FORUM 8

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President's Message

By Nancy T. Baldwin

The year is two thousand fourteen – 2014

With the movement of the mouse or touch of a key one can access centuries of accumulated knowledge and discovery. Scientists can assist in the production of food to feed the world; they can create animals and possibly even prehistoric dinosaurs and humans. How is the information being utilized to make the world safer, healthier and happier? Cruelty, bullying, dehumanization, hunger, abuse, pollution, adversity and renewed violence and killings abound.

On his late night television show Tonight, Johnny Carson used to wrap his head with a turban and assume the character of Carnac The Magnificent; he would give out answers before the questions were asked. Where does one go for information, for facts, for answers in this 21st century....to Google and Yahoo, to Twitter, Facebook, blogs, to peers and Linked-in...to perhaps an occasional book or magazine, a teacher, parent or the courts?

According to Ballentine's Law Dictionary, "A fact is a deed; an act; that which exists; that which is real; that which is true, an actuality, that which took place, not that which might or might not have occurred.

Individuals want answers- the truth -the reassurance of the facts - confirmation that right will triumph, that the purple pill and its related inventions can cure and dismiss the quickly stated multiple consequences. However, awareness of the consequences is not always, or even often, a deterrent.

The December 2013 issue of the magazine The Nation stated, "The only way to uncover the truth is to prove the accepted facts. And if history is a guide, in 2014 those facts will be filled with distortions, half truths, and lies."

Are we easy victims of distortions and half truths? We learn of a "leader" who states that the holocaust didn't exist, that global warming is untrue, a sinister plot, that our leader is not an American, that we have won millions from a publisher and some of us believe.

Do our media present only the information that will not offend the advertisers or permit questionable advertising - such as a recent full page advertisement in the New York Times of a woman in very limited costume in numerous positions - positions that would have even failed to pass the approval of the former Esquire.

We are consumers of bits and pieces of information - incomplete reports - jaded or distorted "research" conclusions. There is a massive increase in smart phones and tablets in Bitcoin and clouds. We consume limited reading material; depend on our social network and mobile devices even for the selection of a spouse.

A recent news article described a university-level religious group who refused to allow some

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Contribute to Your Newsletter!

From The Editor

I'd like to encourage all of our members to contribute to the newsletter by sending in an article, a letter to the editor about a topic of interest or current event, an amusing short story, a profile of a favorite judge, attorney or case, a cartoon, or a blurb about the good works that we do in our communities and personal lives. Submissions are due on the 5th of the preceding month and can be made by email to dvallejos-nichols@avera.com.

About This Newsletter

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

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

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

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Deadline is the 5th of the preceding month

Water Use Permitting: Who Gets to Put Their Straw in the Glass?

By Jennifer B. Springfield and Alexander Boswell-Ebersole

One of several regulatory programs created by the Florida Water Resources Act's provisions is the Consumptive or Water Use Permitting (CUP/WUP) program, which is implemented by Florida's five Water Management Districts (WMDs) and designed to provide for comprehensive water resource management.[1] Through CUP programs, WMDs regulate the use of ground and surface water by requiring permits for the withdrawal and consumptive use of larger quantities of water—quantities exceeding specified threshold amounts.

As no individual property right attaches to water itself in Florida, the core of the CUP program, limited-duration permits, authorize the consumptive ***use*** of water, but do not confer ***title*** to water. Nevertheless, the program does allow permittees to enjoy an essentially guaranteed right to use water for a permit's duration, for a specified purpose(s) and subject to conditions regarding manner of use, because WMDs can only revoke permits in very narrow circumstances.[2] With this guarantee, the CUP program provides a degree of certainty to permitted water users. Yet, the Act also directs WMDs to implement CUP programs so as to avoid harm to water resources.[3] In implementing CUP programs, WMDs have authority to regulate almost all consumptive water uses[4] except domestic consumption by individual users, which does not require a permit.[5] Some view the implementation of CUP programs as one of the most important functions of WMDs because the WMDs' exclusive, preemptive authority to regulate consumptive water use precludes local governments from regulating such use.[6]

Much of the answer to *who gets to put their straw in the glass* is determined by the conditions that applicants must satisfy in order to obtain a permit. Under the Act, these conditions form a three-prong test, where applicants must show that their proposed use of water 1) is "a reasonable beneficial use," 2) will not interfere with any existing legal use, and 3) is consistent with the "public interest."[7] Each WMD has adopted its own detailed technical criteria by rule that flesh out the statutory criteria and guide the respective WMDs' permitting decisions.[8] Although the precise meaning of the statutory three-prong test can sometimes be unclear, especially "public interest," which is not defined in the Act and lacks meaningful articulation by the WMDs and courts, the test and current implementing rules enable the WMDs to attempt to balance human needs with ecological needs when making water use permitting decisions. Yet inconsistencies among the differing criteria now used by the individual WMDs have grown over time, causing increasing confusion for permit applicants and the general public.

