

FORUM 8

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Eighth Judicial Circuit Bar Association, Inc.

December 2012

President's Message



By Dawn M. Vallejos-Nichols

I can't believe it is December already. I can't believe that in one month it will be 2013. I know that as we get older the years seem to go by faster, but even young people that I encounter tell me that they think this year has flown by. Was this year a good one? For the most part, and I can only speak for me and my family, it was. My

family is healthy, we have roofs over our heads (even though currently ours is a little leaky!), good jobs, plenty of food to eat, and friends and family that we care about and that care about us. But I know others whose families have been touched by devastating illness, sudden loss of life, and unemployment in 2012. For them, 2013 can't come fast enough. We will all experience years like that somewhere along the road of life, but for those who experienced tragedy in 2012, I hope 2013 brings you brighter days.

We tend to think about these things more as the holidays and the year's end approach. Whether consciously done or not, it's the time of year that we evaluate where we are and how we are doing – professionally and yes, economically. But while it is lovely to make gains in your professional and economic lives, don't forget the importance of your emotional and for many, spiritual well-being. They are what help us survive the years that bring unexpected turmoil, and should be nurtured above all else. Even while striving to get ahead in your profession, make sure to take time for yourself, and to make time to spend with family and friends. Turn the phone and the computer off every once in awhile,

and enjoy a brief liberation from beeping emails, texts and client calls.

Although the holidays, for many, bring increased stress brought on by over-commercialization, that was certainly not the original intent of any December holiday. Many find that helping others in need brings back the original meaning and spirit of the holiday. I am pleased that the EJCBA has two holiday programs to assist those who find themselves less fortunate this holiday season – we have been collecting canned and non-perishable food items for the past two luncheons for Bread of the Mighty and will be doing so once again on December

14; and we are collecting unwrapped toys for Alachua County Head Start, who will disburse the toys to youngsters ages 3-5 so that their holidays can be filled with wonder. We will also accept donations of money in any amount – please indicate on your check in the "Notes" section that the funds are for the EJCBA holiday project.

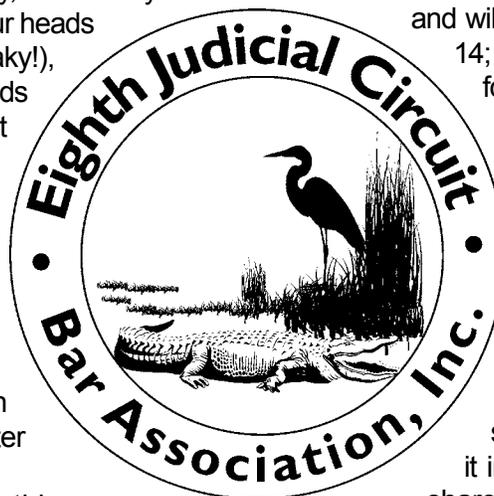
Finally, I want to share with you a story that I read a few years ago and searched out again to share. I hope it inspires you like it does me. I took this shared idea to heart, and each year in my brother's Christmas card, I tell him the charity I have donated to in his name that benefits people in his community (he lives in Seattle). I know that it makes him happier than any gift I could attempt to give, and it makes many others happy, as well.

I hope each of you in this circuit has a joyous and safe holiday season. See you in the New Year.

A Christmas Story

It's just a small, white envelope stuck among the branches of our Christmas tree. No name, no identification, no inscription. It has peeked through the

Continued on page 7



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Professionalism Seminar – Save The Date

Inexpensive (CHEAP) CLE Credits

By Ray Brady

Mark your calendars now for the annual Professionalism Seminar. This year the seminar will be held on Friday, April 5, 2013 from 8:30 AM until Noon, location TBD. The keynote speaker and topic are to be announced.

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

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

About This Newsletter

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

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

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

Judy Padgett
Executive Director

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Deadline is the 5th of the preceding month

Cedar Key Sponsors – We Love You!

The EJCBA would like to thank its 2012 James C. Adkins Cedar Key Dinner sponsor and raffle contributors for their generous support and urge its members to patronize these establishments:

Attorneys' Title Fund Service, LLC
Kanapaha Botanical Gardens
Vellos Backstreet Grill
Hippodrome Theatre
Gainesville Health & Fitness Center
Wine & Cheese Gallery - Panache
Best Buy
New Beauty Magazine
Adrienne Memmoli
Regis Salon
The Spa at the Boca Raton Resort and Hotel
Bloomingdale's

A very special thank you, as in years past, to Attorney's Title Fund Service, LLC and its local Fund Account Executive, Elizabeth Shade, for once again being our drink sponsor and joining in the festivities at Steamers on November 8. Thank you all for continuing to make Cedar Key such a special event!

