

FORUM 8

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President's Letter

By Elizabeth Collins Plummer



Although I was never certain if the story was truth or fiction, I had a friend, a former Marine, who was fond of telling a story about a bench. He said that when he arrived at one of his posts and his battalion relieved another, the list of assignments included an order for one Marine to guard a particular bench 24 hours a day, seven days a week and to ensure

that no one sat upon it.

My friend questioned why they were to guard this bench. All the other guard posts made sense and were places clearly selected due to safety and security concerns. But, this looked like any ordinary park bench and appeared no different than a number of benches in the vicinity, which remained unguarded. There were no plaques or inscriptions to signify anything special about this bench. Why must it be guarded? Did it mark the entrance to a secure military facility or secret warehouse below it? Had some famous military officer died there or was the officer buried there? Was some important treaty negotiated sitting upon it? Had they just not yet received the bronze plaque signifying its importance? Was there something of greater importance nearby? His questions were immediately dismissed and he was summarily told to do as he was ordered. However, after spending several hot days sweltering in the early afternoon sun and becoming drenched in the afternoon downpours, after spending his nights standing beside the bench and carefully inspecting it for any signs of its importance when he was not being watched, he again questioned why

they were guarding the bench. After getting into such a heated argument about it that he was punished for insubordination, my resolute friend made it his mission to find out why this bench was so special.

Each time he questioned anyone, they confirmed that the orders had been passed from battalion to battalion for a number of years, but no one knew why. He eventually followed the paper trail and researched years and years of documents evidencing the guard assignments being passed along. Finally, he dusted off

the original paperwork adding this guard post to the assignment list. The initial request for a soldier to guard the bench contained four little words: "Repaired today. Wet paint."

When he brought the information to the attention of his commanding officers, he also submitted calculations regarding the number of wasted man hours that had been spent over the years guarding the bench. The numbers were staggering.

The waste might have continued into perpetuity without anyone questioning why. He earned a coin for his trouble and, more importantly to him, the satisfaction of having proved himself right to question the order.

Certainly, there are some who will say that this type of inefficiency and unquestioning following of orders is a product of the "military mindset." However, I disagree. I think the parable applies to all of us.

Are there ways that you manage your firm (staff assignments or job descriptions, salary and bonus structures, file naming systems, file organization and retention policies, or other office procedures) that you continue to maintain year after year without really



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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

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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

Alternative Dispute Resolution

50% of Mediators Believe in the Loch Ness Monster



By Chester B. Chance and Charles B. Carter

To be honest, we don't know if half the mediators believe in Nessie. One of the authors spent time looking for a swamp ape in Steinhatchee, but that is the subject of a future article.

You may be surprised at what a lot of folks do believe in when you arrive at the end of this article.

Michael Shermer is the author of the book *Why People Believe Weird Things*. Setting aside for a moment the myriad of explanations in a 349 page book, Mr. Shermer at one point suggests psychological problems in our thinking ability generates our inability to reach the truth, and the resulting belief in, well, weird things.

Mr. Shermer posits that scientific and critical thinking does not come naturally. One must assume lawyers, judges and jurors would not be immune to this analysis. Mr. Shermer suggests we must "always work to suppress our need to be absolutely certain and in total control and our tendency to seek the simple and effortless solution to a problem. Now and then the solutions may be simple, but, usually they are not."

In the context of the law, the effort to seek the truth involves issues such as: Did Defendant Doe murder Priscilla Trueheart? Was Defendant Poindexter at fault for the motor vehicle accident? Was Plaintiff Throckmorton injured as a result of the slip-and-fall at Sears? Was the decedent Appleton unduly influenced when writing her last will and testament?

Sometimes we seek the truth at a trial. Other times we seek to convince 'the other side' of the truth of our position in mediation. When presenting our positions in either scenario, we perhaps are victimized by the same psychological disruptions that cause inadequacies in problem solving. Shermer describes several such psychological monkey wrenches:

1. Immediately forming a hypothesis and then looking only for examples to confirm it.
2. Failure to seek evidence to disprove one's

hypothesis.

3. Being slow to change the hypothesis even when it is wrong.

4. When information is complex, adopting overly-simple hypotheses or strategies for solutions.

5. If there is no solution, forming hypotheses about coincidental relationships one has observed, and as a result, causality is always found.

Go back and read the five disruptions listed in the preceding paragraph. Really, go ahead and re-read them. Think about them.

Have you seen opposing counsel fall prey to one or more of these psychological impediments to critical thinking? Probably you have. In fact, it is probable you have and we have also. Certainly, there is a risk the jury will also.

We think mediation is a good forum to combat the tendency to think in a way where our perspective is distorted or lacks realistic critical thinking. Mediation allows one to hold a mirror to one's analysis. If you won't hold the mirror up, the other side and certainly the mediator will do so. The result may and should be a more realistic evaluation of the truth for which one searches in a legal dispute.

If mediation fails, you can trust the jury to the truth finding mission. But, the jury will be composed of people, according to a 1990 Gallup Poll cited in the Shermer book of whom: 46% believe in ESP; 36% believe in telepathy; 15% believe in channeling; 52% believe in astrology; 32% believe in clairvoyance; 42% believe in haunted houses; 41% believe dinosaurs and humans lived simultaneously; and 33% believe in extraterrestrial contact. In addition, about 20% are 'not sure' about such things.

And to quote the mediation cliché: "All have a driver's license."

Well, does that sound like a pretty good group to arrive at the truth in a critical, skilled fashion? And, if you think things have changed in the last 21 years: a 2001 Gallup Poll reported a significant increase in belief in paranormal phenomena since 1990. Now, that is spooky.



Family Law: When is a marriage not really a marriage?