In response to these issues, the WMDs are currently collaborating with the Florida Department of Environmental Protection (FDEP) to adopt new rules to reduce the inconsistencies and streamline the permitting process through a statewide consumptive use permitting consistency effort known as CUPcon. In addition to these goals, the CUPcon effort is also intended to provide incentives for certain behaviors that aid in protecting water resources.

The Water Resources Act also allows for the periodic re-examination of water uses by generally[9] limiting permits to a duration of up to 20 years.[10] For instance, upon renewal of a CUP, the applicant must demonstrate anew that there is reasonable assurance the three-prong test will continue to be met for the requested duration. Moreover, although a permittee may seek a modification of a permit that has yet to expire,[11] any modification involving more

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Professionalism Seminar - Save the Date

Inexpensive (CHEAP) CLE Credits

By Ray Brady

Mark your calendars now for the annual Professionalism Seminar. This year the seminar will be held on Friday, April 4, 2014 from 8:30 AM until Noon at Trinity United Methodist Church at 4000 NW 53rd Avenue and will feature a panel discussion on the new professional panels.

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

Watch the newsletter for further information and look in your mail for an EJCBA reservation card in early March. Questions may be directed to the EJCBA Professionalism Committee chairman, Ray Brady, Esq., at 373-4141.

Alternative Dispute Resolution

Endangered Words

By Chester B. Chance and Charles B. Carter

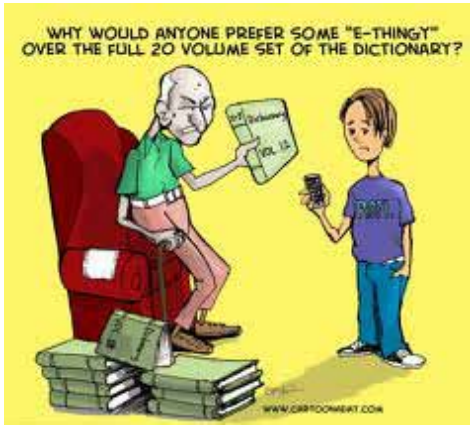
Once a year State Attorney William Cervone writes an article for this newsletter in which he addresses the latest "new" words added to the dictionary. Mr. Cervone is always looking forward. We, on the other hand, are traditionalists who look to the past for inspiration.

In 2009, Simon Hertnon authored a book entitled Endangered Words. He was inspired by the thought of how many valuable words "were languishing out there, in danger of chronic underuse – or oblivion." We think some of the endangered words may apply to mediation or the legal profession.

For instance, *antinomy* is about contradiction whether legal, philosophical or in general. The legal meaning is "a contradiction within a law, or between laws."

As lawyers we try to engage in *apophenia*, which is "the experience of seeing patterns or connections in random or meaningless data." Mr. Hertnon says, "Connecting dots is what we do."

In a mediation joint session, or in a closing argument before a jury, we should never engage in *chavish*, which is "a chattering or prattling noise of many persons speaking together. A noise made by a flock of birds."



Rather than engage in a chavish, we should strive for a *concinnity*. This word means, "Skillful and harmonious adaption or fitting together of parts," whether relating to rhetoric, literary style, artistic style or music. As lawyers, we should always be *concinnous*.

As lawyers we should never *divagate*, which means, "wander about or stray."

Sometimes we lawyers find ourselves in a state of *infonesia*. Infonesia is "inability to remember the location of information." Mr. Hertnon observes "the single biggest problem of the information age is too much information" and now we've given you new information in the form of a new word to note the effects of this problem.

At mediation, we should all strive to be *irenical*. If we are irenical we are "conducive to or operating toward peace, moderation, harmony and conciliation and away from contention and partisanship." This word is especially applicable when addressing the position of those involved in a dispute.

If we are irenical then we are striving for a *juste milieu,* which is "the happy median, the golden mean, judicious moderation." Is there a more appropriate word for mediation? Perhaps all members of congress should be informed of this definition.

For most lawyers, the following is almost a synonym for being a lawyer: *logodaedalous* which means "one who is cunning with words." Shakespeare was logodaedalous.

Many times lawyers have too much on their plate and thus have to cope with *omnistrain*, which is "the stress of trying to cope with everything at once." When we are experiencing omnistrain we tend to *perendinate*. Perendinate refers to the inclination "to defer until the day after tomorrow, to postpone for a day." Perendinate is a more precise term than procrastinate, in that it involves procrastinating until the day after tomorrow. Of course, you could then perendinate again. Besides, as someone said, procrastination gives you something to look forward to.

Often in life, all of us, especially politicians, create a *schlimmbesserung*, defined as "a so-called improvement that makes things worse." We need several additions of this newsletter to list examples of laws which constitute a schlimmbesserung.

