

FORUM 8

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Margaret M. Stack is the Recipient of the Florida Bar President's Pro Bono Service Award for the Eighth Judicial Circuit

By Marcia Green

Margaret M. Stack received recognition for her pro bono work at the Florida Supreme Court in Tallahassee on January 27. As the winner of the 2011 Florida Bar President's Pro Bono Service Award for the Eighth Judicial Circuit, Margaret was recognized for her pro bono work with Three Rivers Legal Services. She knows that as a lawyer she has a unique expertise to offer and with her history of practicing in the public sector, she understands the needs of those who are trying to get out of the cycle of poverty.

Upon retirement as an Assistant State Attorney in the Eighth Judicial Circuit, Margaret contacted Three Rivers and said she wanted to "get on the list of pro bono attorneys" and began accepting family law referrals shortly after opening her private criminal defense solo practice.

Margaret recognized the need for pro bono representation for low income individuals and handles clients referred through Three Rivers as well as those who come into her office without the resources to hire an attorney. Her availability to assist individuals in need of family law help is particularly valuable, especially her willingness to represent victims of domestic violence. She has attended many of the training events held by Three Rivers to solidify her expertise in handling referrals and has offered her assistance in other areas of law as well, suggesting clinics to help those who need their records cleared to secure housing or employment and other issues where her expertise in criminal law is especially beneficial. In addition to her direct representation of pro bono clients, Margaret provides legal assistance to the Faith Tabernacle of Praise Ministries.



Margaret was the chair of the Eighth Judicial Circuit Bar Association's Holiday Project from 2003 through 2009, which was started to insure that all of the students in one grade at a local Title I elementary school received a gift at the holidays. The project blossomed into a celebration providing all students at the school with a specialized gift bag and celebration.

She served as president of the Eighth Judicial Circuit Bar Association from 2008 to 2009, is a member of the Clara Gehan Association of Women Lawyers, a Master in Inns of Court, Chair of the Florida Bar Unauthorized Practice of Law Committee for the Eighth Judicial Circuit, has served on the grievance committee, and is a member of several other specialized bar associations and committees.

From The Editor

Dear Readers:

As you can see, there is no "President's Letter" this month. EJCBA's President, Elizabeth Collins, took some very short but well-deserved time away from her duties to get married in January. At the time of this writing in mid-January, Elizabeth is undergoing her fourth – and hopefully final – "last minute" fitting and handling the myriad amounts of last minute details that crop up even with the best planned weddings. We at the EJCBA offer you heartfelt congratulations, Elizabeth, and wish you every happiness in your marriage. The President's Letter will return in March.

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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

Defenses to Acceleration and Foreclosure:

Equity Considerations versus Contract Rights

By Siegel, Hughes & Ross

A foreclosure is an equitable action. Therefore, equitable considerations may be considered in addition to specific contractual rights. "As recognized in the leading case of [Kreiss Potassium Phosphate Co. v. Knight](#), 98 Fla. 1004, 124 So. 751, and succinctly stated in [Althouse v. Kenney](#), Fla.App.1966, 182 So.2d 270, 272, 'A court of equity may refuse to foreclose a mortgage when an acceleration of the due date of the debt would be an inequitable or unjust result and the circumstances would render the acceleration unconscionable.'" *Campbell v. Werner*, 232 So.2d 252, 256 (Fla. 3d DCA 1970). In exercising reasonable discretion, courts must balance the contractual right that an acceleration clause confers upon the holder of a mortgage or note with certain equitable principles that seek to prevent inequitable and unconscionable results for the mortgagor.

In Florida, it is well settled that an acceleration clause confers a contractual right upon the holder of the note or mortgage. *Id.* at 255. The holder may elect to enforce such a right upon default. *Id.* Courts are constitutionally obligated to protect these contract rights. *Id.* at 256. In language that has been cited many times, including citation by the Supreme Court of Florida, the *Campbell* court held that:

A contract for acceleration of a mortgage indebtedness should not be abrogated or impaired, or the remedy applicable thereto denied, except upon defensive pleading and proof of facts or circumstances which are regarded in law as sufficient grounds to prompt or support such action by the court.

Id.

Equitable considerations established by decades of case law provide specific circumstances which courts regard as sufficient to bar acceleration and foreclosure. The *Campbell* court laid out the specific situations which courts have traditionally recognized as permitting relief from foreclosure:

1) Waiver/Estoppel: the mortgagee waives the right to accelerate or is estopped from doing so due to misleading conduct;

2) Unfulfilled conditions: the mortgagee is barred from accelerating if it failed to perform a duty upon which the exercise of its right to accelerate was conditioned;

3) Tender of payment: the mortgagor tenders payment after default but before notice of mortgagee's election to accelerate; or,

4) Excusable Neglect: the mortgagor intended and attempted timely payment, but failure to make timely payment was frustrated by a misunderstanding or excusable neglect together with some conduct on part of the mortgagee which contributes to the mortgagor's default.

While *Campbell* sets out different equitable scenarios which courts have traditionally examined in determining whether to deny acceleration and foreclosure there is *dicta* which indicates those factors are not exclusive. In *La Boutique of Beauty Academy, Inc. v. Meloy*, 436 So.2d 396 (Fla. 2d DCA1983), the Second District held that the facts fell within the waiver principle set out in *Campbell's* list of equitable considerations and denied foreclosure on those grounds. See *id.* However, in *dicta* the *La Boutique* court explained that the scenarios set out by *Campbell* "are really nothing more than a nonexclusive list of equitable considerations that should be examined whenever a mortgagor is accused of defaulting on his obligations." *Id.* at 399. The court further stated that "our courts have consistently noted that acceleration will be denied where the default is merely technical or where the overall equities of a particular case warrant such a result." *Id.* at 398. In addition, other courts have considered equitable principles such as the fact that a default has not caused harm to the security interest and that the security interest greatly exceeds the debt

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Brent Siegel, Charles Hughes & Jack Ross

Alternative Dispute Resolution

The Impact of Fairness and Time in Negotiation/Mediation



By Chester B. Chance and Charles B. Carter

Experts in negotiation note that a fair outcome may be more important for many clients than winning or losing. Offers may be rejected even though they are economically advantageous because in the client's mind the result is not fair¹.

