

FORUM 8

Volume 76, No. 3

Eighth Judicial Circuit Bar Association, Inc.

November 2016

President's Message

By Stephanie M. Marchman



GATHER.

Fall is in the air and the season to gather is upon us. November will give us the opportunity to visit with our friends and family, give thanks, share good food and stories, and partake in traditions. I particularly enjoy the Thanksgiving holiday, as there's nothing quite like our newfound family tradition of grownups with full bellies working up a sweat as they battle for first prize in our ping pong tournament, while our children hoot and holler from the sidelines.

Our community's commitment to family is one of the many reasons the Eighth Circuit is a great place to live and work. In my office, attorneys and staff are offered flexible work schedules, teleworking options, family health insurance coverage, and paid leave. We have the time to attend our kids' ball games and piano recitals, tend to an ailing parent or spouse, or take our family on vacation. Our office is also like a family. In fact, every year, we gather for a meal the week before Thanksgiving and we all bring our favorite dishes to share. There's an unwritten rule in these office gatherings – work talk is off limits (unless you have a funny story to share about the olden days, then it's allowed!). Instead, we talk about our families, gardens,

cooking, music, movies, and the like. I can personally attest that these things (in addition to a few others) make for a happy, productive, and committed lawyer.

Through last year's Leadership Roundtable, many local lawyers cited family friendly policies in their workplaces, including childcare assistance, flexible workhours, teleworking options, and paid leave, as critical elements to promoting diversity and inclusion in the legal profession. Many law offices in the Eighth Circuit offer such benefits and I'm confident that others will find ways to heed this call.

During the Roundtable, lawyers also asked for the local voluntary bar associations to enact family friendly programming and meetings. I'm pleased to report that the Eighth Judicial Circuit Bar Association is also heeding this call. To avoid interfering with family time in the evening, many of our committees meet by phone or during lunchtime. In addition, board members with family commitments during evening board meetings may call-in if they choose to. Or they may bring their children to the board meeting. Indeed, I prefer the latter, as I noticed that at our last board meeting, the baby in the room seemed to have a calming effect on what can be an otherwise boisterous room full of lawyers!

In terms of programming, the Eighth Judicial Circuit Bar Association is hosting our first ever Family Friendly Tailgate on November 12, 2016. I encourage you to bring your family and tailgate with us at the University of Florida Levin College of Law three hours prior to the South Carolina v. Florida Gators football game. Game time has not been announced, but we anticipate that it will be an afternoon game with a morning tailgate, perfect timing for kids if you'd like to bring them. We'll have plenty of good food, drinks, and games for all ages. If you're interested, please contact Ryan Gilbert at rgilbert@gmail.com. I plan to bring my family to this gathering; I hope you'll do the same.

2016 - 2017 Board Officers

Stephanie M. Marchman
President
200 E University Ave, Ste 425
Gainesville, FL 32601
(352) 334-5011
(352) 334-2229 (fax)
marchmansm@cityofgainesville.org

Robert M. Birrenkott, Jr.
Past-President
PO Box 117630
Gainesville, FL 32611
(352) 273-0860
(352) 392-4640 (fax)
rbirrenkott@law.ufl.edu

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

Gloria Walker
President-Elect Designate
901 NW 8 Ave, Ste D5
Gainesville, FL 32601
(352) 372-0519
(352) 375-1631 (fax)
Gloria.walker@trfs.org

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

Michele Lieberman
Secretary
12 SE 1st Street
Gainesville, FL 32601
(352) 374-5218
(352) 374-5216 (fax)
mlieberman@alachuacounty.us

Members at Large

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

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

Cherie H. Fine
622 NE 1st Street
Gainesville, FL 32601
(352) 372-7777
(352) 372-0049 (fax)
cfine@ffplaw.com

Norm D. Fugate
248 NW Main Street
P.O. Box 98
Williston, FL 32696
(352) 528-0019
norm@normdfugatepa.com

Ryan Gilbert
203 NE 1st Street
Gainesville, FL 32601
(352) 372-4381
(352) 376-7415 (fax)
rgilbert@gmail.com

Nicholas S. Hamm
4707 NW 53rd Ave Ste A
Gainesville, FL 32653
(352) 888-6142
nick@hammlawfirm.net

Michael Hines
317 NE First Street
Gainesville, FL 32601
(352) 375-0812
(352) 375-0813 (fax)
michael@galiganilaw.com