EJCBA 2012 Holiday Project

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

Reminder...

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

Canned And Non-Perishable Food Drive

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

THANK YOU FOR YOUR GENEROSITY!!



Jack Fine, Maritza Arroyo, Cherie Fine and Barbara Blount-Powell enjoy the company at Cedar Key



Bruce Brashear and Judy Collins at Cedar Key

“A Toast to Judge Hodges” Federal Bar Association Reception

By Robert S. Griscti

Senior Judge William Terrell Hodges was recognized for his 40 years (and counting) of service as a United States District Judge at “A Toast to Judge Hodges” reception at the Thomas Center in Gainesville on November 2, 2012. The event was presented by the North Central Florida Chapter of the Federal Bar Association.

Judge Hodges was roasted and toasted by his colleague, Eleventh Circuit Court of Appeals Judge Gerald Bard Tjoflat, as well as by friends and former law clerks from Gainesville and statewide.

Appointed by President Richard Nixon to the United States District Court for the Middle District of Florida in 1971, Judge Hodges served as Chief Judge of the Middle District from 1982 to 1989 and now sits in the Ocala Division of the Middle District of Florida. As a Senior Judge, he resides in Gainesville, Florida by choice -- he is a true Gator fan.

A few of Judge Hodges’ many accomplishments and recognitions were mentioned at the reception by Stephanie Marchman, his former law clerk and prior FBA Chapter President:

- Chair of the District Judges Representatives of the Judicial Conference of the United States and Chair of the Judicial Conference’s Executive Committee, the principal policy making body for administration of the United States Courts;
- Chair of the Committee on Pattern Jury Instructions of the Eleventh Circuit, responsible for developing the pattern jury instructions for the Eleventh Circuit;
- Chair of the United States Judicial Panel on Multidistrict Litigation, responsible for coordinating litigation with common questions of fact in the federal courts across the nation;
- 2002 recipient of the Edward J. Devitt Distinguished Service to Justice Award, an honor bestowed annually by the United States Supreme Court to one Article III judge of national stature.

Judges Tjoflat and Hodges entertained the audience with stories from the federal bench and plenty of humor. Judge Hodges reminisced about such topics as past conversations and contacts with Supreme Court Justices, including “The Chief,”

William Rehnquist. Recalling one instance, Judge Hodges was once asked to make a “2 pm sharp” call to The Chief, who, Judge Hodges later learned, had hiked to a payphone from a country retreat for the pre-scheduled call.

A measure of the respect and admiration for Judge Hodges is reflected in the attendance at the evening reception of members of the federal bench and bar from throughout Florida, joined by many Gainesville and Ocala judges, lawyers and students.

Sponsors for the event were the national Federal Bar Association, the University of Florida Levin College of Law and the Eighth Judicial Circuit Bar Association; from Jacksonville, Bedell, Dittmar, DeVault, Pillans & Coxe, P.A.; Sheppard, White & Kachergus, P.A.; Smith Hulsey & Busey; Akerman Senterfitt; and the Jacksonville Chapter of the Federal Bar Association; from Tampa, Thompson, Sizemore, Gonzalez & Hearing, P.A. and the Tampa Bay Chapter of the Federal Bar Association; from Clearwater, Johnson, Pope, Bokor, Ruppel & Burns, LLP; from Orlando, Rumberger, Kirk & Caldwell; from Tallahassee, Holland & Knight LLP; and from Gainesville, Avera & Smith, LLP; N. Albert Bacharach, Jr., P.A.; Scruggs & Carmichael, P.A.; Law Offices of Gilbert A. Schaffnit; Larry Turner, Peg O’Connor and Ron Kozlowski; Dell Graham; Law Firm of Robert Griscti, P.A.; Donnelly & Gross, P.A.; Fine, Farkash & Parlapiano; Law Offices of Rush & Glassman; and James H. Sullivan III. The North Central Florida Chapter of the FBA thanks everyone for their attendance and support.