By Cynthia Swanson



When you didn't get a marriage license. Or when you didn't file the marriage license that you did get. In a 2010 case, the First DCA ruled that the fact that Dr. Maal and Ms. Hall had a big, fancy ceremony, held themselves out as and referred to each other as husband and wife, that the wife referred to herself as "Mrs. Maal" at work even though she had not legally changed her name, and that they had two children did not mean they were married. So, when they got divorced, they weren't really getting divorced.

This is an interesting en banc opinion with a majority opinion with which 7 justices concurred; one justice concurring in part and dissenting in part, with 3 more justices concurring with this opinion; another justice dissenting with an opinion and yet another justice concurring with him; and a last justice recusing himself.

The problem for Dr. Maal and Ms. Hall was they had not complied with Florida Statutes §741.01, which requires an application for a marriage license, and a subsequent "solemnization" and then return and filing of the license. Now, Dr. Maal and Ms. Hall, in the midst of all their wedding planning, had planned to go to the Clerk's office to get their license. But on the day they had planned to do that, Dr. Maal called Ms. Hall and said they would not be able to get a marriage license because they had not agreed upon a prenuptial agreement. It's not clear from the appellate opinion whether Dr. Maal led Ms. Hall to believe this was the Clerk's rule, or was merely his own. But the opinion does go on to say "Ms. Hall was understandably upset by this - all of the arrangements had been made and many of the guests were already in Pensacola for the ceremony. Dr. Maal persuaded her to go ahead with the ceremony, reassuring her that 'everything would be alright.'" So, Ms. Hall did go along with this, and they had their big ceremony, even though both knew that they did not have a marriage license.

For some reason not disclosed in the opinion, the parties did go to the Clerk's office a year later and obtained a marriage license. However, again for reasons not disclosed, they never solemnized nor returned the license to the Clerk.

Four years after the big, fancy ceremony, Ms. Hall filed a petition for divorce. Dr. Maal responded by

denying the existence of a valid marriage and filing a counter petition to establish paternity. The trial court found that a valid marriage did not exist, and Ms. Hall appealed.

So, what is the "take-away" from this opinion? Generally speaking, I think, most of the justices felt kind of sorry for Ms. Hall, but were really afraid of allowing the specter of common law marriage to rear its ugly head in Florida again. Some of the minority justices and the dissenters would have ruled that the facts in this case would amount to "substantial compliance" with §741.01. Two older Florida cases had mentioned "good faith," and "substantial compliance" as a way to approve the marriage even where there was a failure to strictly comply with the statutes. But the majority held that here, the parties knew they had no marriage license and knew they had not complied with the statutes, and so that really could not be said to be good faith or substantial compliance. The dissent compared the failure of the parties to return the actual license that they did get to an unrecorded deed, and pointed out that the failure to record a deed does not make the conveyance invalid. The majority might accept this analogy only if the parties had gotten their license, then gone through with the ceremony, and then accidentally failed to return the license. But here, the parties did things in more of a Rocky Horror time warped continuum, which the majority just wouldn't buy.

They also used a Latin term I was not familiar with - "expressio unius est exclusio alterius." Luckily, as I may have mentioned, I got an iPad for Christmas, and there's an app for that. I looked up this phrase in the free Nolo Plain English Law Dictionary. Unfortunately, when I searched for this term, the results it returned were "fixed in a tangible medium of..." and "paper hanger." These didn't seem to fit the bill. I checked the app store again, and I could download a copy of Black's Law Dictionary, which I figured might be a better bet for finding definitions of Latin phrases. But it costs \$54.99. And, really, I haven't used the gigantic, heavy hardback copy of Black's that a friend gave me when I started law school ... well, since I started law school. So, I was thinking that my \$54.99 could be better spent elsewhere.

So, from the context of the appellate opinion, I take it this phrase means more or less that if the Legislature expressed its will on a topic and left out something related to that topic, then it must have

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The Florida Bar Board of Governors Report



By Carl Schwait

At its January 28 meeting in Tallahassee, The Florida Bar Board of Governors:

- Approved as a new Bar legislative position support for a constitutional amendment to raise the mandatory retirement age for judges and justices from 70 to 75. The board tabled a related position on a proposed constitutional amendment requiring that those seeking trial judgeships have been members of the Bar for 10 years, instead of the current five-year standard.

- Approved a modification of an existing Bar legislative position that calls for adequate funding of the court system to include adequate funding of clerks of courts in their court-related duties.

- Heard the Investment Committee report that the total return on the Bar's long term investment portfolio for the 2010 calendar year was more than 11 percent.

- Heard Speaker of the Florida House of Representatives Dean Cannon express support for full funding of the courts and advocate that government functions best when all three branches are fully empowered and respect the rights and duties of the other branches. He called for civil debate on legislative matters, including the proper roles of the various branches. He warned Florida's budget crisis will place heavy burdens on the state, and said the federal health care reform law could double the state's Medicaid rolls, further exacerbating its budget problems in the next few years.

- Heard Chief Justice of the Florida Supreme Court Charles Canady warn that further budget cuts would cause severe harm to the courts and their ability to resolve cases, and that it's just as important to see that clerks as well as courts are fully funded.

- Heard the Disciplinary Procedure Committee report that the committee continues to look at proposed changes to the trust accounting rules, including preparing trust accounting forms to assist Bar members. The DPC approved a change to Rule 3-7.10, regarding reinstatement, to define community and civic service as required by the rule.

- Saw a demonstration of the scheduled overhaul of the Bar's website, which is expected to

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President's Letter

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knowing why? Have you ever asked anyone why something is done a certain way, only to receive the answer, "because that's the way we always have done it" or "it has worked in the past, why change it?" Admittedly, I am very detail oriented and prefer consistency among all attorneys and staff in implementing office procedures. (My friends who are reading this know these are euphemisms for saying that I am completely anal retentive.) However, this does not mean being rigid or simply maintaining the status quo. I hope I am always open minded when it comes to making positive changes in my own practice, the legal community, the EJCBA, and other professional and social organizations... and my own life.

