do? No more business as usual, according to the American Bar Association and Florida Legislature. Employers have ethical and legal obligations to proactively address the needs of employee-victims and hold accountable employee-perpetrators.

In August 2014, the ABA approved a model policy on employer responses to domestic violence issues that affect the workplace. The stated purpose is to encourage all employers "to enact formal policies on the workplace responses to domestic violence, sexual violence, and/or stalking violence which address prevention and remedies, provide assistance to employees who experience violence, and hold accountable employees who perpetuate

violence." Among other things, the model policy prevents employment discrimination and retaliation against employee-victims and provides leave, accommodation, reemployment assistance, and other workplace assistance to employee-victims. It emphasizes the need for employer confidentiality and support in enforcement of protection and restraining orders.

In Florida, employers with 50 or more employees must provide leave to allow employee-victims to seek an injunction, obtain medical care or victim services, secure safe housing, and seek legal assistance related to domestic violence. § 741.313, *Florida Statutes* (2014). Further, information related to this leave must be kept confidential.

Florida employers with 50 or more employees should have a policy that addresses domestic violence. While we do not recommend wholesale adoption of the ABA's voluntary model policy, an employer's consideration of this policy is an important first step to raising awareness and addressing workplace consequences related to domestic violence.

Alternative Dispute Resolution

Confidentiality Cases from Local Attorneys

By Chester B. Chance and Charles B. Carter



We all know there is a confidentiality privilege associated with mediation. Often, in reaching a mediation settlement agreement, one party will require not only a Release, but will require that the Release contain a confidentiality provision.

Attorney Stephen Scott provided us with a copy of a recent

Florida District Court decision which also was a feature on some national news programs. The decision is *Gulliver Schools, Inc. v. Snay*, 137 So.3d 1045 (Fla.3rd DCA 2014).

In *Snay*, the school (Gulliver) did not renew Snay's 2010-2011 contract as the school's headmaster. Snay filed an action against the school alleging age discrimination and retaliation under the Florida Civil Rights Act.

The parties executed a general Release and resolved the matter and the settlement agreement included payments of \$10,000 to Snay as back pay, \$80,000 to Snay as a "1099," and \$60,000 to Snay's attorneys.

The Appellate Court noted "central to this agreement" was a detailed confidentiality provision, which provided that the existence and terms of the agreement between Snay and the school were to be kept strictly confidential. The agreement provided that should Snay or his wife breach confidentiality, a portion of the settlement proceeds (\$80,000) would be forfeited.

The confidentiality agreement read in part:

The Plaintiff shall not either directly or indirectly disclose, discuss or communicate to any entity or person, except his attorneys or other professional advisors or spouse any information whatsoever regarding **the existence** or terms of this agreement...a breach...will result in disgorgement of the plaintiffs portion of the settlement payments (emphasis added by the court).

Four days after the agreement was signed the school notified Snay that he had breached the agreement based on a Facebook posting of Snay's college-age daughter. On her Facebook page the daughter stated:

"Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT."



The appellate court observed it was Snay's position 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 plans to do so. "This, however, does not change our analysis."

The court noted the Facebook comment went out to 1,200 of the daughter's Facebook friends, many of whom were either current or past Gulliver's students.

The settlement agreement expressly allowed Snay the unilateral right to revoke the agreement within 7 days of its execution. Snay took no action to revoke the agreement despite Gulliver's notification of the breach.

Gulliver sent a letter to Snay's counsel stating it was tendering the attorney's fee portion of the agreement but was not going to tender Snay's portion because he had breached the confidentiality provision. The school later tendered the back wage portion. The letter included a joint stipulation for dismissal which confirmed in part that the parties had settled the action and Snay signed off on it and returned it to Gulliver. The action was dismissed with a reservation of jurisdiction for enforcement of the settlement agreement.

Snay filed a Motion to enforce the settlement agreement arguing his statement to his daughter and her comment on Facebook did not constitute a breach. After a hearing, the trial court determined neither Snay's comments to his daughter nor his daughter's Facebook comments constituted a breach of the confidentiality agreement. The appellate court disagreed and reversed the lower court.

The appellate court determined the plain and unambiguous meaning of the confidentiality agreement was that neither Snay nor his wife would either "directly or indirectly" disclose to anyone (other than their lawyers or other professionals) "any information" regarding the existence or the terms of the agreement.

