FORUM 8

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President's Message

By Rob Birrenkott

I recently attended the joint fundraising gala benefiting Three Rivers Legal Services and Southern Legal Counsel that featured speakers sharing their insights on the incidents that took place within our circuit in the town of Rosewood in 1923 and the subsequent legal case brought on behalf of the residents 70 years later. The first speaker, Dr. Maxine Jones, the principal author of "The Rosewood Incident," an investigative report commissioned by the Florida Legislature in 1993, shared a historical perspective on the events that took place in early January of 1923 that resulted in a thriving African American community being burned to the ground by a white vigilante mob and how this incident had largely been swept under the rug. The second speaker, Mr. Stephen Hanlon, a pro bono public interest lawyer, shared his experience representing the survivors and the descendants of the Rosewood incident 70 years later which resulted in the successful passing of a claims bill and the story of the victims being resurrected from obscurity and thrust into the public spotlight.

Not only was this fundraising gala a great event benefitting two great organizations, but it also was a stark reminder about how our past can influence our present day attitudes and we are all products of our respective life experiences and surroundings. Similar to the way river currents shape the bank, we are also shaped by the omnipresent forces that subtly but consistently influence us. Both speakers agreed our exposure to, and understanding of, historical events mold our current attitudes. Mr. Hanlon asked the crowd, "When was the last time you had a serious conversation about race with someone from a different race?"

I am proud that our association does not back down from difficult questions like those posed by Mr. Hanlon. Our luncheon this month, and subsequent roundtable event, will focus on implicit bias (subconscious attitudes that we all carry with us simply by virtue of our own experiences which are developed over a lifetime with regard to age, race, ethnicity, gender). The EJCBA is part of the coalition that is jointly sponsoring the "Leadership Roundtable: Is Justice Blind? Recognizing Bias In the Legal Profession and Beyond" which will bring together ABA President Paulette Brown, two dozen federal and state judges, law professors and students, bar leaders, and lawyers on Friday, March 11, 2016 from 1:00-4:00 p.m. (immediately following the EJCBA monthly luncheon). Thank you Stephanie Marchman, EJCBA President-Elect, and members of the planning committee, for your hard work which has made this event possible, and allowing us to respond with a concrete answer to Mr. Hanlon's question, which I assume is all too often met with uncomfortable silence. Please consider making your voice heard and supporting this event.

2015-2016 EJCBA Officers

Robert M. Birrenkott, Jr.
President
P.O. Box 117630
Gainesville, FL 32611
(352) 273-0860
(352) 392-4640 (fax)
rbirrenkott@law.ufl.edu

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

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

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

Meshon Trinette Rawls
President-Elect Designate
P.O. Box 117626
Gainesville, FL 32611-7626
(352) 273-0800
(352) 392-0414 (fax)
rawls@law.ufl.edu

Michele Lieberman
Secretary
12 SE 1st Street
Gainesville, FL 32601
(352) 374-5218
(352) 374-5216 (fax)
mlieberman@alachuacounty.us

Members at Large

Nancy T. Baldwin
309 NE 1st Street
Gainesville, FL 32601
(352) 376-7034
(352) 372-3464 (fax)
baldwinnt@cox.net

James H. "Mac" McCarty, Jr.
2630-A NW 41st Street
Gainesville, FL 32606
(352) 240-1226
(352) 240-1228 (fax)
mac@lawgators.com

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

George Nelson
81 N. 3rd Street
Macclenny, FL 32063
(904) 259-4245
(904) 259-0285 (fax)
nelsong@pdo8.org

Richard H. Fabiani, II
P.O. Box 5877
Gainesville, FL 32627
(352) 376-5226
rfabiani@chandlerlang.com

Peg O'Connor
102 NW 2nd Avenue
Gainesville, FL 32601
(352) 372-4263
(352) 375-5365 (fax)
peg@turnerlawpartners.com

Norm D. Fugate
P.O. Box 98
Williston, FL 32696
(352) 528-0019
(352) 528-4919 (fax)
norm@normdfugatepa.com

Judith Paul
4040 W. Newberry Road
Gainesville, FL 32607
(352) 872-5911
(352) 872-5912 (fax)
judy@jbpaullaw.com

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

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

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

Daphne D. Saddler
203 NE 1st Street
Gainesville, FL 32601
(352) 372-4381
(352) 376-7415 (fax)
duplessis.daphne@gmail.com

Tee H. Lee
2830 NW 41st Street, Bldg M
Gainesville, FL 32606
(352) 375-5602
(352) 373-7292 (fax)
tee.lee@swansonlawcenter.com

Jennifer Springfield
806-B NW 16th Ave
Gainesville, FL 32608
(352) 371-9909
(352) 377-4077 (fax)
jennifer@springfieldlawpa.com

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

Dawn M. Vallejos-Nichols
Editor
2814 SW 13th Street
Gainesville, FL 32608
(352) 372-9999
(352) 375-2526 (fax)
dvallejos-nichols@avera.com

Dominique Lochridge-Gonzales
901 NW 8th Avenue, Ste D5
Gainesville, FL 32601
(352) 415-2324
(352) 375-1631 (fax)
dominique.lochridge-gonzales@trls.org

Mary K. Wimsett
1204 NW 69th Ter, Ste D
Gainesville, FL 32605
(352) 379-1900
(352) 379-3926 (fax)
mkwimsett@millerelderlawfirm.com

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:

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

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

News, articles, announcements, advertisements and Letters to the Editor should be submitted to the Editor or Executive Director by Email. Also please email a photograph to go with any article submission. Files should be saved in any version of MS Word, WordPerfect or ASCII text.