While there are always growing pains associated with change, I would submit that change is far easier when taken in smaller steps all along the way. I think of the grumblings that the federal courts received when they began to require e-filing, because some local attorneys were still using DOS word-processing software (and, at least in one case, an electric typewriter) and had never used a .pdf converter. I heard rumors about a few attorneys who chose to eliminate their federal practice, rather than learning how to use the CM/ECF system. (I wonder if they know that e-filing will soon be in place across the state courts, as well.) For those forced to adapt, what a culture shock that must have been to learn all that new software at once, not to mention having to absorb the associated costs in one fell swoop. It is axiomatic: when change is thrust upon you, you are not simply able to react or adapt in a manner and with the luxury of time that is afforded when you plan the change yourself.

In your practice, are there modes of operation that are outdated, inefficient, or completely obsolete, simply because you never have questioned why it is done this way? Have you considered that no matter how much sense something made in the past, it does not mean that it makes sense now or will make sense in the future?

Could your professional, athletic, social, or charitable organization benefit from a bit of scrutiny? Is the annual bake sale still the best fundraiser for the school swim team? Does your local community theater group really want to perform "A Christmas Carol" for the twelfth holiday season in a row? (Did anyone miss a sit down dinner at the EJCBA's Annual Meeting last spring or were the hors d'oeuvres and an opportunity to mingle welcome changes?)

Greater success and happiness could be as simple as evaluating why you are continuing to guard that bench.

Joint Venture by Implication

By Siegel, Hughes & Ross

When two or more parties enter into an endeavor for a common purpose, they may create a joint venture. A joint venture “is created when two or more persons combine in some specific venture to seek a profit jointly.” *Navarro v. Espino*, 316 So. 2d 646, 648 (Fla. 3d DCA 1975). Although a joint venture is founded on a contract, the existence of a joint venture need not be expressly stated. See, *Russell v. Thielen*, 82 So. 2d 143, 145 (Fla. 1955). Rather, a joint venture arrangement can be implied in whole or in part from the acts and conduct of the parties or the construction which the parties give to the relationship between them. *Id.*; see also, *Florida Tomato Packers, Inc. v. Wilson*, 296 So. 2d 536, 539 (Fla. 3d DCA 1974). A party may not have subjectively intended it be, or even known that it was involved in, a joint venture. See generally, *Uhrig v. Redding*, 8 So. 2d 4, 5-6 (Fla. 1942) (explaining that the parties’ intent controls as to whether a partnership exists, but that such an intent may be shown by the facts and circumstances). It is important to consider whether the nature of the transaction and/or the conduct of the parties support a claim of a joint venture because the existence of a joint venture provides numerous claims and defenses that would not be present in a normal breach of contract case.

In order to determine whether the relationship between the parties is a joint venture, one must examine the requisite elements of a joint venture. A joint venture involves:

- (1) a community of interest in the performance of the common purpose;
 - (2) joint control or right of control;
 - (3) a joint proprietary interest in the subject matter;
 - (4) a right to share in the profits; and
 - (5) a duty to share in any losses sustained.
- Navarro*, 316 So. 2d at 648.

These characteristics are similar to those of a partnership. The distinguishing characteristic of a joint venture, as opposed to a partnership, is that a joint venture is for a single enterprise (i.e. usually of finite duration). See, *Russell*, 82 So. 2d at 145. Joint ventures so closely resemble partnerships that joint venture agreements are governed by the same legal principles that control the law of partnership. See *id.*

Many contractual relationships involve expected profits to both parties, and many times parties to a contract share an interest in a common purpose. These two elements are often the easiest to show.

On the other hand, frequently the two most difficult elements to prove are joint control or right of control, and a duty to share in losses. See, e.g., *Conklin Shows, Inc. v. Department of Revenue* 684 So.2d 328 (Fla. 4th DCA 1996); *Austin v. Duval County School Bd.*, 657 So. 2d 945 (Fla. 1st DCA 1995); *Phillips v. U.S. Fidelity & Guaranty Co.*, 155 So. 2d 415 (Fla. 2d DCA 1963).

The joint right of control does not necessarily mean that each party has an equal right of control. So long as each party has some control this element is established. For example, in *Florida Tomato Packers, supra.*, the Third District affirmed a jury’s finding of joint venture despite the fact that each party exercised control over only certain aspects of the venture (one party controlled production and transport of the tomatoes to packing facility and the other party controlled packing, sale and distribution). 296 So. 2d 536. Other jurisdictions have suggested that the necessity of cooperation among the parties to the success of the parties’ common interest can be sufficient to show a joint right of control. See, e.g., *Judge v. Gallagher*, 461 N.E. 2d 261, 265 (Mass. App. Ct. 1984) (finding presence of joint control element where “cooperation of the plaintiffs was essential to the success [the transaction] and, to that extent, the plaintiffs had some measure of control over the transaction”).

Virtually every contract entails some risk of loss as a result of the other party’s non-performance. Therefore, the risk of loss cannot be solely based on the risk that the other party will not perform. Rather, each side must be exposed to a risk of loss as a result

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Brent Siegel, Charles Hughes & Jack Ross

of the venture failing or falling short of its goal. See, e.g., *Russell*. However, neither losses nor profits have to be shared equally.