U.S. Senior District Judge Hodges & U.S. Magistrate Judge Lammens. Photo courtesy of University of Florida Levin College of Law

Alternative Dispute Resolution

Mediation: Potential Differences When Comparing the Plaintiff's Room to the Defendant's Room in Circuit Civil Mediations



By Chester B. Chance and Charles B. Carter

We've been asked to address some of the differences between the plaintiff's room and the defendant's room in a mediation involving a personal injury claim with an insurance carrier.

First, we thought we would provide some observations with respect to some differences which may characterize the plaintiff's room. If you would like to email your thoughts on the subject matter of this article please send any emails to cartercdpa@bellsouth.net.

Plaintiffs are often confused by legal issues. The typical plaintiff attends mediation for the first time in their life. They typically do not understand legal issues including comparative negligence, proposals for settlement, legal relevance, causation, etc. The plaintiff's attorney, the mediator and the defense attorney need to keep this difference in mind when discussing the importance of various facts and legal issues.

Plaintiffs often come to the mediation with emotions including grief, anger and/or frustration. The defense attorney and the insurance adjuster rarely come to the mediation with anything akin to the emotional burden a plaintiff may have at mediation. The defense must be sensitive to these emotional factors. The mediator should be prepared to discuss the emotions the plaintiff is feeling.

Plaintiffs often come to mediation with high expectations for a monetary resolution. These expectations are often illogical and unreasonable given the plaintiff may have never been involved in a personal injury case and has no way of knowing the value of such a case, especially considering factual and legal issues which may be present. Often a plaintiff evaluates a case in terms of what they "want" or "need" to go into their pockets. Although it's true, "if you ain't got nothing, you got nothing to lose", still, what someone needs or wants may be irrelevant from a fact and law evaluation perspective.

Plaintiffs often suffer from optimistic over-confidence. They look at facts that help their case and choose to ignore facts which may hurt their case. Since they lack experience in litigation, their over-confidence may have no basis in fact or logic.

The defense can address some of the above-

differences between the defense room and the plaintiff's room in several ways. First, meet with the plaintiff's attorney and discuss what type of mediator his or her client may need. Will the plaintiff be more responsive to a male, female, older person, younger person, etc?



The defense should be prepared at mediation. The more prepared in presenting your position, the more likely that position will be conveyed to the claimant and thus reduce expectations, deflate optimistic over-confidence, provide explanation of legal and factual issues which are more readily understood, etc.

The defense should bring documents, photographs, and exhibits to the mediation. A picture is often worth a thousand words in conveying an issue.

The defense should be prepared to address emotional components such as grief, anger, etc. Consider whether a full apology or a partial apology would be beneficial and appropriate.

Often emotions may be addressed with a non-monetary resolution. Consider whether your client, if your client is a corporate entity, may be willing to address some issues raised in the case through in-service training. Think outside the box on non-monetary issues which may deflate emotions.

Most importantly, all involved in the mediation should have patience. It takes time to explain relevancy, legal issues, risk, cost of litigation, etc., with someone who may never have been involved in a lawsuit in their life. Patience and understanding may be the final ingredient, which resolves a claim.



Jesse Smith, Ben Steinberg and EJCBA President Dawn Vallejos-Nichols share a laugh at Cedar Key

Important Wage and Hour Laws for Employers

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



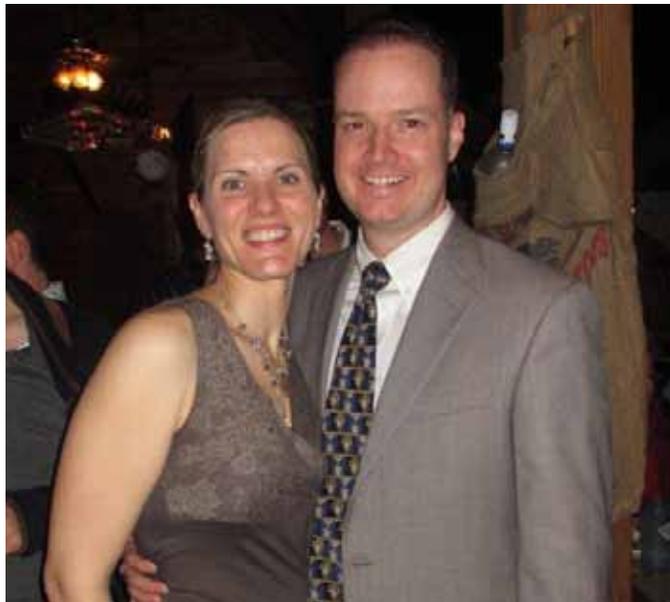
What is the minimum wage? Effective January 1, 2013, the Florida minimum wage will increase to \$7.79 per hour, a 1.5 percent increase from 2012 due to the change in the Consumer Price Index. While the federal minimum wage is \$7.25 per hour, the Florida minimum wage, \$7.67 for 2012, is subject to annual

