

FORUM 8

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Eighth Judicial Circuit Bar Association, Inc.

January 2008

President's Letter



by John Whitaker

Happy New Year! Hopefully this letter finds you and your family in good health, good spirits and refreshed for the New Year after the long holiday season. By the time you read this, our annual Holiday Project will have already occurred.

I would like to thank you, the membership, for your continued support of this wonderful project that provides gifts to so many underprivileged children in our community. Please look for an article written by the committee chairperson of the Holiday Project, President-Elect Margaret Stack, in next month's newsletter. Margaret was instrumental in starting this project and has been the chairperson since its inception. Thank you, Margaret.

This next year should be a great one. We have gotten off to a good start with our fall luncheon schedule and the Jimmy Adkins Cedar Key Dinner held on November 1st at the Sea Breeze in Cedar Key. You can expect that tradition to continue in 2008. The Bar Association has again set up the Professionalism Seminar on March 28, 2008 offering CLE credits here in Gainesville at the UF Law School for a very reasonable price. We will also have several entertaining speakers for the upcoming bar luncheons. Law Week is this spring and the board is looking at several ways to get involved in the community and schools. The theme of this year's law week is: **The Rule of Law: Foundations for Communities of Opportunity and Equity**. This year is also a big election year

with obvious national implications starting with the presidential primary on January 29, 2008. The fall will bring at least two local judicial races, one for the Circuit Court and one for Alachua County Court. I am confident we will have a candidate forum, most likely as part of the fall luncheon calendar. We are also looking into having a social event this spring apart from the Bar Luncheons. Best wishes for a healthy and prosperous New Year! Remember, your comments and ideas are always welcome. Hope to see you or hear from you soon.



Judge Doughtie (ret.) autographs "All Rise" for the approximately 250 people who attended the champagne & wine book signing event on November 13 at The Resolution Center.

Judge Doughtie is to be commended for donating all of the proceeds of the book sales – approximately \$3,500 – to the Guardian Ad Litem program.

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Contribute to Your Newsletter!

From The Editor

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

About This Newsletter

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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.

Three Rivers Legal Services Honors Volunteer Attorneys

by Marcia Green

At the December bar luncheon, Three Rivers Legal Services recognized several outstanding local attorneys who have volunteered their legal expertise over the past years and continue to make significant contributions on behalf of low income clients. The Volunteer Attorney Program is grateful to all of the attorneys who donate either their time or make generous donations to Three Rivers.

Michelle Farkas, an associate at the law firm of Cynthia S. Swanson, received a unique introduction to the world of pro bono referrals when she accepted representation of a disabled woman seeking dissolution of marriage. Farkas, a 2006 graduate of the University of Florida Levin College of Law, spent more than 30 hours working with this client to help her overcome a host of issues, including the need for continued insurance and health care as well as those stemming from the client's declining mental health. We greatly appreciate this young attorney's willingness to spend the time and effort to help our client in her complicated family problems. Farkas is a member of the Family Law and Real Property, Probate and Trust Law sections, as well as the Young Lawyers Division of the Florida Bar.

Sam Boone has regularly provided estate planning and probate assistance to clients referred from Three Rivers. His work is extremely important to keep low income residents in their homes, to establish homestead exemption and to enable elderly clients to be eligible for low cost or free assistance to rehabilitate their homes. Boone, a member of the Florida Bar since 1979, is a member of the Elder Law, Real Property, Probate and Trust Law, and Tax Law sections.

Howard Rosenblatt has assisted clients referred from Three Rivers in numerous ways, including wills, insurance problems and he worked with a small, community based non-profit organization seeking incorporation. A member of the Florida Bar since 1982, Rosenblatt is a member of the Real Property, Probate and Trust Law section of the Florida Bar and serves on the Member Benefits and Prepaid Legal Services Committees.

John McPherson has also assisted community based neighborhood organizations with advice and assistance in their efforts to organize and file the paperwork to become recognized non-profit corporations. In addition, he has provided other help

to clients with homeownership and housing problems. McPherson, who joined the Florida Bar in 1981, is a member of the City, County and Local Government Law section of the Florida Bar.

Throughout the years, we have recognized many local attorneys who have made contributions in a variety of ways. The representation and assistance provided by the volunteer attorneys greatly expands the legal services available to North Central Florida's impoverished population. Those attorneys recognized in past newsletters and at Bar luncheons continue to contribute their pro bono services. We thank you all!

