

FORUM 8

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Eighth Judicial Circuit Bar Association, Inc.

November 2012

President's Message



By Dawn M. Vallejos-Nichols

November has a lot to recommend it – Monday, November 5 is a Law in the Library presentation on “Child Support and the Law” at the Alachua Branch Library; Tuesday, November 6 is Election Day; Thursday, November 8 is EJCBA’s annual James C. Adkins, Jr. Cedar Key

Dinner; Thursday, November 15 is another Law in the Library event at the Tower Road Branch regarding the “Legal Issues Impacting Social Security and Disability Benefits; Friday, November 16 is EJCBA’s luncheon presentation by Jane Curran of the Florida Bar Foundation, speaking on “Stone Soup;” and then of course there is Thanksgiving Day on Thursday, November 22. I hope each of you have an opportunity to participate in and enjoy several of these special events.

I have to talk about Election Day and what it might mean for us as lawyers and judges. If you have not already voted by November 6 via early voting or absentee ballot, please make every effort to get to your precinct on election day and vote. This election stands to be one of the most crucial in Florida’s history, and not just because it’s a presidential election year (although Florida’s winner-take-all 29 Electoral College votes and nearly even polling data make it a crucial battleground state). Unrecognized by many, this year’s ballot contains questions that have the power to potentially destroy a fair and impartial judiciary, the very cornerstone of

our democracy.

Regardless of your political affiliation, it should be a concern to you that one of our political parties has, for the first time, blatantly asserted partisan politics into the retention election of three Florida Supreme Court justices. The Republican Party of Florida issued an official declaration that it would campaign for the ouster of Justices Fred Lewis, Barbara Pariente and Peggy Quince, ostensibly based on the substance of some of their past decisions and the now familiar charge of “judicial activism.” They join with

Americans for Prosperity, a conservative group funded by the billionaire Koch brothers and Restore Justice 2012, a grass roots campaign organized to unseat the justices.

Several prominent politicians have spoken out against the RPOF’s introduction of partisanship into a system that is supposed to be nonpartisan, including Alex Villalobos, a former state senator and a Republican, who is leading the campaign to defend the justices, who have all been retained previously and since the 2003 death penalty decision the Republican Party is using against them. Republican legislators reportedly have also been unhappy with the court’s rulings on prior ballot initiatives, including three that were struck from the ballot two years ago. The failure to retain these three justices would give Republican Governor Rick Scott the chance to appoint three new justices. He already appoints all members of the judicial nominating commissions.

As lawyers, we know how critical it is to maintain the impartiality of our judiciary. The system of

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Reminder...

December's EJCBA lunch will be held on the 2d Friday of the month, December 14, 2012, and not the normally scheduled third Friday of the month. Luncheons will resume on the third Friday of the month in January, 2013. Please make a note of it.

Circuit Notes

Paul Donnelly and Laura Gross of Donnelly & Gross, P.A., have been selected by their peers for inclusion in the 2013 edition of *The Best Lawyers in America* (Copyright 2012 by Woodward/White, Inc.) in labor and employment 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.

Judy Padgett
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Deadline is the 5th of the preceding month

What is employment discrimination, and how can I prevent it?

2nd in a Two-Part Series on the Increase in Private Sector Bias EEOC Charges



By Paul Donnelly and Laura Gross

Federal law prohibits discrimination against employees and job applicants on the basis of race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability and genetic information, among other things. Florida law additionally prohibits discrimination on

the basis of marital status and age (without limitation). Sex discrimination includes sexual harassment. The laws regarding disability and religious discrimination require employers to provide reasonable accommodations for a person's disability or religion. And, disability discrimination includes discrimination based on a person's relationship with a person with a disability. It is also unlawful for an employer to retaliate against a person because that person or a close associate of that person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

The laws apply to all types of work situations including job advertisements, recruitment, application, pre-employment inquiries, hiring, job referrals, job assignments and promotions, pay and benefits, discipline and discharge, employment references, reasonable accommodation for disability and religion, training and apprenticeship programs, harassment,

terms and conditions of employment, and constructive discharge/forced resignation. Even facially neutral employment policies and practices may be discriminatory if they have a disproportionately negative effect on persons of a particular protected status.



The first step in protecting against discrimination claims is to implement a strong written policy against discrimination, harassment, and retaliation. Not only will the policy make it clear to employees that certain types of behavior are intolerable, but the policy may also provide a defense if a lawsuit arises. The policy should identify which statuses are protected and what actions may constitute discrimination. It is critical that the policy include a procedure for reporting alleged violations. At least two people should be identified to receive complaints, such as the employee's manager, or if the employee feels it would be unproductive to inform that person, a human resources director or other higher level manager. And, the policy should affirm that retaliation will not be tolerated. Each employee should read and acknowledge the policy in writing upon hire.