There have been several experiments illustrating the importance of perceived fairness in negotiation. In the experiments, or games, Player A is given a sum of money such as \$100 as a windfall; however, Player A is required to propose a division of that sum with Player B. For example, Player A gets \$75 and Player B gets \$25. Player A may divide the sum any way he/she wishes. Player B can only choose whether to accept or reject the proposed division. If Player B accepts the division (offer), both players will receive their respective allocations. However, if Player B rejects the offer, neither player will receive anything.

Pure economics suggest that Player A should offer only a little more than zero to Player B and Player B should accept this amount as better than nothing which was Player B's status quo at the start. However, in numerous experiments, Player A generally offers 30% to 50% of the total sum to Player B. If less than 50% of the sum is offered, many recipients (Player B) will reject the offer, preferring to take nothing rather than accept what they perceive as an "unfair result." "The results of this game reflect the internalized value of expecting to be treated fairly".

Folberg and Golann note the perception of fairness consists of two components. First, distributional fairness is a quantitative notion of material outcome (what you get as a result of a negotiation). Procedural fairness relates to the process used to reach the outcome (how you were treated during the negotiation).

Recent studies have taken the above experiment/game a step further. When Player B has to give an immediate response as to whether to accept or reject the proposed division, there is a greater tendency for Player B to reject an offer they feel is unfair. However, after perceiving an allocation as "unfair", if Player B is given some time, (such as overnight) to think about the outcome, they are much more likely to accept the division.

Some psychologists and commentators on human

¹ *Lawyer in Negotiation*, by Folberg and Golann at page 20

behavior note that most decisions are made based on emotional reactions rather than on logic. It seems, given more time to make a decision, people may react less emotionally and more logically.

The authors suggest mediation is an excellent process for addressing perceptions of fairness. Studies indicate clients who participate in mediation walk away with a perception that the process is fair. With respect to distributional fairness (what a client gets as a result of negotiation at mediation), these authors suggest that the process of mediation, by extending over time, assists clients making a less emotional decision. Mediation allows for analysis, logic, perspective, weighing potential outcomes, consideration of costs, evaluation of risk and a myriad of other factors to be discussed and analyzed. That takes time, and, when given time to make a decision, it appears, based upon the above studies, people are more likely to react logically rather than emotionally.

We know mediation works. Sometimes it is important to ask why it works. During the mediation process, be prepared to ask your client if they are satisfied or unsatisfied with aspects of procedural fairness and if they are satisfied or unsatisfied with distributional fairness. When someone says, "It's just not fair," that is not necessarily a knee-jerk reaction and it certainly is a reaction that needs to be addressed. Remember, as stated above, a fair outcome may be more important for many clients than winning or losing, and, sometimes it takes time to determine what is "fair."



Judge Lott, Judge Smith (ret.), Judge Davis, Judge Hulslander, Judge Kreider and EJCBA President Elizabeth Collins join Florida Bar President Mayanne Downs at the November 2010 bar luncheon.

Defenses to Acceleration *Continued from page 3*

owed. See *Overholser v. Theroux*, 149 So.2d 582, 584 (Fla. 3d DCA 1963).

However, a subsequent decision by the Florida Supreme Court may limit the equitable principles that courts may consider in denying acceleration and foreclosure. In *David v. Sun Federal Sav. & Loan Ass'n*, 461 So.2d 93 (Fla.1984), the Florida Supreme Court explained that there are limits to the equitable discretion of courts in foreclosure cases. After citing to the equitable considerations laid out by the *Campbell* court, the court in *David* found that the facts of the case at hand did not fall within the traditional equitable circumstances under which the court's discretion should be called upon, and as such, the Court refused to deny foreclosure. *Id.* at 96. The *David* Court reiterated that a court of equity may only consider specific "clearly defined circumstances" in exercising its judicial discretion to bar acceleration and foreclosure. The Court held that:

Mere notions or concepts of natural justice of a trial judge which are not in accord with established equitable rules and maxims may not be applied in rendering a judgment. Although providing equitable relief in a proper case is discretionary with the trial judge, were that discretion not guided by fixed principles, the degree of uncertainty injected into contractual relations would be intolerable. Equity cannot therefore look solely to the result in determining whether to grant relief, but must apply rules which confer some degree of predictability on the decision-making process.

Id. at 95.

Despite questions that may remain as to the extent of the equitable considerations that are within a court's discretion in denying foreclosure, an examination of Florida case law reveals that the majority of cases in which denial of acceleration and foreclosure are considered deal with the established equitable principles of waiver/estoppel and tender of payment.

"Waiver does not arise from forbearance for a reasonable time, but may be inferred from the mortgagee's passive acquiescence, from his knowledge of the sale of the property in violation of a condition, without making objection, from acts putting the debtor off his guard and leading him to believe that the right has been waived, or from his neglect to perform conditions binding on him, and on which his right to

take advantage of the default is predicated; but not generally from loose declarations which he is under no obligations to make and on which no person relies to his prejudice." *Kreiss Potassium Phosphate Co. v. Knight*, 98 Fla. 1004, 1016; 124 So. 751 (Fla. 1929).