In a deposition associated with the Motion to Enforce Settlement, Snay testified that his conversation

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Confidentiality Cases *Continued from page 5*

with his daughter was merely that the case settled and he was happy with the result. The court determined that established a breach of the confidentiality provision. The court determined Snay violated the agreement "... by doing exactly what he had promised not to do." The court further observed the daughter did precisely what the confidentiality agreement was designed to prevent.

It is not unusual to have a confidentiality provision as part of a Release and part of a settlement agreement at mediation. The importance of such provision should not only be understood by counsel, but by the client, as well.

Attorney Jerry Schackow provided us with a summary of the following Federal case: *Bowdler v. State Farm Mut. Auto. Ins. Co.*, 2014 WL2003114 (M.D. Fla. 5-14-14). In *Bowdler*, the court determined the mediation privilege was not as powerful as the mediation rules lead one to believe. Again, we repeat this was a Federal case decision. In a bad faith lawsuit, State Farm was attempting to withhold log notes and claims file notes which State Farm asserted had been made by adjusters who were analyzing the events and communications during a mediation. The Court determined to the extent there were communications summarized in the notes the privilege did not apply to the plaintiff and plaintiff's counsel as they participated in the mediation. With respect to the rest of the notes, which was an analysis of the communication, the Court determined they were, thus, not "mediation communications" subject to the mediation privilege.

The article provided by attorney Schackow raises the following questions: If a defense lawyer analyzes in detail what happened at the mediation and sends it out to the insurance company (remember the defense attorney's "client" is the defendant) then that attorney has made it potentially more likely that a court will find that the analysis is not privileged. Interesting decision and interesting questions.

We all think we understand confidentiality, but courts may understand confidentiality in a far different way.

Administrative Orders

Chief Judge Robert Roundtree, Jr. issued Administrative Order 3.01, Pretrial Orders, on October 10, 2014. You can review it at [http://circuit8.org/web/ao/3.01%20\(v1\)\(s\)\(p\)%20Pretrial%20Orders.pdf](http://circuit8.org/web/ao/3.01%20(v1)(s)(p)%20Pretrial%20Orders.pdf).

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, 2014 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.

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Karen S. Yochim

who joined the firm in 2013

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Criminal Law



By William Cervone

Let's call this the Case of The Romanian Mumble. That was a good enough reference for the 3rd DCA so it will do for us.

Attorney Alexander J. Michaels, a defense lawyer in Miami, was representing a client in an apparently contentious

VOP hearing in 2013. On the third day of testimony (and I think that we all understand that three days of testimony at a VOP hearing could well make anyone querulous) the prosecutor objected to a question by Michaels. Perhaps even before the judge could rule, Michaels responded by making "a hand gesture" that is not otherwise explained to the prosecutor and mouthed under his breath what he later admitted were the words "futos gutos monte," Romanian for the classic "F**k You." Needless to say, as the judge saw and heard all of this, the proceedings pretty much came to a screeching halt and a contempt proceeding followed.

Some background for context: Michaels is apparently well known in Miami, the appellate courts, and the Florida Bar for, shall we say, improvident behavior. In dealing with the Romanian Mumble, the DCA noted three other disciplinary proceedings against him, not to mention prior court sanctions. Regarding his argument to the judge at the VOP-turned-contempt hearing that "[t]hey are obscene words in Romanian...[who] could be insulted by words they do not understand. I [have] been in trouble before. I learned it in order not to offend anybody. It happened before. Sometimes they realize they don't understand the words. They smile, they laugh, they say don't do it again." The DCA responded that they "were not laughing."

In any event, multiple people testified at the contempt hearing that the gesture Michaels made actually was not inappropriate, but rather was an extended arm, palm faced upward in a "stop" or "shush" motion to the prosecutor, who was maybe a bit sensitive in responding that "[if] he threatens me one more time, I'm going to deal with him in a different way..." Like I said, it was a contentious hearing.

In any event, even though the judge found the gesture contemptuous the DCA gave Michaels a pass on that. Not so much for the Romanian Mumble itself. Deferring to the trial judge's "I know what I saw" (literally) finding, the DCA agreed that the mumbled words in the context they were made

were an insult that interrupted the proceedings and were contemptuous. The DCA rejected the argument that "cursing in his native tongue is somehow less contemptuous than cursing in English." I'm reminded of Ricky Ricardo. Lucy, we have a problem here.