Three Rivers Legal Services looks forward to celebrating our 30th Anniversary in 2008, and with that the opportunity to recognize all of the attorneys who show their support of the needs of the poor as well as our organization.

Professionalism Seminar:

Inexpensive (CHEAP) CLE Credits

by Ray Brady

MARK YOUR CALENDARS NOW FOR THE ANNUAL PROFESSIONALISM SEMINAR. THIS YEAR THE SEMINAR WILL BE HELD ON FRIDAY, MARCH 28, 2008, FROM 8:30 A.M. UNTIL NOON, AT THE UF LEVIN COLLEGE OF LAW.

The keynote speaker is Edward M. Waller, Jr., Esq., speaking on the topic of "The Legacy of Atticus Finch: Higher Standards for New and Experienced Lawyers Alike." Mr. Waller is a partner in Fowler White Boggs Banker, P.A., practicing in their Tampa Litigation Department. Mr. Waller frequently publishes and speaks on the topic of professionalism and ethics in the practice of law, and he is actively involved with the committees of various bar associations dedicated to this subject.

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 378-6118.

How Well Do You Know Your Disability Insurance Policy?

by Claudeth Henry, R.N., JD*

Have you considered what would happen if you became disabled and could no longer work? Will your disability policy provide the benefits you are expecting? Like most lawyers, you probably spend so much time taking care of clients and staff that you neglect taking care of yourself. You plan your budget, forecast your profit margins, and watch overhead, all of which are part of sound financial planning. One often overlooked area is the investment **you** made in your long term disability (LTD) policy.

Recently I had the daunting task of doing what I encourage all my clients to do - read my long term disability policy! My first task was finding the darn thing. Unable to locate it, I ended up ordering a copy from our insurance broker.

One by one, I painstakingly read each word in the disability policy, paying special attention to:

Definition of Disability

- Can I get benefits if I'm unable to perform the major duties of my own occupation, but could still perform the duties of another line of work?
- Must I be unable to perform "each and every duty" of my occupation?

Being an ERISA lawyer, I saw legal issues on every page. The word "every" is ambiguous. Under one interpretation, if an employee is unable to perform just one of the duties, the employee could not perform "every duty" of his occupation and is disabled. The other interpretation of "every duty" is that the employee would be disabled only if he or she could not perform **each** of the duties. e. g., Gunderson v. W.R. Grace & Co. Long Term Disability Income Plan, 874 F.2d 496, 498 (8th Cir. 1989) ("any and every" duty means any one of the duties associated with the job); Brassord v. Continental Cas. Co., 630 F. Supp. 951, 955 (D. Conn. 1986) ("each and every" duty means all of the duties associated with the job).

Benefit Amount

- How will my benefits be calculated?
- Is the benefit from this policy a percentage of my regular income or a flat amount?

Elimination Period

- How long is the elimination period in this policy?
- Considering all my resources from spouse income, emergency savings, unused sick leave, and vacation - how long can I afford to wait before

my benefits begin? Less than one month, three to six months, or longer than six months.

Length of Benefit Period

- How long does this policy pay benefits?

Benefits for Partial Disability

- Does this policy provide benefits for partial disability?

Cost-of-Living Adjustments

- Does the policy provide this benefit?

Mental Health/Substance Abuse

- How long does this policy pay benefits for disabilities resulting from mental health problems or substance abuse?

By conducting the policy review, I was able to strengthen my own financial planning in the event of an unfortunate long-term disability. As our situation and station in life change, often our needs change as well. Without conducting a periodic review of your own disability policy, you will not know if your policy will provide the benefits you are expecting in the event of a disability.

An important consideration when conducting your policy review is, how often is your particular disability provider in litigation? The answer to that question won't be found in your disability policy. But taking a few minutes to conduct a simple insurance company name search with your electronic legal research provider can easily determine the number of reported cases in both state and federal courts. The frequency of litigation should be taken into account when reviewing your coverage or purchasing a disability policy.

If you provide group disability benefits to your employees, remember you, as an employer, may have fiduciary duties under ERISA. At least one court has said that there may be liability for the plan administrator (often the employer) that selects a company known to be a poor choice for providing disability benefits. Radford Trust v. First Unum Life Insurance Co. of America, 321 F. Supp 2d 266 (D. Mass 2004). A plan administrator is charged with fiduciary duties, one of the highest duties recognized under the law. 29 USC sections 1002(21)(A) and 1104 (a). While the 11th Circuit has not yet found improper selection

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Save the Date!