Classified Ads

Miller & Brasington, an elder law and special needs law firm is seeking a Certified Paralegal. The applicant must be able to prepare complex legal documents, be a high performer who is attentive to details, be proficient with MS Word, Excel, Power Point, produce work under time constraints, have experience working in a professional office environment, and work well with elderly clients and their families. Compensation commensurate with experience. Please reply to hmb1204@yahoo.com.

SAVE THE DATE!!

**Investiture Ceremony for U.S.
Bankruptcy Judge Karen Specie**

Monday, December 10, 2012
2:00 p.m. EST

U.S. Bankruptcy Courthouse, 110 E. Park
Avenue, Tallahassee, FL

Mark your calendars ...

Florida Bar Board of Governors Report



By Carl Schwait

The Florida Bar Board of Governors met in Atlanta on October 5, 2012. Major actions of the board and reports received include:

Based on the recommendation of the Legislation Committee, the Board approved the position that The Florida

Bar opposes Constitutional Amendment 5 on the November 6, 2012 general election ballot. Amendment 5 would increase the legislature's authority regarding court rules, increase the access by the legislature to records of the Judicial Qualifications Commission, and require confirmation by the Senate of Supreme Court justices.

The Florida Bar will oppose any proposals considered by the American Bar Association House of Delegates to allow lawyers from other countries to practice in Florida without passing the bar exam. This position was recommended by the Standing Committee on the Unlicensed Practice of Law.

Two new member benefits were approved: RPost Registered E-Mail Services verifies the content and delivery of emails for users; and Corporate Creations provides free incorporation services for lawyers setting up firms and discounted services for lawyers setting up businesses for clients. They will be posted on the Member Benefits webpage when available.

On the recommendation of the Communications Committee, a legal technology expert will be retained to advise the Bar on ways to help members handle emerging technology issues.

The Young Lawyers Division has received positive feedback to its proposed legal residency program. The ABA also has inquired about how the program works. YLD President Paige Greenlee said the division is continuing to promote the idea including developing a webinar for those interested in offering residencies.

The Bar's SCOPE (Seek Counsel of Professional Experience) program will be expanded as a Bar service advisory program and the name changed to Lawyers Helping Lawyers.

The Vote's In Your Court merit retention

education campaign activities have included distributing more than 360,000 voter guides in English and Spanish, making more than 100 presentations to community and legal groups, providing information and resources on its webpage www.floridabar.org/thevotesinyourcourt and using [Facebook](#) and [Twitter](#) social media contacts. In addition, the Bar's merit retention educational information is in The League of Women Voters election guide with a distribution of more than one million copies.

By the way, you will find more details on Board actions and discussion from the October 5th meeting in the November 1st edition of [The Florida Bar News](#) -- now also available as a free mobile app.

Thank you for allowing me to serve as your representative on the Board of Governors of the Florida Bar.

Paul A. Remillard, Certified Mediator

Now available in Jacksonville, Pensacola, Gainesville and Panama City at no travel cost to the participants.

Recognized as one of the most experienced and successful mediators by the National Academy of Distinguished Neutrals, Mr. Remillard has mediated over 2,000 disputes.

Also, recently inducted into the National Association of Elite Mediators. Contact our office at 850-656-7821 or remillardlaw@comcast.net



Remillard Law Firm, P.A.

Alternative Dispute Resolution

People Say the Darnedest Things!



By Chester B. Chance and
Charles B. Carter

Recently, a national alternative dispute resolution organization solicited its members to provide things advocates say in mediation, and, mediator responses. We wanted to share some of the items with you.

We've suggested some responses but look forward to receiving any emails you wish to send us sharing some of your suggestions for response. Please let us know if we are authorized to share both a response and your name in any future article.

1. We're only here because the judge said we have to be. (Perhaps the Judge knows something and you should consider that something).
2. We have to speed this up; my claims representative has a 2 o'clock flight. (Ah, then you must be ready to make your final offer. Good.)
3. If they want a confidentiality agreement, they are going to have to pay for it. (Do you want me to keep that confidential?)
4. They are not negotiating in good faith! (Let's leave religion out of this.)
5. My client wants to send a message. (Text? Email? Smoke signal?)
6. We are not afraid to go to trial. (Bravery did not come up in the discussion in the other room; they only discussed money.)
7. They are not being realistic. (I'm not here to decide who gets to do the next mediation reality show.)
8. I would settle, but let me call my [spouse, parents, uncle, etc.] first. (Wow, that will be a long telephone call in order to fill them in on what we've been doing here at this mediation for the last five hours).
9. They have to get serious. (When I tell them that I will use a very stern face.)
10. I'm not going to bid against myself. (I understand that concept if we were playing bridge or you were on *The Price is Right*, but we're at mediation and this is not about ego)
11. I'm not being emotional, I'm just making

a realistic and rational observation! (That is good to hear, because any subjectivity much less foaming at the mouth would be counterproductive.)



