FORUM 8

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President's Letter

By Mac McCarty

As we move into the home stretch of my one year term of office as your President, I want to take the opportunity to comment on—and compliment—the tremendous efforts from our Board and the membership at large directed toward a number of our programs. Our members' contributions are what make the association successful.

First, I would like to mention the 2012 Professionalism Seminar that was held Friday, April 6, 2012, at the Reitz Union on the University of Florida campus. Attendance was spectacular and both the guest speaker, Professor Robert Atkinson, from the Florida State University School of Law, and the small group leaders, which included judges, law professors, and local practitioners, were superb. The issues of professionalism and civility have been mentioned in other Forum 8 articles this year, but it is refreshing to meet in person with extremely experienced attorneys as well as a strong contingent of law students to hear the competing views and issues that intertwine when dealing with professionalism, civility, and ethics. Despite my years of experience, I learn something new every year—maybe next year I'll finally learn the "civility" part…. If you have not attended this seminar in the past, I strongly encourage you to consider it next year. It is an outstanding program that your association presents in conjunction with the University of Florida College of Law and is done for your benefit. Ray Brady and his committee are to be commended.

Second (and as usual) I would like to mention the EJCBA Charity Golf Tournament. This year we had a record number of players in the tournament—and the record was exceeded by over 50%! This year's tournament included a number of law students for the first time; their participation was a welcome addition. This event benefits The Guardian Foundation, Inc. on behalf of the Eighth Circuit's Guardian ad Litem Program. This is one of the major charitable events the EJCBA organizes each year and it is gratifying to see the interest and the number of participants in this year's tournament. A full report on the outcome of the tournament with photographs will hopefully be in the next issue of Forum 8. Mike Pierce and his committee did a great job putting this year's event together.

Third, when you receive this edition of the Forum 8 newsletter, our association's Law Week activities will be in full swing. I ask that you take a moment and reflect on this year's Law Week theme: "No Courts, No Justice, No Freedom" and recognize that by sharing your knowledge and the benefit of your experience with members of the public, it helps enhance our profession and the reputations of the attorneys in our circuit. Nancy Baldwin and her Law Week committee have done well taking the message to as many in our communities as possible.

Lastly, both the association's outreach and diversity programs during the last year have been, in my opinion, exceptional. This ranges from the

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Circuit Notes

Judge Martha Ann Lott resigned as Chief Judge of the Eighth Judicial Circuit on Thursday, April 5, 2012. The judges elected Judge Robert E. Roundtree, Jr. as Chief Judge for the remainder of the term of office beginning April 5, 2012 through June 30, 2013.

Phillip Pena, an Assistant State Attorney with the State Attorney's Office for the Eighth Judicial Circuit, was appointed to the Alachua County Court by Governor Rick Scott on March 21, 2012. Pena will fill the vacancy created by the appointment of Judge Groeb to the Circuit Court.

Jacksonville Magazine has recognized Gainesville lawyers Paul Donnelly and Laura Gross as Jacksonville's Best Lawyers for 2012 in Labor and Employment law, as well as Larry Turner in Criminal Defense law.

About This Newsletter

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

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

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

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Deadline is the 5th of the preceding month

Federal Overtime Laws

1st Article in a 3-Part Series on the Fair Labor Standards Act

By Paul Donnelly

Florida businesses face the highest number of unpaid overtime wage claims in the nation under the federal Fair Labor Standards Act (FLSA).

Lawsuits claiming unpaid overtime against businesses have increased dramatically nationwide, nearly doubling in the past five years. Florida businesses, in particular, received the brunt of this increase. More than 30 percent of all new claims filed in our federal courts were filed in Florida in 2010 - for Florida, nearly one-third of all filings nationwide.

Business owners and managers increasingly are being named personally as defendants, along with their companies, because under certain circumstances they can be held personally liable for unpaid overtime. Today, unpaid overtime litigation is a high-volume, organized practice area for law firms with resources that engage in aggressive multi-media advertising campaigns.

There are several reasons for these increases. Conservative rulings and changes to the law in other types of employment law cases and competition in other practice areas have spurred law firms to seek new areas of revenue. Law firms have focused on unpaid overtime claims, both small and collective, in the hope of seeking attorney's fee awards that far exceed the wages claimed. Also, the definition of "compensable work" has changed with the increased accessibility of off-duty employees, through improved technology.

The overtime laws are mechanical and counter-intuitive, but they apply to nearly every business. Technical violations are not uncommon. Even a minor violation, like the docking of a final paycheck, can subject a business to back pay, liquidated damages, and attorney's fees. Where there is a violation as to one employee, there is often a violation as to others. And, owners or managers in charge of day-to-day operations can be personally liable.

Businesses must thoroughly understand and comply with the laws to avoid liability. They should review the U.S. Department of Labor Wage and Hour Division website and conduct an internal audit to determine that employees are properly classified as exempt or nonexempt and that nonexempt employees' hours of work are properly recorded and paid.

In next month's issue, I will focus on common exemptions for salaried employees under the FLSA.

Job Opening At Three Rivers Legal Services

STAFF ATTORNEY Three Rivers Legal Services is seeking an energetic and creative attorney for the Gainesville office to replace a retiring staff attorney. A desire to aggressively represent the needs of the poor is essential. Experience is preferred but not necessary. Spanish speaking attorneys encouraged to apply. Salary DOE; excellent benefits; EOE. Please send resume and writing sample to attorneyposition@trls.org.

Classified Ads

Private Office space for rent in established law firm in NW Gainesville with access to reception area, conference room, full kitchen, phone, copy/fax/scan machine, Wi-Fi, private entrance. Call to discuss 352/378-2828.

Alternative Dispute Resolution

Questions Concerning Amendments to Florida Rule of Civil Procedure 1.720

By Chester B. Chance and Charles B. Carter

By now everyone is aware of the amendments to Florida Rule of Civil Procedure 1.720. Every mediator in the state has written an email or article advising of the amendments to this Rule entitled "Mediation Procedures".