Judy Padgett
Executive Director
P.O. Box 13924
Gainesville, FL 32604
(352) 380-0333
(866) 436-5944 (fax)
execdir@8jcba.org

Dawn M. Vallejos-Nichols
Editor
2814 SW 13th Street
Gainesville, FL 32608
(352) 372-9999
(352) 375-2526 (fax)
dvallejos-nichols@avera.com

Deadline is the 5th of the preceding month

Alternative Dispute Resolution

By Chester B. Chance and Charles B. Carter

I Will Take Mediation For $60, Alex

We were reviewing the Florida Supreme Court Mediator Ethics Advisory Committee opinions. The opinions are published on a variety of topics which are prompted by mediators writing to the advisory committee asking questions and requesting an opinion. We admit the opinions are perhaps overly technical and sometimes impractical, but, for sure they err on the side of total ethics.

MEAC opinion 2015-001 involved a question by a mediator who said many attorneys and mediation participants use laptops and tablets during mediation. The mediator said he has asked two professional participants to *not* type on their laptops or tablets during the mediation. This particular mediator usually does dependency mediations and advises that parents have told the mediator that they feel intimidated by the "constant clacking of keys and the uncertainty of what may actually be documented."

The mediator states they always explain confidentiality at the mediation and ask if they can insist on the non-typing rule as the "offenders," when asked, have always refused to cooperate. The MEAC authoritatively states "mediators do not have the authority to ban use of laptop devices or tablets during mediation." Interestingly (and this is how things sometimes get a bit overly technical and confusing), MEAC states:

> "If parties cannot resolve their differences regarding the reasons for and the use of laptops or tablets during the mediation, the mediator has the authority to adjourn or terminate the mediation in accordance with the above rule."

And, consider that might result in some loss of business in the real world.

MEAC opinion 2015-002 involves a question from a mediator with respect to a personal injury mediation arising out of a motor vehicle accident. The mediator reports plaintiff's counsel, plaintiff, defense counsel and the insurance adjuster appeared at the mediation; however neither the defendant driver nor the defendant owner appeared. The attorney for the plaintiff advised all were court ordered to be present and declined to go forward without the two defendants. The mediator states "I intentionally did not read the court order and I intentionally did not ask why the defendants did not attend." The plaintiff's attorney declined to proceed in the absence of the defendants.

The plaintiff's counsel instructed the mediator to report the non-appearance of the defendants to the court and the fact that the mediation did not go forward. The mediator reported to the court that a mediation had been scheduled on a certain date and reported who appeared, i.e., the names of the two attorneys, the plaintiff and the adjuster. The mediator then merely stated "the mediation did not go forward." The mediator wanted to know if it was appropriate to report the names of the people who appeared and wanted to know if it was appropriate to report that the mediation did not go forward. The mediator further asked if he was required to do those two things. Further, the mediator wanted to know if he should have even filed the report to begin with and basically asked "what should a mediator do when faced with this circumstance?" He added "I am not sure if it matters to any evaluation, but I am not going to charge the parties."

MEAC advised that unless there is a local court rule, court order or administrative order *requiring* a mediator to identify the parties or participants who appeared for mediation, the mediator *may*, but is not required to do so.

MEAC also advised that if any report is filed, the mediator may state that the mediation did not occur but should do so without any statement or an explanation why it did not occur. Further, MEAC noted sometimes there is a local court rule or order requiring a mediator to identify the parties who appear at mediation (we know some Federal District court rules require this) but otherwise the mediator "may" report who attended, but, again, is not required to do so.

MEAC opinion 2014-005 raised a very interesting question: "generally, under what circumstances is it ethically permissible for Florida mediators to agree to waive mediator fees?" As part of that question, the mediator asked if it is ethical for a mediator to

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EJCBA Charity Golf Tournament

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mac@lawgators.com

The cost for this event is **$115 per golfer**. This price includes 18 holes of golf, riding cart, lunch, reception and various awards and/or prizes. All net proceeds of this charity tournament will benefit the Guardian ad Litem Program of the 8th Circuit through the Guardian Foundation, Inc.

A Guardian ad Litem is a volunteer appointed by the court to protect the rights and advocate the best interests of a child involved in a court proceeding. Currently, the Florida GAL Program represents close to 27,000 abused and neglected children, but more than 4,600 children are still in need of a voice in court. Additional funding to the GAL Program provides invaluable financial support for the volunteers.