12. We're looking to settle this case under a telephone number [case can settle for under 7 digits]. (Does that include an area code?)
13. We will have to pray and ask the Lord if we should take their offer. (The Lord answered your prayer when he gave you a good attorney to give advice; I understand, take a moment, and then after your prayer discuss this with your attorney.)
14. No matter how thinly you slice something, there are always two sides. (This is just so wise the only thing you can do is smile and agree.)
15. We will do it, but only if the insurance company pays the entire mediator's fee. (That's a good strategy, because I've never seen the insurance company ask the claimant to pay the entire mediator fee.)
16. We are not getting anywhere. (Who's fault do you think that is? What do you think we should do about it? Luckily 80% of the movement occurs in the last 20% of the time.)
17. We are confident that the Judge will [grant/deny] summary judgment in this case. (Odd, the other side is confident the Judge will do the opposite, but it doesn't matter, because it looks like everyone is here to resolve things.)
18. Is that their best and final offer? (Believe or not, they never tell me.)
19. The defense offers \$5,000 in response to a demand of \$500,000. (Is that all cash up front, or can the plaintiff structure it?)
20. It's 3 o'clock and we are still really far apart! ("This is your fault mediator!" Am I supposed to kick in some money?)
21. What do you mean the defense says it cannot evaluate this brand new surgical report I just provided to them at mediation? (They did not know they were supposed to bring a physician

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An Award Winning Announcement from a Florida Bar Foundation Board Member



By Philip N. Kabler

Typically these pieces describe activities and accomplishments of The Florida Bar Foundation's grantees in our region and throughout the state. From an "outsider's perspective" (meaning one who is an observer and not a participant in those activities), those achievements on behalf of the children, adults, and families served are moving and inspirational. From a "semi-insider's perspective" (meaning one who regularly receives reports about those activities, sometimes on a nearly "real-time" basis), your writer can report that the staffs of the Foundation and its grantees engage in those activities effectively, efficiently, and economically.

Typically without much fanfare. *Until recently.*

The Foundation for Improvement of Justice, Inc. (FIJ) selected The Florida Bar Foundation as one of six recipients of the 2012 Paul H. Chapman Award. The Chapman Award comes with a \$10,000 grant, which the Bar Foundation will use to increase its 2012-13 grant funding.

The Foundation for Improvement of Justice is a private, non-profit organization founded for the purpose of improving local, state, and federal systems of justice in the United States. (More information about FIJ is available at www.justiceawards.com.) The Bar Foundation was nominated for the Chapman Award by Annette Pitts, executive director of the Florida Law Related Education Association (FLREA), which is a Florida Bar Foundation Improvement in the Administration of Justice grantee.

FLREA uses Bar Foundation funds for model civic- and law-related education programs, and to support the Justice Teaching Institute, a four-and-a-half-day institute on the judicial branch taught by all seven Florida Supreme Court justices which provides 25 Florida teachers with first-hand experience in the appellate process.

The Foundation for the Improvement of Justice annually accepts nominations for the Chapman Award to "recognize and reward individuals or organizations whose innovative programs and work have made

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CGAWL's Cedar Key Dessert Competition, Hail to the Ch(i)ef!

By Anne Rush

On November 6th we will all know which candidate will arrive to *Hail to the Chief* during the next four years. But on November 8th at EJCBA's Annual Cedar Key Dinner, you can still vote for which candidate in the 8th circuit wins the "Hail to the Chef." The Clara Gehan Association for Women Lawyers (CGAWL) is, once again, honored to host the dessert competition at the EJCBA's Annual Cedar Key Dinner and invites you to join in our competition this year as a "voter", a "candidate", or both.

This year our theme is "Hail to the Ch(i)ef!" We are modifying the competition slightly from previous years. Rather than selecting specific judges to determine which chef to hail, we are switching to a "your dollar is your vote" model. While all the desserts are free to the dinner attendees, CGAWL is using the dessert competition to fundraise in support of its annual holiday project benefitting ElderCare of Alachua County (<http://eldercare.ufandshands.org/>). There is no minimum or maximum contribution; however, the suggested "vote" amount is \$1.00. Each dessert entered into the contest will have a voting jar to collect its "votes." The top three entries will be awarded prizes - gift certificates to Kitchen and Spice. Since all proceeds benefit the Elder Care project, this really is the one situation where "vote early, vote often" does apply!

