FORUM 8

Volume 72, No.5 | Eighth Judicial Circuit Bar Association, Inc. | January 2013

PRESIDENT'S MESSAGE

By Dawn M. Vallejos-Nichols

HAPPY NEW YEAR, EVERYONE!! I hope all of our colleagues, friends and Judges in the Eighth Judicial Circuit enjoyed a wonderful and relaxing holiday season and can now begin the new year with renewed vigor and resolve! Did you formulate any new year's resolutions? I generally find that I make the same resolutions every year – I resolve to be a better person, a more patient person, a calmer person, a better lawyer, etc. Things that, no matter how hard I try, can always use more improvement. Continuing to work toward self improvement is a good thing, right? I don't look at the need for improvement each year as a failure of the work I did the year before… I prefer to think of myself as a "work in progress." I long ago recognized that I am not Mary Poppins. Darn it. She was practically perfect in every way.

WIKIPEDIA tells me that the making of resolutions has religious origins in that the ancient Babylonians made promises to their gods at the start of the new year to return borrowed objects and pay their debts. A common resolution made in modern times is to improve one's finances and get out of debt. Guess things haven't changed that much since ancient times.

The resolutions I hear most frequently are to lose weight and to exercise more. The exercise one needs to be on my list again this year, as well. Enough said on that, thank you very much.

USA.gov has a list of resolutions that are popular each year, with links to resources to help you be successful. How helpful is that? I don't know if they are listed in order of popularity or not, but this is their list:

Drink less alcohol
Eat healthy food
Get a better education
Get a better job
Get fit
Lose weight
Manage debt
Manage stress
Quit smoking
Reduce, reuse and recycle
Save money
Take a trip
Volunteer to help others

Whatever resolutions are on your list, I wish you much success in 2013.

The officers of the Eighth Judicial Circuit Bar Association for the year 2012-2013 are:

Dawn M. Vallejos-Nichols
President/Editor
2814 SW 13th Street
Gainesville, FL 32608
(352) 372-9999
(352) 375-2526 (fax)
dvallejos-nichols@avera.com

James H. (Mac) McCarty, Jr.
Past-President
4321NW 51st Dr
Gainesville, FL 32606
(352) 538-1486
mmccarty@lawgators.com

Nancy T. Baldwin
President-Elect
309 NE 1st Street
Gainesville, FL 32601
(352) 376-7034
(352) 372-3464 (fax)
baldwinnt@cox.net

Raymond Brady
President-Elect Designate
2790 NW 43rd St., Ste 200
Gainesville, FL 32606
(352) 373-4141
(352) 372-0770 (fax)
rbrady1959@gmail.com

Sharon Sperling
Treasurer
2830 NW 41st St., Ste. C
Gainesville, FL 32606-6667
(352) 371-3117
(352) 377-6324 (fax)
sharon@sharonsperling.com

Audrie Harris
Secretary
P.O. Box 358595
Gainesville, FL 32635
(352) 443-0594
(352) 226-8698 (fax)
audrie.harris@yahoo.com

Members at Large

Jan Bendik
901 NW 8th Ave., Ste. D5
Gainesville, FL 32601
(352) 372-0519
(352) 375-1631 (fax)
jan.bendik@trls.org

Robert Birrenkott
P.O. Box 117630
Gainesville, FL 32611
(352) 273-0860
(352) 392-4640 (fax)
rbirrenkott@law.ufl.edu

Norm Fugate
P.O. Box 98
Williston, FL 32696
(352) 528-0019
(352) 528-4919 (fax)
norm@normdfugatepa.com

Diana M. Johnson
18 NW 33rd Court
Gainesville, FL 32607
(352) 376-4694
(352) 371-7366 (fax)
djohnson@clayton-johnston.com

Philip N. Kabler
240 NW 76th Dr., Ste. D
Gainesville, FL 32607
(352) 332-4422
(352) 332-4462 (fax)
pnkabler@kmcllp.com

Frank Maloney – Historian
445 E. Macclenny Ave., Ste. 1
Macclenny, FL 32063-2217
(904) 259-3155
(904) 259-9729 (fax)
Frank@FrankMaloney.us

Michael Pierce
203 NE 1st Street
Gainesville, FL 32601
(352) 372-4381
(352) 376-7415 (fax)
mpierce@dellgraham.com