In determining whether a mortgagee has waived its right to accelerate, courts have considered representations or conduct of the mortgagee which induced the mortgagor to believe that payments made on certain dates would be timely. See *Althouse v. Kenney*, 182 So.2d 270, 272 (Fla. 2d DCA 1966). In estopping mortgagees from accelerating a mortgage, courts have considered a significant history of accepting late mortgage payments. See *Northside Bank of Miami v. La Melle*, 380 So.2d 1322, 1323 (Fla. 3d DCA 1980). As concisely stated by the Supreme Court of Florida in *Kreiss*, "[a] mortgagee who induces others to believe and act on a belief that he will not enforce a mortgage, may be estopped from doing so." *Kreiss*, 98 Fla. at 1016.

As previously mentioned, an attempt by a mortgagor to cure a default by tendering payment after default but prior to acceleration by the mortgagee is a circumstance recognized as a ground for denying acceleration and foreclosure. See *Campbell*, 232 So.2d at 257. See also *River Holding Co. v. Nickel*, 62 So.2d 702 (Fla. 1952) (holding that foreclosure was barred where the mortgagor failed to make timely payment due to a mistake as to the due date on his mortgage installment but attempted to make payment upon discovering that his payment was overdue when he tendered payment before the mortgagee elected to accelerate). Acceleration is activated by either the filing of a pleading in a suit for the full indebtedness or by a demand and express notice to the debtor. *Parise v. Citizens Nat. Bank*, 438 So.2d 1020, 1022 (Fla. 5th DCA 1983). If payment is tendered prior to either the filing of suit or by a demand and express notice of acceleration, the right to accelerate is defeated. *Id.*

The law is clear that in order to serve as a proper defense to foreclosure, tender of payment must be made before and not after acceleration by the mortgagee. *Savarese v. Schoner*, 464 So.2d 695 (Fla. 2d DCA 1985) emphasized the strong distinction between attempting to cure default before versus after notice of acceleration, regardless of the existence of fault on the part of the mortgagee. The *Savarese* court distinguished the facts in *Savarese* from those in *David*, in which the Florida Supreme Court affirmed a mortgage foreclosure despite the existence of certain

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I got an iPad for Christmas

By Cynthia Swanson



So, yay! I got an iPad for Christmas. Now I have to figure out what to do with it. I would really love to hear any suggestions and about the experiences of others. I'm searching for the best apps for lawyers.

I have never had an iPhone, so I am not a big consumer of apps. I have long had a smart phone with a Palm operating system, because the legal practice manager software we use at work (Amicus Attorney) has long been able to sync with Palm phones. Even just a few years ago, when standing in a judge's chambers to set a trial date, I was the only one with a phone on which I could check my calendar. Now, most everybody can do it - but they mostly use Blackberries and Outlook. Me, personally, I can't stand Outlook, and am a loyal disciple of Amicus. So, sticking with the Palm phone has always been my choice. And while I am totally happy with my Palm Centro, and there are apps for it, it is not really great for playing games, reading books, or providing navigation instructions.

But, now I have an iPad, which means getting apps! I really decided that I had to get an iPad because of that most basic of human emotions - envy. Only lawyers will understand this particular model of envy, though. I serve on the Florida Bar's Adoption Law Certification Committee. This is an inaugural committee which is setting policies and rules for certifying lawyers who practice adoption law. We created the applications, are writing the exam, and so on. First, let me say, it's a huge honor to have been selected to serve on this committee, and I appreciate the help from our local Board of Governors member, Carl Schwait, as well as Judges McDonald and Nilon, in recommending me. Second, however, let me say that this is a "be careful what you wish for" thing. I have never done so much un-paid work. This committee has met every month (and occasionally twice a month) since its inception in several different cities (never Gainesville!). We need to have access to statutes, rules of procedure, case law, Bar rules, etc. every time we meet.

So, one of the other lawyers on the committee is an "early adopter," and had an iPad almost before I even knew they existed. While I'm lugging a briefcase with my statutes, rules (could that book be any larger? - and, yes, I realize its gargantuan size is due almost exclusively to the proliferation of forms for use by pro se parties in family law cases - but don't let me get on my soapbox about that right now), and a binder full of Florida bar rules and policies, copies of our proposed exam questions which we all had to review and mark up, and so on . . . this other lawyer has her nice, slim, relatively lightweight iPad. While I'm thumbing through my copy of Florida Statutes Ch. 63 (one of the most opaque chapters of any legislation you will ever have to deal with), which is so thoroughly annotated with different colored highlighters and post it notes that it is almost unreadable, this other lawyer is gracefully flicking one finger across her iPad's shiny, friction-free surface, and lightly tapping her finger tip when she quickly finds the exact section we are talking about.

That ease of reading and searching statutes, reviewing essay questions, finding rules and policies was my motivation for wanting an iPad. NOT the need to play "Angry Birds," which is apparently the #1 most popular app for iPhones and the Pod Touch. This is a game where players use a slingshot to launch birds at pigs and the pigs' castles. People pay money to download this. This game has its own Wikipedia article. Can you imagine that? Of course, I imagine that most of the people who do use their iPhones and iPods to play "Angry Birds" can't really imagine using them to look up adoption statutes.

In the top 10 lists of apps for the iPad in 2010, more productivity (read "work-related") apps made the list, including some mentioned below. So, maybe iPad owners are less fun loving than iPod owners?

I did some searching on the internet to find some ideas for useful apps for lawyers. I found one or two I already knew about and have used for a while. Plus, some recommendations for others I have at least heard of. Plus more recommendations for others I have not even heard of. So, here is some stuff I found:

Continued on page 7

First, of course we lawyers need some word processing functions. It appears that virtually the only app to get is Pages. You can download iWork for iPad, which includes a word processor (Pages), a spreadsheet application (Numbers), and a presentation application (Keynote). This suite of applications will enable you to create fairly sophisticated documents, although it's probably better for editing documents, rather than creating full-fledged contracts or agreements on the fly. And if you're really going to be typing documents, you might want to add a real keyboard. The iPad does have a virtual keyboard that can appear and disappear like magic, and it's not terrible - certainly way better than the tiny keys on my Palm Centro. But for real typing, you can get a bluetooth wireless portable keyboard. But, then, you will look more geeky than cool. As a WordPerfect user, I am not sure I will use Pages. I also don't think I am likely to really ever want to type out long documents on my iPad anyway.