Also, CGAWL is requesting that "candidates" provide a copy of their dessert recipe to compile an e-book. If there is a dessert you fall in love with at the competition, you can purchase the e-book for \$5.00 and enjoy it year-round. There will be a sign-up sheet for the e-book at the dinner or you can submit a request afterward. Again, all proceeds will benefit CGAWL's holiday project for Elder Care of Alachua County.

If you want to enter a dessert into the competition or if you have any questions, please contact Anne Rush, anne.rush.1024@gmail.com. I hope to see many of you at the Annual Cedar Key Dinner and want to thank everyone in advance for their support of CGAWL, our holiday project, and for helping us support our community.

2013 Pro Bono Service Awards Nominations Due by Nov. 12

Each year, the Supreme Court of Florida and The Florida Bar give special recognition to lawyers, groups and a member of the judiciary who have freely given their time and expertise in making legal services available to the poor. The pro bono service awards ceremony will be held at the Florida Supreme Court at 3:30 p.m., Thursday, Jan. 31, 2013. **Nominations must be received by Nov. 12, 2012.** Nomination forms are available at www.floridabar.org for these award categories:

The Tobias Simon Pro Bono Service Award

Presented annually by the Chief Justice to an attorney to recognize extraordinary contributions in assuring the availability of legal services to the poor. Named for the late Miami civil rights lawyer Tobias Simon, the award represents the Supreme Court's highest recognition of a private lawyer for pro bono service. All current recipients of The Florida Bar President's Pro Bono Awards are considered for this prestigious award as are direct nominees who have demonstrated exemplary pro bono service over the course of their careers.

The Florida Bar President's Pro Bono Service Award

This award is given to an outstanding attorney residing in each of the state's 20 judicial circuits and to an outstanding attorney among the out-of-state Florida Bar members.

The Florida Bar's Young Lawyers Division Pro Bono Service Award

With more than 22,200 members, the Young Lawyers Division includes all lawyers in good standing under age 36 and all new Florida Bar members of any age for their first five years in practice. The award is given to the division member who best exemplifies the highest ideals of public service.

The Chief Justice's Law Firm Commendation

This statewide award recognizes a law firm which has demonstrated a significant contribution in the provision of pro bono legal services to individuals or groups that cannot otherwise afford the services. This award recognizes extraordinary commitment on the part of a law firm to provide access to the courts for all Floridians.

The Chief Justice's Voluntary Bar Association Pro Bono Service Award

Also presented by the Chief Justice, this award

recognizes a voluntary bar association that has demonstrated a significant contribution in the delivery of legal services on a pro bono basis to individuals or groups that cannot otherwise afford the services. This award also recognizes an extraordinary commitment to provide access to the courts for all Floridians.

The Distinguished Judicial Service Award

Presented by the Chief Justice, this award is given for outstanding and sustained service to the public, especially as it relates to support of pro bono legal services. **Nominees' pro bono service contribution may be cumulative. Consideration is not limited to the events of the immediate past year.** For additional information, contact public information coordinator Dorohn A. Frazier at The Florida Bar, 850/561-5764 or dfrazier@flabar.org.

EJCBA 2012 Holiday Project

The EJCBA is once again asking our members to stuff boxes with toys for Head Start kids in our circuit. If you didn't get a box at our October luncheon and you would either like to fill a box or otherwise contribute to a box, please contact Anne Rush at anne.rush.1024@gmail.com or pick up one at the November lunch. Your generosity is greatly appreciated!!

Canned And Non-Perishable Food Drive

This is a reminder to bring with you to the November and December EJCBA luncheons any canned foods and/or non-perishable food items you can to help those less fortunate than ourselves have a great holiday. All items will go to Bread of the Mighty Food Bank, which for 25 years has served as our community's dependable source for local non-profit agencies serving the hungry.

THANK YOU FOR YOUR GENEROSITY!!

Arc of Alachua County & Gone4ever

By Lawrence J. Marraffino

The Arc of Alachua County has been serving the developmentally disabled community since 1966. My sister in law has been living in an Arc group home for the past two years. I have seen first-hand the wonderful work that this organization does for some of the area's most vulnerable citizens. What is truly great about Arc is the way they treat the people they serve. They allow them to help themselves. Towards this end the Arc has workshops where its clients are able to perform jobs where they earn money for themselves and, more importantly, gain self esteem and feel like normal hard working people everywhere. There is an opportunity for attorneys to support Arc while getting services you already need.