Meshon Trinette Rawls
P.O. Box 117626
Gainesville, FL 32611-7626
(352) 273-0800
(352) 392-0414 (fax)
rawls@law.ufl.edu

Anne Rush
11621 Research Circle
Alachua, FL 32615
arush@rtix.com

Anthony Salzman
500 E. University Ave., Ste A
Gainesville, FL 32601
(352) 373-6791
(352) 377-2861 (fax)
tony@moodysalzman.com

Gloria Walker
901 NW 8th Ave., Ste. D5
Gainesville, FL 32601
(352) 372-0519
(352) 375-1631 (fax)
gloria.walker@trls.org

Congratulations to the new EJCBA Young Lawyer's Division 2013-2014 Officers:

President: Diana Johnson
Vice-President: Blake Fugate
Secretary/Treasurer: Rick Fabiani
Social Chair: Dan Vazquez
Community Liaison: Anne Rush
President-Elect: Courtney Johnson
Imm. Past President: Sondra Randon

About This Newsletter

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

Eighth Judicial Circuit Bar Association, Inc.
P.O. Box 13924
Gainesville, FL 32604
Phone: (352) 380-0333 Fax: (866) 436-5944

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
P.O. Box 13924
Gainesville, FL 32604
(352) 380-0333
(866) 436-5944 (fax)
execdir@8jcba.org

Dawn Vallejos-Nichols
Editor
2814 SW 13 St
Gainesville, FL 32608
(352) 372-9999
(352) 375-2526 (fax)
dvallejos-nichols@avera.com

Deadline is the 5th of the preceding month

Grateful To Be Practicing "Business As Usual"

By Marcia Green

Happy New Year! As we enter into 2013, Three Rivers Legal Services has overcome another hurdle in the precarious world of non-profits and politics! Whew!

As many of you are aware, the majority of our funding comes from a grant from the Legal Services Corporation [LSC], an independent federal agency created by an act of Congress. Every three years, Three Rivers must re-apply for our grant and our work is subject to periodic compliance and quality reviews. We had one of these visits in early 2012 and representatives from LSC looked at how we spent our money and how we served our clients; they wanted to know that we were providing the maximum bang for their buck. They wanted to see how we were viewed by both the legal community and the other service providers to low income individuals. They looked at whether our paperwork was in order -- making sure that our clients were financially eligible, met the priorities set by our board, and that we weren't serving those we are prohibited from serving. They wanted to see how we work with the private bar and whether our pro bono program is effective. Although the staff just wants to practice law and advocate on behalf of our clients, we must always make sure we are in compliance with our funders!

But the last six months have been particularly painful. Jacksonville Area Legal Aid, the major legal aid provider serving Duval, St. Johns, Nassau and Clay counties, applied for *our* grant. This was a first in the history of LSC, where one established legal aid program competed for the grant of another. In September, LSC again sent teams of representatives to north Florida, interviewing staff, community and bar leaders, the judiciary, and board members. They poured over our financial records; they poured over our cases and case management system. It was excruciatingly time consuming and stressful! The wait for the decision was just as bad. During that period, all plans for 2013 were put on hold.

In early December, Three Rivers received word that we have once again been awarded a grant from the Legal Services Corporation. Now we can move on and breathe at least one sigh of relief. Congress will still determine whether to continue funding LSC overall and, if so, at what level. There is a continuing resolution for funding through June although the "fiscal cliff" negotiations may change everything. This is our annual stressor at Three Rivers and we're used to continuing resolutions, threats of cutbacks, good years and bad years, but at least we can continue *business as usual*.

Now I can get back to writing about what I wanted to write about before my work world was so rudely interrupted!

In 2013, Three Rivers hopes to continue our successful CLE programs, both full day training events as well as webinars. Our first webinar will be an Ethics webinar in February; details will be forthcoming and we are grateful to attorney Eugene Shuey for volunteering for this presentation. We are also planning a "live" CLE seminar on Landlord/Tenant practice sometime in the spring. Our goals with training are to help volunteers learn skills in the areas of law needed most by our clients, earn free CLE credits as volunteers and impart legal information useful in your own practice.

If you have skills that might meet our goals and would like to provide a CLE webinar or "live" seminar for pro bono attorneys, let me know. If you have suggestions for CLEs that you would like for TRLS to sponsor, please let me know as well and we'll see if we can put it together.