Next, I can recommend Evernote. This is a very cool program which you can use on your computer, iPad, iPhone, etc. to take notes of any kind and store them in any way you want. You can record things and store audio files, take photos and videos and store them, type text notes, scan documents, etc. You give each note a name, and tag it with some useful descriptors. They are stored on Evernote's servers. It automatically synchronizes all your devices and you can access your notes any time from anywhere. And it's free! It has a cool "web clipper" function, also. If you see something you like on a web page, you click the little green elephant which is installed in your browser and it automatically "clips" the page and creates a note. The image of the page is saved for you forever!

Another app to check out is Aji Annotator. Many legal documents come in PDF format. This app lets you mark-up, annotate, and add notes to PDF documents, which you can then save and re-share with other people.

I haven't used DropBox, but it is very often cited as a very good and very useful app. DropBox, which is free, allows you to share files via the "cloud" with multiple users on multiple different platforms. Obviously, highly confidential material needs to be treated with more care, and so this may not be appropriate for all documents

you use. But for commonly used forms, standard agreements and standard documents, this is recommended as a good solution.

The #1 most downloaded free app for iPad in 2010 was iBooks, a free e-book reader. That was the first thing I downloaded, too. But the second thing I downloaded was the Kindle app for iPad. I have had a Kindle for about two years, and I love, love, love it. There is one distinct difference between reading books on an iPad and reading books on an actual Kindle - the lighting. The iPad's screen is lit; the Kindle's is not. So, to read in bed at night, you don't need an external light source for the iPad. You can even turn the backlit screen slightly brighter or less bright, as needed. For the Kindle, you need a lamp or little clip on light. However, for reading during the day, outside, at the beach, etc., you cannot beat the Kindle. It is smaller, much lighter, and you can read it very easily in bright sunlight. You know how you can't really see your phone's screen outside or in bright light? The iPad is just like that. In my opinion, the page turning is smoother in the Kindle, although that is hardly something to base your purchase decision on. With the Kindle app for iPad, I can really be ridiculous, and use my Kindle to read outside, during the day, etc. and the iPad to pick up where I was and read in bed at night. Except that I don't . . . I still turn to the Kindle and my little clip on light.

One last quick thing. Did you know that you can sign up for email notices from the appellate courts? They will send you an email to announce when written decisions have been issued, with a link to the page on their web site where the cases are listed. You can then click on the case name you are interested in and viola, you are directed to the pdf version of the case for easy reading and downloading. It's a great service.

OK, so this wasn't so much about Family Law this month. If you have any apps for your iPad that you really love, law related or not, please give me a clue - email me at cynthia.swanson@swansonlawcenter.com. Email me there also if you want to receive (or want to stop receiving) notices for the monthly Family Law Section meetings. We meet at 4:00 pm on the third Tuesday of each month in the Chief Judge's Conference Room in the Alachua County Civil and Family Justice Center.

Protected Free Speech at the Expense of Candid Speech



By *Stephen N. Bernstein*

Don't you think that the Russian people were shocked - shocked! - to discover that U.S. diplomats think the Russian president, Dmitry Medvedev, "plays Robin to Putin's Batman?" Italians were equally horrified to learn that their prime minister,

Silvio Berlusconi, is considered "feckless, vain and ineffective as a modern European leader," just as the French were stunned to hear President Nicolas Sarkozy called "thin-skinned and authoritarian." Do you think that the Afghans were appalled to read that their president, Hamid Karzai, was described as an "extremely weak man who did not listen to facts?"

Were you surprised to read that Zimbabwe's Robert Mugabe is a crazy old man, or that Moammar Gaddafi of Libya travels with a "voluptuous blonde" whom he describes as his "senior Ukrainian nurse?" The Wikileaks disclosures were simply a treasure trove of things we all already knew were said off the record. These aren't records of human rights abuses or evidence of weapons of mass destruction - just accounts of conversations. And, just like July's Wikileaks revelations about Afghanistan, this just confirms what was publicly known and much discussed.

The leaks just showed that among other things, the United States is (surprise) lobbying others to organize sanctions against Iran; that South Korean diplomats have discussed what would happen if North Korea collapses; that U.S. diplomats have been bribing other countries to accept ex-prisoners from Guantanamo Bay. Germany's *Der Spiegel* concludes, furiously, that the United States "seeks to safeguard its influence around the world." I'd be a lot more worried if the opposite were true.

What is truly novel is not the information, but the language. While this revelation may be embarrassing for those who made the remarks, I don't think their revelation gets us anywhere. On the contrary, it seems that, in the name of "free speech", a blow has been struck against candid speech. I don't think we'll see better government from these revelations, just deeper secrets. Oral communication will replace writing, as even off-the-record chats do now.

I'm afraid that in the modern "hackable" world any form of frank discussion will soon be impossible. The State Department is not the first to run across

this. No American General will ever again give full access to the press as did General McCrystal when he revealed that he, like many military minds, sometimes disagreed with politicians in power. After his words were published, he had to resign. The end result heads toward "free, candid speech" only where there is total control, the way it used to be in Russia.

In, fact, the world's real secrets - the secrets of the regimes where there is no free speech and tight control on all information - have yet to be revealed. This stuff may have been embarrassing and awkward but it doesn't change very much. How about a leak of Chinese diplomatic documents? Russian military cables? Some stuff we don't actually know such as Iranian discussions about nuclear weapons? If WikiLeaks is serious about internet openness, and not just embarrassing the United States, then that's where they will go next. Somehow, I won't be surprised if they don't go there. Now that would be courageous.