The other day I could not decide to have as dessert bread pudding, gelato or chocolate cake. I was experiencing a *trilemma* involving three alternatives instead of two, which would be a dilemma. A trilemma is thus "more perplexing than a dilemma." Mr. Hurtnon indicates a trilemma involves "the combined effect of not choosing A and

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Alachua County Implements New Wage Theft Ordinance

By Eric J. Lindstrom

Employees in Alachua County have a new remedy against wage theft this year. The Alachua County Wage Recovery Ordinance (Alachua County Code, Ch. 66) went into effect January 1, 2014, and provides employees who work within the county, including the incorporated areas, a free administrative process to recover unpaid wages. An employer found liable in a hearing under the ordinance must pay the employee two times the amount of wages owed and must pay the county the costs of the proceeding.

Before filing a complaint under the ordinance, the employee must attempt to resolve the wage claim with the employer by making a specific demand within 60 days of the alleged violation. If the claim remains unresolved 15 days after the demand, the employee may then file a complaint with the Alachua County Equal Opportunity Office. The employee must file the complaint within 180 days of the alleged violation; however, the ordinance retroactively covers violations back to April 16, 2013, and the 180-day limitations period was tolled for these retroactive claims until January 1, 2014.

Once a complaint is filed, the county will attempt mediation. If mediation is unsuccessful, an administrative hearing will be scheduled. Parties have discovery and subpoena powers before the hearing, and may present evidence and cross-examine witnesses at the hearing. The employee must prove the complaint by a preponderance of the evidence at the hearing. The employee may, however, establish a rebuttable presumption regarding wages paid and hours worked if the employer is subject to but failed to comply with a duty under federal law to maintain wage and hour records. (See, e.g., 29 U.S.C. § 211(c) [requiring employers subject to the Fair Labor Standards Act to maintain records of their employees' wages and hours worked].) If the employee proves unpaid wages, the hearing officer must order the employer to pay two times the amount of wages owed and pay for the county's costs of providing the administrative process.

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New location: EJCBA Members gather for the January luncheon at The Wooly

The Overlapping Jurisdictions of Employment Laws

By Paul Donnelly & Christopher Deem, Donnelly & Gross, P.A.

The default rule at the common law is that employment decisions can be made for a good reason, a bad reason, or no reason at all. This is referred to as "at will" employment. However, the default rule of at-will employment is often modified by the law, rules, and regulations of at least three jurisdictions that must be followed: federal, state, and local. To examine how this patchwork quilt of laws and ordinances functions, we'll use the example of employees who complain that they were terminated due to sexual orientation discrimination by a private employer.

Congress has been attempting to pass the Employment Non-Discrimination Act (ENDA), but currently under Title VII and federal law, there is no protection for sexual orientation in private employment. *Fredette BVP Mgmt. Assocs*., 112 F.3d 1503, 1510 (11th Cir. 1997).

Florida's Civil Rights Act (FCRA) is modeled after Title VII, only differing by adding protection for "age, handicap, or marital status." Fla. Stat. § 760.10(1)(a); *Espinosa v. Burger King Corp.*, 2012 WL 4344323 at *5 n.5 (S.D. Fla. 2012). The FCRA does not provide protection for sexual orientation discrimination. *Id*. However, while there is no protection for sexual orientation under state law, localities in Florida may, and sometimes will, provide separate protection.

For example, Alachua County and Gainesville both provide protection against sexual orientation discrimination. Starting January 1, 2014, Alachua County provides protection against discrimination or harassment regarding employment, housing, and public accommodation based on sexual orientation due to a new human rights ordinance going into effect. The City of Gainesville also provides that it is an unlawful employment practice to discriminate against an individual because of that person's sexual orientation.

Where employees bring their claim that they were terminated due to sexual orientation discrimination will determine the resolution of their claim. Given the maze of local, state, and federal laws that can apply to employment decisions, it is best practice for an employer to be able to justify their employment decisions for legitimate business reasons.

Wage Theft Ordinance *Continued from page 5*

Wage theft is a significant problem in Florida. In 2012, the U.S. Department of Labor recovered about $10 million in wages through enforcement actions under the minimum wage and overtime provisions of the Fair Labor Standards Act. (See Department of Labor, Data Enforcement statistics, http://ogesdw.dol.gov/.) The actual extent of wage theft is, of course, much higher because not all employers are subject to federal wage laws and not all employees file complaints in response to wage theft. Although Florida has a state minimum wage law, the state has not actively enforced the law on behalf of employees and the expense of bringing a private action can quickly surpass an employee's total unpaid wages. Alachua County's solution of providing a free administrative process for the victims of wage theft follows similar ordinances in Miami-Dade County and Broward County.

Endangered Words *Continued from page 4*

B, A and C, or B and C." Put another way, instead of choosing the lesser of two evils (a dilemma), you are choosing between the lesser of *six* evils.

Do you ever *verbigerate*? If so, you "repeat a word or sentence endlessly and meaninglessly." The word suggests a pathological repetition.