As an example, it is well-established that a joint venture exists where one party supplies capital and the other supplies experience, skill and labor. See *Russell* at 146. "Losses under such circumstances would be shared, for in the event of a loss the party supplying the 'know how' would have exercised his skill in vain and the party supplying the capital investment would have suffered diminishment." *Id.*; see also, *Florida Tomato Packers*, at 539-40. Another example occurs when one party supplies property to be developed and helps secure the development loan by mortgaging the property and the other provides the labor and materials to develop the property with an agreement to split the profits. See, e.g., *Russell*. The first party risks the loss of its property if the development fails to generate sufficient funds to pay back the loan while the other party risks the loss of its labor and material investment. See *id.*

If a joint venture is established, the parties will have numerous rights and obligations that would otherwise not exist. Joint-venturers owe each other "a duty of the highest and finest loyalty." See, *Gossett v. St. Paul Fire and Marine Ins. Co.*, 427 So. 2d 386, 387 (Fla. 4th DCA 1983). "There is a fiduciary relationship between joint venturers requiring that they deal with each other in utmost good faith, fairness and honesty." *Id.* Thus, a party to a joint venture may have a claim for breach of fiduciary duty if a co-venturer usurps a business opportunity in the venture's line of business or conceals a profit or otherwise engages in self-dealing with the venture. See *id.* (finding a duty of contribution among co-venturers for a judgment paid by one venture); see also, *Reaves v. Hembree*, 330 So. 2d 747 (Fla. 1st DCA 1976) (imposing a constructive trust where transfer of venture property was done without consent of the co-venturers); *Prescott v. Krehler*, 123 So. 2d 721 (Fla. 2d DCA 1960) (holding that secret profit earned by one party to venture, at the exclusion of co-venturers, inured to the benefit of the venture)

Further, parties to a joint venture may be entitled to an accounting. See, *Soler v. Secondary Holdings, Inc.*, 823 So. 2d 893 (Fla. 3d DCA 2002); see also, *Prescott*, *supra*. An accounting may reveal claims for unjust enrichment when one party was relieved of an obligation at the other's expense. See, *Pride Furniture Corp. v. Hollywood Federal Sav. and Loan Ass'n*, 547 So. 2d 717 (Fla. 4th DCA 1989); see also, *Gossett*,

supra. Other claims may include interference with a business relationship and a basic action for breach of the venture agreement. See, *New Vista Development Corp. v. Doral Terrace Associates, Ltd.*, 878 So. 2d 462 (Fla. 3d DCA 2004) (recognizing interference claim); see also, *Cobia v. Kalogridis*, 518 So. 2d 356 (Fla. 2d DCA 1987) (breach of venture agreement).

In addressing a joint venture agreement an attorney must consider a myriad of considerations not present in a traditional contract dispute. These considerations include not only the intent of the parties but principles of fairness and fiduciary duties as well. See, e.g., *Gossett*. For these reasons, it is important to consider whether a business transaction may be construed as a joint venture rather than a typical contractual relationship.

EJCBA & Partners Awarded Florida Bar Voluntary Bar Association Diversity Leadership Grant

By Rob Birrenkott

The Eighth Judicial Circuit Bar Association, along with its partners (the Josiah T. Walls Bar Association, the North Central Florida Chapter of the Federal Bar Association, and the Clara Gehan Association for Women Lawyers) received a \$3,000 grant award from the Florida Bar. The grant funds will facilitate the implementation of the North Central Florida Diversity Forum, an event designed to bring together lawyers, judges, scholars, and students to discuss the importance of diversity within the legal profession. The event will also provide a launching pad to support the identification and implementation of future collaborative diversity initiatives. The diversity forum is tentatively scheduled to take place on Wednesday, April 6th at 6pm at the University of Florida Levin College of Law. Please mark your calendars and be on the lookout for additional details. The EJCBA would like to thank the University of Florida Levin College of Law for its efforts and support of this project. If you would like to take an active role in the North Central Florida Diversity Forum, please contact Rob Birrenkott by phone: (352) 273-0860 or via email: Rbirrenkott@law.ufl.edu.

The Tea Party Edition Of The Constitution



By *Stephen N. Bernstein*

It seemed at first blush to be a rather straightforward proposition: the new House Republican majority would lead the chamber in reading the Constitution. However, nothing in Congress is straightforward, and the moment they began this exercise, they bogged down in a

dispute over which version.

Excuse me, which version? Now I bet most of you didn't realize that there is a, say "King James" version of the Constitution and a "New International" version of the Constitution. Best I remember there is only one. Yet our new leaders, in their infinite wisdom, had other views.

"Will we be reading the entire original document without deletion?" inquired Rep. Jay Inslee (D-Wash).

"Those portions superseded by amendment will not be read," declared Rep Bob Goodlatte (R-Va.).

"They are not deletions!" Rep. Louie Gohmert (R-Tex.) countered.

So you see, although there is only one version of the Constitution, it wasn't what our lawmakers read aloud. They opted for the sanitized Constitution which did not count a black person as three-fifths of a white person, never denied a woman the right to vote, never allowed slavery and never banned liquor.

The idea of reading the Constitution aloud was raised by the Tea Party as a way to reaffirm our allegiance to the framers but in reality it did just the opposite. In deciding to leave out the objectionable passages later altered by amendment, they edited out "originalist" beliefs and offered a "new and improved" product pruned of the forefathers' errors. I submit that we can't understand or interpret a document that we are not candid and accurate with in the first place.

This selective reading shows that for all the rhetoric about honoring the Constitution, these folks are more interested in editing it. Some have talked about repealing the 14th Amendment, which gives birthright citizenship and guarantees equal protection. The new majority leader has endorsed a constitutional amendment that would allow a group of states to nullify federal laws.

If they ever decide to do this again and the new majority persists in its desire to rewrite the Constitution, there will be plenty of additional passages to read next time.

2011 Brings New Professional Legal Seminars through Three Rivers Legal Services

By *Marcia Green*

In our ongoing efforts to increase the availability of private attorneys to help clients referred through Three Rivers Legal Services, we are continuing to offer legal training and education seminars funded in part by a renewed grant from the Florida Bar Foundation. As part of our Pro Bono Pilot Project, TRLS will offer a series of events focusing on intermediate level family law and a variety of consumer issues, including collection and garnishment defense. We hope to add a session on unemployment benefits as well.