Chief Judge Martha Ann Lott and Mac McCarty, President-Elect of the EJCBA, at the January bar luncheon.

Criminal Law



By William Cervone

I read FLW every week. For those of you who prefer to fly by the seat of your pants and don't need to be bothered with things like the law, FLW means Florida Law Weekly. It is the old fashioned way of staying reasonably current with the

law as passed down to us by our various levels of appellate courts, as opposed to the law as passed down to us by our legislators. It requires no computer alerts, has no bells and whistles, and shows up in my old fashioned mailbox, not my cyber-mailbox, with painfully predictable regularity.

Usually reading FLW depresses me; sometimes it amuses me and now and then it saves me in court. Generally, I recommend it. Although old news now, I cannot help but pass on some of my more recent favorites from FLW even though they are not necessarily earth shaking. For example, there was the wonderful case of Hearn v State from last June, in which the 3rd DCA chastised a trial court judge for not following its mandate. The facts are interesting if not especially legally complicated, and you can read them at 35 FLW D1123 if you want. What I enjoyed was Footnote 1 at the end of the "we reverse and remand with directions" conclusion: "And we mean it this time." That's a direct and literal quote. Put another way: "Judge, go to your room." Who says appellate work is dry and boring?

Also entertaining in a way is a September opinion, Sturdivant v State, from the 1st DCA and found at 35 FLW D1997. The facts in the case are meaningless. Legally, the bottom line was that the court refused an en banc request filed by a judge who had not been a part of the panel that decided the case. You'd think that would be the end of it, but no. To my surprise, there followed a concurring opinion and a warring dissenting opinion.

Basically, the concurrence was caused by the dissent, so to the dissent first. Bear in mind that the dissent was at least technically from the refusal to proceed en banc. But in fact, the rather lengthy dissent is all about the wisdom and correctness of the underlying opinion of the majority in the case, for which the dissenting judge was not a panel member and with which he clearly and quite strenuously disagreed. For many pages,

he goes on to explain his reasons for that. Were this a regular dissent to an opinion, that would all make sense. But instead it was an unsolicited and perhaps impermissible (again, technically) assault on the work of other judges in a case that the writing judge had no involvement in other than that he didn't like the outcome.

Moving to the concurrence: amazingly it is not just an agreement with the decision not to proceed en banc but rather is a castigation of the dissent. In essence, the concurring judge criticizes the dissenting judge for using the en banc process to air his displeasure with an opinion that he was not a part of. The concurrence points out in no uncertain terms that the result of a non-panel judge doing this to the panel that rendered the opinion at issue "undermines the state constitutional system of deciding cases by three judge panels, enables judges to publically prejudice issues that are not before them and causes significant harm to the collegiality of the court."

Of that there is no doubt. I don't know if I've ever seen such a public display of judicial in-fighting. In all fairness, I agree totally with the concurrence as to procedure and policy, but I sympathize with the dissent in the frustration over what is seen as an incorrect decision. Who among us who has practiced for more than a day or two hasn't been there?

Nevertheless, it is still an amazing opinion and worth reading, especially to those of you who are scholars of all those things like judicial personalities and how they contribute to opinions that shape our laws and society. It is a rare glimpse of what we must all intuitively know to be so: that the panel you draw on appeal can be just as determinative of your result as the jury you select, the prosecutor or defense attorney handling the case, or any number of supposedly unimportant factors that we all know drive decisions and results.

Meanwhile, one wonders how things are these days in the hallways at the 1st DCA. Not only is there the ugly little piece of business over the court's new building in Tallahassee and whether it is indeed an exercise in excess, but now there is the specter of the Chief Judge having to lecture the others: "Play nice with each other or go to your room!"

EJCBA to Co-Host Reception Honoring Judge Mickle

By Whitney M. Untiedt

The Eighth Judicial Circuit Bar Association, in conjunction with the University of Florida Law Alumni Council and the North Central Florida Chapter of the Federal Bar Association, will co-host a reception for Gainesville area attorneys in celebration of the distinguished legal career of UF Law alumnus The Honorable Stephan P. Mickle, Chief Judge of the United States District Court, Northern District of Florida. Plan to join Judge Mickle, along with special guest Bob Jerry, Dean of the University of Florida Levin College of Law, for drinks and refreshments as the legal community gathers to connect in a festive atmosphere.

Mark your calendar now for the reception, which will be held in Gainesville on Tuesday, February 15, 2011, from 5:30 to 7:30 pm at Urban Flats. Invitations and the details of the reception will be sent to all EJCBA members via email. The EJCBA and LAC hope that all Bar Association members will be able to attend this special event. The invitation will contain a link to the RSVP form, and all who plan to attend are asked to RSVP upon receipt of the invitation.

The reception is made possible by the generous contributions of the following members of the Gainesville legal community:

Firm Sponsors: Avera & Smith; Dell Graham; Hertz & Kearns; Hutson & Brockway; Rush & Glassman; Salter, Feiber, Murphy, Hutson & Menet; Silverman, Vorhis & Doan; and Turner & Hodge.

Individual Sponsors: Hon. Stacy A. Scott; Hon. William P. Cervone; Byron D. Flagg; and Whitney M. Untiedt.

To join our esteemed list of sponsors, please contact Law Alumni Council Representative Whitney Untiedt at wuntiedt@gmail.com.