We are also looking to update our Volunteer Attorney Program roster. If you are already a volunteer but have changed your legal practice focus or want to try something new, please email me at marcia.green@trls.org. If you want to become a volunteer, go to our website at www.trls.org/VolAttorney.html and complete our simple on-line enrollment form.

While the majority of our cases involve family law, landlord/tenant, foreclosure defense, consumer law and wills and probate, you may be able to help even if those are not your specialties. For example, did you know that a Guardian Advocacy allows a parent or relative to take care of the medical needs of a disabled adult, most often their own child? Maybe you can help an elderly or disabled client by advocating for them against a creditor. While these may not be your specializations, helping a client through the process is a needed role you can play without learning a whole new practice of law. We welcome your skills, your talents and your license to practice law; we hope that you will volunteer!

Once again, thank you to all of our volunteers and thank you to those of you who continue to financially support Three Rivers. *Business as usual* means that funding is precarious, what funding we do receive provides for just 20% of the actual need, that the low income members of our community continue to need help and, in 2013, Three Rivers Legal Services will continue to be the provider of free civil legal services in our community.

Filing a Frivolous Appeal Can Be Costly

By Audrie M. Harris

How many times have we all heard our adversary yell with righteous indignation: "Judge, we will appeal!" or "Judge, we'll let the appellate court comment on that"? All too often, certain lawyers recite this threatening mantra after receiving an adverse ruling and convince their client to appeal, not because the ruling is legally or factually wrong, but to feed into the client's unhealthy need to continue the battle; to allow the lawyer to continue billing; and/or maybe to help the lawyer avoid a malpractice or ineffective assistance of counsel claim. Whatever the reason, the threats are made, the appeal filed, and the litigation continues. I am not suggesting that there aren't meritorious appeals. There is an appellate court for a reason and sometimes an appeal must be filed to correct a ruling. However, as I'm sure we have all experienced, some appeals are simply pursued for all the wrong reasons and it is those appeals which can end up becoming costly to the appellate lawyer and client as well as to the administration of justice.

Unfortunately, Florida courts have actually had to comment on this precise problem many times. Certainly, a lawyer has a duty to zealously represent their client's interests. However, such a duty does not justify the filing of a frivolous appeal. The Florida Supreme Court has cautioned that the Florida Statutes,[1] The Florida Bar's rules of professional conduct,[2] as well as the oath of admission,[3] all warn that attorneys must be governed by considerations other than mere zealous advocacy.[4] The Court openly noted that: "[t]oo many members of the Bar practice with complete ignorance of or disdain for the basic principle that a lawyer's duty to his calling and to the administration of justice far outweighs - and must outweigh - even his obligation to his client, and, surely what we suspect really motivates many such inappropriate actions, his interest in his personal aggrandizement."[5]

When an argument is not supported by the application of the governing law, or a good faith argument for an extension, modification, or reversal of existing law, a Florida lawyer has both an ethical and a statutory duty ***not*** to file the appeal.[6] Filing a frivolous appeal will justify the imposition of sanctions. So how will an appellate court determine that an appeal is frivolous? This circuit's own district court of appeal has expressly addressed this issue and found that, in general, "[a] frivolous position is one that a lawyer of ordinary competence would recognize as so lacking in merit that there is no substantial possibility that the tribunal would accept it."[7] More specifically, guidelines have been established to determine if an action is frivolous. For instance:

1. Is the case wholly without legal merit and unable to be supported by a good faith argument for an extension, modification or reversal of existing law?
2. Is the case contradicted by overwhelming evidence?
3. Has the case been undertaken to delay or prolong the litigation, or to harass or maliciously injure another? or
4. Does the case assert material factual statements that are false?[8]

Relying on the above guidelines to sanction a client and lawyer for raising frivolous arguments on appeal, the First District Court of Appeal has stated:

> We believe that applying sanctions in cases such as this will protect this court's ability to serve litigants with meritorious cases, will encourage lawyers to give thoughtful consideration as to whether there are non-frivolous grounds for an appeal before filing, and will discourage lawyers from raising meritless appellate arguments on the chance that they will "stick." The filing of an appeal should never be a conditioned reflex. ***About half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop***.[9] (Emphasis added).