We thought we would answer some questions about the changes.

Question: As an attorney, am I compelled to file a certification of authority prior to a mediation?

Answer: Rule 1.720 (e) states "unless otherwise stipulated by the parties" each party, 10 days prior to appearing at a mediation conference, shall file with the court and serve all parties a written notice identifying the person or persons who will be attending the mediation as a party representative or as an insurance carrier representative and confirming those persons have the authority required by subdivision (b). Since the Rule says "unless otherwise stipulated by the parties" the answer is "no". We suggest the Rule permits an attorney to call opposing counsel and agree/stipulate to waive this requirement. That's just our opinion. If not waived by such a stipulation, all counsel must comply with Rule 1.720 (e) and file the certificate of authority.

Question: Do the amendments to Rule 1.720 provide new requirements for insurance representatives?

Answer: Not really. Prior to any amendment the Rule required attendance at mediation by a representative of the insurance carrier for any insured party who is not such insurer's outside counsel and has full authority to settle in an amount up to the amount of the plaintiff's last demand or policy limits, whichever is less, without further consultation. That requirement has existed for a long time and continues in effect with the amendments to Rule 1.720.

Question: Before the amendment to Rule 1.720, I would often have the other attorney agree to waive the requirement having my party attend the mediation and/or agree that a party or an insurance representative could appear by telephone. Can I still do that?

Answer: Yes. First, please see the above discussion about Rule 1.720 (e), which talks about waiving the requirement for filing a certificate of authority. But, you would need to obtain consent of opposing counsel and lay that out in a certificate (unless the filing of a certificate is waived). Also, 1.720 (b) of the Rule states, "Unless otherwise permitted by court order or stipulated by the parties in writing, a party or the insurance representative must appear at the mediation." The amended Rule and the old Rule both allow for the parties to stipulate with respect to attendance requirements or allow the court to change the requirement. Please note, the amendment to Rule 1.720 states any such stipulation in regard to attendance should be "in writing."

Question: What do I do if the person I named in my certificate of authority pursuant to Rule 1.720 (e) can't attend the mediation and I find that out a day or two prior to the scheduled mediation?

Answer: That is a very good question. We suggest calling opposing counsel and getting a written stipulation to a new person substituting for the named person and filing a new certificate of authority in that regard and setting the stipulation out in a new certificate even if that is done in less than 10 days before the mediation. The alternative would be either canceling the mediation, getting a court order allowing the new person to attend, or, risking the rebuttable presumption of a failure to appear set forth in Rule 1.720 (f). [Rule 1.720 (f) states the failure of a person identified in the certificate of authority to appear at the mediation creates a rebuttable presumption of a failure to appear.] Technically absent doing what is just suggested for consideration, you may want to postpone the mediation, although, that may put you in conflict with a possible court order requiring the mediation by a certain date.

In should be noted the "committee notes" to the 2011 amendments to Rule 1.720 state as follows:

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Invest in Our Community

By Marcia Green

For 35 years, Three Rivers Legal Services has been the sole provider of free civil legal services to the low income residents of the Eighth Judicial Circuit. What exactly does that mean to our community? It means that an elderly widow can get relief from an unscrupulous debt collector; it means the young parent struggling to make ends meet can break free of an abusive spouse; it means the couple facing foreclosure can understand their options and find relief; and it means the family facing eviction can receive legal help to avoid homelessness. Your donation to Three Rivers is more than a contribution; it is an investment in the health and well-being of our community.

In her recent guest article in the Sarasota *Herald Tribune*, Florida Bar Foundation President, Michele Kane Cummings, wrote "In the United States, when a suspect is accused of a crime, he or she is guaranteed the right to an attorney. But when someone is the victim of an abusive spouse or landlord, when a foster child needs help navigating the legal system, or when a disabled veteran is improperly denied government benefits, there is no such guarantee of representation."

Three Rivers is here to fill that gap; we are the local non-profit law office that provides free civil legal assistance to the poor, disabled, abused and elderly of North Florida. With the hard work of our well-trained staff and many local *pro bono* attorneys, we provide civil legal advice and/or representation to residents in our community. We work to educate local residents about legal issues to prevent future legal problems and we work with client groups, who in return provide much needed services to the community.

Unfortunately, at the same time that our low income client population has grown, our funding sources have cut back and, in some instances, eliminated grants or support all together.

Our largest source of support is a grant from the Legal Services Corporation, an independent agency of the federal government. We receive grants from The Florida Bar Foundation, Elder Options, AmeriCorps, Florida Coalition Against Domestic Violence and the Victims of Crime Act. We also receive funding through the Alachua County Community Agency Partnership Program and are affiliated with the United Way of North Central Florida and the University of Florida Community Campaign. We are also supported through a generous contribution of a local foundation to address the family law needs of the community.

You are already aware of the desperate needs of the Florida Bar Foundation and its effort to recoup its losses with the NOW appeal. While extremely important, Three Rivers must also ask for your investment in our program, either for the first time or by increasing your donation.

Soon you will be receiving your Florida Bar dues statement and it will be time to reflect on your financial and/or *pro bono* contributions. We ask this year that you consider making an investment in our community by making a contribution to Three Rivers. Your donation of at least $350 will directly and positively impact the services we are able to provide for our community's most vulnerable citizens. Please send your contribution to Three Rivers Legal Services, attn: M. Green, 901 N. W. 8th Avenue, Suite D-5, Gainesville, FL 32601 or pay through PayPal on our website at www.trls.org.

We are extremely grateful for Eighth Judicial Circuit attorneys who support our program through their *pro bono* service. If you are not already a volunteer, please consider us for your *pro bono* efforts. Our clients benefit greatly from your experience and we cannot do it alone. You may volunteer or get assistance in calculating the hours you donated to Three Rivers by contacting Marcia Green at 352-372-0519 or e-mail marcia.green@trls.org.