Strangely enough, there was a dissenting judge whose opinion is lengthier than the majority opinion. The dissent outlines numerous cases in which various pejoratives and curses were uttered, mouthed, or somehow communicated by an attorney but not found to be subject to contempt. In many, the dissent notes that the presiding judge was unaware of those comments. The dissent also notes that perhaps Michaels should be excused because the prosecutor, who might have been physically restrained by co-counsel at some point, had actually provoked the Romanian Mumble by shaking his own fist at Michaels and threatening to move for a Baker Act inquiry against him. Many are the times I thought that opposing counsel should have to undergo a mental health examination but I've never actually asked for that, at least not on the record. Anyway, and perhaps begging the question, the dissent says that while "[W]e do and should expect better behavior from attorneys," the trial judge "moved too quickly to mete out" punishment, which, by the way, was two days in jail.

The entire opinion, which although long is well worth a read, is styled as *Michaels v Loftus*, 139 So3d 324 (Fla. 3d DCA 2014) if you're interested. Even if not there are lessons to be learned. Not the least of them is that I am ever so glad that I don't practice in Miami. Or Romania.



Jane Muir, Director of Florida Innovation Hub at UF, speaks at the October luncheon

Eight Points That May Be Useful

By Siegel Hughes & Ross

The right to attorneys' fees is substantive, not procedural.

A statutory right to attorneys' fees is a substantive right. Therefore, the statute which applies is the statute in effect at the time the cause of action accrued. *Young v. Altenhaus*, 472 So.2d 1152 (Fla. 1985); *Bitterman v. Bitterman*, 714 So.2d 356 (Fla. 1998); *City of Crestview v. Howard*, 657 So.2d 73 (Fla. 1st DCA 1995).

An account holder must notify a financial institution of any objection to an unauthorized withdrawal within one year.

A bank customer must notify the bank of any unauthorized withdrawal within one year of receiving notice of the withdrawal. A customer who fails to do so is precluded from seeking recovery of the unauthorized withdrawal from the bank. *Fla. Stat.*, §670.505.

An undifferentiated settlement agreement from two defendants creates joint and several liability.

Two defendants who make a lump sum offer which is accepted by plaintiff will be jointly and severally liable to the plaintiff for the full amount of the offer if they fail to perform the agreement. Agreements between the two defendants do not relieve either defendant of full performance unless part of the offer to plaintiff. *Funk v. CIGNA Group Insurance*, 2012 WL 870220 (D.N.J. 2012)

Party defending attorneys' fee claim may not be entitled to review moving attorneys' file.

The First District Court of Appeals has held that the trial court committed error by requiring an attorney seeking fees to turn his file over to an independent expert to evaluate the reasonableness of the fees. *Smith v. Smith*, 764 So.2d 650 (Fla. 1st DCA 2000). In this case

the attorney seeking fees was a former attorney of the defending client, not the adverse party, and the case appears to be unresolved. There may be a different result after conclusion of the case.

Essential elements of contract vary depending on nature of transaction.

A contract will not be enforced unless there is agreement on all *essential elements*. However, what elements are essential to the agreement will vary widely according to the nature and complexity of each transaction and must be evaluated on a case specific basis. *Miles v. Northwestern Mutual Life Insurance Company*, 677 F. Supp.2d 1212 (M.D. Fla. 2009).

Work product privilege protects identity of documents reviewed by deponent in preparation for deposition at direction of his attorney

While the documents themselves may not be privileged, the identity of documents used to prepare a witness for deposition are protected from disclosure by the work product privilege. See, *Proskauer Rose LLP v. Boca Airport, Inc.*, 987 So. 2d 116 (Fla. 4th DCA 2008). When the deponent's counsel selects documents for him to review in preparation for his deposition, disclosure of those documents would reveal which documents counsel thought were most important. The result may be different if the deponent reviews documents on his own initiative.

Summary judgment cannot be defeated by stacking inferences

Despite the general rule that all reasonable inferences are construed in favor of the non-moving party, the non-moving party may not defeat summary judgment by stacking inferences. See, *Cohen v. Arvin*, 878 So. 2d 402 (Fla. 4th DCA 2004). Just as at trial, a party cannot rely upon stacked inferences to defeat summary judgment unless the original, basic inference was established to the exclusion of all other reasonable inferences.

Parent corporation must produce documents in possession of wholly owned subsidiary

A parent corporation that is involved in litigation can be compelled to produce records belonging to its wholly-owned, but separate and distinct, subsidiary. *Am. Honda Motor Co., Inc. v. Votour*, 435 So. 2d 368, 369 (Fla. 4th DCA 1983).