All too often certain lawyers want to fight to the death and put on a good show for their client regardless of whether their argument has merit or not. However, filing a frivolous claim or appeal can be costly to the lawyer and their client as well as to the administration of justice. As the First District Court of Appeal has expressly stated, Section 57.105 ***mandates*** the award of fees for bringing or failing to dismiss meritless claims or defenses.[10] It is ***not*** discretionary. Further, a lawyer who files a frivolous appeal violates both a duty to serve the client's interests as well as a duty to the judicial system.[11] Filing an appeal should not be automatic. There is an ethical and statutory duty to counsel clients appropriately about filing frivolous appeals that only serve to harass others, prolong litigation and/or

Continued on page 9

Alternative Dispute Resolution

A Rose By Any Other Name…

By Chester B. Chance and Charles B. Carter

Sharon Begley wrote an article in Newsweek some time ago regarding how language shapes our thoughts.

Her first example was the Viaduct de Millau, which opened in the southern region of France in 2004. The Viaduct is the tallest bridge in the world.

According to Ms. Begley, German newspapers described the Viaduct floating above the clouds with elegance and lightness and breath-taking beauty.

Ms. Begley notes French newspapers discussed the Viaduct as an immense concrete giant. She wondered why Germans saw the bridge in terms of aesthetics and beauty and the French saw power and strength.

Ms. Begley looked to Lera Boroditsky, Psychologist at Stanford University. The issues centered around whether "the language we speak shapes the way we think and see the world." If so, Ms. Begley and Dr. Boroditsky opine it means language is not merely a means of expressing thought "but, a constraint on it, too."

How so? In German, the noun for bridge is feminine. In French, the noun for bridge is masculine. As a result, Dr. Boroditsky suggests German speakers see female features in a bridge while French speakers see masculine ones. By way of further example, Germans describe keys (as in used to open a door) with words such as hard, heavy, jagged, metal, etc. The Spanish describe keys as golden, intricate, little and lovely. The German word for key is masculine and the Spanish word for key is feminine.

"Even a small fluke of grammar" - the gender of nouns – "can have an effect on how people think about things in the world" according to Dr. Borditsky.

Grammatical gender influences our perception of abstractions. Depictions of death and victory in art are more likely to be represented by a man if the noun is masculine and a woman if the noun is feminine. Thus, a German would tend to see death as male while a Russian would see death as female.

Some more interesting examples: People apparently remember colors more easily if different shades of color had distinct names. In English, we may refer to something as light blue or dark blue, but a Russian would have a specific word for the shade nuances and thus, tend to remember them more easily. They thus perceive color differences more easily.

Koreans use a word for "in" when an object is in another snuggly and a different one when an object is in something loosely. As a result, Ms. Begley suggests Korean adults are better than English speakers at distinguishing tight fit from loose fit.

There are many other examples of how language shapes our thoughts and perceptions. Cultural and individual perceptions of thoughts, actions, and abstractions shape thought.

Ms. Begley suggests that in English we might say, "she broke the bowl" even if it was smashed accidentally. However, Spanish and Japanese would describe the event more like "the bowl broke itself" if it was an accident. As an eyewitness, English speakers seem to remember who was to blame even in an accident, but Spanish and Japanese remember it less well than they do intentional actions. "It raises questions about whether language affects even something as basic as how we construct our ideas of causality," according to Ms. Begley. Thus, there's an influence on witness perception and eyewitness testimony.

As lawyers, it seems there are many occasions to remember that language may shape our thoughts. Certainly this would apply, the studies suggest, to eyewitness testimony. It also applies to communication during negotiations, mediations, closing argument, etc.

Some people have suggested that communication never "communicates" at a 100% effective level. The studies suggested in the Newsweek article by Ms. Begley seemed to confirm that thought. The impreciseness of

Continued on page 6

A Company's Primer on Employee Medical Leave

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

When establishing the best practices related to employee medical leave, companies must consider both the Family Medical Leave Act (FMLA) and the various laws against discrimination based on disability including the Americans with Disabilities Act (ADA) and Florida Civil Rights Act (FCRA).

The FMLA is fairly mechanical. It is intended to help employees balance their work and family life by allowing them to take unpaid job-protected leave. Qualified employers (those with 50 or more employees in 20 or more work weeks in the current or preceding year) must allow twelve work weeks of leave in a 12-month period for a "serious health condition" that makes the employee unable to perform the essential functions of his or her job, among other reasons.