Stephanie N. Hines
120 W University Ave
Gainesville, FL 32601
(352) 374-3670
hiness@sao8.org

Courtney Wilson Johnson
115 NW 34th St
Gainesville, FL 32607
(352) 372-1282
(352) 375-9960 (fax)
courtney@foldsandwalker.com

Dominique Lochridge-Gonzales
901 NW 8th Avenue, Ste D5
Gainesville, FL 32601
(352) 415-2324
(352) 375-1631 (fax)
dominique.lochridge-gonzales@trfs.org

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

George Nelson
81 N. 3rd Street
Macclenny, FL 32063
(904) 259-4245
(904) 259-0285 (fax)
nelsong@pdo8.org

Peggy A. O'Connor
102 NW 2nd Avenue
Gainesville, FL 32601
(352) 372-4263
(352) 375-5365 (fax)
peg@turnerlawpartners.com

Monica Perez- McMillen
101 NW 75th St, Ste 1
Gainesville, FL 32607
(352) 335-2393
(352) 375-0104 (fax)
m.perez@foryourlaw.com

Star M. Sansone
3940 N.W. 16th Blvd, Bldg. B
Gainesville, FL 32605
(352) 376-8201
(352) 376-7996 (fax)
stars@salterlaw.net

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

Jamie L. White
203 NE 1st Street
Gainesville, FL 32601
(352) 372-4381
(352) 374-7415 (fax)
jwhite@dellgraham.com

Mary K. Wimsett
1204 NW 69th Ter, Ste D
Gainesville, FL 32605
(352) 379-1900
(352) 379-3926 (fax)
mkwimsett@millerelderlawfirm.com

Contribute to Your Newsletter! From The Editor

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

About This Newsletter

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

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. Also please email a photograph to go with any article submission. 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 M. Vallejos-Nichols
Editor
2814 SW 13th Street
Gainesville, FL 32608
(352) 372-9999
(352) 375-2526 (fax)
dvallejos-nichols@avera.com

Deadline is the 5th of the preceding month

Alternative Dispute Resolution

By Chester B. Chance and Charles B. Carter



The Insurer as Mediation Participant

If your practice is personal injury law you will almost always be dealing with an insurance company as a participant in mediation. Other practice areas may also find themselves coordinating a mediation with an adjuster as a participant because

of the potential for coverage.

Lawyers often ask mediators questions about the role of insurance, the insured and the adjuster in mediation. Let's see if we can examine some of those routine questions.

1. *Most asked question:* Should the adjuster attend the mediation in person or by telephone? The answer is: well, that depends. Where is the adjuster traveling from? Down the street or from Minnesota? Is it a complicated case? Is there a lot of money on the line? There is no hard and fast answer to the question. It is probably better not to have someone come from New York on a soft tissue fender/bender. It is a compelling idea to have an adjuster come from Mars if it is a high value, complicated case. Some cases fall in between and you should make the call balancing case value, case issues, and geography/travel distance. Do you have a good relationship with opposing counsel? If so, get their thoughts on the question. Often you catch more flies with sugar than with vinegar but weigh the discussed factors, check with opposing counsel, and just do not have any hard and fast rule one way or the other.

2. *Second most asked question:* *Shouldn't the insured always attend mediation in person?* The answer is: no. Plaintiff's counsel think the insured will sit with the adjuster and demand the case be settled. Guess what? That is typically not what happens. The majority of the time the insured insists they did not do anything wrong, the claimant is a faker, etc. Although the insurer by contract usually has control of settlement, most of the time the insured is fighting any settlement. However, if there are circumstances like punitive damages being alleged, a real chance of an excess verdict, a wild card factor like DUI, etc., then, yes, have the insured at mediation. Again, just do not have a hard and fast inflexible rule and do not live under the illusion that the insured is always insisting on settlement as usually that is not the case.

How do we know? We see it and we have defense attorneys tell us about it.

3. *Another question:* *Suggesting the insurer is committing bad faith works magic, right?* Wrong. Insurers bow-up at the words 'bad faith' especially when they are tossed around all the time. Using the words when bad faith is probably not in the cards is counter-productive. Never pull a gun on someone unless you are prepared to use it. Is there a time to use a bad faith stratagem? Sure. Again, do not have a hard and fast rule one way or the other.