To register, please return this form with payment. All checks must be made payable to the McCarty, Naim & Keeter, P.A. Trust Account. **If you would like to register for either a two-some or a four-some, please fill out the corresponding number of spaces below and check the appropriate box.**

Entry Fee: $115 per golfer

Please check the appropriate box: ☐ Two-person scramble ☐ Four-person scramble

Name (**Golfer 1**)

Address

Phone Number

Email Address

Name (**Golfer 2**)

Address

Phone Number

Email Address

Name (**Golfer 3**)

Address

Phone Number

Email Address

Name (**Golfer 4**)

Address

Phone Number

Email Address

Criminal Law

By William Cervone

I love inevitable discovery. It's the great eraser for search and seizure violations; the salvation of many an error by an anxious if over-zealous officer. But I'm loving it a lot less these days and it's all Miguel Rodriguez's fault.

Miguel was home one day, minding his own business, when he was visited by some bail bondsmen. They were looking for one of their clients, can you imagine, who was facing marijuana cultivation charges and had apparently put Miguel's address down on his bond application. Miguel said he didn't know their client (given his apparent occupation and the coincidences which follow seems to have been a fib) and agreed to let the bondsmen look through his house just to be sure the client wasn't there. He was so cooperative that when they came to a locked bedroom door he even opened it for them, confiding as he did that he was growing pot in that room which, sure enough, housed a grow operation. One of the bondsmen politely excused himself, went outside, and called the police.

Predictably, about half an hour later a uniformed officer arrived, followed shortly after by various narcotics officers. They obtained consent to enter and search, seized 36 pounds of marijuana and assorted grow equipment, and promptly arrested Miguel.

At the inevitable suppression hearing that eventually followed, Miguel's first pitch was that his consent was involuntary and coerced because the various officers were armed and, at least some of them, masked (this was in Dade County so I suppose that's not surprising). The judge agreed. No matter, argued the prosecutor, because the lead detective had testified that he would have sought a warrant had Miguel not consented, and he clearly had probable cause and would have gotten one. Eureka - inevitable discovery! The day, or so the prosecutor thought, was saved. So did the 3rd DCA.

But not the Supremes.

Inevitable discovery, which has been around since 1984, "applies to balance the need to deter police misconduct with the societal cost of allowing obviously guilty persons to go free." But inevitability, the Supreme Court noted, "involves no speculative elements" and requires that the State show "that at the time of the constitutional violation an investigation was already underway" so that there would be a "reasonable probability" that the evidence would have been found despite any improper police action.

Moving beyond all of that, the Court analyzed numerous Florida and other jurisdiction cases and took another step, finding that "there is no room for probable cause to obviate the requirement to pursue a search warrant, for this would eliminate the role of the magistrate and replace judicial reasoning with the current sense impression of police officers." Surely the nation would fall if we continued to do that. Henceforth, then, it has been decreed that inevitable discovery can only apply if the police "actually were in pursuit of" a warrant when they stumble across something. This is especially so as to people like Miguel because his situation involved the sanctity of his home, "a bedrock of the 4th Amendment and an area where a person should enjoy the highest expectation of privacy," even, one supposes, when busily growing pot. Or perhaps making meth. Or whatever. To do otherwise would "eviscerate" the exclusionary rule, encourage police misconduct, nullify the Constitution's search warrant requirements, and so on.

I am left to wonder at the mechanics of all of this but I suppose that is for another day. There are also several ancillary lessons to be learned from this tale, one of which is that maybe bail bondsmen are not the disreputable scofflaws some think them to be, given their having immediately ratted Miguel out. One hopes they weren't merely churning up more business. Another is that you should be careful about who your business associates are, especially if they might use your address on court papers. Finally, one also wonders if the trial judge thought that the coerced consent issue was a throw away, given inevitable discovery, and might have ruled otherwise had he known the trap he had stepped into, but that might imply things that shouldn't be verbalized.

Position Wanted

2L seeks summer law clerk position. Please contact Nicolas Iannucci at (941) 276-8248 or niannucci@law.ufl.edu if interested.

Employee Handbook Revisions For 2016: Wage and Hour Policies

By Laura Gross

Employment class action litigation is at an all time high and the stakes keep getting higher. The top 10 employment class action settlements totaled nearly $2.5 billion last year. Plus, 2016 promises expanded employer liability for claims of unpaid wages, discrimination, and anti-union policies. It is time to think about revising the old employee handbook.

Wage and hour practices deserve first consideration given the sheer volume of unpaid wage claims and this year's expected dramatic changes. From class actions to bread and butter claims, wage and hour litigation is expected to rise. The biggest hurdle for employers who want to avoid being swept up in this tide of litigation will be compliance with the Department of Labor's impending final regulations. These regulations, expected July 2016, will increase the minimum wage for salaried employees (those not entitled to overtime) and substantially expand the number of employees entitled to overtime. As the first update to the "white collar" exemptions since 2004, the new regulations will require companies to change longstanding pay practices.

Under the new regulations, workers making less than $50,400 per year or $970 a week must be paid overtime for hours worked over 40 per week. To be exempt from overtime, those making over the threshold must also pass a "duties" test. The salary for "highly compensated employees" who are exempt from overtime will be increased from $100,000 to $122,148.