The purpose of the small grant is to encourage pro bono representation by private attorneys. By providing training and professional education in specific areas of law needed by our clients, we also provide valuable information useful in the representation of your clients as well.

The first full-day session, Intermediate Topics in Family Law, will be held Friday, March 25 at Santa Fe College. Mark your calendars and watch for additional information, including the course outline and times, at www.trls.org "Calendar of Events" as well as through emails from the bar association. CLE credits will be available.

Previous webinars are available at www.trls.org and include sessions in adoption, domestic violence, guardian advocacy, special needs trusts, summary administration, equitable distribution and tax issues in divorce.

Please remember that attorneys who accept pro bono referrals through Three Rivers Legal Services are covered by our malpractice insurance (secondary to yours). If you are currently uncovered, TRLS insurance covers you!

Finally, Three Rivers welcomes attorney Summer Griggs to our Gainesville office. Summer is managing our domestic violence unit and representing victims of domestic violence in the Eighth Judicial Circuit. A 2002 graduate of Florida State University College of Law, Summer previously worked in our Jacksonville office through an AmeriCorps Legal Services grant and transferred to her hometown of Gainesville at the end of 2010.

Criminal Law



By William Cervone

I think I meant to write about this before and didn't. Better late than never. If I did and am repeating myself, well, some things bear repeating.

I suppose most of you are far more into social networking than I am. I have no Facebook page and I don't Twitter. I am guessing that many of you do. Beyond e-mail, which I am addicted to, I have no real clue about how any of those things work. I do know, however, that all things electronic are not wonderful and that bad things can happen to those who don't think about what they're doing. Hence, this cautionary tale.

It all begins with a story that made the rounds several months ago, at least in criminal law circles. During a trial in St. Lucie County the prosecutor posted a poem he had composed about the case on his Facebook page. I assume he thought it was cute because it was apparently arranged to the tune of Gilligan's Island. Included in the lyrics were references to "the judge and jury confused" and "the gang-banger defendant." I assume that those folks were not amused. Certainly, the defense attorney (who I cannot say for sure but who might have been the "weasle face" also mentioned in one verse) was not, as he was reported as intending to complain about the matter to the Bar. Bar counsel eventually weighed in with a reminder that Bar rules prohibit disseminating disparaging remarks about judges, jurors or attorneys, and that those rules would apply to things like Facebook.

In defense of the prosecutor, it is unclear exactly when the post was made and it might have been after the jury had deliberated so that there was at least no possible jury taint in the verdict. Still, there is the matter of acceptable behavior to maintain public trust and confidence in the legal system. As the prosecutor's boss pointed out, it's no longer the same as talking shop after work over a beer, it's in an electronic medium where it's saved forever, not to mention forwarded to who knows where.

What reminded me of this was an article I more recently saw about two civil practitioners in the Tampa area who got into quite the e-mail snit with each other. Apparently the two couldn't agree on much of anything, including a hearing date. Eventually, the older of the two, who is 50, started e-mailing the younger, who is 36, referring to him as "Junior." Not to be outdone, the younger responded to the older with the salutation "Old

Hack." Pleased with that, the younger's next shot across the bow was to suggest (well, he didn't suggest it, he said it) that the "Old Hack" was really a "bottom feeding/scum sucking loser lawyer." He went on to say that the Old Hack's "closely spaced eyes, dull blank stare, bulbous head, lying and inability to tell fiction from reality" were of concern to him. The response, of course, was neither measured nor temperate: a suggestion that "Junior" look in the mirror for signs of mental disability. There's more, of course, some of it deteriorating even further into personal attacks on each other's children and such, but I'll stop with this.

The Supreme Court did not stop, however. Both lawyers have been sanctioned. One pulled a 10 day suspension with required anger management counseling. The other got a public reprimand and mandatory professionalism class.

I don't know that I need to state the obvious but I will. We won't always agree about our cases but we ought not reduce ourselves to this level. If you insist on doing so, consider the risk of making a permanent record through social media. Save yourself the aggravation. Save the rest of us being subjected to your irritability.

Marriage

Continued from page 4

meant not to include that other thing. So, the dissent argues, since the Legislature has explicitly made some marriages invalid (incestuous ones and same-sex marriages), and has not expressly provided that marriages without benefit of a license are not valid, then even though it did say that you need a license to get married, it must not really mean that marriages achieved without a license are not valid. But, says the majority, to the extent such a construction would mean that a marriage ceremony coupled with living together and acting married would create a valid marriage, that would recreate a type of common law marriage, which the Legislature specifically abolished in Florida in 1967.

This case is Hall v. Maal, 32 So.3d 683 (Fla. 1st DCA 2010).

Please remember that the Family Law Section meets on the third Tuesday of every month, even if I forget to send out a reminder email, at 4:00 pm in the Alachua County Civil and Family Justice Center. I would also like to shamelessly refer you all to my blog: <http://swansonlawcenter.blogspot.com/> . I post interesting items related to family law, adoptions, probate, and so on.

Save the Date!

Upcoming FBA Seminar

by Peg O'Connor, FBA Chapter Secretary

Mark your calendars for Friday, April 8, 2011 and join us at the law school for a half-day of techno fun. "Federal Practice in the Electronic Age: Don't Be a Dinosaur" will show you how to successfully navigate cyberspace as a federal practitioner.

We'll discuss e-discovery, including Rule 26(f) conferences, the pitfalls of social media, and the how-to's of advertising on the web. We'll also show you a demonstration of a forensic computer examination.

Plus, if you're not currently an FBA member, \$50 of your registration fee will be applied toward your new national membership.

Send in your registration form below. Please e-mail peg@larryturnerlaw.com with any questions.