inflation reviews and adjustments under the Florida Constitution and statutes. The adjusted Florida minimum wage, which takes effect every January 1 for the calendar year, is posted on the Agency for Workforce Innovation and the Department of Revenue websites by October 15 of each year prior to the effective date of the adjusted minimum wage. Written notice of the adjusted minimum wage and the effective date is mailed to employers registered in the unemployment compensation database by November 15 of each year.

When is overtime pay due? Generally, federal law requires payment of overtime pay, at the rate of one and one-half times the regular rate of pay, for all hours worked after 40 in a workweek. Certain employees are exempt from the overtime pay requirements. The most common exemptions are executive, administrative, professional, and outside sale employees who meet certain

salary, duties and responsibilities requirements. To avoid liability, the employer needs to ensure that employees treated as exempt are properly classified, accurate records of employees' hours of work are kept, and wage deductions to not reduce wages below the minimum wage and overtime requirements.

What are the child labor restrictions on hours of work? Minors are subject to heightened standards, including restricted time and hours of work, under both federal and Florida law. Minors under thirteen may not work except in the Florida Legislature as a page, in the entertainment industry, or in domestic or farm work for their parents or guardian. Fourteen and fifteen year olds may work up to fifteen hours per week while sixteen and seventeen year olds may work up to thirty hours per week. There are additional restrictions on the time of day and number of hours per day and per week that minors may work while school is in session. And, no minor may work more than four hours without a 30 minute meal period.



Anne & Jake Rush at Cedar Key

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Remillard Law Firm, P.A.

President's Message *Continued from page 1*

branches of our tree for the past 10 years or so.

It all began because my husband Mike hated Christmas – oh, not the true meaning of Christmas, but the commercial aspects of it – overspending... the frantic running around at the last minute to get a tie for Uncle Harry and the dusting powder for Grandma – the gifts given in desperation because you couldn't think of anything else.

Knowing he felt this way, I decided one year to bypass the usual shirts, sweaters, ties and so forth. I reached for something special just for Mike. The inspiration came in an unusual way.

Our son Kevin, who was 12 that year, was wrestling at the junior level at the school he attended; and shortly before Christmas, there was a non-league match against a team sponsored by an inner-city church, mostly black.

These youngsters, dressed in sneakers so ragged that shoestrings seemed to be the thing holding them together, presented a sharp contrast to our boys in their spiffy blue and gold uniforms and sparking new wrestling shoes.

As the match began, I was alarmed to see that the other team was wrestling without headgear, a kind of light helmet designed to protect a wrestler's ears.

It was a luxury the ragtag team obviously could not afford. Well, we ended up walloping them. We took every weight class. And as each of their boys got up from the mat, he swaggered around in his tatters with false bravado, a kind of street pride that couldn't acknowledge defeat.

Mike, seated beside me, shook his head sadly, "I wish just one of them could have won," he said. "They have a lot of potential, but losing like this could take the heart right out of them."

Mike loved kids – all kids – and he knew them, having coached little league football, baseball and lacrosse. That's when the idea for his present came.

That afternoon, I went to a local sporting good store and bought an assortment of wrestling headgear and shoes and sent them anonymously to the inner-city church.

On Christmas Eve, I placed the envelope on the tree, the note inside telling Mike what I had done and that this was his gift from me.

His smile was the brightest thing about Christmas that year and in succeeding years.

For each Christmas, I followed the tradition – one year sending a group of mentally handicapped youngsters to a hockey game, another year a check to a pair of elderly brothers whose home had burned to the ground the week before Christmas, and so on.

The envelope became the highlight of our Christmas.

It was always the last thing opened on Christmas morning and our children, ignoring their new toys, would stand with wide-eyed anticipation as their dad lifted the envelope from the tree to reveal its contents.

As the children grew, the toys gave way to more practical presents, but the envelope never lost its allure. The story doesn't end there.