Another wage and hour issue employers must grapple with is what is overtime and how to track it given changes in technology that allow some employees to work from home and work after hours by logging in or using employer or employee owned electronic devices. Increases in technology also continue to create questions and litigation over whether a worker is an employee or independent contractor when interacting through an app, like Uber.

Other timely issues to consider are whether the employer is subject to expanded liability as a joint employer and how multi-state companies should deal with state wage and hour laws, which vary dramatically.

For more information about federal wage and hour regulations, enforcement, and compliance, the United States Department of Labor Wage and Hour Division website at www.dol.gov/whd/ is very helpful.

Volunteer Attorneys Needed

The Eighth Judicial Circuit Court is seeking attorney volunteers to serve as pro bono guardians ad litem in contested family law cases. To qualify, the attorney needs to be in good standing with the Florida Bar. Volunteer hours count toward the Florida Bar pro bono requirement. Please contact Katherine Mockler, mocklerk@circuit8.org, to volunteer.

Please fill out the following survey in order to provide the court with information as to what causes attorneys to hesitate to volunteer: https://www.surveymonkey.com/r/9NJYWKP Responses are anonymous.

Nominees Sought For 2016 James L. Tomlinson Professionalism Award

Nominees are being sought for the recipient of the 2016 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, April 29, 2016 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.

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offer to continue mediation via email or telephone after a court ordered mediation conference on the basis that none of the mediator's time after the initial conference will be billed to either side. Interestingly, the mediator said he would not charge for post-conference time *unless* the case resolved. Interesting.

The MEAC response was simple: a mediator's fee may never be based on the outcome of mediation. MEAC emphasized that a mediator shall not charge a contingent fee or base a fee on the outcome of the process. MEAC added it was unaware of any restrictions on mediators waiving their fees or working pro bono, provided the fees are waived as to all parties.

MEAC opinion 2014-006 addressed whether there were any restrictions on the mediator, instead of one of the parties, filing the notice of mediation. MEAC opined that a mediator may *not* file a notice of mediation *unless* there is a court order referring the parties to mediation and the parties have selected the mediator, or, the parties have stipulated in writing to mediation and to that mediator in their case. In other words, the mediator can prepare a notice, but may not file it unless the described conditions are met.

The above opinion caused a bit of a stir. In MEAC opinion 2014-011 a mediator raised the aforementioned opinion and said Rule 10.520 of the Mediator Rules does not expressly forbid a mediator from filing a notice of mediation. MEAC stood its ground and opined there is a distinction between the filing of a notice of mediation with the court and notifying the parties in writing of the date, time and specifics of the mediation. MEAC emphasized that a mediator may not file a notice of mediation with the court unless the parties have agreed to the use of the mediator, the court has designated a mediation program which selects the mediator, or the court selects the mediator directly.

MEAC opinion 2011-001 asked whether a mediator should sign a settlement agreement which was obtained at mediation. No rule requires a mediator to sign a settlement agreement; instead, the rules only require counsel and the parties to sign. The mediator, whom your authors know intimately, noted that he signs mediation agreements indicating that he has witnessed the parties and attorneys signing it as his business record. "By signing, it's my notation of a work habit that I do not sign unless I have either seen people sign or they have confirmed/affirmed that it is their signature on the agreement. It also signifies that I have given copies of the signed agreement to the parties or to their counsel."

MEAC states it is neither a requirement nor a violation of any rules for a certified mediator to sign a written settlement agreement in the capacity of mediator. "However, it should be clear that if the mediator does sign the agreement, it is done solely in the capacity of mediator and not in any other capacity, such as notary, witness or party." MEAC is of the opinion that by signing the agreement the only thing the mediator is doing is signifying that they mediated the case. Again, it seems like this is a very overly technical reading of the rules, impractical and a disservice to the parties. However, these opinions are pretty much in stone.

Even the cell phone has prompted questions. MEAC opinion 2011-012 involves a concern by a mediator about the confidentiality that is required for the mediation process. "Our mediators are finding that the parties are calling family, friends, pastors, etc., to discuss what is happening at mediation." Specifically, it was asked whether mediators should ban the use of cell phones during the mediation process to ensure confidentiality.

MEAC answers very clearly that mediators do not have the authority to unilaterally ban the use of cellular communications during the mediation process. Specifically, MEAC opines:

> "Mediators may wish to consider addressing the use of cell phones or texting devices in their opening orientation by obtaining agreement as to the use of such devices and further reminding parties that mediation confidentiality applies to all mediation participants, whether present in person or by electronic means."

Boy, does that open up a can of worms.

When mediators sit around, they actually discuss things like the above questions. Mediators often disagree with the MEAC opinions as being overly technical and not "real world" practical. Still, nobody seems to dispute that the intention of the authors of the MEAC opinions is extremely and vigorously ethical.