Board of Governors


Continued from page 5

go online May 1. The revised site will feature faster ways to find information, improved graphics, and enhanced search capabilities.

- Approved unanimously a proposal presented by the Program Evaluation Committee defining Bar programs and services that can help lawyers hurt by the ongoing poor economy. The Lawyers Helping Lawyers program will have a section on the Bar's revamped website and will offer ways to build a practice, discounted goods and services for lawyers, a job and career center, and other helpful information.

- Heard a report on the special committee examining mandatory regulation of paralegals. The committee has tentatively decided that paralegals should be regulated and is now looking at the


Continued on page 14



Raising the Bar to New Heights

Federal Bar Association

— North Central Florida Chapter —



Federal Practice in the Electronic Age: Don't Be a Dinosaur
 Friday, April 8, 2011, 9:00am-1:00pm

Name:	Employer:		
Mailing Address:			
Phone Number:	Email Address:		
Please send a completed registration form and remit payment according to the fee schedule below to: NORTH CENTRAL FLORIDA CHAPTER OF THE FEDERAL BAR ASSOCIATION c/o Peg O'Connor 204 West University Ave., Ste. 7 Gainesville, FL 32601			
Fee Schedule:			
Federal Bar Association Members	\$45	Law Students (FBA members)	free
Non-Members	\$95	Law Students (non-FBA members)	\$25
no fee for judges and judicial staff			

Federal Law Clerk Roundtable Report

By Troy Hiller, *UF Law*

Throughout law school, students are told many times that most disputes these days end with negotiation and settlements, and days spent in front of a judge will be few and far between. However, there is one opportunity that allows for a constant presence in a courthouse, and unparalleled access to a judge. That opportunity is a judicial clerkship, and on Tuesday, Feb. 1, the North Central Florida Chapter of the Federal Bar Association, along with the Center for Career Development, hosted a Federal Judicial Clerk Roundtable to present information on clerking.

The roundtable included three graduates of the University of Florida Levin College of Law. Larry Dougherty (JD 09) served as editor in chief of Florida Law Review before clerking for Judge Charles Wilson of the United States Court of Appeals for the Eleventh Circuit, and now practices in Tampa. Lindsay Saxe (JD 09) was also a member of Florida Law Review, where she served as research editor and then executive notes and comments editor. She is clerking for Judge Steven Merryday of the United States District Court for the Middle District of Florida. Midori Lowry (JD 94) has made clerking her career, and has clerked for Judge Stephan Mickle of the United States District Court for the Northern District of Florida since 1998.

Also participating in the roundtable was Stephen Smith, a 2010 graduate of Vanderbilt University Law School. Smith clerks for Magistrate Judge Gary Jones of the United States District Court for the Northern District of Florida. Judge Jones, who is also the current president of the North Central Florida Chapter of the Federal Bar Association, attended the event, and gave opening remarks.

Dougherty mentioned that his experience with the law had given him the perception that one of the most important abilities that an attorney can possess is being able to predict how cases will be resolved. While clerking, he said that he was able to constantly observe how decisions were made, and that opportunity has allowed him to understand the law and the processes of the court system much better. This allows for more accurate advice, and as Dougherty said, "your counsel, your judgment and your advice are obviously the most important things you can offer your client."

The decision to clerk instead of practice immediately following graduation is an important decision, and one that requires a great deal of thought. Lowry was able to get a taste for clerking while in law school when she served as a clerk in Ocala for the Fifth Judicial Circuit

after being chosen by the Florida Bar Young Lawyers Division, which sponsored the clerkship. She also volunteered as a clerk in Gainesville for the Eighth Judicial Circuit before clerking for Judge Mickle. The chance to look at cases from an objective standpoint was one of the things that first drew Lowry to clerking. "One of the best things about it is that if you are a lawyer, you're always trying to put the law in the light most favorable to your client," Lowry said. "But when you're working for the court system, you remain neutral and just go with where the law takes you. So there's something very pure about it, and it's just wonderful to do."

The advantages to clerking don't stop after the clerkship is over, either. Firms and other employers hold former clerks in high regard, so clerking can be an excellent addition to one's resume. Saxe said that in law school, she would often interview with firms who would ask why she was interested in practicing in their area of Florida. Being from Ohio, and having worked in Washington D.C. prior to law school, she was not able to come up with much other than being at UF and liking Florida. "I've been in the process of looking for a job in Tampa, and have found that it has made a huge difference. I know I would not have gotten some of the interviews I've been able to get without the clerkship."

Considering the advantages that clerking provides, it should come as no surprise that clerkships are highly sought after, and that getting one is not easy. Smith recommended that students get to know their professors well, as their letters of recommendation can be very important. "I'm not saying go to office hours every single week," he said, "but I think something that is important is getting to know your professors, even if that's only going up after class and introducing yourself after the first week or so." Smith was speaking from experience, saying that he had not done this enough during his first two years of law school. "When they told us to start looking around for people to recommend us, I was caught off guard."

At this point, Judge Jones chimed in to say that he called the professors who had recommended Smith, and had in-depth conversations with them. "I think more and more judges are doing that," Jones said, "and that was certainly a very valuable part of Steve's application." Jones also mentioned the importance of recommenders being able to say something about the applicant as an individual, and not merely mention that the student received a high grade in the recommender's class.

RESERVE NOW FOR THE 2011 PROFESSIONALISM SEMINAR!

WHEN: Friday, April 1, 2011 – 9:00 a.m. – 12:00 NOON

WHERE: UF College of Law - Chesterfield Smith Ceremonial Classroom

PROGRAM: Our keynote speaker is John T. Berry, Director of the Legal Division of The Florida Bar, speaking on the topic of "The Challenges of Teaching Professionalism"

COST: \$65.00 (Make checks payable to EJCBA)
(3.5 Hours of CLE is expected)

REMIT TO: EIGHTH JUDICIAL CIRCUIT BAR ASSOCIATION, INC.
c/o Raymond F. Brady, Esquire
2790 NW43rd Street, Suite 200
Gainesville, FL 32606

RESERVE: **By Tuesday, March 29, 2011** – Remit payment with reservation to Raymond F. Brady, Esquire

Please identify first and second choices for your area of specialty for small group discussions.