We tried to select words relating to the law or alternative dispute resolution; however, there were a couple of words with which we were fascinated. *Millihelen*, which is defined as "a unit of measure of beauty corresponding to the amount of beauty required to launch one ship." Recall, Helen of Troy had a face that launched a thousand ships and Mr. Hertnon notes a millihelen would be enough beauty to launch two cabin boys, perhaps in a rowboat.

We also liked *drachenfutter*, which is "a peace offering from guilty husbands for wives."

The authors must now go look for an appropriate drachenfutter after we said we spent all day writing this article when in reality we were fishing.

Probate Section Report

By Larry E. Ciesla

The Probate Section continues to meet on the second Wednesday of every month beginning at 4:30 p.m. in the third floor meeting room in the Criminal Courthouse at 220 South Main Street. There is abundant free parking in the lot immediately south of the courthouse, very conveniently located near the attorneys' entrance door on the south side of the building.

The following matters were discussed during the January 2014 Section meeting.

• Ellen Gershow was welcomed as a new member of the section. Ellen is an LLM, is one of the most senior members of the local estate planning bar, and has a wealth of knowledge in a variety of areas of estate planning, some of which she shared with the group during the January meeting.

• A brief discussion was held regarding the procedure to be employed when providing Notice to Creditors to the Medicaid estate recovery unit. Jane Hendricks brought to the attention of the group a lengthy e-mail written by Rohan Kelley on this subject, based on a recent discussion he had with the General Counsel for the State of Florida Agency for Health Care Administration. According to the General Counsel, the following address may be used for service of the Notice to Creditors: Agency for Health Care Administration, Office of the General Counsel, 2727 Mahan Drive, MS #3, Tallahassee, FL, 32308. This address was proposed due to the confusion sometimes created by providing notice to the Medicaid estate recovery unit's private contractor, which has changed several times in recent years. The current contractor is Xerox State Healthcare, LLC, the address of which is P. O. Box 12188, Tallahassee, FL, 32317 (the same address used by ACS Recovery Systems, the former contractor). It is my understanding that Xerox simply purchased ACS, and nothing else about ACS has changed.

For whatever it's worth, I am continuing to use the ACS Post Office Box as I have never had any problem getting back my green return receipt cards. It was also pointed out by Mr. Kelley that, regardless of which entity and address practitioners choose for service of the Notice to Creditors, e-service is not appropriate. Notice to Creditors should be sent via certified mail, return receipt requested, and the return receipt should be filed in the court file so that the probate judge can see that there has been compliance with the statutory notice requirement.

• The meeting proceeded to a report by your author regarding the latest word from The Fund regarding "Ladybird" deeds. The issue discussed was first raised in the November 2013 issue of The Fund Concept newsletter, in example #6 of "2013 Title Teasers - Part II."

A hypothetical example was given which involved the grantor of a Ladybird deed who, pursuant to the power reserved in the deed, changed the remainder persons named in a Ladybird deed by executing and recording a new Ladybird deed. The grantor then dies. The "new" remainder person then goes to sell the property. The question presented is whether, for insuring purposes, a deed is required from anyone other than the "new" remainder person. In the answer section, The Fund indicated that deeds from the two original remainder persons would be required.

Your author wrote to The Fund to inquire as to why the extra deeds would be required. The Fund's written response can be summarized as follows: The Fund refers to this scenario as one involving "Unilateral Elimination of Interest of Remaindermen." The Fund recognizes that there is no case law on point. The Fund states that its position is based purely on a risk analysis basis due to The Fund's concern regarding the potential for litigation from the original remainder persons.

The Fund's view is as follows: If the original remainder persons are willing to give a deed, there is no problem; if they refuse, there is a potential for litigation. One other negative that The Fund has taken into consideration is the fact that the new remainder person/seller has received ownership of the property without consideration. In The Fund's view, this makes for a weaker case when it comes to insuring title.

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Probate Section

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The Fund goes on to address the possible solution of beefing up the language employed in the Ladybird deed on the issue of the right of the grantor to change remainder persons. It is The Fund's position that this would be of no avail as it would not eliminate the potential for litigation from the original remainder persons. The Fund concludes by emphasizing that it will still insure title in the case of a sale or mortgage by the grantor during his/her lifetime where the remainder persons have not been changed.

• The meeting proceeded with a discussion led by Richard White, with assistance from Ellen Gershow, regarding the operation of Section 732.4017, Florida Statutes. This statute was enacted in 2010 and deals with a procedure that may be employed by a homestead owner who is single and has a minor child as a way to avoid the title to the homestead passing to the child in the event of the untimely death of the homeowner during the child's minority.

The statute contains, among others, the following significant provisions:

(1) A transfer of the title by the (single parent) property owner into a trust (during the child's minority) does not constitute a "devise" for purposes of descent of the title upon the death of the property owner, so long as the grantor does not retain the power to revoke the trust (i.e., the trust is irrevocable).

(2) The grantor may retain the right to change/alter beneficiaries (i.e., reserve a limited power of appointment, which also has the effect of making the transfer be viewed an incomplete gift for IRS purposes so as not to trigger the gift tax). This allows the grantor to include after-born children as beneficiaries.