Defenses to Acceleration *Continued from page 5*

equities favoring the mortgagor because there was no evidence of fault on the part of the mortgagee. Like *David*, the mortgagee in *Savarese* did not contribute to the mortgagor's failure to make timely payment; however, the court made apparent that "a salient fact that distinguishes *David* is that the mortgagee there had exercised its right to accelerate only after giving notice and opportunity to the mortgagor to cure the default." *Id.*

While tender of payment may serve as an equitable defense to foreclosure, in order to defeat a mortgagee's right to accelerate, specific requirements must be met in the "tender" of payment. First and foremost, in order to cure default, prior to acceleration, a mortgagor must tender payment in full so that the payment is sufficient to bring the mortgagor's account with the mortgagee current. See *Tompkins v. Jim Walter Homes, Inc.*, 656 So.2d 963, 964 (Fla. 5th DCA 1995). Accordingly, partial payment on past-due mortgage installments after default but prior to acceleration will not prevent a mortgagee from electing its right to accelerate and declare the full indebtedness due because the payment will not bring the mortgagor's account current. See *id.* Moreover, "tender" has a definite legal significance. *Kreiss*, 98 Fla. at 1013. "Tender" denotes a readiness and ability to pay as well as an actual production of the payment and an offer of it to the appropriate person to whom the tender is to be made. *Id.* Merely offering to make payment does not constitute tender of payment. *Id.*

There also exist requirements for a pleading that seeks to establish tender of payment as a defense to a foreclosure suit. To be proper, a pleading that states tender of payment as a defense to foreclosure must show that the payment was produced and offered to the person whom tender is to be made and that ever since such production and offer, the mortgagor has been ready and able to pay. *Id.* Additionally, a pleading that offers tender of payment as a defense to a foreclosure suit must demonstrate that the mortgagor is in fact ready and able to pay by depositing payment of the money into the court. *Id.*

In deciding whether to bar foreclosure and acceleration, courts attempt to strike a balance between contract rights and certain inequities. The inequities that a particular court considers may vary. However, the Supreme Court of Florida reminds us that a court's discretion is not unlimited. The most common themes in equitable defenses to foreclosure are those that Florida courts have traditionally examined: waiver/estoppel and tender of payment.

The Florida Bar Board of Governors Report

By Carl Schwait

At its December 10 meeting at Amelia Island, The Florida Bar Board of Governors:

- Heard from former Bar Director of Lawyer Regulation Tony Boggs on the importance of maintaining high standards in the Bar's grievance and admissions processes, and the importance of having a balance in the discipline process that both protects the public and respects individual rights.
- Heard Investment Committee Chair Ian Comisky report that Bar investments are at an all-time high and have completely recovered from the 2008 market decline. He said the investment committee is slightly adjusting its short-term fund investments to up the percentage in the bond market to get higher returns in the current low-interest market. The Bar's long-term fund earned 8.85 percent since the third quarter of 2010, and the new investments in managed futures and hedge funds have performed well and as expected. The board approved the committee's recommendation to replace Henderson International Growth with Harding Loevner as manager for part of the Bar's international fund investments.
- Heard that the Bar had a good audit for the 2009-10 fiscal year.
- Approved, on the recommendation of the Board Review Committee on Professional Ethics, a modified Proposed Advisory Opinion 09-1 on contacting government employees when they are represented by counsel. Chair Carl Schwait also reported the committee voted 9-0 to uphold the Standing Committee on Advertising that a group seeking to compile a directory of Christian lawyers would constitute a lawyer referral service. Presented were two PAOs that were drafted by the Professional Ethics Committee at the board's request. PAO 10-2 advises that lawyers must take reasonable steps to preserve confidential client information that may be captured and stored on hard drives of scanners, printers, and other computer-related equipment when that equipment is sold or disposed. That opinion is final because the board received no comments on the opinion and board members did not suggest any changes. The second opinion, PAO 10-3, addresses disclosing confidential information of a decedent at the request of a personal representative, beneficiaries, heirs of the decedent's estate, or their counsel. Schwait said since comments had

been received on this opinion, it will go back to the PEC at their next meeting.

- Carl Schwait also presented for first reading the new advertising rules. The time for written public comments will now begin including in-person comments at the next Board of Governors meeting on January 27, 2011.
- Approved the recommendation of the Program Evaluation Committee to create a new special committee to study lawyer referral services. Chair Greg Coleman also said the committee is continuing with its review of the Bar's professionalism and paralegal programs.
- Heard from Clients' Security Fund Procedure Committee Chair Greg Coleman that the committee is working with the Disciplinary Procedure Committee on developing forms and software to help attorneys meet Bar trust account regulations. DPC Chair Andy Sasso said the forms and software could reduce costs of the Bar's grievance operations by reducing the number of cases prosecuted because of inadvertent errors on handing trust accounts. The DPC is also looking at requiring lawyers to fill out the trust account compliance statement on annual fee statements, with those who fail being considered delinquent members.
- Approved a \$50,000 budget amendment for the Bar's diversity grant program and heard Dori Foster-Morales and Arnell Bryant-Willis, co-chairs of the Special Committee on Diversity, note the approval of money for diversity program grants earlier in the meeting. They asked board members to help get the word out to local bars that the money is available to support initiatives and programs which encourage diversity, diversity training and dialogue among lawyers in Florida through financial support of conferences, seminars, summits and symposia planned and hosted by local and specialty bar associations. The first deadline for grant applications is January 18.
- Approved on the recommendation of the Legislation Committee, a reauthorization of 13 legislative positions from the 2008-10 biennium for the 2010-12 biennium. The board withheld action on requested legislative positions from the Real Property, Probate and Trust Law Section and the Business Law Section on potential legislation

Continued on page 15

RESERVE NOW FOR THE 2011 PROFESSIONALISM SEMINAR!

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

WHERE: UF College of Law - Chesterfield Smith Ceremonial Classroom

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

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

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

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

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

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

NAME(s): _____

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

Thank you.