I Saw it on Facebook: The Admissibility of Social Media Evidence

By Krista L.B. Collins, Siegel Hughes & Ross

The dangers of social media for parties involved in litigation are well-known to attorneys these days—although the parties themselves often don't seem to realize that information they put on the internet is public! A personal injury plaintiff posts pictures to Instagram showing himself skiing the slopes, while at the same time claiming the injuries to his back are incapacitating. A criminal defendant uses YouTube to brag about getting away with a bank robbery. Opposing counsel files an emergency motion for continuance because his client is unexpectedly in the hospital, but his client's Facebook page shows that he's actually vacationing out of state. In fact, social media posts have recently been cited in criminal complaints filed against Ammon Bundy and the other armed occupiers of the wildlife refuge in Oregon. Social media offers many opportunities to catch out the unwary opponent—but once you've got the damning evidence in hand, how do the rules of evidence apply, so that it can actually be used in court?

The easiest, and probably the most common (at least in a civil action), method of authenticating social media evidence is simply to see if the opposing party will identify it. But if they are unable or unwilling to do so, then we must look to basic evidence law: Section 90.901, *Fla. Stat.*, requires authentication or identification of evidence as a condition precedent to its admissibility. This requirement is satisfied by "evidence sufficient to support a finding that the matter in question is what its proponent claims." §90.901, *Fla. Stat.* There is no specific list of requirements in making such a determination and the evidence may be authenticated by appearance, context, substance, internal patterns, other distinctive characteristics or by using extrinsic or circumstantial evidence. *Symonette v. State*, 100 So.3d 180, 183 (Fla. 4th DCA 2012) (internal citations omitted); *Sunbelt Health Care v. Galva*, 7 So.3d 556, 559 (Fla. 1st DCA 2009). The evidence can also be authenticated by showing it meets the requirements for self-authentication. *Symonette* at 183. Stated even more simply, "The requirements of the evidence code are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." *Sunbelt* at 559. Once a *prima facie* case of authenticity has been established by the proponent of the evidence, any disputes as to the genuineness of the exhibit are to be resolved by the trier of fact. *Sunbelt* at 559-560. With regard to photographs, this means that once a photo has been authenticated and admitted, questions of possible "distortion" or manipulation go to the weight which the photograph is given by the trier of fact. *See Hannewacker v. City of Jacksonville Beach*, 419 So.2d 308, 311 (Fla. 1982).

While there are many cases involving the scope of discovery of social media, there is no Florida state case law discussing the admissibility of social media pages—yet. Given the prevalence of social media use, it is surely only a matter of time before a Florida state court weighs in on the issue. However, federal courts and courts in a few other states have addressed the issue. In *U.S. v. Broomfield*, 591 Fed. Appx. 847 (11th Cir. 2014), the Eleventh Circuit held that a YouTube video was properly authenticated under Rule 901(a), *Fed.R.Evid.*, where the government's evidence identified the individual in the video as the defendant, identified the firearm and ammunition in the video and established where and approximately when the video was recorded. As with the Florida evidence rules, the Court noted that authentication is allowed through circumstantial evidence.

In *Tienda v. State*, 358 S.W.3d 633 (Tex. Crim. App. 2012), the Court engaged in a thorough discussion of the authentication of social media, specifically several MySpace pages. The standard for authentication and admission of evidence, and the means by which evidence could be authenticated are largely the same in Texas as in Florida: the proponent of the evidence must make a threshold showing that it is what the proponent claims it is, and may do so through direct testimony from a witness with personal knowledge, by comparison with other authenticated evidence, or by circumstantial evidence. *Id.* at 638. The Court held that the internal contents of the MySpace pages constituted sufficient circumstantial evidence to establish a *prima facie* case that the page was created and maintained by the defendant. *Id.* at 642. The pages contained photos of the defendant, references to the victim and his funeral, references to personal information about the defendant (that he had been wearing an ankle monitor for a year, along with a photo of the same) and other references to the facts and circumstances surrounding the crime. *Id.* at 645. The Court noted that it is within the realm

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Rosewood Dinner Event A Success

By Marcie Green

Three Rivers Legal Services and Southern Legal Counsel came together to raise funds and awareness of their programs with a dinner event, Rosewood: The Road to Reparations. Despite the horrendous weather, the event, sponsored in part by the Eighth Judicial Circuit Bar Association, was a success.

Thank you to all of the sponsors and donors: Emmer Development Corporation, Fine Farkash & Parlapiano, Avera & Smith LLP, EJCBA, N. Albert Bacharach, Jr., PA, Raymond Brady, Harvey Goldstein, Meldon Law, Dean Laura Rosenbury, Bill Salmon, Johnson & Osteryoung, PA, Randy Kammer, and Kathleen Fox. Other sponsors included Brown & Brown Insurance, Everyman Sound Company, Swanson Hill, Xerographic Copy Center, CC's Flower Villa, Jon Anderson Printing, and Saul Silver Properties.

Nancy Baldwin, Christine Larson and Stephanie Marchman attend the Rosewood event on February 4, 2016.