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"The concept of self-determination in mediation also contemplates the parties' free choice in structuring and organizing their mediation sessions, including those who are to participate. Accordingly, elements of this Rule are subject to revision or qualification with the mutual consent of the parties."

Thus the authors suggest that when a problem arises counsel should attempt to work out a stipulation in writing, since the committee notes to the Rule state the elements of Rule 1.720 are "subject to revision or qualification with the mutual consent of the parties." When one party will not consent, such as when a designated representative becomes unavailable at the last minute, the only "safe" alternative would be an emergency motion with the court to determine, for instance, whether the mediation should be postponed, whether a substitute is permissible, etc.

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This Month's Thoughts from a Florida Bar Foundation Board Member

By Philip N. Kabler

Nearly every month I write pieces about programs funded by The Florida Bar Foundation. It is important that our Fellows and other donors know where their contributions are going. (Let us be candid, of course.....I do typically partner those updates with a *gentle* solicitation request, always gentle.)

It is quite likely you have heard of the Innocence Project of Florida. Reduced to its essence, the Innocence Project pursues the exoneration of wrongly convicted people, whatever the basis for the wrongful convictions. To-date, the Innocence Project has resulted in 13 exonerations in Florida.

The Foundation has been the Innocence Project's single largest funder starting in 2004-2005, providing it just over $2.2 million to support their basic criminal justice work. Those funds are used to support the science, research, and advocacy which drives exoneration cases. In order to grasp the scope of the Innocence Project's work, please visit their website, where you can follow the human stories of Florida's exonerees: www.floridainnocence.org.

Here, then, is the *gentle* part - given the reduced resources available to the Foundation to make its grants to statewide and local organizations which provide legal services to Florida's indigent children and adults, if you are not yet a Foundation Fellow, please strongly consider becoming one now. If you are already a Fellow, please consider participating in the current NOW Campaign presented in the past edition of *Forum 8* and *The Florida Bar News*. You can give to the NOW Campaign at https://www.flabarfndn.org/now.

If you are open to becoming a Fellow or participating in the NOW Campaign, or have questions about The Florida Bar Foundation's grant programs or the Foundation in general, please feel free to call me at (352) 332-4422. And to get the latest news about the Foundation and its grantees, please become a fan on Facebook by visiting www.facebook.com/TheFloridaBarFoundation.

The Attorney-Client Privilege in the Corporate Context

By Siegel, Hughes & Ross

Most of us remember being advised in early law-school ethics classes of the thin line that must be walked in representing corporations and communicating with those corporations' employees. "You represent the corporation, not its employees." Representation of the corporation involves issues and problems relating to the attorney-client privilege. Florida statutory law clearly states that the attorney-client privilege applies to corporations. Florida Statutes, Section 90.502 defines a communication between a lawyer and client as "confidential" if it is not intended to be disclosed to third persons. § 90.502(1)(c), *Fla. Stat*. Section 90.502(1)(b) defines "client" as "any person, public officer, *corporation*, association, or other organization or entity, either public or private, who consults a lawyer with the purpose of obtaining legal services or who is rendered legal services by a lawyer." (emphasis added). However, a corporation can communicate only through its individual employees. When is a communication between an employee of a corporate client and the corporation's attorney privileged?To determine whether the attorney-client privilege applies to a communication between a corporate employee and the attorney representing the corporation, courts first applied the "control group test," which was adopted by *City of Philadelphia v. Westinghouse Elec. Corp.,* 210 F.Supp. 483, 485 (E.D.Pa.1962). Under the control group test,

> if the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply. *Id* at 485.

However, in *Upjohn Co. v. United States,* 449 U.S. 383, 396-97 101 S.Ct. 677, 66 L.Ed.2d 584 (1981), the United States Supreme Court rejected the control group test because it failed

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to offer protection to the corporation in regards to communications made by middle and lower-level employees. The Court feared that the control group test would discourage open communication between employees of the corporation and the attorney. While *Upjohn* made clear that the privilege would attach under certain circumstances to communications between middle and lower level employees and the corporation's attorney, it specifically declined to define the limits of the privilege in the context of corporations. As a result, the parameters of the attorney client privilege remained imprecise for attorneys representing corporations.

In *S. Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377, 1380 (Fla. 1994), the Florida Supreme Court expressly recognized that the legal standard for determining whether the attorney-client privilege applied in the corporate context was unclear. The Court laid out five specific elements to determine if a communication between an employee and the corporation's attorney was privileged. *Id* at 1383. In order for the privilege to apply, *Deason* required that the following elements exist:

1. the communication would not have been made but for the contemplation of legal services;
2. the employee making the communication did so at the direction of his or her corporate superior;
3. the superior made the request of the employee as part of the corporation's effort to secure legal advice or services;
4. the content of the communication relates to the legal services being rendered, and the subject matter of the communication is within the scope of the employee's duties;
5. the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents. *Id* at 1383.

In adopting these criteria, the *Deason* court weighed the necessity of both discovery and the "free flow of information" between attorney and client. The Court reasoned that "[d]iscovery facilitates the truth-finding process, and although this process constitutes the core of any litigation, it must be tempered by the established interest in the free flow of information between an attorney and client." *Id* at 1383. The test articulated by the court in *Deason* seeks to find middle ground between the two. The *Deason* court reiterated the law that the burden lies with the party claiming the privilege. As a precaution against corporations intentionally thwarting the discovery process by claiming the attorney-client privilege, the Court ruled that "claims of the privilege in the corporate context will be subjected to a heightened level of

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Attorney-Client Privilege *Continued from page 7*

scrutiny." *Id* at 1383.

The authority to invoke or waive the privilege lies not with the employees, but with the corporation's board of directors or with the corporation's management. *Tail of the Pup, Inc. v. Webb*, 528 So.2d 506, 507 (Fla. 2d DCA 1988). Still, employees can create problems for the corporation in regard to the attorney-client privilege. An employee may communicate information to the attorney representing the corporation that is not privileged under *Deason*. If this occurs, the attorney may be forced to divulge information to a third party that is harmful to its client, the corporation.