- _____ P. I./Insurance Defense Law
- _____ Family/Domestic Relations Law
- _____ Criminal Law
- _____ Estates & Trusts Law
- _____ Transactional/Commercial Law

NAME(s): _____

NOTE: Please send a separate card with specialty areas for each attorney attending.

Thank you.

Parking:
Decal requirements
For **Commuter** parking
will be waived.
Spaces are limited, so
arrive early.

Professionalism Seminar

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 1, 2011 from 8:30 AM until Noon, at the University of Florida Levin College of Law. The keynote speaker is John T. Berry, Director of the Legal Division of the Florida Bar, speaking on "The Challenges of Teaching Professionalism."

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

A reservation card is provided above or 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.

James L. Tomlinson Professionalism Award Nomination Form

Name of Nominee: _____

Nominee's Business Address: _____

County in which Nominee Resides: _____

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

Name of Nominator: _____

Signature: _____

Probate Section Report



By Larry E. Ciesla

A regular monthly meeting of the Probate Section was held on January 12, 2011. The meeting began with a brief summary of matters discussed during a recent brown bag luncheon with Judge Griffis and members of the civil bar. It was reported that Judge Griffis will be scheduling trials during the first two weeks of each month; accordingly, hearings for probate matters will, for the most part, need to be scheduled during the last two weeks of each month. It was also reported that Judge Griffis favors liberal use of case management conferences and that as a general rule, personal appearances by both attorney and client will be required. It is anticipated that Judge Griffis will attend a Probate Section meeting in the very near future, at which time he will advise as to any specific procedures that he will require for probate cases.

Amy Tully then gave a report as to the current status of staff attorney assignments. Bridget Baker has been handling Alachua County guardianships. She will be going on maternity leave in April. There will be a new hire coming on board and it is possible this person may be assigned to handle Alachua County Guardianships.

Amy Tully is also going on maternity leave, beginning in May, for six months. It is unknown at this point who will be taking her place. Troy Patten, the staff attorney in Union County, has moved to Kansas due to his wife's employment. An announcement regarding his replacement should be forthcoming.

Jean Sperbeck announced that e-filing in Alachua County is being postponed. A pilot program has been launched with a handful of counties participating. Alachua County's e-filing program is now in wait and see mode. Jean also indicated that the probate clerks will begin redaction of social security numbers as a matter of course. The recording department will not be following suit; practitioners will need to make special arrangements for redactions in documents to be recorded in the Public Records.

The meeting continued with a presentation by Freddie Johnson, President of Conservation Burial, Inc., a non-profit organization providing "green" burials in the newly opened Prairie Creek Conservation Cemetery. A 78-acre parcel near the Prairie Creek Lodge has been set aside for the cemetery. Burials will be limited to 100 per acre. Traditional grave markers (headstones) are prohibited. They will employ a GPS system to keep track of who is buried where. Embalming is not employed and only biodegradable containers are permitted (plain pine box; cardboard box; cloth shroud). Metal and concrete are not used. Tree planting to mark the grave is permitted. A small marker may be attached to the tree to identify the decedent. The land is subject to a perpetual conservation easement and is maintained in its natural state. Their fee for burial is \$2,000.00, a portion of which goes to an endowment fund to handle the costs of conservation and management of the land. It is important to note that, in addition, a decedent's family must hire a licensed funeral director to handle the paperwork to obtain a death certificate; take possession of the body; transport the body to the cemetery; and in most cases, provide refrigeration during the interim. This cost typically runs around \$3,000.00. The cemetery takes "reservations", but no fee is paid and a specific burial location cannot be guaranteed. When a person is buried, the adjacent space is left empty so as to allow for subsequent burial of a spouse or other loved one. For further information, go to www.conservationburialinc.org.

The Probate Section continues to meet on the second Wednesday of each month at 4:30 p.m. in the fourth floor meeting room in the civil courthouse. All are welcome to attend.

Nominees Sought for 2011 James L. Tomlinson Professionalism Award

Nominees are being sought for the recipient of the 2011 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 April 30, 2011 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.

The Florida Bar Foundation: A Cause We Can Share



By John A. Noland, President

I hope lawyers in Florida will join me in supporting a common cause: The Florida Bar Foundation.

The Foundation, a 501(c)(3) public charity, is a means through which lawyers can support a commonly held belief that everyone should have access to legal representation – regardless of his or her ability to pay.

The Florida Bar Foundation's mission to provide greater access to justice is accomplished through funding of programs that expand and improve representation and advocacy for the poor in civil legal matters; improve the fair and effective administration of justice; and make public service an integral component of the law school experience.

In 1981, financial support for the Foundation increased significantly when the Florida Supreme Court adopted the nation's first Interest on Trust Accounts (IOTA) program. Over the past 29 years, the Florida IOTA program has distributed more than \$350 million to help hundreds of thousands of Florida's poor receive critically needed free civil legal assistance and to improve Florida's justice system. More than 30 percent of the total funding for legal aid organizations in Florida comes from The Florida Bar Foundation.

Domestic violence, predatory lending and foreclosure, and access to public benefits are among the types of cases flooding legal aid offices throughout the state. For the sake of those throughout Florida with nowhere else to turn for legal help but to Legal Aid, your support of The Florida Bar Foundation is vital.

Gifts to the Foundation provide added value to your local legal aid organization because of Foundation initiatives such as salary supplementation and loan repayment programs to help retain legal aid

attorneys, a Summer Fellows program that places law students at legal aid organizations for 11 weeks each summer, new technological efficiencies such as a statewide case management system, and training opportunities for legal aid staff attorneys.