(3) The grantor may retain a life estate in the homestead (so as to preserve the grantor's right to homestead for tax exemption and SOH purposes).

(4) The grantor may specify an event in the future for termination of the interests of the beneficiaries (i.e., the youngest child's 18th birthday).

(5) The trust may provide that ownership of the property reverts back to the grantor upon occurrence of the foregoing event.

Although not set forth in the statute, such a trust would typically contain provisions for the trust to continue beyond the youngest beneficiary reaching 18 in the event there is an untimely death of the grantor (i.e., continuation to age 25, 30, 35, etc.). Title would be held by the trustee, who could sell, if desired, and then continue to manage the sales proceeds in trust until the ages specified in the trust. Other assets, such as life insurance proceeds, could also be placed in the trust, especially if it is the grantor's intent that the property not be sold in the event of the untimely death of the grantor.

The discussion then reverted back to the question originally posed a couple of months ago by Susan Mikolaitis: Is there a good solution to the estate planning question of what to recommend to a homestead-owning single parent with one or more minor children. The answer seems to be, at least insofar as this particular solution is concerned, that this is a lot of time, effort and money to spend on this problem and that it probably does not work well for most single parents. Other options discussed include creating a JTWROS deed with a parent or sibling, or for the more adventurous, a Ladybird deed with a parent or sibling as remainder person. In any event, the consensus of the group appears to be that there is no good, simple solution to the single parent-minor child-homestead issue.

• The meeting concluded with a discussion by Probate Staff Attorney Katherine Mockler regarding show cause and case management hearings. Katherine indicated that, at the request of the judges, she is attempting to handle by e-mail as many of these matters as is possible. She will send an e-mail asking for the status of a particular matter which the court file reflects has not been completed. If a satisfactory response is received, no further action will be taken by the court. By not scheduling show cause or case management hearings except when absolutely necessary, it is hoped that everyone involved will benefit (attorneys, clients, staff attorneys, judges) by not having to spend unnecessary time in the hearing process.

All interested parties are invited to participate in Probate Section meetings. Please contact my office if you wish to be added to the e-mail list to receive notice of future meetings (lciesla@larryciesla-law.com).

Water Use Permitting *Continued from page 3*

than 100,000 gallons of water per day requires the permittee to satisfy all of the same requirements applicable to an initial permit application.[12] Finally, when two applications directly compete (i.e., where two applicants seek permits for the use of water from a source that cannot satisfy both prospective uses), the Act gives the WMDs the right to approve the permit that best serves the public interest.[13] However, where the competing applications equally serve the public interest, WMDs must give preference to the renewal.[14]

1 The Florida Water Resources Act's provisions providing for the consumptive use permitting program are codified as Fla. Stat. Part II, Chapter 373.
2 See Fla. Stat. § 373.243.
3 See Fla. Stat. § 373.219(1).
4 Note that WMD rules provide detailed descriptions of which types of uses require permits. For example, the St. Johns River WMD requires a permit for water where the "[a]verage annual daily withdrawal exceed[s] 100,000 gallons average per day on an annual basis." Fla. Admin. Code R. 40C-2.041.
5 Fla. Stat §373.219(1).
6 See Fla. Stat. § 373.217.
7 Fla. Stat. § 373.223(1).
8 See, e.g., Fla. Admin. Code R. 40C-2.301 (providing the St. Johns River WMD's rule section for conditions for issuing permits).
9 See Fla. Stat. §§ 373.236(3), (5), (6) and (7) (authorizing Water Management Districts to issue permits for longer than 20 years for certain applicants under certain circumstances).
10 Fla. Stat. § 373.239(3).
11 Fla. Stat. § 373.239(1).
12 Fla. Stat. § 373.239(2).
13 Fla. Stat. § 373.233(1).
14 Fla. Stat. § 373.233(2).

Judge Roundtree delivering the "State of the Circuit Address" at the January luncheon

Ron Kozlowski (second from left) and Stephanie Marchman receive the 2013 FBA Chapter Activity Presidential Citation – one of just 3 awarded by the National Federal Bar Association.

Criminal Law

By William Cervone

Sometimes I don't quite know what to do or say about something but I know that something cries out for comment. This month is such a time.

Most of you know of my perhaps disturbing penchant for reading the advance sheets every week even though that, more often than not, is upsetting, as well as my near obsession with professional decorum and treatment of each other. Hence the following that flows from a case reported last Fall (and I should hasten to add that I often write these articles as I see things so they are often, as this one is, several months old before being published) under the headnote of "Judicial Disqualification." The case, which comes from Tampa, holds that while a judge may disqualify herself from all cases involving a certain lawyer under appropriate circumstances, it was error to file a blanket disqualification in a single, particular case. More important to my eye, perhaps, the case also held that it was inappropriate for the judge to include in that order her personal opinions regarding the particular attorney's reputation and professionalism.