The second problem that may arise from the corporation's attorney working closely with the non-management employees is that the attorney may be found to represent an employee individually. If an employee communicates information to the corporation's attorney that is found to be not privileged in the corporate context and the attorney actually advises the employee, a court may find that the attorney represents both the corporation and the individual employee. If so, any communication between the employee and the attorney, as well as the corporation and the attorney would not be privileged in a subsequent suit between the employee and the corporation. Florida Statute, Section 90.502 (4)(e) explicitly lays out the exception to the attorney client privilege when two clients have a common interest. It states that the privilege does not apply when:

> [a] communication is relevant to a matter of common interest between two or more clients, or their successors in interest, if the communication was made by any of them to a lawyer retained or consulted in common when offered in a civil action between the clients or their successors in interest."
> § 90.502 (4)(e), *Fla. Stat*.

In *Transmark, U.S.A., Inc. v. State, Dept. of Ins*., 631 So. 2d 1112, 1116-17 (Fla. 1st DCA 1994), the court found the defendant corporation and its plaintiff subsidiary to be joint clients, despite the corporation's argument otherwise. Accordingly, the communications between the joint clients and the attorney were found not to be privileged. *Id*. at 1116. The court based its decision on the exception to the privilege stated in § 90.502 (4)(e), *Fla. Stat*. The court held that it was irrelevant that both clients were not physically present at the time the communication was made, so long as a "professional relationship" existed between the clients and the attorney at the time of the communication. *Id.* The court reasoned that "there was no expectation of confidentiality among various companies in corporate family." *Id* at 1112. This same rationale may be applied to employees and corporations. See *Odmark v. Westside Bancorporation, Inc.*, 636 F. Supp. 552, 555-56 (W.D. Wash. 1986).

President's Letter *Continued from page 1*

Law & the Library series, to diversity seminars, to luncheon speakers focusing on diversity issues, to the diversity CLE planned for late this summer. I am pleased to announce that in 2012-2013, the EJCBA and members of our association will participate in a second speaking series, this one at Oak Hammock. If you are interested in assisting the Law & the Library series (which will continue through this May and then begin again in late summer), the Oak Hammock series, or the diversity seminar, please contact Rob Birrenkott, who has done a very good job expanding our association's reach in these areas. Rob's email address is: rbirrenkott@law.ufl.edu .

I would like to take a moment to personally thank Judge Martha Ann Lott, who resigned as Chief Judge of the Eighth Judicial Circuit in early April. Judge Lott has always been extremely gracious and giving to our association. She was a pleasure to work with and helped us achieve the goals of the association. At the same time, we welcome incoming Chief Judge Robert Roundtree and look forward to working with him on the many projects involving our judiciary.

Please don't forget this year's Annual Meeting and Reception of the Eighth Judicial Circuit Bar Association, which will be held again at The Thomas Center in Gainesville on Thursday, May 31, 2012. The emphasis—like last year—will be on "more food and drink," "less talk and meeting." We hope you will come out and enjoy the casual atmosphere and camaraderie this event affords. You will receive an invitation in the mail shortly and a reservation card is included in this issue of Forum 8.

Again, it is gratifying as your President to have witnessed the efforts of so many members and the level of participation in this year's association projects. Thank you.

Judge Mickle's Portrait Unveiled at Ceremony Honoring His Life, Career

By Kim Burroughs

On March 15, leaders of the North Florida legal community assembled to celebrate the life and career of Stephan P. Mickle, the first African-American federal judge of the Northern District of Florida. The reception featured the unveiling of Mickle's official portrait, painted by Tennesee artist Carl Hess II.

Held at University of Florida President Bernard Machen's home, the reception celebrated Mickle's attainment of senior status. He has served as a federal judge for the Northern District of Florida since 1999, working as chief justice from 2009 to 2011. In addition to being the first black federal court judge of Florida's Northern District, Mickle was also the first African-American to establish a private law practice in Gainesville, the first African-American county judge of Alachua County, the first African-American circuit court judge of the 8th Judicial Circuit, and first African-American 8th circuit court judge to be appointed to the Florida First District Court of Appeals.

As distinguished guests assembled around Mickle's veiled portrait, prominent speakers including Chief United States District Judge of the Northern District of Florida Casey Rogers, North Central Florida Chapter of the Federal Bar Association President Gilbert A. Schaffnit, Eighth Judicial Circuit Bar Association President James H. "Mac" McCarty, Jr., and UF Law Dean Robert Jerry gave remarks on Mickle's life and career. Each speaker celebrated Mickle's success in the face of racial adversity, his selfless contributions to Florida's judicial system, and his compassionate practice of law.

"I'm proud to be part of this well-deserved recognition of Federal Judge Stephan Mickle and to see his family and friends be able to share in the recognition of his role in the community," said Alachua County Sheriff Sadie Darnell.

As Judge Mickle's closest family members pulled away the cloth covering the portrait, a rendition of "America the Beautiful" performed by Ray Charles swelled over the applause of the audience of family and friends. As the song approached its chorus, audience members spontaneously sang along, celebrating both Mickle's accomplishments and our country.

The reception was sponsored by the Federal Bench and Bar Fund for the Northern District of Florida, the North Central Florida Chapter of the Federal Bar Association, the 8th Judicial Circuit Bar Association, and the University of Florida Levin College of Law.

ADR: Amendments

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Other Questions

Question: Why do you keep writing articles about the PETA lawsuit against SeaWorld?

Answer: Because the article writes itself when you quote the press releases.

Question: Why do you write the dumb mock mediation comedy articles? No one thinks they are funny.

Answer: As Stephen Wright once said: "I write children's books. I don't intend to, they just come out that way."

Question: Given that some law firms specialize based on the gender of their clients, are you aware of any mediators who likewise specialize?