4. *What do I do when the adjuster advises, through the mediator, that the plaintiff's demand is too high to merit a response?* Well, first, hopefully the mediator has already tried to dissuade such a message. If the defense says "we are not responding until the plaintiff is under six figures" you do not necessarily have to jump through that hoop. Perhaps a bracket response gets the ball rolling again and is a way of addressing the defense perceptions. For instance: "if the defense moves to \$25,000, the plaintiff will move to \$98,000" may be a more palatable way to respond rather than saying "we don't bid against ourselves." There is not enough space in this article to address this not unusual scenario, we just want you to know there are ways to deal with it.

5. *What happens when we provide new information at mediation and the adjuster is angry that they have to adjust to new facts at mediation?* Well, if it is your fault the information is late, we would suggest an apology to soothe ruffled feathers. That works wonders and gets folks back on track. Remember a carrier works through claims committees. They sit down and scrutinize the facts and issues (or at least are supposed to do so) in advance of the mediation and react poorly to "updated medical bills." Stuff happens, but, just recognize the psychology of explaining why new data is just being shared helps ameliorate any reaction.

6. *Demanding the policy limits in every case is a good idea, right?* Wrong. It cannot be a coincidence that many lawyers think it is required to start by requesting policy limits. Again, that might be a fine idea: sometimes. But when you demand \$300,000



Continued on page 9

Criminal Law

By William Cervone



I promised you legalities this month so here goes.

Ever heard of jocular boasting? I hadn't either until it surfaced in a recent 4th DCA opinion. I certainly hadn't heard of it as a part of 90.803(3)(a), Then-Existing Mental, Emotional, Or Physical Condition, as an exception to the hearsay rules. Or any other

exception, for that matter.

Jocular, of course, means intended for joking, jesting, waggish or facetious purposes. As we suffer through an election year, we all know about boasting. But neither jocular nor boasting seem to fit having just killed an 11 year old and seriously injuring several others in a traffic crash, which brings us to Michael Opsincs.

Opsincs was speeding and zigzagging in and out of traffic on a wet road in Martin County when he blew through a red light. According to a witness on the other side of the road he was looking down and never braked. He broadsided a car with an impact severe enough to split it into two. An 11 year old occupant died, another child in the vehicle was severely hurt, and the driver and a third child were also injured. Half of the car careened into a third vehicle and injured its two occupants.

Opsincs was apparently not hurt. Why that always seems to be the case is one of life's great mysteries. Anyhow, he was able to interact with several witnesses immediately after the accident and claimed that he had the green light. When challenged on that, he opined "Well, shit happens."

You can imagine how that statement played with the jury under those facts, not to mention how many times the prosecutor repeated it. The trial court had ruled pre-trial that the statement was admissible as relevant to the defendant's state of mind as well as being jocular boasting under an earlier case.

That earlier case featured one Etheria Jackson, who currently resides on Death Row, where as usual he has been for decades now. While being questioned about the murder he'd eventually be convicted for, he'd suggested to detectives that "No, man, I'll go with my story, I can beat you, you can't prove this on me." Yes they can prove this on you said the jury, and yes that was properly admitted testimony relevant to his state of mind, said the Supreme Court.

And now for the inevitable rub. In yet another case, Ariella Rubinger managed to clip another car at high speed on the Interstate, killing the driver of that car. Rubinger, of course and yet again, was not injured and at the accident scene was too busy fixing her hair and makeup while talking on her cellphone about a party she was late for to be bothered with the aftermath of her driving. Her jury was also not amused, but the DCA saved her day by ruling that admission of the testimony about her somewhat callus activities was improper because behavior after the accident was not relevant to her reckless driving, and that the prejudicial impact of it outweighed its probative value.

And so we return to Opsincs, and I think you see where this is going. In reversing, the 4th DCA found that while boasting about a crime, jocular or not, is relevant and admissible (ie, Etheria Jackson), behavior after an accident is not relevant to prove reckless driving at the time of the accident. Even, apparently, immediately after the accident. No reasonable factfinder, the court said, apparently excluding the juries that convicted Opsincs and Rubinger, could conclude that Opsincs was boasting about the accident, and any probative value his rather offensive statement had was unfairly prejudicial. This portrayal of Opsincs as callous and uncaring just might have contributed to his conviction, said the court, and thus, all jocularity aside (and I'm sure the family of the dead child saw none in any of this), a new trial was ordered.

And so we know that Etheria Jackson's post-crime braggadocio ended up with him sitting on Death Row. Ariella Rubinger and Michael Opsincs ended up with new trials, the results of which are unknown to me, I suppose because actions do not speak louder than words. And all jocularity again aside, angels continue to dance on the heads of pins.