The Gainesville Area Federal Bar Association (FBA) is Sponsoring Two Continuing Legal Education Seminars in the Spring

Internet Crimes Against Children by Assistant United States Attorney Frank Williams on February 8, 2008

Assistant United States Attorney Frank Williams will present *Internet Crimes Against Children – How to Protect Your Children and Others* at the Eighth Judicial Circuit Bar Association (EJCBA) Luncheon on February 8, 2008. Immediately following his brief luncheon presentation, Frank will present additional information on this topic for an anticipated two hours of free continuing legal education credit. The presentation is co-sponsored by the FBA and EJCBA and will take place at Steve's Café American.

A View from the Bench on March 6, 2008

Would you like to know when it is appropriate to contact a federal judge's chambers staff or law clerk? Do you ponder why some motions are ruled on by the United States Magistrate Judge, while others are ruled on by the United States District Judge? Do you want to know how a panel of circuit judges is selected to consider your appeal? Do you want clarification on how to correctly electronically file motions and exhibits?

Find out the answer to these questions and more on March 6, 2008, when the FBA will host "A View from the Bench" from 1 to 5 p.m. This seminar is an invaluable resource for any local attorney practicing in federal court, either regularly or on occasion. The seminar will include information on federal practice, including appellate practice, and the do's and don'ts in federal district court from the perspective of the clerk. In addition, United States District and Magistrate Judges from the Ocala and Gainesville Divisions will serve on a panel to discuss such topics as chambers procedures and protocol, scheduling, pretrial and trial practice and procedure, and professionalism. The FBA will host a reception immediately following the seminar.

For additional information regarding either seminar, please contact Elizabeth Waratuke at waratukeea@cityofgainesville.org or Stephanie Marchman at marchmansm@cityofgainesville.org or 334-5011.

Clerk's Corner



by Buddy Irby, Clerk of the Court

Happy New Year, everyone. I hope you all had a safe and joyful holiday season. Now that most of us are back to business as usual, I'd like to remind you of two statutory provisions taking effect this month that will have an impact on us at

the Clerk's Office, and on many of you and your clients as well.

First, as you probably are aware, the Florida Legislature, meeting in special session last fall, reinstated as of January 1, 2008, the requirement for Florida drivers to carry personal injury protection insurance. The Legislature previously had eliminated the requirement beginning October 1, 2007. Therefore, from October 1 through December 31, PIP was not required.

For the Clerk's Office, reinstatement of the PIP requirement means that our Traffic Bureau will again be seeing citations for failure to display proof of insurance, pursuant to Section 316.646(3), Florida Statutes. Drivers who had PIP in effect at the time of the citation may be able to qualify for dismissal of the citation if they submit proof of insurance to the Traffic Bureau within 30 days of the citation. Drivers who did not have PIP in effect at the time of the citation, but obtain it after receiving the citation, may be able to qualify for a reduced payment if they submit proof of insurance to the Traffic Bureau within 30 days. Drivers who are not eligible for either dismissal or a reduced payment must pay the full amount of the citation, as well as providing proof of insurance. Those of you who represent drivers cited for failure to display proof of insurance may wish to discuss these options with your clients.

The second provision I would like to mention is Section 119.0714, Florida Statutes. Subsection (2)(a) of the statute provides that social security numbers, bank account numbers, and debit, credit or charge account numbers included in a court file are subject to public inspection and copying until January 1, 2011. Until then, an individual, the individual's attorney or the individual's guardian may request redaction of these numbers. Forms for making these requests may be found on our website at www.alachuaclerk.org. An earlier provision made such information confidential as of January 1, 2008. Also, please note that subsection (3)(a) of the statute provides that persons preparing or filing documents for recording in the Official Records may not include a social security number, or a bank account, debit, credit or charge account number, unless otherwise required by law.

Probate Section Report

by Larry E. Ciesla

The probate section continues to meet on the second Wednesday of each month throughout the year. Many thanks to Steve Graves and Judy Paul for steering the November meeting in my absence. Following are various matters discussed during the last three meetings.

Caridad (Cary) Gonzalez has returned to open an office in Gainesville (as well as a satellite office in Marion County) following a hiatus spent caring for elderly family members in South Florida. The experience has motivated Cary to make elder law a substantial part of her new practice. Cary has several years' prior experience in Gainesville working with the state, the Clayton firm, and the Schackow firm. We welcome Cary and wish her the best of luck in the future.