Answer: No. We are not aware of any mediators who specialize in mediations between men, women or orcas. Some mediators have considered blending this new gender approach with the improper grammar prevalent in the '90s legal advertising, e.g., "A Accident Men's Mediator", or, "A Orca Alpha Female ADR", but such advertising is still on the drawing board.

Question: We saw a billboard where a lawyer is rolling up his shirt sleeve, but he is still wearing his jacket. Why is that?

Answer: Well, if the shirt sleeves were French cuffs that might explain it, but nothing really explains it. The authors keep both their jackets and eyeglasses on when they fight for their client or anytime someone wants to fight.

Family Law Section: Recent Family Law Cases

By Cynthia Stump Swanson

Since the Legislature didn't pay much attention to family law in this last session, I thought I would look instead at some recent appellate decisions.

It's the Economy!

In a case out of Duval County and notable for its very detailed explanation of the facts, the First District Court of Appeal reversed an alimony modification award because, even though it decreased the former husband's obligation, it didn't decrease it enough. See *Galligar v. Galligar*, Case No.: 1D10-6108, December 31, 2011. The former husband had been earning $175,000 per year when the trial court initially awarded $60,000 per year in permanent alimony. About four years later, however, the former husband was terminated and given one year's pay as severance. He was eventually able to find another job earning only $66,000 per year. He filed a modification action to reduce his alimony obligation.

He had a modest home and mortgage obligations, a car and motorcycle he had at the time of the divorce, and a new car he bought a few years earlier before he knew he would be losing his job. He had contributed some additional funds to his retirement accounts since the divorce. The former wife was working part time as a bookkeeper and with her $12,000 per year salary and her alimony she had bought a "high-rise" condo and at the trial she stated, "[M]aybe I lived beyond what I should have." She had withdrawn $123,000 from an IRA (received as part of the divorce) to pay for her move to the condo, for new furniture, and for taxes. She testified she needed the alimony to pay for her mortgage payment and a new car payment of $481 per month.

The former husband filed a financial affidavit, averring that he had a present monthly net income of $3,825 and present monthly expenses of $4,377; thus, leaving him with a deficit of $552 per month. In response, the former wife submitted a financial affidavit, averring that she had a present monthly net income of $6,066 (including the $5,000 monthly alimony payment awarded under the 2005 judgment) and total monthly expenses of $6,501, resulting in a monthly deficit of $435.

The trial court reduced the former husband's alimony obligation from $5,000 per month to $3,500 per month. The former husband appealed and the appellate court held that the trial judge abused his discretion in ordering alimony equal to 81% of the former husband's net income. The trial judge found that the former husband had some significant assets (retirement accounts) from which he could pay the alimony award, but the appellate court pointed out that, while the trial court may properly consider the former husband's assets in determining his ability to pay, the court cannot require the former husband to deplete assets to make alimony payments.

The trial court had also observed that the former husband had plenty of notice that he would be losing his job and that he had received an entire year's worth of pay as severance. But the appellate court rejected the suggestion by the trial court that a party who is meeting a current alimony obligation is required to set aside additional funds to meet future alimony obligations, in anticipation of a potential loss of income.

Uh . . . No, It's Not the Economy!

In *Ferguson v. Ferguson*, 54 So. 3d 553 (Fla. 3d DCA 2011), the appellate court held that changes in the economy do not constitute unanticipated circumstances that will support an impossibility defense. The parties signed a settlement agreement, which provided, with respect to the real property owned by the parties, that the wife was to execute a quitclaim deed and that the husband would refinance the house and would pay the wife an equalization payment of $185,000. The wife executed the quitclaim deed, but the husband neither paid the $185,000 equalization payment nor tried to refinance the house because, shortly after the agreement, the real estate market entered into one of its periodic downward adjustments. The court held that the trial court erred in voiding the portion of the agreement pertaining to the parties' real property for impossibility of performance due to changes in the economy. The decline in the market shortly after the husband signed the marital settlement agreement, while marked and unfortunate, was not the sort of unanticipated circumstance that fell within the purview of the doctrine of impossibility. Thus, the trial court was obligated to enforce the agreement as voluntarily agreed upon by the parties.

However, compare this result to *Elliot v. Bradshaw*, 59 So. 3d 1182 (Fla. 4th DCA 2011). Here, the Former Husband was $38,000 behind in paying alimony. At

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a contempt hearing, the trial court found he had the ability to pay because he could sell a house he owned with his mother. The appellate court agreed that the record supported the finding regarding the sufficiency of the husband's equity in the home to cover the purge amount, but disagreed that in the distressed housing market the husband could immediately sell the home. The trial court's finding that the husband had the ability to pay was therefore speculative, and was not supported by competent substantial evidence. The evidence may have been relevant to whether the husband should have been punished for willfully violating court orders and whether he had divested himself of the present ability to pay, but a finding that a party divested himself of assets did not substitute for a finding of present ability to pay. Thus, he should not be incarcerated indefinitely for civil contempt under Fla. Fam. L.R.P. 12.615 where he lacked the present ability to pay a support obligation.

OK for Child Support to be Actually Used to Purchase College Fund

Laussermair v. Laussermair, 55 So. 3d 705 (Fla. 4th DCA 2011) (agreement to substitute payments to college fund in place of obligor's regular, periodic child support payments did not violate public policy). The appellate court held that there was no public policy violation in the provision of the settlement agreement requiring the child support payment of $750 to be deposited into a college educational account. That provision did not "relieve" the former husband of "his duty to support his minor child entirely or permanently," which would have been contrary to public policy.

How to handle entitlement receipts

In another well written opinion from the First District Court of Appeal, the appellate court took on the issue of how to allocate an adoption subsidy when the parents of an adopted special needs child divorce. See *Nabinger v. Nabinger*, 1D11-2616, December 30, 2011. When the parties were married, they adopted a special needs child from DCF and received an adoption subsidy from the State of Florida. Later, they divorced and their settlement agreement provided that the wife would have custody of the child, and would receive the subsidy, and the husband would pay $800/month for child support. No guidelines were filed, and there was no mention that the $800 was a child support amount reduced by the subsidy.