As stated on its website: The Arc fulfills two basic functions -- The first as a direct provider of service in Alachua County to almost 300 individuals, both adults and children, covering the entire spectrum of developmental disabilities. These include: intellectual disability from all causes; spina bifida, autism, cerebral palsy, and Prader-Willi Syndrome. Services include residential settings, transitional living, supported independent living, sheltered employment, mobile work crews, supported employment, adult day training, community inclusion, and behavioral support.

The Arc's other main function is to serve as an advocate for all persons with developmental disabilities regardless of where they may live or who may provide supports and services to them. Since Florida ranks 49th among the 50 states in funding for people with developmental disabilities, the need for a strong, unified voice in the political arena is crucial.

Lawyers in the Eighth Circuit can now support the Arc as it provides two services that most attorneys need: Document shredding and electronics recycling. The following is from the Arc website:

Document destruction is how Gone4ever came to be who we are today. From unsecure shredding to completely secure destruction of documents has never been more affordable or easier than with Gone4ever. We are certified to handle the most sensitive documents properly, no matter what your business is. We service doctors, lawyers, utilities, etc. If you have customer contracts and records or just scrap paper, we can pick it up at your schedule and properly shred and destroy to your needs.

We do more than just compare to the competition in our area, we shred them. Local, on call, certified and SDA membership. We also bundle services for many of our business customers. If we are coming to pick up

your paper, why not have us pick up your old computers, plastic bottles, and card board?

Gone4ever does not lock our customers in to long term contracts. We supply month to month and arrange pick ups based on the schedule of the client. You should not have to pay more for unused pick ups because you aren't generating enough waste. We can pick up bi-weekly or bi-monthly, you choose.

Computer, small appliance, and e-waste is our newest type of recycling offered at Gone4ever. Computer waste has become a huge problem for society and especially in Gainesville, Florida. What do you do with an old outdated computer? Simply give it to us!

We break down old machines and recycle the raw materials. We also offer secure hard drive destruction for anyone interested at \$5 per drive*. If requested, we can even give you a certificate of secure destruction. Businesses love the ability to empty their old supply closets and give to a good cause while making sure their old machines don't end up in a land fill.

We accept drop offs during business hours for area residents as well. Whether you have an old printer, desktop computer, laptop, server, keyboard, or other computer or small appliance; we will take it. Don't Waste it, we want it.

For more information on either of these programs at the Arc, contact Todd Baker at 352-334-4060 ext. 132 or by email at tbaker@arcalachua.org. You can check out their website at: www.gone4evershredding.com.

Your use of their services is a win/win. Your office gets a needed service and some of the people in our community who need a helping hand get to help themselves.

*Hard drive destruction prices can be negotiated based on amount of drives and frequency of destruction.

Florida Bar Foundation *Continued from page 6*

improvements in the various systems of justice." The awards are given for accomplishments, not grants for future projects. Other 2012 Chapman Award recipients include the National Immigrant Justice Center and the National Crime Victim Law Institute.

For information about The Florida Bar Foundation or its grant programs, 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 Facebook fan at www.facebook.com/TheFloridaBarFoundation.

President's Message *Continued from page 1*

selecting and retaining justices should be based on fairness and competence, and a justice should be removed only upon a demonstration of misconduct or incompetence. The public must be secure in the knowledge that cases are and will continue to be decided on the law and the facts and not through political pressure, intimidation, or posturing.

In addition, the Republican-led legislature is asking voters to give them greater power over the Supreme Court appointments and judicial rules of procedure. Proposed Amendment 5 would give the senate, not the governor, final approval over the choice of State Supreme Court justices; it also would allow the legislature to repeal court rules with a majority vote, not the two-thirds vote now required. The proposed amendment would additionally grant the speaker of the Florida House access to confidential judicial misconduct investigation files before any charges have been filed. Do any of these proposed measures, designed solely to increase the power of the legislature, merit a constitutional amendment? I would argue that no such reason has been demonstrated.

As Alexander Hamilton claimed in the Federalist #78, an independent judiciary is the public's last defense against a dictatorial executive or runaway legislature. I urge you to educate your neighbors and friends about this unprecedented attack on our system of justice and to vote on November 6 to maintain a free and impartial judiciary.

* * *

I hope to meet new members and greet old friends at Steamers in Cedar Key on Thursday, November 8. Join the dessert competition put on by CGAWL: the theme this year is "Hail to the Chief." The cost is \$40 (EJCBA members only, please) and \$45 at the door without a prior reservation. Dinner and 2 free drink tickets is included in the cost of admission and a raffle will also be part of the fun. RSVP to execdir@8jcba.org.