Carl Schwait Receives Tradition Of Excellence Award

Carl B. Schwait received the 2016 Tradition of Excellence Award at the Solo & Small Firm Conference in Orlando on Friday, Jan. 22. The honor is presented by the General Practice, Solo & Small Firm Section of The Florida Bar.

Schwait, who in 2015 retired from Dell Graham in Gainesville, is currently working as a mediator and is a longtime faculty member at the University of Florida Levin College of Law, where he teaches Trial Practice and Pretrial Practice. He is serving his sixth term on the Board of Governors of The Florida Bar, representing the Eighth Judicial Circuit – Alachua, Baker, Bradford, Gilchrist, Levy and Union counties. He also is a member of the Legal Education Subgroup of the Vision 2016 Commission. In 2011, Carl received The Florida Bar President's Award of Merit for chairing the committee that rewrote and restructured the lawyer advertising rules.

The Tradition of Excellence Award honors one lawyer for exceptional contributions to, or an exemplary career in, general, solo and/or small-firm practice. The award goes to a lawyer who has practiced law in Florida for at least 10 years and has enhanced the standing of general, solo and small-firm practitioners in Florida; contributed to continuing legal education for general, solo and small-firm practitioners; helped the community through public service; advanced the administration of justice; and/or had a model career in general, solo and/or small-firm practice.

LEADERSHIP ROUNDTABLE

Sponsored by the Clara Gehan Association for Women Lawyers, Eighth Judicial Circuit Bar Association, The Florida Bar Diversity Leadership Grant, Josiah T. Walls Bar Association, North Central Florida Chapter of the Federal Bar Association, and the University of Florida Levin College of Law and Bob Graham Center for Public Service

IS JUSTICE BLIND?

RECOGNIZING BIAS IN THE LEGAL PROFESSION AND BEYOND

March 11, 2016, 1:00 p.m. – 4:00 p.m.

The Leadership Roundtable immediately follows the Eighth Judicial Circuit Bar Association Luncheon beginning at 11:45 a.m. with Featured Speaker:

AMERICAN BAR ASSOCIATION PRESIDENT PAULETTE BROWN

Diversity Award
Please send your nomination to recognize a member of our legal community who advances diversity, inclusion, and equality in the legal profession to the email address below by February 26th!

"Implicit Bias in the Legal Profession"

Boys and Girls Club
Invest in the future of our children; sign up today to volunteer your time and mentor a local child or donate to the Boys and Girls Club of America. For more information, go to www.bcga.org

Implicit Bias Workshop: Jason Nance & Sarah Redfield

Law Professors Jason Nance and Sarah Redfield will engage participants in a 1-hour workshop on implicit bias and its effect in different contexts, as well as present techniques for participants to overcome their own implicit bias. The workshop will be followed by moderated small group discussions, with ***nearly two dozen federal and state judges expected to participate***, as well as law students, young lawyers, experienced lawyers, and bar leaders.

The Wooly, 20 North Main Street, Gainesville, Florida 32601

Cocktail Networking Reception from 2:15-3:00 p.m.

The Roundtable is free for members of sponsoring organizations; $50.00 for non-members. The Luncheon is $17.00 for EJCBA Members (who have not prepaid through the meal plan); $25.00 for Non-EJCBA members. Register for the Roundtable and/or Luncheon by February 26th at http://events.8jcba.org. Space is limited and will be guaranteed on a first come, first serve basis only. Approved for 4 hours of Bias Elimination CLE. Contact Stephanie Marchman at 352-393-8816 or marchmansm@cityofgainesville.org with questions.

I saw it on Facebook

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of possibility that the defendant was the victim of an elaborate conspiracy in which the MySpace pages were created by "unknown malefactors," but held that the likelihood and weight of such a scenario was for the jury to assess. *Id.* at 646.

The *Tienda* Court's method of authentication would likewise enable a party to have the contents of a Facebook, Instagram or other social media page admitted into evidence. And once a social media page or post is authenticated, admissions contained therein are admissible under §90.803(18), *Fla. Stat. See Metro. Dade County v. Yearby*, 580 So. 2d 186, 189 (Fla. 3rd DCA 1991) ("it is well settled that an admission by a party opponent may be made in writing…as well as orally").

Photographs are generally not hearsay and are admissible as substantive as well as illustrative evidence. *United States v. May*, 622 F.2d 1000, 1007 (9th Cir. 1980) (noting that photographs are not assertions, oral, written or non-verbal). Similarly, under Florida Statutes, a photograph is not a "statement," defined as an oral or written assertion or nonverbal conduct intended as an assertion. §90.801, *Fla. Stat.* In order to have a photo admitted into evidence, the proponent must be able to establish that it fairly and accurately represents what it purports to depict. *Bryant v. State*, 810 So.2d 532, 536 (Fla. 1st DCA 2002). The testimony of the photographer is not necessary in order for a photograph to be admitted into evidence. *Hillsborough County v. Lovelace*, 673 So.2d 917, 918 (Fla. 2nd DCA 1996). Similarly, where the photo was obtained and whether it was a printed photo or a digital image, does not appear to make any difference for purposes of authentication.