The members of the probate section had an opportunity to meet Ryan Hulslander at the September meeting. Ryan is a recent law school graduate (who is Judge Hulslander's son) working as a courthouse staff attorney handling Alachua County guardianships as well as probates and guardianships in Baker, Bradford and Union Counties. Early reports say Ryan has hit the ground running and has quickly become a valued asset to the judges with whom he is working. Welcome Ryan from the probate section. The section also wishes to recognize and welcome Michael Heider, a new lawyer working with Sam Boone.

Several real estate issues were discussed at the September meeting. According to a recent directive from Attorneys' Insurance Fund, Inc., effective October 1, 2007, House Bill 111 changed some definitions regarding title services such that lawyers should no longer charge a separate fee for "title examination" (line 1103) on the HUD-1 Settlement Statement. Title examination is now included as a part of the main fee for title insurance. Likewise for line 1105 – Document Preparation and line 1106 – Notary Fees.

Marvin Bingham advised that both First American and Attorneys' Title will not insure a title involving a LadyBird Deed where there is an IRS lien against a remainder beneficiary, even though the grantor is still alive and the remainder beneficiary has no vested interest. Marvin also advised that there is an exemption in the sales tax law for leases on agricultural lands.

The October meeting began with a discussion

of the current handling of the DR-312 Nontaxable Affidavit for estates. This form has technically been eliminated as of January 1, 2005, when Florida discontinued the Florida estate tax (a/k/a sponge tax). Sam Boone and Richard White indicated they both intentionally still file the DR-312 form because it remains useful for title purposes (by establishing that the estate is not subject to the federal estate tax). Attorney's Title, for example, currently requires either a federal estate tax closing letter or an affidavit that the estate was not taxable.

For those members with spouses working in their offices, Sam Boone pointed out that Florida law prohibits a notary from notarizing the signature of a spouse. Therefore, for will signings, the lawyer and spouse should both be witnesses and someone else should be the notary.

A few section members have joined the so-called "LINDAS List" with the Clerk of Court, which allows internet access to the images of documents in cases in which the lawyer is counsel of record. It is easy to do (one-time set-up fee; obtain password) and my experience is that it works well; no glitches.

The issue of the appropriate length for the "cooling off" period before signing a prenuptial agreement was discussed in the November meeting. The consensus was that at least 30 days is preferable. Anything less runs the danger of being too close to the short time-frames (1 week or less) which the appellate courts have decided is too little time and is grounds to invalidate the agreement. Another issue discussed concerns whether to put homestead real estate into a testamentary trust where the testator and/or testatrix have one or more children under the age of 18. Although a court would certainly treat the homestead as not being in the trust in the event of death of the parents prior to the youngest child reaching 18, the consensus was that this should not prevent the lawyer from putting the homestead in the trust, as it is more probable that the children will have all reached age 18 before the death of the parents, in which case the estate plan will work as intended. Furthermore, in the event of the former, nothing has been lost, as the outcome will be the same regardless of whether the homestead has or has not been put in the trust.

The probate section will meet again on January 9. All interested practitioners are invited to attend.

January EJCBA Luncheon

by Frederick D. Smith

Chief Judge Frederick D. Smith will be our luncheon speaker on Friday, January 11, 2007. Judge Smith will speak on the state of the circuit and the judiciary.

Judge Smith was elected Circuit Judge in January, 1991 following his appointment by Governor Graham and subsequent election to the position of Alachua County Court Judge in 1986. He is a long-time Gainesville resident, having graduated from P. K. Yonge Laboratory School, the University of Florida, and the Holland Law Center at the University of Florida.

Prior to his appointment, Judge Smith was an attorney in private practice in Gainesville from 1974 until 1986, specializing in business transactions and civil litigation.

Since 1991, Judge Smith has been assigned to the civil, felony, family and probate divisions, and he was Administrative Judge of the family division for four years. Presently, he is the Chief Judge of the Eighth Judicial Circuit.

Judge Smith has also served as an Adjunct Professor of Law at UF's College of Law and as a member of the Judicial Evaluation Committee of the Florida Bar. Currently, Judge Smith is a member of the Domestic Violence Sub-Committee of the Committee on Children and Families in the Courts and the Local Rules Advisory Committee of The Florida Supreme Court.

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Registered Paralegal Program Will Begin March 1

The Florida Supreme Court has unanimously approved creation of the Florida Registered Paralegal Program, which provides for voluntary registration of paralegals who meet minimum educational, certification, or work experience criteria, and who agree to abide by an established code of ethics. The goal is to better serve the public by establishing high professional standards for a profession that has been, until now, largely self-regulated.