* * *

As announced at our October luncheon, the EJCBA is once again collecting canned goods and non-perishable food items for Bread of the Mighty to distribute to those who are less fortunate and need a little help to make sure their families have a joyous and healthy holiday season. Please give generously if you are able.

I want to wish all of our members and their families a wonderful and safe Thanksgiving holiday.

Alternative Dispute *Continued from page 5*

- to the mediation to do a compulsory medical exam.)
22. Maybe my demand was unrealistic but I am insulted by their counter offer. (Please say that one more time.)
 23. Lawyer to other party during the joint session says: "You have absolutely no case recognizable in law or fact but we are here in complete and utter good faith." (Blessed are the flexible for they shall never be bent out of shape.)

Included in the list of things advocates say during mediation were some other observations often said at mediation, usually by the mediator, which we thought were worth sharing.

- We're juggling grenades here, so please no upsetting movements.
- Blessed are those who expect little for they shall not be disappointed.
- Remember the old gypsy curse: may you have a lawsuit you are sure you will win.
- I see your strategy: start slow and then taper off from there.
- Most people are willing to meet each other half way, but the problem is most people are poor judges of distance.
- We seem to be picking the fly droppings out of the pepper.
- We seem to be having some serious forest and tree problems.
- If you want to see my underwear, I need to know I have a proposal of marriage. (Translation: you get my best offer if you can close the deal.)
- When riding a dead horse, the best strategy is to dismount.
- I see you are an advocate of the Pony Express Defense: you ride on horse until it gets tired and then get on another.
- Trial is like surgery, but without the anesthesia.
- As every good pilot knows: to make a good landing, you need to make a good approach.

Again, if you have some favorite mediation sayings, or if you have some suggested responses to the things advocates say in mediations which are listed above, email them to cartercdpa@bellsouth.net and confirm whether we can publish your name and your suggested response.

Discovery of Personal Financial Information in Light of the Constitutional Right of Privacy

By Siegel, Hughes & Ross

The Florida Supreme Court has recognized that the right of privacy afforded by Article 1, Section 23 of the Florida Constitution extends to private financial information. See, e.g., *Friedman v. Heart Institute of Port St. Lucie, Inc.*, 863 So. 2d 189 (Fla. 2003); see also, *Spry v. Professional Employer Plans*, 985 So. 2d 1187, 1188 (Fla. 1st DCA 2008). However, such information is quite often relevant, and therefore discoverable, in civil litigation.

In many cases, otherwise private financial information of the parties is essential to a court's resolution of the issues. The most common example is a marriage dissolution action, in which the assets and liabilities of the parties is the *sine qua non* of the court's plan of equitable distribution. See generally, § 61.075, *Fla. Stat.* (listing factors the court must consider for equitable distribution). Likewise a court cannot determine proper plans of alimony or child custody without both parties disclosing their full financial circumstances. See generally, §§ F.S. 61.08, 61.29, & 61.30, *Fla. Stat.*

In the context of commercial and even general civil litigation, the relevance of financial information can be a murkier subject. As a general rule, "information sought in discovery must relate to the issues involved in the litigation, as framed in the pleadings." *Diaz-Verson v. Walbridge Aldinger Co.*, 54 So.3d 1007, 1011 (Fla. 2d DCA 2010) (emphasis in original). Discovery of any information, and private financial information, in particular, may be no broader than necessary to determine the issues. See, *Friedman*, at 194. For example, a plaintiff who is claiming lost wages is required to produce information concerning his wage-earning activities, such as paystubs and tax returns. The plaintiff cannot complain that his private financial information is subject to disclosure because he injected the issue of his lost wages into the litigation. However, the scope of financial discovery should be limited by the pleadings. See *id.* If, for example, the plaintiff's tax returns contain information concerning the plaintiff's passive income, that information is not relevant and should be redacted.

It is important for a plaintiff to be aware that each claim he raises may open the door to the discovery of his private financial information. A cautious plaintiff would be wise to consider whether any of his private financial information includes

potentially troublesome or embarrassing details. The plaintiff in *Nationwide Mut. Fire Ins. Co. v. Bruscarino*, 982 So. 2d 753 (Fla. 4th DCA 2008) encountered a troublesome dilemma when she was required to provide the defendant with her private financial information. Bruscarino sued Nationwide for underinsured motorist benefits, including damages for loss of earnings and loss of ability to earn a living. In her deposition, Bruscarino testified that she made \$900 per week as a waitress. Yet, her tax returns (which were apparently disclosed subsequent to the deposition) revealed that she claimed only \$200 per week in wages for the same period. This would, quite obviously, make the plaintiff's attorney uncomfortable. Bruscarino dropped her claim for lost wages before trial. The trial court precluded Nationwide from impeaching Bruscarino on this issue as impeachment on a collateral issue by the time of trial.