FBA Chapter Starts off Strong in 2014-2015

By Peg O'Connor, Chapter President

The North Central Florida Chapter of the Federal Bar Association rang in its new year on September 18, when members gathered to enjoy drinks and hors d'oeuvres, hear the chapter's announcements and accomplishments, elect a new slate of officers, and honor retiring District Judge Stephan P. Mickle.

Outgoing president Ron Kozlowski reported on the awards and grants the chapter received at the national convention in Rhode Island last month. First, the chapter was awarded a Community Outreach Grant Award for its upcoming writing competition, open to all UF law students. The grant will be used to advertise the competition and provide scholarship awards to the winners. Competitors will be submitting essays on current legislative and judicial attitudes toward a free press in light of the 50th anniversary of *New York Times v. Sullivan*.

Second, in recognition of the superior roundtable event held this past April (Women, the Law, and Leaning Into Leadership), the chapter was presented with a Presidential Achievement Award at a special luncheon during the convention.

After new officers were elected and sworn in by Judge Mickle, incoming president Peg O'Connor gave the audience a preview of the activities planned for the coming year, including brown bag lunches with judges and other members of the court system; the introduction of a volunteer lawyer panel for the Northern District of Florida; and another leadership roundtable scheduled for April.

The highlight of the evening was an appearance by Assistant United States Attorney Corey Smith, who traveled from Tallahassee to represent United States Attorney Pam Marsh and the Department of Justice.

He presented Judge Mickle with a framed letter from Attorney General Eric Holder which cited the judge for the impact his work has had not only in Florida, but across the country:

This lasting legacy—founded on your passion for the rule of law, and your fidelity to those whom the law protects and empowers—marks you as an extraordinary public servant, an exceptional jurist, and an inspiration for countless members of America's legal community—including me.

After the official program had ended, attendees took the opportunity to mingle informally with the judge, converse with fellow members, and congratulate the new board:

President: Peg O'Connor

Secretary: Kate Artman

Treasurer: Jung Yoon

Membership: Ron Kozlowski

Programs: Stephanie Marchman

Board, Law School Representation, and Ex-Officio Members: The Hon. Gary Jones, The Hon. Philip Lammens, Jennifer Lester, Jamie White, Rob Birrenkott, Dustin Mauser-Claassen (3L), Marla Spector (3L), Kristin Nelson (2L), Ashley Martell (2L), Rob Griscti, Gil Schaffnit, and David Wilson.

We encourage you to get involved with our chapter; it's a great way to meet federal judges and practitioners, learn about federal law and procedure, and help develop your practice. We look forward to seeing you at future events.



Judge Stephan Mickle swears in the 2014-2015 local FBA Board of Directors

Quasi-Legislative & Quasi-Judicial Local Land Use Decisions

By Jennifer B. Springfield and Alexander Boswell-Ebersole



The duties of local governing bodies - county and municipal commissions and plan boards - often include making land use decisions. These decisions frequently involve public hearings. When a land use application makes its way to a county or municipal governing body, also referred to as a “local government,” the body generally conducts one of two basic types of hearings. Depending on the nature of what the local government is being asked to decide, hearings either proceed as “quasi-legislative” or “quasi-judicial,” and local governing bodies either make “quasi-legislative” or “quasi-judicial” decisions. The word “quasi” as used in this context means “resembling” or “like,” and therefore quasi-judicial hearings/decisions are “like judicial proceedings,” while quasi-legislative hearings/decisions are “like legislative proceedings.”

Other significant differences also exist between quasi-judicial and quasi-legislative hearings and decisions. The level of due process required, the burden of proof and standard of review, and the degree of immunity enjoyed by the local government and its representatives are some of the aspects that will differ depending on whether a hearing proceeds as quasi-legislative or quasi-judicial. Whether its large-scale development like Plum Creek’s plans for eastern Alachua County, Butler Plaza’s expansive expansion, the mixed-use, transit-oriented Springhill community west of Gainesville, or something more modest, like the construction of a new brewery downtown or an alteration to a private residence, plenty of opportunities exist to encounter the differences between quasi-legislative and quasi-judicial hearings and decisions.

Quasi-legislative hearings/decisions are essentially those hearings/decisions where a local governing body formulates policy for future application to a broad area of public business, whereas quasi-judicial hearings/decisions are those where the governing body applies previously established policy or regulations to a specific proposed activity. Examples of quasi-legislative land use decisions are the adoption and amendment of comprehensive plans and land development regulations. Plum Creek’s proposed development provides a local example of a land use action implicating a quasi-legislative decision

because it seeks County Commission approval of a sector plan, which requires the comprehensive plan to be amended. On the other hand, decisions concerning zoning variances, special use permits, and code violations are all examples of quasi-judicial decisions.