The voluntary program, which is set forth in the newly created Chapter 20 and begins March 1, 2008, will establish a two-tier system for regulating paralegals. The first tier encompasses paralegals as currently defined by Bar Rule 10-2.1, which holds that a paralegal is someone qualified by education, training, or work experience who, under the supervision of a lawyer, performs delegated, substantive work for which the lawyer is responsible. Tier two paralegals would have to meet experience, education, and continuing education criteria and then could hold themselves out as "Florida Registered Paralegals." The program also creates a disciplinary system and a code of ethics for paralegals.

Primary responsibility for monitoring the conduct and activities of all paralegals will still rest with the lawyers who employ them. Additionally, the plan allows for lawyers to retain control of who is considered a paralegal in their law firms.

Excerpted from "Court OKs registration program for paralegals," by Mark D. Killian, The Florida Bar News, Vol. 34, No. 23, December 1, 2007.

Advertisements

Gainesville Executive Center, 309 NE 1st Street, has space and virtual offices available. Please contact Patricia at 352-374-7755.

Downtown office suite for rent – walk to courthouse – 1,071 sq. ft., 2 offices, secretarial & reception areas and ½ bath. Call Shelley Salzman at 352-373-6791.

Worker's Compensation News: Gainesville District Office Closes Successful Year

by Deputy Chief Judge David Langham

Judge John Thurman has long served Florida as an assistant public defender, a Circuit Judge, and a Judge of Compensation Claims. In 2006, he transferred from the Orlando district to the Gainesville district after Judge Ohlman was appointed to the Circuit Bench. Under his leadership, this district office has made significant progress and is progressing in the timely adjudication of disputed workers' compensation claims.

The Office of the Judges of Compensation Claims (OJCC) is part of the executive branch, but is often erroneously referred to as a "court." The OJCC operates eighteen offices in which thirty-two Judges manage the entire volume of workers' compensation litigation in Florida. They are assisted in this responsibility by mediators, clerks, and secretaries. This effort is further supported by the Division of Administrative Hearing, or "DOAH," in Tallahassee. The DOAH became involved in the OJCC when the Department of Labor was abolished in 2001. At that time, the OJCC was transferred to the DOAH, which now provides extensive expertise and support to the OJCC operations in many ways. Two of the most important aspects of DOAH support have been the DOAH expertise in administrative and facilities management and the Management Information Services.

It has required significant effort to integrate the OJCC operations into the DOAH organization. In the midst of that transition, the OJCC began a long overdue transition to exploiting developing computer technology and the internet. The DOAH had long been a leader in State of Florida information management. Soon after the OJCC transfer, the DOAH leadership recognized the immense potential that the internet and better technology held for improved public service in the workers' compensation litigation system. Leadership, coupled with vision, dedication and sound fiscal management have resulted in the OJCC making a quantum leap in the last six years, to the undeniable benefit of the litigants, the attorneys that represent them, and the State.

Florida workers' compensation seems to be always changing. The Florida Legislature has amended the Florida workers' compensation law repeatedly in the last twenty years. Significant alterations were made in 1989, 1990, 1991, 1994, 2001, and 2003. These statutory amendments have made the practice of

workers' compensation law challenging to attorneys, and have likely been difficult for injured workers and employers to follow at times.

The administrative processes have probably been as difficult for attorneys and their clients. In 1973 the Florida Supreme Court adopted workers' compensation rules of procedure, similar to the other procedural rules they have adopted and maintain for practice in Florida's courts. In 1993 the Legislature directed the OJCC to undertake this responsibility and to publish procedural rules. Despite this mandate, the OJCC elected instead to publish a supplemental set of uniform "procedures" designed to explain or augment the Supreme Court rules. These were called the Uniform Practices and Procedures, and were published but never formally adopted pursuant to Chapter 120. In 2003 the DOAH published procedural rules pursuant to the Legislature's 1993 mandate. This decision was challenged in the courts, with the Florida Supreme Court concluding that the DOAH rules were appropriate, and retracting the previously published Supreme Court procedural rules.

Certainly, attorneys have struggled with these changes in substantive and procedural laws and processes. In the midst of it all, they have been further called upon to understand and embrace the benefits that technology and modern electronic information management techniques have brought to the system. We find that despite these many challenges, the vast majority of workers' compensation attorneys are persevering.