The Foundation is unique as a funder in providing leadership, along with its financial support, by working with its grantees to improve Florida's legal services delivery system and identifying and addressing the legal needs of particularly vulnerable client groups. You can learn more about the Foundation at www.floridabarfoundation.org.

I hope you will come to consider The Florida Bar Foundation one of your charities. It's truly an organization in which all of us, as Florida attorneys, can take tremendous pride.

Board of Governors *Continued from page 10*

best way to do that. The Bar will survey the 4,500 registered paralegals in the Bar's Florida Registered Paralegal Program to get their views. The matter could be presented to the board at its March meeting.

- Heard my report as Chair of the Board Review Committee on Professional Ethics that the committee will be redrafting its pending rewrite of the Bar's advertising rules after getting input the previous day during a three-hour meeting with the Bar's Citizens Forum and from lawyers during a two-hour public comments hearing before the committee. I reported that many good suggestions were made, and that it might be difficult to meet the committee's original schedule of having the rules ready for second reading at the Board's May meeting, but reported it was more important to get the revisions right than meet the arbitrary deadline.

- Heard from the Special Committee on Diversity and Inclusion that the committee has received 29 grant applications requesting more than \$56,000 for the Bar's new diversity grant program for local bars, which is funded at \$50,000 this year.

- Heard a report from the Florida Bar Foundation President that the foundation's income continues to be extremely low because of low interest rates paid in the IOTA program and the Foundation is looking for alternative sources to reduce the cuts for legal aid programs.



It's that time again!

The Eighth Judicial Circuit Bar Association Nominations Committee is seeking members for EJCBA Board positions for 2010-2011. Please consider giving a little time back to your bar association. Please complete the application below and return the completed application to EJCBA. The deadline for completed applications is **May 2, 2011**.

EIGHTH JUDICIAL CIRCUIT BAR ASSOCIATION, INC.

Application to Nominations Committee

Name: _____ Bar No. _____

Address: (Office) _____

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

Area of practice: _____ Years in practice: _____

Office of Interest: (Check all that apply)

Secretary _____ Treasurer _____
Board member _____ Committee Member _____

Preferred Committee Interest: (Check all that apply)

<input type="checkbox"/> Advertising	<input type="checkbox"/> Law Week	<input type="checkbox"/> Professionalism
<input type="checkbox"/> Annual James C. Adkins Dinner	<input type="checkbox"/> Lawyer Referral Services	<input type="checkbox"/> Publicity/Public Relations
<input type="checkbox"/> Annual Reception	<input type="checkbox"/> Luncheon/Speakers	<input type="checkbox"/> Social
<input type="checkbox"/> CLE	<input type="checkbox"/> Member Survey	<input type="checkbox"/> Sponsorships
<input type="checkbox"/> Community Service	<input type="checkbox"/> Membership	<input type="checkbox"/> Website
<input type="checkbox"/> Judicial Poll	<input type="checkbox"/> Policies and Bylaws	<input type="checkbox"/> Young Lawyers Division Liason
<input type="checkbox"/> Judicial Robes and Reception	<input type="checkbox"/> Pro Bono	<input type="checkbox"/> Other (Describe Below)

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

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

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

Return to: EJCBA – Nominations Committee
P O Box 127
Gainesville, FL 32602-0127

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



Eighth Judicial Circuit Bar Association, Inc.
Post Office Box 127
Gainesville, FL 32602-0127

March 2011 Calendar

- 2 EJCBA Board of Directors Meeting; Ayers Medical Plaza, 720 SW 2d Avenue, North Tower, Third Floor – 5:30 p.m.
- 3 CGAWL meeting, Flying Biscuit Café, NW 43rd Street & 16th Avenue, 7:45 a.m.
- 4 Deadline for submission to April Forum 8
- 9 Probate Section Meeting, 4:30 p.m., 4th Floor, Family & Civil Courthouse
- 18 EJCBA Luncheon, Ti Amo!, 11:45 a.m., Justice Ricky Polston, Florida Supreme Court, "Reporting Attorney Misconduct is an Ethical Obligation"
- 22 Family Law Section Meeting, 4:00 p.m., Chief Judge's Conference Room, Alachua County Family & Civil Justice Center

April 2011 Calendar

- 1 2011 Professionalism Seminar at UF College of Law - Chesterfield Smith Ceremonial Classroom, 9:00 a.m. – 12:00 noon; speaker John T. Berry, Director of the Legal Division of The Florida Bar, "The Challenges of Teaching Professionalism"
- 5 Deadline for submission to May Forum 8
- 6 EJCBA Board of Directors Meeting; UF Levin College of Law, Faculty Dining Room, Bruton-Geer Building, 5:30 p.m.
- 6 North Central Florida Diversity Forum, UF Levin College of Law, 6 p.m.
- 7 CGAWL meeting, Flying Biscuit Café, NW 43rd Street & 16th Avenue, 7:45 a.m.
- 8 FBA Seminar – "Federal Practice in the Electronic Age: Don't be a Dinosaur," UF Levin College of Law, 9:00 a.m. – 1:00 p.m.
- 8 EJCBA Luncheon, Ti Amo!, 11:45 a.m., Speaker TBA
- 13 Probate Section Meeting, 4:30 p.m., 4th Floor, Family & Civil Courthouse
- 22 2011 EJCBA Golf Tournament, Mark Bostick Golf Course, UF, 11:30 a.m.
- 26 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 let us know the particulars, so we can include it in the monthly calendar. Please let us know (quickly) the name of your group, the date and day (i.e. last Wednesday of the month), time and location of the meeting. Email to [Dawn Vallejos-Nichols at dvallejos-nichols@avera.com](mailto:dvallejos-nichols@avera.com).