To be eligible for FMLA leave, an employee must have worked for the employer for at least 12 months (continuity is not required) and the employee must have worked for the employer for at least 1,250 hours during the 12-month period immediately before the start of the leave. The employer may require medical certification for serious health conditions of employee before the leave starts or within 15 calendar days thereof.

The ADA and FCRA apply to employers of 15 or more employees, and all employees are eligible. Where an employee's "serious health condition" could also be considered a "disability," these laws against disability discrimination must be considered. They require a company to allow leave to accommodate a "disability" if the employee can provide a general window of time to return to work and there is no "undue hardship" on the company. Accordingly, the ADA and FCRA may require longer leave than the FMLA. As a result, compliance with the technical requirements of the FMLA, without consideration of the requirements of the ADA and FCRA, is usually not sufficient.

Alternative Dispute

Continued from page 5

communication has something to do with our differences over the connotation as well as the denotation of words and how words shape our thoughts, our perceptions, our reality, our ability to do tasks, etc.

We relay this article not only to provide thought for communications during alternative dispute resolution sessions, but, in other legal scenarios and perhaps in our personal communications. Never take it for granted that the listener interprets what we say in exactly the same way. Assume that what we say is never heard in the same way we intend.

In a world where so much of our communication is now done electronically, without the benefit of personal expressions, perhaps language shapes our thoughts and our perceptions even more than ever before.

EJCBA President Dawn Vallejos-Nichols fills her plate at the November luncheon

January 2013

1 New Year's Day, County and Federal Courthouses closed
2 UF v. Louisville, 2013 Sugar Bowl, New Orleans, TBD
5 Deadline for submission of articles for February Forum 8
9 Probate Section Meeting, 4:30 p.m., 4th Floor, Family & Civil Courthouse
9 EJCBA Board of Directors Meeting; Ayers Medical Plaza, 720 SW 2d Avenue, North Tower, Third Floor – 5:30 p.m. (Date Change)
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
31 EJCBA Social, 101 Downtown, 5:30-7 p.m.

February 2013

5 Deadline for submission of articles for March Forum 8
6 EJCBA Board of Directors Meeting; Ayers Medical Plaza, 720 SW 2d Avenue, North Tower, Third Floor – 5:30 p.m.
11 Law in the Library, Alachua County Public Library Headquarters, "A Parent's Guide to Educational Rights and Resources," 6-7:00 p.m.
13 Probate Section Meeting, 4:30 p.m., 4th Floor, Family & Civil Courthouse
15 EJCBA Luncheon, Paramount Plaza, 11:45 a.m.
18 President's Day, Federal Courthouse closed
19 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.

November EJCBA luncheon speaker Jane Curran, Florida Bar Foundation

Attendees at the November EJCBA luncheon, Paramount Plaza Hotel

What is the Standard for Determining the Amount of a Fee Award in a Fee Dispute Between Attorney and Client Under a Written Fee Agreement?

By Siegel, Hughes & Ross

Where someone other than a client is required by agreement or statute to pay prevailing party attorneys' fees (hereafter referred to as "third-party" fee disputes), the trial court may award only a reasonable fee, which can be established only by expert testimony (absent a stipulation of the parties). *See, Kemp v. Kemp,* 61 So. 3d 481 (Fla. 5th DCA 2011). This topic was addressed in our article from the April 2009 edition of Forum 8, entitled *Is Expert Testimony Required to Recover a Reasonable Attorney's Fee.* Is the standard the same for determining the amount of fee award in a fee dispute between an attorney and his own client (hereafter referred to as "first-party" fee disputes) arising from a written fee agreement?

In the 1998 case of *Franklin & Marbin, P.A. v. Mascola,* the Fourth DCA addressed this issue. 711 So.2d 46 (Fla. 4th DCA 1998). In that case, the plaintiff-law firm filed a notice of charging lien and then sued their former client for fees due under a contract of representation. *Id.* at 47. The Fourth DCA held that a first-party fee dispute, unlike a third-party one, is simply a contract dispute between the lawyer and client. *See id.* at 52. It strongly implied that the attorney would be entitled to a fee award based on the rates agreed to by the client, unless the fee contract was illegal, prohibited, or excessive. *See id.* For reference, Rule 4-1.5(a)(1) of the *Florida Rules of Professional Conduct* defines an excessive fee as follows: "after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee or the cost exceeds a reasonable fee or cost for services provided to such a degree as to constitute clear overreaching or an unconscionable demand by the attorney."