You see, we lost Mike last year due to dreaded cancer. When Christmas rolled around, I was still so wrapped in grief that I barely got the tree up. But Christmas Eve found me placing an envelope on the tree, and in the morning it was joined by three more. Each of our children, unbeknownst to the others, had placed an envelope on the tree for their dad.

The tradition has grown and someday will expand even further with our grandchildren standing around the tree with wide-eyed anticipation watching as their fathers take down the envelope. Mike's spirit, like the Christmas spirit, will always be with us.

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Investiture Ceremony for Karen K. Specie, U.S. Bankruptcy Judge

The U.S. Bankruptcy Court for the Northern District of Florida announces the Investiture Ceremony for the Honorable Karen K. Specie as U.S. Bankruptcy Judge at 2 p.m. on Monday, December 10, 2012. The ceremony will take place at the U.S. Bankruptcy Courthouse at 110 E. Park Avenue, Tallahassee, Florida. Friends and associates planning to attend the ceremony are requested to confirm attendance at: judy_miller@flnb.uscourts.gov.

Judge Specie was appointed to a 14 year term as a U.S. Bankruptcy Judge by the Eleventh Circuit Court of Appeals effective July 25, 2012. After graduating from the University of South Florida with a degree in political science, she received her law degree from the Florida State University College of Law. She then embarked upon a distinguished legal career, practicing law in New York and Tampa prior to settling in Gainesville, which included extensive bankruptcy experience representing both debtors and creditors, and serving as a Chapter 7 panel trustee for five years. Ms. Specie is a Fellow of the American College of Bankruptcy and has served as an adjunct Professor of law, teaching bankruptcy and secured transactions, at the University of Florida's Levin College of Law.

To Accept or Reject? A look into Florida's Duty to Defend and a Defense Under a Reservation of Rights

By Siegel, Hughes & Ross

Under Florida law, liability insurance companies have a broad duty to defend their insureds against third party claims. A liability insurer's duty to defend its insured from third party claims is distinct and broader than its duty to indemnify an insured. *Colony Ins. Co. v. G & E Tires & Service, Inc.*, 777 So.2d 1034, 1036 (Fla. 1st DCA 2000). Whether an insurer has a duty to defend its insured is determined solely by the allegations made in the complaint. *Id.* Any questions as to whether a duty to defend exists must be resolved in favor of the insured. *See id.* Even where an insurer is uncertain as to whether there is coverage for the facts alleged in the complaint, there is a duty to defend the insured. *Id.* This is so even if it is later determined that there was no coverage. *Id.* The duty is so far-reaching that it "is not affected by the merits of the third party's claim or the likelihood that the claim will ultimately be successful; an insured is entitled to a defense by its insurer against even the most frivolous suit, so long as it describes an occurrence within coverage." *Travelers Indem. Co. of Illinois v. Royal Oak Enterprises, Inc.*, 344 F.Supp.2d 1358, 1365 (Fla. M.D. 2004).

When a third party brings a claim against an insured, Florida law affords protections to both the insured and the insurer by allowing insurers to essentially defend now and determine liability later. This is called defending under a reservation of rights. When an insurer is uncertain whether coverage exists, it may defend under a reservation of rights, whereby it does not breach its duty to defend, but instead defends while reserving its claim for non-liability of a judgment entered against the insured. *Taylor v. Safeco Ins. Co.*, 361 So.2d 743, 745 (Fla. 1st DCA 1978).

The forefront case on the law regarding defending under a reservation of rights is *Taylor v. Safeco*

Insurance. Co., 361 So.2d 743 (Fla. 1st DCA 1978). *Taylor* involved a third party claim against the insured, who was the driver of an automobile in an accident. The insurer, Safeco, disputed whether Earl Taylor was an insured under the policy and offered a defense, but reserved its rights. The court explained that Safeco had the right to take that stance, noting the difference between the duty to defend and to indemnify, and further explained that the law allows for such agreements between an insurer and an insured:

Safeco was entitled to take that position, for the law distinguishes between the insurer's duties to defend and to pay....and does not forbid agreement between insurer and a putative insured which resolves the urgent question of who shall defend and postpones resolution of the contingent question of who shall pay any judgment... *Id.* at 745.