Later, the wife filed a modification petition seeking a child support increase, alleging substantial change of circumstances in that the husband spent no time with the child, and so she has 100% responsibility for child. The trial judge in Columbia County granted modification, increased support from $800 to $950 per month, but then subtracted the amount of the subsidy, so the husband was actually paying LESS THAN $800. The wife appealed.

The First District affirmed all but the reduction of child support by the amount of the subsidy. This is mostly based upon the fact that it was not apparent from the settlement agreement or the final judgment that the subsidy was intended by the parties to reduce the husband's child support obligation. But the court also quoted from other cases in other states which had held that the subsidy was IN ADDITION to the parent's regular child support obligation, and also pointed out that if the parties were married, the child would have the benefit of both parties' incomes and the subsidy.

In *Maslow v. Edwards*, ___ So. 3d ___, 2011 Fla. App. LEXIS 1074, 36 Fla. L. Weekly D266 (Fla. Dist. 5th DCA Feb. 4, 2011), the Fifth District Court of Appeal dealt with an issue of how to apply benefits paid by the Veterans' Administration (VA) to assist a disabled parent's child. The Court ruled that, like social security benefits that arise from parent's disability, VA benefits for the child must be included in parent's income, along with any VA disability benefits received by disabled parent for himself or herself).

Maslow, the veteran, received a $440 per month disability benefit, and an additional $157 per month as a benefit for his child as a result of his disability. DOR included the $440 only in his income, and then determined his child support obligation to be $158 per month. DOR then added the $159 to the $157 to determine a total child support obligation of $316 per month. However, the appellate court determined this to be error, holding that VA disability benefits for a child should be included in the veteran's income in the same way that Social Security benefits are. In this case, the $440 and the $159 should be included in the veteran's income in order to determine his child support obligation. In this case, his correct child support obligation, then, was $238, rather than $316.

Due Process is not required if other party is pro se??

In a case from South Carolina, *Turner v. Rogers*, 564 U.S. ___, 131 S. Ct. 2507, 180 L. Ed. 2d 452 (2011), the U.S. Supreme Court held that in a civil contempt proceeding brought against an indigent

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Eighth Judicial Circuit Professionalism Committee's Annual Report

Following is the annual report of the Eighth Judicial Circuit Professionalism Committee, chaired by Judge Lott. The Professionalism Committee was established by Administrative Order 8.1301 to "provide effective coordination of professionalism programs and activities throughout the Eighth Judicial Circuit in compliance with the Supreme Court of Florida's Administrative Order entitled In Re: Commission on Professionalism, dated June 11, 1998…. The Professionalism Committee is charged with the responsibility of ensuring professionalism activities in order to maintain the highest standards and conduct of professionalism throughout this circuit." The information contained herein was compiled by Ray Brady from the committee members noted below and forwarded to the Florida Bar as required. The report highlights the many seminars and workshops promoting professionalism in this circuit over the past year:

The Bench Bar Committee (written by the Honorable Martha Ann Lott):

The Bench Bar Committee was created and operates pursuant to Supreme Court Order No. AOSC01-50 and Administrative Order 8.470(A) meeting quarterly and as needed to intervene in issues of professionalism by both judges and lawyers. The committee is made up of a cross section of the legal community and has enjoyed continued success in resolving issues that might ultimately have involved the Judicial Qualifications Committee or The Florida Bar without early timely peer intervention.

The Judicial Mentoring Program (written by the Honorable Martha Ann Lott):

The Judicial Mentoring Program, coordinated by Judge David Glant, continues into its third decade successfully mentoring new judges formally for one year and continuing informally thereafter. Over the years, the 8th Circuit Mentoring program has been effective in helping new judges transition from the practice of law into their new role as Judge. In the past few years, and continuing even now, our Circuit experienced higher than normal turnover due to Judicial retirements within our 6 counties. One Circuit Court vacancy was filled within the past 60 days leaving a new vacancy on the County bench. Additionally, two regional County Judges are retiring at the end of 2011.

The Florida Supreme Court requires appointment of a mentor Judge immediately after the announcement of a Governor's appointment. Our Circuit has been proactive in training mentor judges for the County and Circuit bench. We maintain a roster of experienced judges qualified to serve as Mentor Judges for both courts. Some of our newer Judges have requested training and certification because they have acquired sufficient Judicial experience to be effective in that role. The next training will be conducted within 60 days for Judges interested in serving in this valuable program. The feedback of Mentor Judges and new Judges who had Mentor Judges is overwhelmingly supportive. This is a very successful, highly valuable program with immediate and direct benefits to the new Judges and to the Circuit or County they serve.

The James C. Adkins Chapter of the American Inns of Court (written by Paul Brockway, President of the James C. Adkins Inn of Court):

During the late 1970's, Chief Justice Warren Burger was a driving force of a movement to promote legal ethics and professionalism through professional associations modeled after the barrister inns of court in London. This in turn led to the creation of the American Inns of Court, and later the James C. Adkins Chapter which serves the Eighth and Third Judicial Circuits. The membership ranges from law school students ("Pupils"), newer attorneys (Associates), attorneys with at least five years of experience ("Barristers"), judges and attorneys of significant experience ("Masters"), and Emeritus members. The current membership of 150 consists of circuit and county judges, law school students and faculty, and both public sector and private attorneys. An extremely wide range of practice areas are represented. The membership is divided into eight groups, all of which are designed to have a balance of newer and experienced members so to promote mentoring.