While a plaintiff has the advantage of framing the issues and therefore the advance knowledge of whether his or her financial information will be implicated, the considerations are often different when a defendant is "involuntarily" brought into court and asked to produce information in support of one of the plaintiff's claims. In *Friedman*, the Florida Supreme Court addressed this scenario. In that case, a medical corporation sued its former employee/doctor for injunctive relief, damages, and fraudulent transfer. The latter claim alleged that Friedman transferred over \$400,000 to his fiancée in an effort to divest himself of assets. Friedman sought a stay of this claim pending judgment on the underlying damages claim. The trial court denied the stay, and certiorari appeal ensued.

Because a fraudulent transfer claim can be raised by a creditor with a "contingent" claim, the Fourth DCA and the Supreme Court agreed that such a claim can be raised before judgment is obtained on the underlying damages claim. The Supreme Court went on to discuss whether Friedman's private financial information would be discoverable for purpose of the fraudulent transfer claim. See *id.* at 194. It explained that, while "personal financial information is ordinarily only discoverable in aid of execution after judgment has been entered, where materials sought by a

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Criminal Law



By William Cervone

Back in 2005, Daniel Chavez killed his wife in Wakulla County. It seems that after only seven months of marriage she had had her fill of him and left, despite him having threatened to kill her if she did that on the age old “If I can’t have you no one else will either” theory. As happens, he found

her and stabbed her in front of several people, all of whom were around to testify.

Mrs. Chavez, of course, was not available to testify at trial about his killing her. Clearly, her unavailability was because of his actions. Nor could she testify to Chavez’s many threats to her before the killing although she had repeated those to many other people before her death. And therein lies the genesis of this article.

Citing the equitable common law exception to the hearsay rule of forfeiture by wrongdoing, and I assume over vociferous defense objection, the trial judge allowed the State to have various witnesses testify to what would otherwise have been hearsay, namely, the defendant’s threats to kill Mrs. Chavez as she related those threats to others before her murder. In what was, I assume, short order, Chavez was convicted of First Degree Murder and whisked off to prison for life.

He remained there until 2010, when the 1st DCA caused him to be returned to Wakulla County for a new trial. Rightfully so, at least then, the 1st DCA had a small problem with the admission of this hearsay in that forfeiture by wrongdoing was not authorized by the Florida Evidence Code, which requires a statutory exception before any hearsay becomes admissible.

In that regard, Florida was unlike the federal courts, which codified forfeiture by wrongdoing in 1997. Numerous other states (Michigan, Tennessee, Pennsylvania, and Ohio to name a few) had also done so. Not so Florida. The at least temporarily fortunate Mr. Chavez thus won a new trial.

Fast forward, then, to 2012. I’m thinking there is a connection here, because thanks to the work of the 2012 Florida Legislature, and the signature of Governor Scott on April 27th of this year, we now have in place FS 90.804(2)(f), under which “a statement offered against a party that wrongfully caused, or acquiesced in wrongfully causing, the declarant’s unavailability as a witness, and did so intending that result” is no longer excluded as hearsay. In other

words, forfeiture of the protection you would otherwise enjoy against the use of damaging hearsay against you because it’s your fault by your own wrongdoing or that of someone you were in league with that there is a need to prove what was said by hearsay.

Ironically, none of this really mattered in the end to Daniel Chavez, who ultimately ended up back in the Department of Corrections doing life for Second Degree Murder after a short sabbatical in Wakulla County. But certainly it will matter to many other defendants in the future. Florida, of course, has no case law on this new rule of evidence just yet and will draw guidance from federal and out of state precedent as we learn how to use it. One thing I am pretty sure about from that authority is that the nexus required to show that a witness’s failure to appear was caused by the defendant requires only a showing of the preponderance of the evidence, making the application of this section much more likely. That and that since unavailability is a given in this scenario, there won’t be an annoying *Crawford* problem. And, of course, (2)(f) applies to civil as well as criminal cases, although I’m thinking that the odds of Joe the neighborhood drug dealer intimidating someone into not showing up to testify are much higher than those of Joe the banker dude who is foreclosing on someone doing so.

And just to bring this all full circle, I harken back to last month’s article about criminal practice in England and how the Brits routinely read prior statements to juries when witnesses neglect or don’t bother to come to court. My lament that we should be more like our ancestral legal brethren has been answered.

Gobsmack!