Despite the fact that the fees claimed by the law firm were not found to be excessive by the trial court and the Court's belief that the law firm was entitled to fees based on the rates set forth in the contract, the *Franklin* Court did not affirm the fee award against the client because there was no charging lien to which the award could attach. *See id.* at 52-53. It did, however, make clear that the law firm could sue for a money judgment against the client. *See id.*

Although the law firm in *Franklin* presented expert testimony on the reasonableness of its fee award, the Fourth DCA's opinion makes clear that reasonableness (not to be confused with excessiveness) of a fee award is not an issue in the first-party context. Indeed, the Court specifically held that, "[i]n the absence of a legal determination by the court that the fee contract is illegal, prohibited or excessive, under a *periodic* fee agreement for services already performed the lawyer is entitled to a money judgment for the amount of fees due under the contract." *Id.* at 52 (emphasis in original). The requirement of reasonableness is wholly absent from this holding. Notably, the contract at issue in *Franklin* required the client to dispute bills in writing, if at all, which the client failed to do. *See id.*

For over a decade, the Fourth DCA seemingly adhered to the rule set forth in *Franklin*: that the terms of the contract for representation control in a fee dispute between attorney and client. For example, in *Haines v. Sophia,* the Fourth DCA explained that it concluded in *Franklin* "that the rights and obligations of the parties as to the fee were determined by their fee agreement," and that the "same principle" applies to the *Haines* appeal. 711 So.2d 209 (Fla. 4th DCA 1998). Later, in *Gossett & Gossett, P.A. v. Mervolion*, the Fourth DCA again found that first-party fee disputes are governed by the contract between the lawyer and client. 941 So.2d 1207 (Fla. 4th DCA 2006). In *Gossett*, the Court reversed the trial court's final judgment because it improperly reduced the fee award to the lawyer. *See id.* at 1209. On remand, it directed the trial court "to enter an amended final judgment based on the contractually agreed-to fees." *See id.* There was no mention of expert testimony in the *Gossett* or *Haines* opinions.

Continued on page 10

Frivolous Appeals

Continued from page 4

incur unnecessary fees and expenses. A lawyer's duty to his calling and to the administration of justice far outweighs - and ***must*** outweigh - even his obligation to his client.[12] Sometimes the best advice we can and should give our clients is to simply stop – stop the unnecessary battling.

1 Fla. Stat. § 57.105 (allowing a court to sanction the losing party and the losing party's attorney if the court finds the losing party or the losing party's attorney knew or should have known that a claim or defense was not supported by the application of then-existing law).

2 Rules Regulating The Florida Bar 4-3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law." See also, Rules Regulating The Florida Bar 4-3.3(a)(1) ("A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.").

3 "I do solemnly swear: …I will not counsel or maintain any suit or proceedings which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land; I will employ, for the purpose of maintaining the causes confided in me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law…".

4 *Boca Burger, Inc. v. Forum*, 912 So. 2d 561, 571 (Fla. 2005), quoting, *Lingle v. Dion*, 776 So. 2d 1073, 1078 (Fla. 4th DCA 2001).

5 Id. at 572, citing, *Rapid Credit Corp. v. Sunset Park Ctr.,* Ltd., 566 So. 2d 810, 812 n.1 (Schwartz, C.J., specially concurring).

6 Rules Regulating The Florida Bar 4-3.1; Fla. Stat. § 57.105; *de Vaux v. Westwood Baptist Church*, 953 So. 2d 677, 683 (Fla. 1st Dist. 2007).

7 *de Vaux,* 953 So. 2d at 683, quoting Restatement (Third) of Law Governing Lawyers § 110, cmt. d. (2000); see also, *Visoly v. Sec. Pac. Credit Corp.,* 768 So. 2d 482, 491 (Fla. 3d DCA 2000) (a "frivolous" appeal is one which raises arguments a reasonable lawyer would either know are not well grounded in fact, or would know are not warranted either by existing law or by a reasonable argument for the extension, modification, or reversal of existing law.").

8 d*e Vaux,* 953 So. 2d at 683, citing *Wendy's of N.E. Florida, Inc. v. Vandergriff*, 865 So. 2d 520, 524 (Fla. 1st DCA 2003).