In *United States v. Benford*, 479 Fed. Appx. 186, 191 (11th Cir. 2011), the photo that was at issue was obtained from the defendant's MySpace page, and showed the defendant posing with two pistols that were charged in the indictment. The fact that the photo was acquired from a MySpace page did not change how it was authenticated: an ATF agent testified that the pistols in the photo had markings consistent with the pistols that were the subject of the indictment. *Id.* In other words, it was the distinctive characteristics of the pistols in the photo that allowed the photo to be authenticated.

Although social media is a relatively new phenomena, proper application of the existing rules of evidence should enable the savvy litigator to present the social media evidence to the court.

Submit Nominations Now:

Leadership Roundtable Diversity Award

This year's Leadership Roundtable Planning Committee would like to recognize a member of our legal community who advances diversity, inclusion, and equality in the legal profession. Please send your nominations for the Diversity Award with a short statement of support to Stephanie Marchman at marchmansm@cityofgainesville.org by February 26, 2016. The Diversity Award will be awarded at the Leadership Roundtable on March 11, 2016

The Florida Bar Board of Governors Report

By Carl Schwait

The Florida Bar Board of Governors met on January 29, 2016. The major actions of the Board and reports received included:

President Ramón Abadin made a presentation on the challenges facing the legal profession and the changes technology has brought to the delivery of legal services. The Board discussed the presentation and the proper Bar response to member input regarding these challenges, and what the Bar can do to increase access to justice and help its members impacted by these challenges, particularly those in small firms. Private non-lawyer providers in the legal marketplace and options regarding these providers were also discussed. President Abadin, as well as several board members, said the Bar must act quickly on behalf of its members or it risks being left behind and perhaps eclipsed in the provision of legal services. Additional coverage of the presentation was reported in the Feb. 15 issue of The Florida Bar News.

Efforts to oppose a proposed constitutional

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Probate Section Report

By Larry E. Ciesla

The Probate Section continues to meet on the second Wednesday of every month at 4:30 p.m. in the 4th Floor Meeting Room of the Alachua County Family and Civil Justice Center at 201 East University Avenue. Following are some items of interest discussed during recent meetings, in no particular order.

A discussion regarding cloud storage was held during the January 2016 meeting. Two services in particular were mentioned as worthy of consideration: Backblaze and Crashplan. When I checked into Backblaze, I learned that they charge $5.00 per month (or $50.00 for one year if paid in advance) per computer. Please note that, according to The Florida Bar, an attorney is required to perform his or her own due diligence in selecting an appropriate cloud storage vendor. Presumably, hiring an IT consultant to perform this task will satisfy The Bar's requirements.

A discussion was also held during the January meeting regarding the Supreme Court of Florida's opinion released on December 17, 2015, regarding amendments to the Florida Probate Rules. As per the opinion, the amendments are effective immediately. A copy of the opinion has been put into the Probate Section's Dropbox. To access the opinion once the Dropbox is opened, please click where it says "ScanSnap."

The most significant changes relate to the contents of the Notice of Administration. The Supreme Court added new language to the effect that the three-month period for objecting to the validity of the will, venue or jurisdiction of the court may only be extended in the event of, "... a misstatement by the personal representative regarding the time period within which an objection must be filed." The Supreme Court also added that, "The time period may not be extended for any other reason ..." Finally, with regard to persons not served with a copy of the Notice of Administration, the Court created a new deadline for the filing of objections of one year from the date of the Notice of Administration or the closing of the estate, whichever shall first occur. Other minor changes were made affecting both probate and guardianship.

Another issue discussed was the effect of Section 736.0802(10), *Florida Statutes,* regarding use of trust funds to pay the lawyer for the trustee in breach of trust litigation. The potential problem with such a case is that a lawyer who has received trust funds for defending a trustee in a breach of trust case could be ordered to return the fee money to the trust. In order to avoid this outcome, it is advisable for an attorney, when approached to defend a trustee, to insist that all fees be paid from the trustee's personal funds, subject to the trustee being reimbursed from the trust when the litigation is concluded.

Susan Mikolaitis raised the issue of what happens when a decedent's homestead exceeds one-half acre within the city limits of a municipality. An interesting article on this subject was written in 2012 by an attorney named Charles B. Jimerson and a then-law student named Austin B. Calhoun, dealing primarily with the rights of a creditor in a bankruptcy context. A copy has been placed in the Probate Section's Dropbox.

It would seem that the analysis employed by the bankruptcy cases would be applicable in the probate context in the event there are no other assets from which a creditor could be paid. The worst-case scenario would be where the property cannot be physically divided consistent with local land use law, in which case courts have ordered the entire homestead to be sold with the proceeds being equitably apportioned between the creditor and the property owner. In order to avoid such a result, it may become necessary for the heirs to pay the creditor from their own pocket(s) in order to preserve the property for themselves.

All interested parties are invited to participate in Probate Section meetings. There are no dues, and there is never an obligation to attend future meetings. E-mail notices of Probate Section meetings are sent on the Monday prior to the Wednesday meetings. Please contact Jackie Hall (jhall@larryciesla-law.com) if you wish to be added to the e-mail list to receive advance notice of the monthly meetings.