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

Professionalism Seminar

Inexpensive (CHEAP) CLE Credits

By Ray Brady

Mark your calendars now for the annual Professionalism Seminar. This year the seminar will be held on Friday, April 1, 2011 from 8:30 AM until Noon, at the University of Florida Levin College of Law. The keynote speaker is John T. Berry, Director of the Legal Division of the Florida Bar, speaking on "The Challenges of Teaching Professionalism."

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

A reservation card is provided above or look in your mail for an EJCBA reservation card in early March. Questions may be directed to the EJCBA Professionalism Committee chairman, Ray Brady, Esq., at 373-4141.

James L. Tomlinson Professionalism Award Nomination Form

Name of Nominee: _____

Nominee's Business Address: _____

County in which Nominee Resides: _____

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

Name of Nominator: _____

Signature: _____

Some Refreshed Thoughts from a Florida Bar Foundation Board Member



By Phil Kabler

I hope you will pardon this indulgence, but from time-to-time (basically once each year), I may repeat (better put, refresh) a prior topic. Like here.

By now you have read – in both Forum 8 and The Florida Bar News -- more than you ever expected about The Florida Bar Foundation. You have read about our programs, initiatives, grants, and local grantees. So at this point you should have a reasonably good idea of what happens to the individual donations, IOTA funds, estate gifts, and cy pres awards that the Foundation administers.

The Foundation takes the funds under its management and provides grants to local and statewide legal aid organizations, to law school clinics, and to new lawyers pursuing careers in civil legal services (to help them pay their law school loans). Here are some local “awardees” -- Three Rivers Legal Services, Southern Legal Counsel,

Florida Institutional Legal Services, and the UF Law School’s Virgil Hawkins Civil Clinic.

The Foundation also makes grants to promote improvements in the administration of justice, which range from start-up funds for a program to improve child support collection, to law-related education, to major funding of the Innocence Project of Florida. Another “AOJ” grant program supports community service programs by voluntary bar associations.

I shall now present the annual “ask.” {Wait, please do not change the channel. I promise to be brief.} Individual attorneys can directly participate in the Foundation’s programs by joining the “Fellows Program.” Fellows pledge \$1,000 to the Foundation, payable over five years, or ten years for young lawyers, government lawyers, and employees of non-profit organizations, and become lifetime Foundation members. (Of course, greater amounts, shorter payment periods, and renewed pledges are always welcome.)

Fellows are accorded substantial membership recognition. They receive e-mail and written publications (including estate planning educational materials) and invitations and reduced cost tickets to the Annual Dinner which coincides with the Florida Bar’s Annual Meeting, and they have ready access to the Foundation’s professional staff for questions and suggestions. The Fellows yellow ribbon is definitely a badge of distinction at the Bar’s Annual Meeting and all Foundation events.

If you are not yet a Fellow, please seriously consider becoming one. (If you already are, please consider a new gift.) Gifts can be directed to legal assistance for the poor, children’s legal services, administration of justice, or law student assistance. Fellows pledges are not especially burdensome when amortized over five or ten years.

If you have questions about The Florida Bar Foundation or the Fellows Program, please feel free to call me at (352) 332-4422. Or you could invite me to visit with you (or your firm), to go into further detail about the Foundation, and – hopefully –enroll you in the Fellows Program. I promise to be brief. And finally, to get the latest news about the Foundation and its grantees, please become a “Fan” on Facebook by visiting www.facebook.com/TheFloridaBarFoundation.

Nominees Sought for 2011 James L. Tomlinson Professionalism Award

Nominees are being sought for the recipient of the 2011 James L. Tomlinson Professionalism Award. The award will be given to the Eighth Judicial Circuit lawyer who has demonstrated consistent dedication to the pursuit and practice of the highest ideals and tenets of the legal profession. The nominee must be a member in good standing of The Florida Bar who resides or regularly practices law within this circuit. If you wish to nominate someone, please complete a nomination form describing the nominee’s qualifications and achievements and submit it to Raymond F. Brady, Esq., 2790 NW 43rd Street, Suite 200, Gainesville, FL 32606. Nominations must be received in Mr. Brady’s office by April 30, 2011 in order to be considered. The award recipient will be selected by a committee comprised of leaders in the local voluntary bar association and practice sections.

Iota Accounts Will Have Unlimited FDIC Insurance

Effective December 31, 2010, all funds in IOTA accounts at Insured Depository Institutions are insured in full under the Federal Deposit Insurance Corporation's temporary unlimited insurance program which runs from December 31, 2010 through December 31, 2012. IOTA accounts at financial institutions that did not opt out of the Transaction Account Guarantee Program (TAGP) have unlimited insurance through December 31, 2010 and also will have unlimited coverage through December 31, 2012.

Unless extended by Congress, after December 31, 2012 unlimited FDIC coverage will not be available on IOTA or noninterest bearing accounts. Starting January 1, 2013, the standard FDIC insurance amount of \$250,000 per depositor will go into effect. Because the FDIC labels IOTA and other lawyer/law firm trust accounts as fiduciary accounts, the per depositor coverage means that funds of individual clients and third persons in a trust account will be fully insured up to the \$250,000 maximum, including any funds a client or third person also has on deposit at the same Insured Depository Institution.

For clients or third persons to receive FDIC insurance payments, trust account records required under the Rules Regulating The Florida Bar must be maintained identifying the name and amount of client or third person funds held in trust.

For more information, see the Florida Bar News story at: <http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/8c9f13012b96736985256aa900624829/e5f11093e164cc8d8525780f004ba8eb!OpenDocument>.



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MEMBER FDIC

Judicial Nominating Commission Vacancy

The Florida Bar began advertising for one lawyer vacancy for each of the 26 Judicial Nominating Commissions (JNCs) on December 1, 2010. The Bar must nominate three lawyers for each vacancy, for a total of three nominees for each JNC.