Quasi-legislative hearings proceed with less formality. While quasi-judicial hearings need not adhere to strict rules of evidence and procedure, certain standards of fairness must be met to assure that due process is provided.¹ These standards include the right to present evidence, cross-examine witnesses, and demand that witnesses be sworn.² Parties to quasi-legislative hearings do not typically enjoy such rights, at least not as a matter of due process requirements.

One of the most discussed distinctions between quasi-judicial and quasi-legislative proceedings involves ex parte communications or discussions with a member of the governing body, e.g., a commissioner, outside the presence of other parties. Nothing restricts ex parte communications when it comes to quasi-legislative hearings. Parties with an interest in such matters are generally free to speak to or otherwise contact the local representatives who will be making the quasi-legislative decisions. Conversely, significant restrictions apply to ex parte communications during quasi-judicial proceedings. Any ex parte communication made outside of a quasi-judicial hearing raises a presumption that the ex parte communication prejudices the final decision, unless the communication is disclosed at the hearing.³ If ex parte communication occurs and is not disclosed, the presumption of prejudice may only be rebutted if the local government can establish, pursuant to an analysis of several criteria articulated by case law, that the communication lacks any prejudicial effect.⁴ Since applicants seeking land use approvals, local government representatives, the general public, and other parties are usually accustomed to communicating freely, this restriction on ex parte communication often causes substantial confusion, misunderstanding and friction.

In addition, different levels of immunity for local government representatives and different burdens of proof and standards of review also apply in quasi-legislative versus quasi-judicial hearings/

Continued on page 11

decisions. When making a quasi-legislative decision, local government representatives personally enjoy *absolute* immunity from suit due to the fact that they are making policy decisions, but in making quasi-judicial decisions, i.e. applying established policy, local representatives merely enjoy *qualified* personal immunity.⁵ The degree of immunity afforded to representatives arose where a local commission denied a landowner's application for a land use approval, leading the landowner to file suit against the commissioners individually under federal civil rights law claiming that the denial constituted a deprivation of private property without due process of law.⁶ The court found that the representatives did not have absolute immunity because the decision amounted to an application of a zoning ordinance and therefore, the qualified immunity that the representatives did enjoy required that they plead and establish an affirmative defense in order to avoid personal liability under a proper civil rights claim.⁷

Finally, local governing bodies as a whole enjoy considerable discretion when making quasi-legislative decisions. As such, quasi-legislative decisions must merely satisfy the "fairly debatable" standard, i.e. the decision must not be arbitrary, discriminatory, or unreasonable.⁸ In contrast, quasi-judicial decisions are subject to review by certiorari in circuit court and the decision is reviewed under the "competent substantial evidence" standard.⁹ Due to this heightened standard, the governing body and the parties presenting evidence face greater responsibility to ensure that the record of the hearing comprehensively and accurately reflects the matters presented.

1 *Jennings v. Dade City*, 589 So.2d 1337 (Fla. 3rd DCA 1991).

2 See Fla. Stat. § 286.0115(2)(b).

3 See *Jennings*, 589 So.2d at 1341. See also Fla. Stat. § 286.0115(1)(a) & (1)(c) (providing that a county or municipality can adopt an ordinance or resolution establishing a process for disclosure, and the process will remove the presumption of prejudice if it adheres to the procedure spelled out in the statute).

4 See *Jennings*, 589 So.2d at 1341.

5 *Penthouse, Inc. v. Saba*, 399 So.2d 456 (Fla. 2d DCA 1981).

6 See *id.*

7 *Id.*

8 *County Com'rs of Brevard County v. Snyder*, 627 So.2d 469 (Fla. 1993).

9 *Id.*

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 are joining forces with both the Adkins and Bennett Inns for collecting toys via their "AmazInn Race" event 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 will be available for pick up at the November luncheon or by making arrangements with Anne Rush (anne@robertarushpa.com). If you don't want to take an entire box, starting in November, donation boxes will be 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 either luncheon during November or December, 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.