The centerpiece of the Inn year are the monthly meetings held in September, October, January, February, March, April, and May of each year. Each meeting begins with a social hour and dinner, and then moves on to a presentation produced by one of the member groups. These presentations

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have an established history of being approved by the Florida Bar for C.L.E. and certification credit. Almost all of the presentations at least touch upon ethics and professionalism issues. Some of the programs are focused completely on such issues. For example, a recent program was entitled "Dealing with the Difficult Attorney" and included illustrative examples of unprofessional email communication, a skit demonstrating how to handle an unprofessional attorney at a deposition, and then a panel discussion. Also discussed were the results of a poll of area attorneys regarding civility and professionalism in the local bar and bench. The codes of professionalism of both the Third and Eighth Circuits were also reviewed. The panel discussion included circuit court judges Toby S. Monaco, Victor Hulslander, and Robert K. Groeb. This portion of the program was moderated by former circuit court judge Larry G. Turner and was a lively and frank discussion that included input from the panel, as well as the judges and attorneys in the audience. This discussion included advice from older members how to informally handle situations and instruction regarding more formal remedies such as Bar complaints and the local Bench Bar Committee.

Beyond the formal continuing education programs, the Inn offers great opportunity for dialogue regarding professionalism issues. The Inn promotes mentoring of both younger attorneys and pupils, and dialogue between attorneys and judges. It also provides common ground for attorneys who have differing practice areas to interact. The Inn also invites non-attorneys as occasional guests and speakers in the hope of promoting both the Bar's image and its integration into the community at large.

Activities of the 8th Circuit Office of the State Attorney (written by State Attorney Bill Cervone):

Professionalism and Ethics are addressed in the Office of the State Attorney in several ways. First, supervisors always monitor for compliance with both rules and the State Attorney's expectations. Problems are addressed as necessary, if identified. Second, all newly employed Assistant State Attorneys are provided with written material relevant to these topics beyond Bar rules, and are expected to be familiar with that. Third, ethics topics are routinely included in training programs, both those are done internally and at outside conferences put on by the Florida Prosecuting Attorneys Association (FPAA) when we are able to send attorneys to those. Specific as to 2011, a two hour block entitled Professional Conduct and the Assistant State Attorney was presented to my staff by Carl Zahner, Director of the Bar's Center For Professionalism. That presentation was on October 28, 2011, and was attended by about 40 of my Assistants, the remaining few having been excused for various reasons but only with my approval. That presentation was approved by the Bar for CLE credit under Course No. 25422. Going forward and as an example of outside conferences, we sent six of our lawyers to an FPAA sponsored training seminar in early February that included a one hour ethics presentation by a Palm Beach County Court Judge who was formerly a prosecutor as a part of the program.

Activities of 8th Circuit Office of the Public Defender (written by Public Defender Stacy Scott):

The Office of the Public Defender has a strong commitment to the highest standards of professionalism and ethics in the practice of law. The Office of the Public Defender for the 8th Judicial Circuit is the largest criminal defense firm in the area, employing 36 attorneys and 32 support staff. Under Stacy Scott's leadership, the Office of the Public Defender has instituted a regular training schedule for all attorneys and support staff in the Office. The trainings encompass both substantive and ethical components, and are frequently approved for CLE credits by the Bar. Additionally, Ms. Scott initiated an attorney mentoring program, both for new attorneys and for attorneys transitioning from the misdemeanor to the felony division. Ms. Scott participates in the regulation of lawyer conduct in the 8th Circuit as a member and current chair of the Grievance Committee, 8B. Additionally, Ms. Scott was recently appointed by the President of the Florida Bar to be a member of the Hawkins Commission on Ethics.

Activities of the University of Florida Levin College of Law (written by Robert Jerry, Dean of the U.F. Levin College of Law):

Professionalism Week: From September 6-9, 2011, the UF Law Center for Career Development and John Marshall Bar Association coordinated and promoted a week of events designed to foster law students' professional development. This included a program on online communications and professional reputation, professional attire, a program on

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Professionalism

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networking sponsored by the Florida Bar YLD Law Student Division UF Chapter and the EJCYLD, and a presentation on the role of a federal Circuit Judge by the Hon. Gerald Tjoflat, sponsored by the Federalist Society. Details of these programs can be found at: http://www.law.ufl.edu/career/students/proweek11.shtml. The programs were all very well attended and successful.

Practical and Ethical Tips for Avoiding Legal Malpractice: This collaboration, sponsored by the EJCBA and organized by UF Law students, brought together students and practitioners to hear William E. Loucks, President / CEO of Florida Lawyers Mutual Insurance Company provide advice on how to avoid legal malpractice. This Lunch, Network and Learn program occurred on Friday, October 28, 2011 at the law school.

EJCBA/EJCLSA Mentoring Program: The EJCBA has established a mentoring program in partnership with the Eighth Judicial Circuit Law Student Association. This was the second year the program has been implemented and it is presently ongoing. Mentors participated in a training this past fall which was led by Carl Zahner from The Florida Bar Henry Latimer Center for Professionalism. More information about the law student group and the mentoring program can be found on their website at http://www.ejclsa.info/ .

EJCBA Professionalism Symposium: UF Law again collaborated with the EJCBA to organize, host, and co-sponsor the annual professionalism seminar. This program provided CLE credits for lawyers and an educational opportunity for law students and was held at the J. Wayne Reitz Union on the UF campus on Friday, April 6, 2012. Law students participating in summer externships attended this program, which featured Professor Rob Atkinson from Florida State University College of Law as keynote speaker, as well as a series of panels and small group breakouts sessions on topics that included criminal law, estates and trusts, family/domestic relations, civil litigation (including tort litigation), business law, government lawyering, and real estate and land use. The College of Law and EJCBA worked together to engage lawyers, judges, and professors from UF Law to lead these breakout groups.

Activities of the Eighth Judicial Circuit Bar Association (written by Ray Brady, Chair of the EJCBA Professionalism Committee):

The EJCBA Professionalism Committee is comprised of three members. Once again the EJCBA co-sponsored the annual Professionalism Seminar with the U.F. Levin College of Law. This Seminar is described in detail in the preceding paragraph. The EJCBA Professionalism Committee will also select a recipient to receive the prestigious James L. Tomlinson Professionalism Award. This annual award is presented at the EJCBA's Annual Reception to an attorney who exemplifies the highest ideals of professionalism, ethics, and competence in the practice of law.