Taylor then set the precedent for the rights of the insured, in holding that an insured is not required to accept and may reject a defense under a reservation of rights:

Similarly, Earl Taylor was not obliged to surrender control of his personal defense to an insurer which disclaimed responsibility for any judgment within policy limits that might result from the litigation...Just as the insurer is not required to abandon its contest of a duty to pay as a condition of fulfilling an assumed or admitted duty to defend, the insured is not required to abandon control of his own defense as the price of preserving his claim, disputed by the insurer, that the insurer pay any judgment. *Id.*

The right to reject a defense under a reservation of rights has been followed and upheld by subsequent case law. Therefore, under Florida law, an insured has the right to reject a defense under a reservation of rights, retain its own counsel, and later seek indemnification

Continued on page 11



Criminal Law



By William Cervone

This month to end the calendar year I have some loose ends to tie up.

First, in September I wrote about the continuing trials and errors of juvenile sentencing in adult court under the *Graham* decision. That was Part Four of the saga. Now for Part Four

And A Half.

This was probably inevitable. One Marvin Jean-Michel committed a few armed robberies, during one of which he shot someone in the head but somehow managed not to kill that victim. He got life. Despite the fact that he was 19 when he committed his crimes, he claimed *Graham* didn't really define a minor and that he should get the benefit of its logic, such as it is.

Such is also the slippery slope that has been created. Fortunately, the 4th DCA has shut Jean-Michel down, reminding him that *Graham* said 18 and 18 it is, not to mention that his crimes were loathsome and despicable. This all begs the question of any arbitrary line. Like 18. Details of Jean-Michel's plight are at 37 FLW D2082 if you'd like.

Next, in November I mentioned our Evidence Code's new accommodation of the doctrine of forfeiture by wrongdoing. An early case (*Mortimer v State*, 37 FLW D2073 4DCA if you're interested) has stated that that rule is procedural and may be applied retrospectively as well as to pending cases even while awaiting Supreme Court adoption. So have at it with using the bad guy's bad behavior.

Finally, relevant to absolutely nothing, two quotes:

"A telephone (n) - an invention of the devil which abrogates some of the advantages of making a disagreeable person keep his distance." Ambrose Bierce, 1911.

"A cell phone is a telephone on steroids. I do not have a cell phone and will not." Frank Maloney, 2012.

This does serve to sum up my growing suspicions about much of modern technology.

Those of you who know me know that I have become shockingly and woefully devoted to my cellphone. No mere cellphone, it is an I-phone, appropriately capitalized. It has more computing power than the Apollo spacecraft that went to the moon, or so I'm told and so I believe. I've stopped wearing a watch because my I-phone tells me what time it is. Literally so if I wish to ask Siri. It entertains

me with mindless games. It tells me the weather in Reykjavik. It takes better pictures than just about any camera I've ever owned. It gets and sends e-mail so that even if I'm thousands of miles away I am able to conduct the business at hand, whatever it might be. And it even makes phone calls. Truly amazing. But at what price? Yes, that's a rhetorical question although I will pass on the observation that courtesy and etiquette have taken a substantial beating as people who you are trying to have a conversation with, maybe even about something important like in a courtroom or during mediation, now routinely ignore you while texting, e-mailing, playing games, or doing whatever they do on their cell phone while you stare at them in mid-sentence and feel like you are an inconvenience.

And speaking of e-mails, I conducted an experiment during the summer. In the space of one month I received 958 SPAM e-mails. Everything from fabulous riches coming my way from African potentates to more sexual activity than occurs in all of America. Remind me why we need this?

Ambrose Bierce, by the way, was an American editorialist, journalist and satirist around the turn of the last century. He disappeared without a trace while traveling with rebel troops during the Mexican Revolution in 1913 at the age of 71. One hopes that a better fate awaits our own EJCBA historian.



Judges Stephanie Ray and Robert Benton from the First DCA enjoy the annual Cedar Key dinner on November 8, 2012.

Thank You from Three Rivers Legal Services!

By Marcia Green

As this year draws to a close, I can't help but feel humbled by the good deeds of our legal community. Please join me in thanking the following attorneys who have volunteered and committed their expertise to the low income residents of our community and to the support of Three Rivers Legal Services!

Amy Abernethy
Bob Ackerman
Margaret Anderson
N. Albert Bacharach, Jr.*
Nancy Baldwin
Robert W. Bauer
Gregory V. Beauchamp
Marilyn "Lynn" Belo
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Continued on page 11

Florida's Duty

Continued from page 8

from the insurer for liability. *Travelers Indem. Co. of Illinois*, 344 F.Supp.2d at 1370. However, rejecting such a defense has brought up interesting questions of an insurer's liability where the insured rejects the defense and then enters into a settlement agreement with a third party claimant.