The advent of computer hardware and software improvements allows the OJCC to more precisely track the changing trends in litigation volume and processing. These information management improvements have made it possible for the OJCC to track both the volume of petitions filed and new cases filed. We are also able to monitor the lifespan of petitions, from filing through their closure by voluntary dismissal, judicial dismissal, or adjudication. In short, the OJCC can now determine where the work volume is, where performance issues exist, and track trends in both work volume and work performance.

An integral part of the OJCC is the Gainesville District office. This OJCC team is lead by Judge John Thurman, who transferred from Orlando last year following Judge Ohlman's appointment to the Circuit

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Worker's Comp

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Court. Judge Thurman was initially appointed by Governor Chiles and has been reappointed by Governor Bush twice. Judge Thurman's team includes state mediator Andrew Goshen, Deputy Clerk Erical Shaw, Executive Secretary Carolyn Morgan, Administrative Secretary Karen Fitzwater, and Secretary Specialist Amanda Hanner. This operation provides effective and efficient service to the residents of six counties (Marion, Alachua, Columbia, Levy, Gilchrist, and Dixie). Many proceedings occur at the OJCC facility in Gainesville; however some mediations and hearings are held in Ocala. The Gainesville District has seen a dramatic decrease in filings since 2003. In 2003, 5,566 petitions were filed in Gainesville District, compared to 2,869 (-48%) in 2007. Statewide, petition filings decreased 45% during the same period. During the same period, "new case" filings have decreased from 1,760 to 1,179 (-33%). New case filings decreased 36% statewide during the same period. Thus, the overall petition filing rate in Gainesville is greater than the state average, while the "new case" filing rate has decreased less dramatically in Gainesville District.

In 2007, Judge Ohlman entered a significant volume of trial orders prior to his appointment to the Circuit Court. Judge Thurman entered 46 trial orders in 2007, which is slightly above than the average of 43 for all Judges. Judge Thurman has worked diligently to bring cases to trial in a timely manner. These efforts are expected to produce significant improvements in Gainesville district in coming years. Despite the trial volume in Gainesville, Judge Thurman averaged only 26 days between trial and entry of the final order in 2007. This is within the time prescribed by law, and is a significant achievement. In 2007, Judge Thurman closed 17,805 petitions, which was the greatest volume of any OJCC Judge in Florida.

The operations of Gainesville District are further detailed in the 2007 OJCC Annual Report, available on the OJCC website under the "reports" tab, www.fljcc.org. The OJCC continues to look to the horizon and plan for the future of Florida workers' compensation litigation. However, we also remain focused also on the here and now. We are working hard to provide Florida with timely performance and accurate statistical analysis of the litigation process. As we bring our collective efforts to focus on workload management, we recognize the contributions of diligent and effective Judges like Judge Thurman, and the team he manages. Florida is fortunate to have Judge Thurman and his effective and efficient Gainesville District team.

Passenger's Bill of Rights

by Stephen N. Bernstein



Occasionally the law and common sense aren't at odds. That was the case with a recent unanimous Supreme Court ruling about whether a passenger in a car stopped by police is "seized" within the meaning of the Fourth Amendment and therefore entitled to challenge the constitutionality of the stop. The Supreme Court, agreeing with the conclusion of all nine Federal Appeals Courts and nearly every state court, said yes. It is undisputed that when police stop a vehicle, the driver is entitled to the protection of the Fourth Amendment against unreasonable search and seizure. Thus, if the stop isn't justified by probable cause or reasonable suspicion, the driver can seek to bar any resulting evidence from being used in court. Until this case, the high court had not ruled explicitly on what right the passenger had in the same situation. The legal question is whether a passenger in a car stopped by police would reasonably believe that he or she was free to leave. Sensibly, the Justices, in overturning the California Supreme Court, said no. A traffic stop "necessarily curtails the travel a passenger has chosen just as much as the driver." Justice David H. Souter wrote, "a passenger's attempt to leave the scene would be so obviously likely to prompt an objection from an officer than no passenger would feel free to leave in the first place."

Sounds like a lot of seizure to me, and it did to the court as well. Passengers everywhere – from Supreme Court Justices to the parole violator and accused methamphetamine manufacturer whose arrest produced this ruling – can now rest easy.