The case, *Holt v Sheehan*, which is reported at 38 FLW D2149, was filed by 13th Circuit Public Defender Julianne Holt when a Circuit Judge responded to a motion to recuse filed by an Assistant Public Defender on behalf of a client with an order that did not simply grant the recusal but went on as follows, and I quote:

Based upon the factual matters raised in the motion, the Court further enters a standing Order to Disqualify the Court in all cases involving Attorney [the APD, whose name the DCA did not include]. The Court acknowledges that she has strong feelings that Attorney [withheld] is incompetent, untrustworthy, and extremely dilatory in matters related to her legal duties, based upon Attorney [withheld]'s actions and inactions in this Division over the past month and based upon Attorney [withheld]'s ten year tenure at the Courthouse which has developed her widespread reputation as an inept supervisor and mean spirited individual who publically berates her underlings as "stupid" and "idiotic."

Wow. I will not go into all of what the 2nd DCA said about that language - you can read it yourself if you're interested - other than to note that it had seldom if ever seen such an attack. Unspoken is whether or not there are facts to support what the trial judge wrote, but suffice it to say that neither have I. In any event, the DCA concluded that it had the authority to strike "impertinent or scandalous matter placed in a court file" and did so. The court went on to note that trial and appellate judges have the authority to criticize attorneys in open court or by published opinion for conduct falling below expected standards of professionalism as a "prompt" to better behavior, but called this language something far beyond that.

Some observations. One reason I would not want to be a judge is that I cannot imagine presiding over bad lawyering and having to keep your mouth shut. Maintaining the quiet circumspection of a neutral presiding judge must at times be exceedingly difficult. It must be torture, and in all fairness all of us have voiced disparaging opinions about not just other practitioners but judges as well. And let none of us fool ourselves: just as the Bar talks about judges and their conduct, I am 100% positive without ever having been told so or heard it that the Bench does that about practicing lawyers as well. That said, I have very mixed feelings about the propriety of this trial judge's observations and choice of language in this instance. Maybe, just maybe, it was all well and deservedly called for. After all, a common complaint from the public is that all we lawyers do is protect each other, which this judge certainly was not doing. One thing it is not, however, is productive and civil, or, put another way, professional. There are, as the DCA observed, other more appropriate forums to deal with such concerns. Certainly, if a lawyer said these things publically about a judge that would not be the end of it and you can bet your bottom dollar contempt proceedings would be likely.

Fundamentally, I suppose that the problem with what happened is one of due process. The un-named attorney had no recourse for what amounted to the discipline of a public scolding and banishment from a particular judge's courtroom, and her employer had no say in how she chose to assign her staff.

It's all very interesting and it all points out what I try to tell new people in my office, whether they be interns or attorneys or staff: your every action, especially when you are starting out, establishes your reputation and you'd be well advised to be thoughtful about how you develop and guard that.

President's Message

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group members to invite speakers who disagreed with the political philosophy of the group to address the group, to provide alternative answers.

There may be no opportunity for questions in the search for answers. Perhaps not so blatant, but the pressure exerted on television decision-makers to reinstate the vocal Ducks star, not so much for his free speech options as his political posture... that a monument to the dead union soldiers should not be permitted alongside the monuments to the southern soldiers - renewing the anger, perceived victimization, and flag flying.

It is difficult to discover the facts. The facts, the presumed truth, depends on what one reads -what one watches, whether we follow the Ducks or the New York Times, the tabloids or the Wall Street Journal.

Advertisers have subtly moved toward diminishing the line between news and advertising - unless the reader is alert, the advertising resembles a news story - the reader sees facts rather than opinions or puffing.

Does it matter where one looks for answers - what one reads and listens to, where one lives and works? One often tends to accept that which agrees with one's own perceptions and beliefs. Both the Guardian and the New York Times encourage the exoneration of the controversial Snowden.

We as attorneys must assume responsibility for consideration of the multifaceted questions and answers.

It is essential to make an effort to listen to those who have different ideas or programs. We are not good listeners, unless it is a small phone held to one's ear. One does not expect the one who greets you with "how are you" to pause and let you explain how you feel.

There is a story of two children in the backseat of the family vehicle - not talking to each other - but texting each other.

Individuals argue and complain that many actions are against their constitutional rights; they claim to rely on the US Constitution, but citizens and government officials do not agree what the Constitution says or means, what the Bill of Rights promises. Judges who support the philosophies of the appointer are confirmed. Some Sheriffs openly state that they will not uphold laws with which they do not agree. Legislators support or veto legislation along party lines rather than what is in the best interest of the community, the state and country.

We rely on answers to criminal actions that tend to fill our prisons with boot camp trainees. Children who are not having success in school, who violate certain school regulations, are suspended from school; exacerbating their movement toward gangs and incarceration.

Question: Is the formulation of questions or issues essential prior to the search for the answer?

In the search for understanding of issues and possible answers, may we evoke a desire for collaboration, cooperation, empowering rather than denigrating. May we encourage media to high quality performance and utilization of resources to coverage of all sides of the issues.