9 *Id.* at 685, citing, *Hill v. Norfolk & Western Ry. Co.,* 814 F. 2d 1192, 1202 (7th Cir. 1987).

10 Fla. Stat. § 57.105 ("the court shall award a reasonable attorney's fee…"); see also, *de Vaux*, 953 So. 2d at 685, citing, *Smith v. Gore*, 933 So. 2d 567, 568 (Fla. 1st DCA 2006) and *Albritton v. Ferrera*, 913 So. 2d 5, 8-9 (Fla. 1st DCA 2005); *Martin County Conservation Alliance v. Martin County*, 73 So. 3d 856, 859 (Fla. 1st DCA 2011).

11 *de Vaux*, 953 So. 2d at 685, citing, *Mullins v. Kennelly*, 847 So. 2d 1151, 1154 (Fla. 5th DCA 2003).

12 *Boca Burger, Inc.,* 912 So. 2d at 572, citing, *Rapid Credit Corp. v. Sunset Park Ctr., Ltd.*, 566 So. 2d 810, 812 n.1 (Schwartz, C.J., specially concurring).

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 this year will be renowned Ft. Lauderdale litigator Bruce S. Rogow. Mr. Rogow will address issues of professionalism, including issues that arise in his profile cases, such as those he has litigated throughout his career, in both the civil and criminal arena.

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.

Fee Dispute

Continued from page 8

Based on *Franklin, Haines,* and *Gossett*, it would appear safe to assume that expert testimony is unnecessary to establish the amount of a fee award in a first-party dispute. Yet, in the recent case of *Robin Roshkind, P.A. v. Machiela,* the Fourth DCA somewhat inexplicably held that expert testimony is required to establish a fee award in the first-party context. 45 So.3d 480 (Fla. 4th DCA 2010).

The Fourth DCA began its analysis by restating the third-party rule, "where a party seeks to have the opposing party in a lawsuit pay for attorney's fees incurred … independent expert testimony is required." *Id.* at 481. (citations omitted). Without any further explanation, it then stated that "case law throughout this state has adhered to the requirement of an independent expert witness to establish the reasonableness of fees, regardless of whether a first or third party is responsible for payment." *Id.* (citing *Sourcetrack, LLC v. Ariba, Inc.*¸ 34 So.2d 3d 766 (Fla. 2d DCA 2010). Strangely, the *Sourcetrack* case cited by the Fourth DCA in support of this latter-stated rule is a third-party case that makes no mention of first-party fee disputes. Also strange is that the *Roshkind* Court deals with *Franklin* and *Gossett* only in a tersely-worded footnote, wherein it states that "neither case truly supports [the law firm's argument that expert testimony is not required] because an expert witness testified in *Franklin* and it is unclear whether an expert testified in *Gossett*." *See id.* at fn. 1.

In any event, the *Roshkind* decision makes clear that expert witness testimony is required to establish the reasonableness of a fee award in the first-party context. Yet, even the *Roshkind* Court criticized this requirement, devoting the majority of its opinion to such criticism. *See id.* at 482. It explained that trial judges are ultimately obligated to decide the reasonableness of a fee award, a task with which they are frequently confronted. *See id.* Because trial judges are aware of going rates in their communities for lawyer's services and whether the time expended is reasonable, it seems that expert testimony does little but increase litigation costs. *See id.* Often, each party chooses a lawyer friend, who willingly testifies that the rate and time expended is reasonable (or unreasonable, if opposing the award). *See id.* The trial court is left to decide the reasonableness of the rate charged and time expended. *See id.* Thus, expert testimony of the reasonableness of a fee award "seems to have long outlasted its usefulness." *See id.*

These criticisms are justified, particularly in the first-party context where the client has agreed to pay a certain rate for the lawyer's services. If each side merely presents expert testimony supporting or disputing the reasonableness of the fees sought, it ultimately falls on the trial court, as a finder of fact, to decide what amount is reasonable. Thus, both sides have spent time and money arguing an issue that the trial judge will generally have the expertise to resolve on his own.