Calling All Arbitrators

Chief Judge Frederick Smith has designated Robin Davis to update and maintain a list of qualified persons to serve as arbitrators in our circuit pursuant to Rule 1.810 Rules of Civil Procedure. If you meet the requirements of the Florida Rules for Court-Appointed Arbitrators and would like to be included on the circuit list of qualified arbitrators, please submit your name and qualifications to: Robin Davis, ADR Director, Suite 303, 201 E. University Ave., Gainesville, FL 32601.

Criminal Law

by William Cervone



I have a new hero. Shockingly, he is a judge, and even more shockingly an appellate judge at that. His name is Gary M. Farmer, and he sits on the 4th DCA.

Before I get to Judge Farmer, let me digress long enough to provide some background. You may recall that in 2003 a horse named Funny Cide won the Kentucky Derby and the Preakness, but not the Belmont, and thus not the elusive Triple Crown of horseracing and the riches that would have brought. Funny Cide's people decided that his loss had nothing to do with the race itself but rather was caused by the Miami Herald having run what turned out to be an incorrect story suggesting that Funny Cide's jockey cheated in the Derby, the story causing the jockey to then ride the horse too hard in the ensuing Preakness in an effort to prove how terrific the horse was as well as to vindicate himself, thereby exhausting Funny Cide so that he couldn't win the Belmont when it took place. The legal theory, apparently, is called "injurious falsehood;" I prefer to think of it as a legal version of Disney's Fantasyland. One of our civil brethren will have to explain it, unless it relates to a criminal defendant's usual testimony, which I usually anticipate will be a falsehood so convoluted as to be injurious to my mental health if I try to follow it.

But I digress. Suffice it to say that an actual law suit followed in Broward County over all of this, and that an actual appeal followed that when the Circuit Court tossed the Complaint on Summary Judgment. After which an actual opinion (affirming the Summary judgment, by the way) was issued with the usual weighty - and ponderously boring - language and citations of authority and precedent by the 4th DCA.

Which brings me back to Judge Farmer. Apparently sensing the lunacy of it all, he wrote a separate opinion agreeing that the suit was a bunch of hooley. It is his comments in dicta, however, that I most applaud. Here are some samplings, in his words, not mine:

Judicial writing is, he says, "dreary and tedious," "filled with long, vague, and fuzzy words." Opinions are "wordy, unclear, pompous and tedious," not to mention "too long," containing a "painstaking account of background and trial which turns out to be unnecessary to grasp the essential issues." "Legal issues are analyzed through mind-numbing, many-factored 'tests'. Each factor is unloaded nit by nit." "Arcane legal terminology

is woven in and out, even though simpler, plainer words could be used. Simplicity, tone, style, voice, personality, levity - all are shunned." Least I be accused of picking on judges, let me say loud and clear that all of this and more applies to all too many arguments, memos, presentations, and tantrums from the Bar at hearings, trials, in briefs, and in general.

Anyhow, Judge Farmer goes on to confess his own contributions to this "legal ennui" and to offer "a good act of contrition" and to "do some penance," after which he suggests that there are alternatives in style that might lead to "greater openness to all readers." He even suggests that there is a time and a place for levity and a light fictional tone in explaining the defects in some litigants's positions.

Alas, would that it could be so. As Judge Farmer found, his fellow panelists on the 4th DCA would have none of it. His opinion, in two parts titled "The Backstretch" and "The Finish Line" respectively, stands alone in the seldom read no man's land following the *per curiam* opinion of his colleagues. The entire thing runs perhaps four pages and is worth your time to read. You'll find it cited as Funny Cide Ventures, LLC v The Miami Herald Publishing Company, 955 So2d 1241 (4DCA '07). Perhaps if you do read it you'll also decide that it's time we all did some penance and started talking plain talk. Happy New Year to all, and may this be among your resolutions.

Disability Insurance

Continued from page 4

of an insurance company to be a breach of fiduciary duty, the Radford case underscores the importance of careful selection of a disability plan.

As the new year begins and you finalize your financial plans, don't neglect your LTD policy. Hopefully this article will provide you food for thought as you review your policy or select long term disability insurance for you and your employees. Pull out that policy and dust it off. If you can't find it, call your broker. Read it!

*Claudeth Henry is a Registered Nurse and lawyer at Sims, Stakenborg & Henry, P.A. specializing in long-term disability insurance claims. As a *Pro Bono* service to the local community, she also conducts free disability policy reviews for local attorneys and other professionals. For a free, confidential policy review, you may contact her at Henrycj@ocalaw.com.