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

Three Rivers Legal Services Pro Bono Survey

1. Are you a member of a law firm?
 Yes No
If yes, how many attorneys are in your firm? _____
2. Do you perform pro bono work within your law firm?
 Yes No
3. Do you perform pro bono work *within* your legal practice area?
 Yes No
4. Do you perform pro bono work *outside* of your legal practice area?
 Yes No
5. If you perform pro bono services, do you do it through an organized program?
 Yes No
If yes, what program?

If no, what type of pro bono work do you do?

6. Would you be willing to take pro bono referrals or assist in a pro bono clinic outside of your legal practice area?
 Yes Yes, only with training
 No
7. Would you be willing to attend substantive training sessions regarding a specific practice area and then participate in pro bono in that area of law?
 Yes No, not interested
8. What type of training session would you be most interested in attending?
 In person CLE?
 Telephonic CLE?
 Webinar CLE?
 Lunch & Learn?
9. What is the maximum amount of time you would dedicate to a substantive training session?
 30 minutes
 45 minutes
 1 hour
 2 hours
 More?
10. Would you prefer to work with a "mentor" when you accept a pro bono case outside of your usual legal practice area?
 Yes No, not really
11. What prevents you from taking a pro bono case (check all that apply)?
 Lack of Time
 Lack of Training
 Lack of Interest
 Lack of Resources
 Lack of Support
 Other _____
12. What type(s) of cases would you be interested in working on? (Check all that apply)
 Sealing & Expungement
 Guardian Advocacy
 Family Law
 Federal Income Tax
 Consumer Law
 Eviction Defense
 Foreclosure Defense
 Disability Benefits
 Probate
 Wills/Advance Directives
 Tabling at Ask-A-Lawyers Events
 Making Presentations at Community Events

Please complete this survey and return it to marcia.green@trls.org or fax it to 352-375-1631.

Reserve Now for the EJCBA November 2014 Luncheon



WHEN: Friday, November 14, 2014 – 11:45 a.m.
 WHERE: The Woolly – 20 N. Main Street, Gainesville, FL 32601
 PROGRAM: Tony Jones, City of Gainesville Chief of Police — “Initiatives to Keep Youth Out of the Criminal Justice System”
 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, November 10th at Noon at <http://8jcba.dev.acceleration.net/event-registration/november-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 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 Charity Golf Tournament benefiting the Guardian ad Litem Program - Friday March 20, 2015

EJCBA Professionalism Seminar - Friday, April 17, 2015 from 9 am to noon, at the UF Levin College of Law.

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 November and December luncheons. Please bring unwrapped, new toys for 3-5 year olds. Age appropriate books are strongly encouraged.



EJCBA President/Master of Ceremonies Ray Brady at the Annual Cedar Key dinner



Judge Hulslander, Judge Monaco, Lynn Monaco and Judge Roundtree enjoy EJCBA's annual Cedar Key dinner



Judge Lancaster, Norm Fugate, Judge Jaworski and Judge Griffis enjoy a Cedar Key get-together at Norm Fugate's office



Attorneys Larry Turner and Phil Beverly at Cedar Key

November 2014 Calendar

- 1 UF Football v. Georgia (Jacksonville), 3:30 p.m.
- 5 EJCBA Board of Directors Meeting – 5:30 p.m., Gaineswood Clubhouse
- 5 Deadline for submission to December Forum 8
- 8 UF Football at Vanderbilt (Nashville), 7:30 p.m.
- 11 Veteran’s Day Holiday – County & Federal Courthouses closed
- 12 Probate Section Meeting, 4:30 p.m., Chief Judge’s Conference Room, 4th Floor, Alachua County Family & Civil Justice Center
- 14 EJCBA Luncheon, Chief of Police Tony Jones, “Initiatives to Keep Youth Out of the Criminal Justice System”, The Woolly, 11:45 a.m.
- 15 UF Football v. South Carolina, TBA
- 18 Family Law Section Meeting, 4:00 p.m., Chief Judge’s Conference Room, Alachua County Family & Civil Justice Center
- 22 UF Football v. Eastern Kentucky, TBA
- 27 Thanksgiving Day – County & Federal Courthouses closed
- 28 Friday after Thanksgiving Holiday – County Courthouses closed
- 29 UF Football at FSU (Tallahassee), TBA

December 2014 Calendar

- 3 EJCBA Board of Directors Meeting – 5:30 p.m., Gaineswood Clubhouse
- 5 Deadline for submission to January Forum 8
- 6 SEC Championship Game, Atlanta, GA – 4:00 p.m., CBS
- 10 Probate Section Meeting, 4:30 p.m., Chief Judge’s Conference Room, 4th 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

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.