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party ‘would appear to be relevant to the subject matter of the pending action,’ the information is fully discoverable.” *Id.* (citations omitted).

In cases where the relevance of requested financial information is contested, the requesting party must show that the information is, in fact, relevant. See *id.* The Supreme Court suggested that this showing can be made by an in-camera inspection where the trial court balances “the right to privacy and the right to know.” See *id.* The First

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DCA has subsequently explained that the trial court should hold an evidentiary hearing to determine whether the information sought is relevant. See, *Spry*, at 1188. At the hearing, the "party seeking discovery must provide evidence to show that the information is relevant." *Id.*

While these general rules afford some guidance to litigants who are faced with discovery seeking private financial information, the duty of protecting such information will almost always fall on the attorney(s). As the Supreme Court has noted, "the disclosure of personal financial information may cause irreparable harm to a person forced to disclose it, in a case in which the information is not relevant." *Id.* Thus, when a litigant is concerned that the financial information sought by his adversary is too broad or otherwise not relevant to the issues framed in the pleadings, his attorney should seek a protective order. See, e.g., *Friedman*, at 194. As the Supreme Court explained, the "discovery rules provide sufficient means to limit the use and dissemination of discoverable information via protective orders." See, *Friedman*, at 195.

Further, while financial information is discoverable where it relates to issues raised in the pleadings, a litigant must be cautious of disclosing,

before judgment, information that is typically been discoverable only *after judgment* is obtained. A defendant, in particular, must be aware that a plaintiff may be seeking financial information merely as means to assess the defendant's "collectability." This is not a permissible purpose of financial discovery. See, *Capco Properties, LLC v. Monterey Gardens of Pinecrest Condominium*, 982 So. 2d 2008 (Fla. 3d DCA 2008).

Likewise, a similar concern arises where a plaintiff seeks discovery in support of punitive damages before he has plead a proper claim for such damages. Up until 1987, a plaintiff merely had to plead a claim for punitive damages in his initial pleading in order to be entitled to financial worth discovery from the defendant. In 1987, section 768.72, *Fla. Stat.* became effective, and it requires a plaintiff to make a reasonable evidentiary showing (or proffer) before he may assert a claim for punitive damages. This was an important change because it created "a substantive legal right not to be subject to a punitive damages claim and **ensuing financial worth discovery** until the trial court makes a determination that there is a reasonable evidentiary basis for recovery of punitive damages." See, *Globe v. Newspaper Co. v. King*, 658 So. 2d 518 (Fla. 1995).



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November 2012 Calendar

- 2 "A Toast to Judge Hodges," an event honoring Senior U.S. District Judge William Terrell Hodges, The Historic Thomas Center, 6-9 PM
- 3 UF Football v. Missouri, TBA
- 5 Deadline for submission to December Forum 8
- 5 Law in the Library, City of Alachua Branch Library, "Child Support and the Law," 6:30 p.m.
- 7 EJCBA Board of Directors Meeting; Ayers Medical Plaza, 720 SW 2d Avenue, North Tower, Third Floor – 5:30 p.m.
- 8 ANNUAL CEDAR KEY DINNER , Steamers, 420 Dock Street, Cedar Key, 6-9 PM
- 10 UF Football v. Louisiana (Homecoming), TBA
- 12 Veteran's Day – County & Federal Courthouses closed
- 14 Probate Section Meeting, 4:30 p.m., 4th Floor, Family & Civil Courthouse
- 15 Law in the Library, Tower Road Branch, "Legal Issues Impacting Social Security and Disability Benefits," 6:00 p.m.
- 16 EJCBA Luncheon, Jane Curran, The Florida Bar Foundation, "Stone Soup;" Paramount Plaza Hotel, 11:45 a.m.
- 17 UF Football v. Jacksonville State, TBA
- 20 Family Law Section Meeting, 4:00 p.m., Chief Judge's Conference Room, Alachua County Family & Civil Justice Center
- 22 Thanksgiving Day – County & Federal Courthouses closed
- 23 Thanksgiving Holiday – County Courthouses closed
- 24 UF Football at Florida State, Tallahassee, TBA

December 2012 Calendar

- 5 Deadline for submission to January Forum 8
- 5 EJCBA Board of Directors Meeting; Ayers Medical Plaza, 720 SW 2d Avenue, North Tower, Third Floor – 5:30 p.m.
- 12 Probate Section Meeting, 4:30 p.m., 4th Floor, Family & Civil Courthouse
- 14 EJCBA Luncheon, Speaker TBA, Paramount Plaza Hotel, 11:45 a.m.
- 24 Monday before Christmas Day – County Courthouses closed
- 25 Christmas Day – County & Federal Courthouses closed

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