Generally, if one is not a party to a settlement agreement, then it cannot be bound by the terms of that agreement. See *Ahern v. Odyssey Re (London) Ltd.*, 788 So.2d 369, 371-72 (Fla. 4th DCA 2001). A well established exception to this rule is, of course, a *Coblentz* agreement, which culminates when an insurer outright and wrongfully refuses to defend its insured and the insured enters into a negotiated final consent judgment with a third party claimant. See generally *Coblentz v. Am. Sur. Co. of New York*, 416 F.2d 1059 (5th Cir.1969). If it is determined that there is coverage under the policy, then the insurer may be bound by the terms of the agreement entered against its insured. See *id.*

Florida law has carved out another exception to the general rule regarding settlement agreements. In *Zurich American Ins. Co. v. Frankel Enterprises, Inc.*, 509 F. Supp.2d 1303, 1310-12 (S.D. Fla. 2007), the court explained that an insurer may be bound by a settlement agreement to which it is not a party where the insurer defends under a reservation of rights and the insured rejects that defense and enters into a settlement agreement. However, the court made clear that in order to bind an insurer to a settlement agreement entered against its insured, the insured must actually have rejected the defense. *Id.* at 1312.

A defense under a reservation of rights elicits important questions for both the insured and the insurer. Before providing a defense under a reservation of rights, an insurer should be prepared to potentially lose control of the defense and later be found liable for a judgment entered against its insured. An insured who is faced with a defense under a reservation of rights must carefully review the reservation of rights letter for vital provisions, such as reimbursement for defense costs should the insurer later establish that there was no duty to defend. An insured who is considering rejecting a defense under a reservation of rights, must strongly consider the high costs of defending upfront. For both sides, there exist many implications, which should be thoroughly examined by counsel and explained to the respective parties.

In the next issue, we will examine the right of an insured who has accepted a defense under a reservation of rights to later reject the defense if it is not satisfied with the way the insurer is defending.

Three Rivers

Continued from page 10

*designates attorneys who have received the Florida Bar President's Pro Bono Service Award

** designates attorneys who have received the Florida Supreme Court's Law Firm Commendation

My sincerest apologies to any names omitted in error or enrolled after publication deadline.

As a reminder, attorneys who volunteer with Three Rivers Legal Services are referred clients who have been pre-screened for financial eligibility; attorneys are offered mentoring and support, malpractice insurance coverage and litigation cost reimbursement as available. As a volunteer, you can even use our office to meet with your pro bono clients. We try to make your experience positive while recognizing that our clients are often needy in their situation and confused with the legal system. For those who donate money, we also applaud your generosity. Last month, you received a letter from our long-time board member, Bill Salmon. If you haven't done so yet, please take his words to heart and respond to his call for contributions to Three Rivers.

As a final closing note for the year, please check out www.FloridaProBono.org the newly updated statewide website that seeks to encourage lawyers to take on pro bono cases and provide more resources for lawyers completing pro bono work. The database allows attorneys to search for local opportunities and for volunteer attorneys to view video CLE training in relevant areas of law.

Wishing you a very wonderful holiday season; I look forward to working with you again in 2013.



First DCA Judge Robert Benton, Chief Judge Roundtree, Judge Monaco, First DCA Judge Stephanie Ray with her husband, John Ray at Cedar Key



Eighth Judicial Circuit Bar Association, Inc.
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December 2012 Calendar

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

January 2013 Calendar

- 1 New Year’s Day, County and Federal Courthouses closed
- 2 EJCBA Board of Directors Meeting; Ayers Medical Plaza, 720 SW 2d Avenue, North Tower, Third Floor – 5:30 p.m.
- 5 Deadline for submission of articles for February Forum 8
- 9 Probate Section Meeting, 4:30 p.m., 4th Floor, Family & Civil Courthouse
- 14 Law in the Library, Alachua County Public Library Headquarters, “The Patient Protection and Affordable Care Act: Just the Facts, No Politics,” 6-7:00 p.m.
- 15 Family Law Section Meeting, 4:00 p.m., Chief Judge’s Conference Room, Alachua County Family & Civil Justice Center
- 18 EJCBA Luncheon, Chief Judge Robert E. Roundtree, Jr., Paramount Plaza, 11:45 a.m.
- 21 Martin Luther King, Jr. Birthday, County and Federal Courthouses closed

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.