Each appointee serves a four-year term commencing July 1, 2011. All applicants must be engaged in the practice of law and a resident of the territorial jurisdiction for the JNC to which they are applying. Applications can be found on The Florida Bar Website (www.floridabar.org) and must be filed with The Florida Bar Executive Director's Office no later than 5:30 p.m. on February 25, 2011.

Members Only: Log-in Now to Print your EJCBA Directory

Remember, only current EJCBA members can access a printable version of the complete member directory, edit their own information online, and post additional data on their member profile, such as practice areas, photos, and a website link. Log-in to the EJCBA website at www.8jcba.org by clicking the link on the top left hand side of the home page. If you have forgotten your password, please email execdir@8jcba.org to have it resent to you. Once you have logged in, click on the "Member Directory" tab to access links to download and print a complete member directory and court directory, as well as to update your profile.

EJCBA is on Facebook

In addition to the EJCBA website at www.8jcba.org, the EJCBA now has a facebook fan page, which contains additional information regarding upcoming events, photo galleries, discussion boards, and more! Pictures from our events from recent terms, including the 2010 James C. Adkins Cedar Key dinner, are now posted. If you have a facebook profile, take a moment to search for the "Eighth Judicial Circuit Bar Association (EJCBA)" facebook fan page and click the "like" button. Get connected!

EJCBA Luncheon Policy

Please be reminded that the EJCBA is once again enforcing its long-standing policy that if you RSVP to the EJCBA luncheon, but do not attend, you must still pay for your lunch. You will receive a bill if you have not pre-paid. The EJCBA is obligated to pay for the lunches regardless of whether you attend or not and we will expect the same obligation of you.

In addition, we encourage you to RSVP, when possible. We welcome your attendance and always hope to have as many of you attend as are able, but we need your help in ensuring an accurate headcount, so that our lunches can continue to run smoothly. Thank you in advance for your cooperation!

UF's "Raising The Bar" Event Scheduled For February 19, 2011

By Laura Thayer

All practicing attorneys in the Eighth Judicial Circuit are invited to meet and join with their future colleagues, UF's Law Student Division, in volunteering at the Five Points of Life Kids Marathon and 5K Race on Saturday, February 19, 2011 from 6:30 a.m. until 10:00 a.m. The Five Points of Life Race Weekend aims to raise awareness of the need for lifesaving donations of blood, apheresis, marrow, cord blood, organ and tissue. In addition, the race is designed to promote health and fitness.

Volunteers should arrive no later than 6:15 a.m. at the Southwest Recreation Center parking lot across from the Harn Museum of Art where a Law Student Division sign will mark the meeting spot. Breakfast will be provided to all volunteers, who will be assisting with registration and/or directing the runners on the Course. Volunteers should wear comfortable shoes and bring sunscreen. Volunteers are additionally invited to attend the Gator baseball game that afternoon at 4 p.m. to socialize and have fun after their morning of service.

If you are interested in volunteering at this event, please email Laura Thayer at laura85@ufl.edu before January 28, 2011. The first 30 volunteers to RSVP will receive a free water bottle the day of the Raising the Bar event.

Governor's Report

Continued from page 11

addressing the Florida Supreme Court's recent Olmstead decision affecting multi-member limited liability corporations. The delay will allow the Trial Lawyers Section, the Family Law Section, and possible other groups to review the issue.

- Heard Steve Metz, the Bar's chief legislative counsel, discuss the upcoming session. Metz warned there are many uncertainties, including a larger than expected budget deficit, a new governor, and criticisms by some legislative leaders of recent Supreme Court rulings. He also warned of a trend by business and other outside interests mounting expensive and last minute campaigns against appellate judges up for merit retention and said that could happen in Florida in 2012.
- Heard a report on the updating of the Bar's strategic plan from President-elect Scott Hawkins. Bar goals remain protecting the judicial branch and its funding, building public confidence in the profession and the legal system, ensuring access to the courts and legal services, and enhancing the value of a Bar membership for lawyers.

I wish to thank the lawyers and judges of this circuit for reelecting me to a fourth two-year term commencing in June, 2011. I look forward to continuing to represent your interests and concerns.

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

February 2011 Calendar

- 2 EJCBA Board of Directors Meeting; Ayers Medical Plaza, 720 SW 2d Avenue, North Tower, Third Floor – 5:30 p.m.
- 3 CGAWL meeting, Flying Biscuit Café, NW 43rd Street & 16th Avenue, 7:45 a.m.
- 4 Deadline for submission to March Forum 8
- 9 Probate Section Meeting, 4:30 p.m., 4th Floor, Family & Civil Courthouse
- 11 EJCBA Luncheon, Ti Amo!, Senator Mike Haridopolos, speaking on the Florida Innocence Commission, 11:45 a.m.
- 15 UF Law Alumni & Friends Reception for Judge Stephan P. Mickle, 5:30-7:30 p.m., Urban Flats
- 19 “Raising the Bar” volunteer event at the Five Points of Life Kids Marathon and 5K Race, 6:15 a.m. – 10:00 a.m., UF Southwest Recreation Center parking lot
- 21 Washington’s Birthday, Federal Courthouse closed
- 22 Family Law Section Meeting, 4:00 p.m., Chief Judge’s Conference Room, Alachua County Family & Civil Justice Center
- 25 Deadline for filing applications for Judicial Nominating Commission Vacancy

March 2011 Calendar

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

Have an event coming up? Does your section or association hold monthly meetings? If so, please fax or email your meeting schedule let us know the particulars, so we can include it in the monthly calendar. Please let us know (quickly) the name of your group, the date and day (i.e. last Wednesday of the month), time and location of the meeting. Email to Dawn Vallejos-Nichols at dvallejos-nichols@avera.com.