Page 2b of the January 6th Gainesville Sun carried a 3 short paragraph AP news article about a Florida execution scheduled for January 7. I remember Thomas Knight, aka AAM; he has been in prison for some 40 years on death row, existing in a small cell. After forty years he will be executed. How has society benefited from this lengthy, expensive exercise? Has it served as a question, an answer, a deterrent?

What have we learned – have we found answers, have we made life better? Phoebe Cade Mills of the Cade Foundation has established a unique museum with the goal of making life better.

In our search for answers and question we encounter scams , theft of identity, polluted springs, serious misbehaviors of leaders in government and the military.

May we not be deterred in our listening and our carefully considered actions.

May we consider what is good for children - all children; what is good for our governments. May we make an effort to understand and consider multiple faceted answers/alternatives, read many points of view, and listen. May we strive to examine the issues from many perspectives, to wisely and sensitively construct the questions and search for answers. The year is 2014.

May the year 2014 bring advances that will enhance our courage and our encounters with challenges and make us ever mindful of the role of attorneys and judges in the search for questions and answers for justice.

Metatagging: Comparative Advertising and Trademark Law in the Google Age

By Siegel, Hughes & Ross

Federal courts have long recognized that the trademark protections of the Lanham Act do not extend to truthful comparative advertising. "[L]iability for [trademark] infringement may not be imposed for using a registered trademark in connection with truthful comparative advertising." *Network Automation, Inc. v. Advanced Systems Concepts, Inc.,* 638 So.2d 1137, 1153 (9th Cir. 2011) (quoting *Lindy Pen Co., Inc. v. Bic Pen Corp.,* 725 F. 2d 1240, 1248 (9th Cir. 1984). In fact, the Federal Trade Commission ("FTC") has specifically recognized that "[c]omparative advertising, when truthful and non-deceptive, is a source of important information to consumers and assists them in making rational purchase decisions." *See,* 16 *C.F.R.* § 14.15(c). "Comparative advertising encourages product improvement and innovation, and can lead to lower prices in the marketplace." *Id.* For these reasons, the courts impose no restrictions on truthful advertising comparing specific products and their "objectively measurable attributes." *See id.*; *see also, Deer & Co. v. MTD Products, Inc.,* 41 F. 3d 39, 45 (2d Cir. 1994).

However, with the rise in internet advertising, the courts have been forced to apply and adapt trademark rules that developed in traditional media to the more direct advertising that internet search engines allow. In contrast to print, radio, or television advertising, internet advertising can be, and often is, much more targeted. Companies like Google have built their entire business by providing merchants with the opportunity to directly advertise to consumers based on the interests, activities, and even specific products and services they are searching for. This difference has led the courts to treat internet comparative advertising, even when truthful, differently than advertising through other media.

The one area where this disparate treatment is perhaps most important is in the use of metatags (also meta tags or meta-tags) to direct internet search traffic. To understand why metatags present unique problems in trademark law, one must first understand how internet searches and metatags work. As explained in *Brookfield Communications, Inc. v. West Coast Entertainment Corp.,* 174 F. 3d 1036, 1044-45 (9th Cir. 1999):

> Oftentimes, an Internet user will begin by hazarding a guess at the domain name, especially if there is an obvious domain name to try. Web users often assume, as a rule of thumb, that the domain name of a particular company will be the company name followed by ".com." […] A Web surfer's second option when he does not know the domain name is to utilize an Internet search engine, such as Yahoo, Altavista, or Lycos.[1] When a keyword is entered, the search engine processes it through a self-created index of web sites to generate a (sometimes long) list relating to the entered keyword. Each search engine uses its own algorithm to arrange indexed materials in sequence, so the list of web sites that any particular set of keywords will bring up may differ depending on the search engine used. Search engines look for keywords in places such as domain names, actual text on the web page, and metatags. Metatags are HTML code intended to describe the contents of the web site. There are different types of metatags, but those of principal concern to us are the "description" and "keyword" metatags. The description metatags are intended to describe the web site; the keyword metatags, at least in theory, contain keywords relating to the contents of the web site. The more often a term appears in the metatags and in the text of the web page, the more likely it is that the web page will be "hit" in a search for that keyword and the higher on the list of "hits" the web page will appear. *Id.* (citations omitted)

Thus, unlike print, radio, or television advertising, a metatag can be used to target consumers based on what they are actually searching for. This can present a problem when a merchant uses a competitor's trademark to direct internet traffic to his own website, even if website uses the trademark in a truthful comparative advertisement. As explained more fully below, the use a of a competitor's trademark can lead to a type of consumer confusion known as "initial interest confusion." *See id.* at 1065.