Moreover, in the first-party context, modern fee agreements generally have a provision requiring the client to dispute bill(s), if at all, within a certain amount of time. *See, e.g. Franklin,* at 52. This protects the client by allowing the client a measure of control over the total, ultimate fee in the case, and ensures that he does not incur fees for services he does not wish to receive and/or for which he cannot pay. *See id.* It also protects the lawyer by ensuring that he is not faced with after-the-fact objections to expenditures of time that might have been avoided if timely raised. *See id.* Yet, these mutually beneficial provisions are, in effect, nullified by the requirement of expert testimony to establish a fee award. *See id.* It allows a client to run up large legal fees while not contemporaneously disputing the reasonableness of same, only to later rely on the purported unreasonableness. It is akin to ordering a meal for the price stated on the menu, eating all of it, and then refusing to pay for the meal because the price is unreasonable in relation to the quality of the meal.

In response to these problems with the expert testimony requirement in first-party fee disputes, the *Roshkind* Court certified this question to the Supreme Court of Florida:

> Is expert witness testimony necessary to establish attorney's fees due under a charging lien against a client, who has entered into a retainer agreement that requires all fee disputes to be made in writing within thirty days of the bill's receipt and has failed to object?

The Supreme Court has not yet answered this question, but there seems to be no good reason not to answer it in the negative. In fact, if one were to read *Franklin, Haines*, and *Gossett,* one might already believe that the Fourth DCA has answered its own question in the negative.

Criminal Law

By William Cervone

It is amazing to me how the world works. There is a symmetry to things that is sometimes impossible to believe but nonetheless undeniable. Such is the occasion for this commentary.

In our October issue, contributors Chester B. Chance and Charles B. Carter outlined for us the many and varied events of the Lawyer Olympics. Included in their documentary was reference to Trial by Combat, which they point out has been a part of the Lawyer Olympics since 1902. Perhaps formally so, but certainly this event pre-dates the turn of the last century and has its jurisprudential and other roots in times far more ancient. As far back as ancient Greece, from which much of our democracy comes, there are references to the efficacies of Trial by Combat. In medieval times many a witch came to a bad end in this fashion. Only a few years ago, the Florida legislature paid unacknowledged and unspoken homage to this under-used method of dispute resolution in passing our current Stand Your Ground version of self-defense.

So it could not have been mere serendipity that at about the same time as we were reminded of the sporting applications of Trial by Combat, alert reader Steve Scott sent me the following pleading:

Plaintiffs' Demand For Trial By Mortal Combat

COME NOW the Plaintiffs, by and through their undersigned counsel, and hereby serve this Demand For Trial By Mortal Combat, and in support of said demand would show this Court as follows:

1. Florida Statutes 2.01 (2003) states the following:

The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the 4th day of July, 1776, are declared to be of force in this state; provided, the said statutes and common laws be not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this state.

2. There has been no legislation passed by the Legislature of the State of Florida forbidding or abrogating trial by mortal combat.

3. As of July 4, 1776, trial by mortal combat was part of the common law of England, although seldom, if ever, resorted to in modern time. See Winston S. Churchill, *A History Of The English Speaking People*, Vol. 1 (Dodd, Mean and Co., New York, 1966), p. 218, wherein it is stated:

"...as late as 1818, a litigant non-plussed the judges by an appeal to trial by battle and compelled Parliament to abolish this ancient procedure."

WHEREFORE, plaintiffs hereby request this Honorable Court to enter its Order directing that the trial of this cause be by mortal combat, and setting forth the date, place, and conditions for said combat.

The possibilities are rich and endless, and start with the now too numerous to count law schools in Florida. True, those with Division I caliber athletic programs might have an advantage in teaching Trial By Mortal Combat 101, but would any of you want to discount the advantages that the faculty at, say Ave Maria School of Law (yes, it exists in Naples), would have in harkening back to battle proven Inquisition methodologies? In times when the competition for enrollment and tuition dollars is increasingly desperate, any edge of this sort must surely count.

The Bar exam itself must, of course, be re-configured to test the ability of applicants to prove their mastery of Trial by Combat techniques. And upon admission, CLE requirements must also keep pace with developing Trial by Combat procedures. I also suspect that our courtrooms will require modifications. It will no longer be sufficient that we have computer technology at our fingertips. We will clearly need weaponry. I favor the mace, and not the spray-can kind. I'm not sure how to deal with courthouse security screening and will leave that to Court Administration.

In any event, I trust that at least some of you will explore this further. It is but a small step from the sometimes less than admirable lack of decorum that is creeping into the practice of law anyhow.

Happy New Year!

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