May 2012 Calendar

3	CGAWL meeting, Manuel's Vintage Room, 5:45 p.m.
4	Deadline for submission of articles for June Forum 8
9	Probate Section Meeting, 4:30 p.m., 4th Floor, Family & Civil Courthouse
9	EJCBA Board of Directors Meeting; Ayers Medical Plaza, 720 SW 2d Avenue, North Tower, Third Floor – 5:30 p.m.
10	North Florida Area Real Estate Attorneys meeting, 5:30 p.m., TBA
11	EJCBA Luncheon, Panel Discussion on "Stand Your Ground" law, Jolie, 11:45 a.m.
15	Family Law Section Meeting, 4:00 p.m., Chief Judge's Conference Room, Alachua County Family & Civil Justice Center
16	CGAWL lunch/business meeting, Fat Tuscan, 11:45 a.m.
28	Memorial Day Holiday, County and Federal Courthouses closed
31	EJCBA Annual Meeting & Reception at The Thomas Center, 6-9 p.m.

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.

Criminal Law

By William Cervone

It's time once again for my almost annual report on the American Dialect Society's very annual Word of the Year ceremony, held this year in Portland, Oregon, in January. I've been to Portland in August and it's a wonderful place, but in January? Just goes to show you that intellectuals, which I assume the American Dialect Society to be made up of, may not have a firm grip on reality and the value of where a mid-winter conference is held. Guys, try Hawaii. Or Arizona. I'd even suggest Florida if it wasn't for Florida being not much of a trip for, well, those of us who live in Florida.

Anyhow, and perhaps because the locale overbore better judgment, it is with dismay that I tell you that the 2011 Word of the Year is Occupy. This is intended as a homage to the occupy movement and, as the Society explained it, the new and unexpected direction this old word has taken. But really. This is the best we could come up with? I long for the gusto and sheer alliterative value of truthiness (2005 Word of the Year).

For example, one of this year's losers was humblebrag. Not only does humblebrag cause my spell check to send out alarms (always a plus for a new Word of the Year), but its simplicity of purpose and creativeness of meaning are charming. It is an expression of false humility, especially one given by celebrities on Twitter. Alas, humblebrag will have to settle for being the winner of the category "Most Useful" in the competition. Kind of like the Miss Congeniality award I suppose.

Perhaps even better was the winner of the Most Creative category, Mellencamp. Mellencamp is a woman who has aged out of being a cougar, apparently after John Cougar Mellencamp. Personally, I preferred another Most Creative entrant, kardash. This would be a unit of measurement consisting of 72 days, after the short lived marriage of Kim Kardashian and Kris Humphries. As I understand it, kardash was coined by Weird Al Yankovic, also a plus. Can you imagine the possibilities? "Judge, I'd like to continue this case for at least another kardash to take the depositions I've been promising to schedule for the last two kardashes now."

There were, of course, other submissions that just didn't make the cut. I was disappointed to see Tebowing, which needs no explanation here, relegated to the Least Likely to Succeed category, and not even a winner there. I can agree that artisan/artisanal as faux-fancy terms to describe food or other products may be Most Euphemistic, even though it didn't win that category. Job Creator, a member of the top 1% of money makers, did. Apparently the Society was quite taken by social events of the recent past as they actually created a new category for Occupy Words. I'd have been OK with occupy winning the Occupy Words category, but The 99%/99 percenters did. How occupy failed to win its own category but still won Word of the Year is beyond me. These folks may also be involved in the BCS. I just hope this category goes away by next year. And bi-winning, a term apparently used by Charlie Sheen to pridefully describe himself in dismissing accusations of being bi-polar probably is indeed the year's Most Un-Necessary word.

So that's it from the wonderful world of linguistics. As always, I urge your inclusion of these new words in your briefs, oral arguments, and appeals to the court for some relief you have no prayer of getting. Maybe someday there will even be an app (2010 Word Of The Year) from which you can tweet (2009 Word Of The Year) news of this year's win by occupy to others before being plutoed (2006 Word Of The Year) as irrelevant. There is much truthiness in this.

Family Law

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respondent for failure to pay child support, respondent does not automatically have a 14th Amendment due process right to appointed counsel, even though he or she may be incarcerated as a result of the proceeding, if (1) support is owed to other parent rather than to state, (2) opposing parent is not represented by counsel, and (3) there are adequate substitute procedural safeguards. "But we attach an important caveat, namely, that the State must nonetheless have in place alternative procedures that assure a fundamentally fair determination of the critical incarceration related question, whether the supporting parent is able to comply with the support order." 5-4 decision. Opinion by Breyer, joined by Kennedy, Ginsburg, Sotomayor, and Kagan. One dissenting opinion by Thomas, in which Scalia joined, and in which Roberts, and Alito joined in parts.

FORUM 8

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

The Eighth Judicial Circuit Bar Association

invites you and your guests to join us for the

2012 Annual Meeting and Reception

on Thursday, May 31, 2012,
6:00 pm until 9:00 pm
at the
Thomas Center
(Spanish Court and Long Gallery)
302 NE 6th Avenue, Gainesville, Florida.

Cocktails and heavy hors d'oeuvres will be served and entertainment will be provided by the Stardust Quintet.

Reservations required. $40 per person

RSVP

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

___ The following individuals will be attending (please include yourself):

Mr./Ms._____

Mr./Ms._____

Mr./Ms._____

Mr./Ms._____

___I have enclosed $_____.

___I will pay at the door.

Please RSVP by email to execdir@8jcba.org, by fax to 866-436-5944 or mail to
EJCBA, P. O. Box 13924, Gainesville, FL 32604
Must be received no later than May 25th