In more traditional media, such as television advertising, permissible comparative advertising

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Metatagging

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often consists of a company like Ford comparing the number of airbags or horsepower in its vehicle to a competitor's, such as Toyota's, vehicle. The same type of comparative advertising may be permissible online; but what if Ford wants to use the name "Toyota" to direct internet users to its comparison? The *Brooksfield* decision addressed this issue with a hypothetical involving two brick and mortar movie-rental companies[2]:

> Using another's trademark in one's metatags is much like posting a sign with another's trademark in front of one's store. Suppose West Coast's competitor (let's call it "Blockbuster") puts up a billboard on a highway reading—"West Coast Video: 2 miles ahead at Exit 7"—where West Coast is really located at Exit 8 but Blockbuster is located at Exit 7. Customers looking for West Coast's store will pull off at Exit 7 and drive around looking for it. Unable to locate West Coast, but seeing the Blockbuster store right by the highway entrance, they may simply rent there. Even consumers who prefer West Coast may find it not worth the trouble to continue searching for West Coast since there is a Blockbuster right there. Customers are not confused in the narrow sense: they are fully aware that they are purchasing from Blockbuster and they have no reason to believe that Blockbuster is related to, or in any way sponsored by, West Coast. Nevertheless, the fact that there is only initial consumer confusion does not alter the fact that Blockbuster would be misappropriating West Coast's acquired goodwill. *Id.* at 1064.

For the reasons outlined in *Brooksfield,* the trend in the federal case law is to not permit the use of a competitor's trademark as a metatag. *See id.*; *see also, North American Medical Corp. v. Axiom Worldwide, Inc.,* 522 F.3d 1211 (11th Cir. 2008). Further, because of the unique issues that metatags present, the *Brooksfield* court noted that the traditional eight-factor test of assessing consumer confusion, commonly known as the *Sleekcraft* factors, "is not well-suited for analyzing the metatags issue." *Id.* at 1062 (fn. 24). Rather, *Brooksfield* and subsequent cases have focused on three factors in the context of the Internet: the similarity of the marks, the relatedness of the goods, and the use of the Internet as a marketing channel. *See id.*; *see also, Soilworks, LLC v. Midwest Indus. Supply, Inc.,* 575 F. Supp. 1118, 1130-31 (D. Ariz. 2008). However, even these factors seem ill-suited to analyzing the use of a competitor's specific trademark in a metatag, as they are more geared to analyzing similar, but not identical, trademarks. Indeed, in the *Soilworks* case the Court's analysis of these factors was little more than an acknowledgement that the companies were competitors who both advertised on the internet. *See id.*

At bottom, the problem that arises in using a competitor's trademark in a metatag is that it has the effect of connecting web customers familiar with the competitor's mark to another merchant's website. *See id.* This can result in a would-be buyer of a product from Company ABC landing on the website of Company XYZ and perhaps never bothering to leave if XYZ has a product that meets the buyer's needs. This initial interest confusion, alone, has provided the basis for enjoining the use of a competitor's trademark under the Lanham Act. *See id.*

1 In 1999, when the *Brooksfield* decision was rendered, Google was barely even a player in the internet-search field, as it was just founded in September 1998.

2 At the time of this 1999 decision, Blockbuster and other movie-rental companies were still viable business.

Annual EJCBA Golf Tournament - 2014

Please save the date for the 2014 EJCBA Golf Tournament which will be held Friday, March 28th in Gainesville, at the Mark Bostick Golf Course at the University of Florida.

Registration and lunch for the 2-person scramble will begin at 11:30 a.m., with shotgun start at 1:00 p.m. The cost will be $100 per golfer. All proceeds will benefit the 8th Circuit's Guardian ad Litem Program through the Guardian Foundation, Inc. Cost of the tournament includes 18 holes, riding cart, lunch, awards and/or prizes and a post-round reception.

FORUM 8

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

February 2014 Calendar

5 Deadline for submission to March Forum 8
5 EJCBA Board of Directors Meeting – 5:30 p.m., Room 350, Levin College of Law
12 Probate Section Meeting, 4:30 p.m., 3rd Floor Conference Room, Alachua County Criminal Justice Center
14 V*alentine's Day – show the love!*
17 President's Day Holiday – Federal Courthouse closed
18 Family Law Section Meeting, 4:00 p.m., Chief Judge's Conference Room, Alachua County Family & Civil Justice Center
21 EJCBA Luncheon, Professor Mike Foley, UF Journalism, The Wooly (20 North Main St.), 11:45 a.m.

March 2014 Calendar

5 Deadline for submission to April Forum 8
5 EJCBA Board of Directors Meeting – 5:30 p.m., Room 350, Levin College of Law
12 Probate Section Meeting, 4:30 p.m., 3rd Floor Conference Room, Alachua County Criminal Justice Center
14 EJCBA Luncheon, Jon L. Mills, Dean Emeritus of the UF Levin College of Law, on Privacy issues [including issues implicated by the NSA and Edward Snowdon matter]
18 Family Law Section Meeting, 4:00 p.m., Chief Judge's Conference Room, Alachua County Family & Civil Justice Center
28 EJCBA Annual Charity Golf Tournament

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.