Alternative Dispute Resolution

Nonbinding Arbitration: Sec. 44.103 and Rules 1.820 and 1.700



by *Chester B. Chance and Charles B. Carter*

A couple of newsletters ago (before the fruitcake and eggnog mediation) this column discussed the recent changes to Sec. 44.103 Fla. Stats. concerning court ordered nonbinding arbitration. The article discussed the changes

in the statute which went into effect on October 1, 2007.

The primary change in the statute is the consequence of rejecting a nonbinding arbitration award and proceeding to trial and obtaining a verdict less favorable than the rejected award (See Sec. 44.103(6)).

However, both the statute and the Rules of Civil Procedure address many procedural matters associated with nonbinding arbitration.

For example the statute sets out the compensation for arbitrators (at a lower hourly rate than you may have imagined). The rate is \$1500 per diem (unless otherwise agreed to by the parties).

The Rule and the Statute address several procedural matters including:

Who gets to pick the arbitrators and who picks how many? (The court unless otherwise agreed by the parties). Rule 1.810(a).

When does the nonbinding arbitration hearing take place? (Unless otherwise ordered by the court, the arbitration hearing shall be held within 60 days of the order of referral). Rule 1.700(a)1 (This is the same time frame for a court ordered mediation).

How is the arbitration hearing conducted? (Informally, primarily through statements and argument of counsel). Sec. 44.103(4) and Rule 1.820(c).

Can subpoenas be issued for attendance of witnesses or can parties compel the production of documents? (Yes, for good cause shown absent agreement by the parties). Section 44.103(4).

When must the hearing be completed? (Within 30 days of the first arbitration hearing unless extended by order of the court on motion of the arbitrator or a party, but, no extension shall exceed 60 days from the date of the first hearing.) Rule 1.820(g)1.

If a panel presides over the hearing, must a

decision be unanimous? (No, a decision shall be final upon a majority vote.) Rule 1.820(g)2.

What goes into the wording of the decision? (The decision may set forth the issues in controversy and the arbitrators' conclusions and findings of fact and law). Rule 1.820(g)3. Note: It may be a good idea to give the arbitrator the applicable jury verdict form intended to be used.

Is the decision read by the judge? (No, at least not until 20 days have passed and no party has requested a trial de novo. The decision is sealed in the file. If a trial de novo is requested, it is read after judgment). Sec. 44.103(5).

How long do I have to reject a decision and ask for a trial? (20 days from service on the parties of the decision). Sec. 44.103(5); Rule 1.820(h).

This article has barely touched upon the time frames and procedures associated with nonbinding arbitration in the referenced statute and Rules. The cited statute and Rules are the primary references for many of the procedural issues associated with nonbinding arbitration. Use will breed familiarity. Twenty years ago the Bar was equally unfamiliar with similar Rules and statutes addressing court ordered mediation which is now so commonplace and comfortable.

Future articles in this column will address numerous questions raised in the context of nonbinding arbitration hearing and the resulting decision of the arbitrator(s).



January 2008 Calendar

- 1 New Year's Day – County & Federal Courthouses closed
- 4 Deadline for submissions to February newsletter
- 7 EJCBA Board of Directors Meeting, Ayers Medical Plaza, 720 SW 2d Ave., North Building, Third Floor conference room, 5:30 p.m.
- 9 Probate Section Meeting, 4:30 p.m., 4th Floor, Family & Civil Courthouse
- 11 EJCBA luncheon – Steve's Courtyard Café, 11:45 a.m., Chief Judge Smith, speaker
- 21 Martin Luther King, Jr.'s Birthday – County & Federal Courthouses closed
- 30 Family Law Section meeting, 4:00 p.m in the Chief Judge's Conference Room (former Grand Jury Room) of the Family and Civil Courthouse

February 2008 Calendar

- 4 Deadline for submissions to March newsletter
- 4 EJCBA Board of Directors Meeting, Ayers Medical Plaza, 720 SW 2d Ave., North Building, Third Floor conference room, 5:30 p.m.
- 8 EJCBA luncheon – Steve's Courtyard Café, 11:45 a.m. – US Attn. Frank Williams, speaker
- 8 CLE – Internet Crimes Against Children – Steve's Courtyard Café – 1 p.m.
- 13 Probate Section Meeting, 4:30 p.m., 4th Floor, Family & Civil Courthouse
- 18 President's Day – Federal Courthouse closed
- 27 Family Law Section meeting, 4:00 p.m in the Chief Judge's Conference Room (former Grand Jury Room) of the Family and Civil Courthouse

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.



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