Representatives of the EJCBA receive the Voluntary Bar Association Pro Bono Service Award from Chief Justice Labarga on January 28.

Save The Date!
The Conversation Project

March 31, 2016 9 a.m. –2 p.m.

UF Health invites members of the Eighth Judicial Circuit Bar Association to attend a free communitywide initiative to raise awareness about advance directives.

Why is this important to you? From time to time you may have the opportunity to encourage your clients to begin the process of legally documenting their medical preferences should they become unable to speak for themselves. It starts by asking your clients to engage in important conversations with their loved ones about designating a health-care surrogate who will know their medical preferences. Our goal is to normalize these conversations and help patients carefully consider and document health-care preferences prior to entering crisis situations.

The Conversation Project , a national initiative to encourage end of life planning, in conjunction with UF Health, is hosting an event March 31 from 9 a.m. to 2 p.m. to "train the trainer" on the importance of "having these conversations" and documenting these choices. We hope to reach every adult in the area about completing an Advance Directive.

You can help us by sharing this information with law students and others who may be interested in helping us reach out to all Alachua County residents, as well as by developing a system of collection of these important documents in your practice. To participate in our efforts to raise Gainesville to the next national leader in Advance Directives, visit our website at https://ufhealth.org/advance-directives/overview or RSVP by calling 265-9040.

It's that time again! The Eighth Judicial Circuit Bar Association Nominations Committee is seeking members for EJCBA Board positions for 2016-2017. Consider giving a little time back to your bar association. Please complete the online application at https://goo.gl/QVaYDI. The deadline for completed applications is May 6, 2016.

Board of Governors Report

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amendment establishing term limits for appellate judges will continue until the 60-day legislative session ends. The Florida Bar adopted a position to oppose term limits for any state court judges in Florida, either on the trial or appellate bench, during its Dec. 4 meeting after joint resolutions were introduced in the Florida House and Senate. The resolutions would limit appellate judges to no more than two appearances on the merit retention ballot, which, depending on when they were appointed, would give a maximum term of between 12 and 15 years. The legislative position was published in the Jan. 1, 2016, Florida Bar News. According to the National Center for State Courts, no other state in the U.S. has term limits for state court appellate judges.

The Board Review Committee on Professional Ethics and the Board Technology Committee's joint efforts to study the future of the Bar's Lawyer Referral Service and to respond to the Supreme Court mandate to suggest rules prohibiting lawyers from belonging to for-profit referral services unless owned or operated by Bar members will be discussed in a preliminary report at the Board's March 11 meeting. The report will also address how the Bar should view private companies such as Avvo and LegalZoom as matching services for lawyers and clients versus referral services. The Board Program Evaluation Committee is also reviewing the Bar's Lawyer Referral Service and its report is also expected in March.

A proposed change to the comment to Rule 4-4.2 addressing when lawyers can contact public officials who are represented by government attorneys was rejected by the Board Review Committee on Professional Ethics, ending attempts by organizations affiliated with government lawyers to amend the rule or its comment.

A special committee has been announced to include law school deans, the Florida Board of Bar Examiners, Supreme Court justices, and The Florida Bar to look at proposed changes to the certified legal intern rule and issues related to the Florida Bar Examination.

March 2016 Calendar

2 EJCBA Board of Directors Meeting – 5:30 p.m., UF Law, Room TBA
4 Deadline for submission of articles for April Forum 8
9 Probate Section Meeting, 4:30 p.m., Chief Judge's Conference Room, 4th Floor, Alachua County Family & Civil Justice Center
11 EJCBA Luncheon, ABA President Paulette Brown, "Implicit Bias in the Legal Profession," The Wooly, 11:45 a.m.
11 EJCBA Leadership Roundtable: Workshop on Implicit Bias presented by UF Law Professor Jason Nance and University of New Hampshire Professor Sarah Redfiled, with networking reception (CLE), The Wooly, 1-4 p.m.
15 Family Law Section Meeting, 4:00 p.m., Chief Judge's Conference Room, Alachua County Family & Civil Justice Center
18 EJCBA Annual Charity Golf Tournament benefiting the Guardian ad Litem Program, UF Golf Course
25 Good Friday, County Courthouses closed

April 2016 Calendar

5 Deadline for submission of articles for May Forum 8
6 EJCBA Board of Directors Meeting – 5:30 p.m., UF Law, Room TBA
6 EJCBA Second Annual Spring Fling Social – Thomas Center, 6:00 p.m.
13 Probate Section Meeting, 4:30 p.m., Chief Judge's Conference Room, 4th Floor, Alachua County Family & Civil Justice Center
15 EJCBA Luncheon, Nathan Whitaker, Lawyer and Co-Author of *Through My Eyes* by Tim Tebow and *The Mentor Leader, Quiet Strength,* and *Uncommon* by Tony Dungy, The Wooly, 11:45 a.m.
19 Family Law Section Meeting, 4:00 p.m., Chief Judge's Conference Room, Alachua County Family & Civil Justice Center

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