Judge Roundtree addresses the audience following his roast at Cedar Key as EJCBA President Stephanie Marchman looks on.



The Federal Bar Association has awarded the local North Central Florida Chapter the Presidential Achievement Award for 2016. The award honors chapters that meet or exceed the national Association's expectations for programming and other services to members. Treasurer Peg O'Connor and Membership Chair Ron Kozlowski accepted the award on behalf of the Chapter in September, while attending the national convention in Cleveland, Ohio. The North Central Florida Chapter, which encompasses both the Northern District and Middle District of Florida from Gainesville to Ocala, hosts events throughout the year that foster professionalism and excellence in federal practice. For more information on the Chapter, please contact Robert Griscti, Chapter President, at robertg@salterlaw.net.

Free CLE

Ben Overton Lecture in Florida Constitutional Laws

WHERE: Martin H. Levin Advocacy Center Courtroom, UF Levin College of Law

WHEN: 9:00 a.m., Thursday, November 10, 2016

SPEAKER: Honorable Barbara Pariente, FL Supreme Court Justice

Eighth Judicial Circuit Bar Association attendees may receive one free CLE credit with their attendance. Additionally, EJCBA has arranged to have parking spaces available to members. Those attending will be required to park in a designated area in the green lot and must arrive by 9:15 am. Since spaces are limited, please RSVP with Meshon Rawls at rawls@law.ufl.edu by 5 pm on Nov. 9.

Reserve Now for the EJCBA November 2016 Luncheon



WHEN: Friday, November 4, 2016 – 11:45 a.m.
 WHERE: The Woolly – 20 N. Main Street, Gainesville, FL 32601
 PROGRAM: Honorable Nikki Ann Clark, Retired First District Court of Appeals Judge—"Access to Justice"
 COST: **Members: \$17.00, Non-Members: \$25.00***
 Chef's choice luncheon buffet, including meat or vegetarian entrees, seasonal sides, and dessert
 DEADLINE: Register on or before **Monday, October 31st at Noon at <http://www.8jcba.org/event-registration/nov-2016-luncheon/>**

***\$20.00 for members and \$25.00 for non-members, not having made prior reservations.** If you are reserving at the last minute, or need to change your reservation, email Judy Padgett at execdir@8jcba.org or call **(352) 380-0333**. Note, however, that after the deadline, EJCBA is obligated to pay for your reserved meal and we make the same obligation of you. Thank you for your support.

Mark Your Calendars for Upcoming Events

EJCBA Family Friendly Tailgate – Saturday, November 12, 2016
 EJCBA Annual Professionalism Seminar— Friday, February 10, 2017
 EJCBA Charity Golf Tournament benefiting the Guardian ad Litem Program— Friday, March 3, 2017

Holiday Toy Drive

You may contact Jennifer Springfield (jennifer@springfieldlawpa.com) or Gloria Walker (gloria.walker@trls.org) to have an EJCBA Holiday Project box delivered to you. Alternatively, boxes may be picked up at Three Rivers Legal Services, located at 901 NW 8th Avenue Suite D5, Gainesville, 32601 between the hours of 8:30 and 5:00 (Monday-Friday). Boxes may be returned at the November 4th EJCBA Luncheon, or a pickup may be scheduled with Jennifer or Gloria.

New Overtime Rules Unlikely to be Delayed

By Laura Gross



Last month, twenty-one states sued the US Department of Labor challenging the implementation of new modernized overtime rules which promise to expand overtime eligibility to 5 million workers, including nearly all salaried employees who earn up to \$47,476. Hours later, in the same federal court, fifty business groups, including the US Chamber of Commerce and several trade groups, filed a parallel lawsuit. As previously mentioned, the new rules are scheduled to go into effect on December 1 and will require employers to raise the salary of most currently exempt employees to \$47,476 or pay these employees overtime pay for hours worked over 40 per week. This new minimum salary will automatically escalate every three years.

The plaintiff states argue that the new rules violate the Tenth Amendment by regulating state and local government employees' compensation for hours worked and disrupting the governmental budgeting process. The lawsuit requests declaratory and permanent injunctive relief. The businesses' claim is brought under the Administrative Procedure Act and argues that the new rule has set the minimum salary threshold so high that it effectively disregards Congress' mandated exemption of white-collar employees from the overtime requirements. This lawsuit asks the court to postpone implementation of the rule pending determination of whether the rule should be vacated. Both suits focus on compliance costs.

One week after the suits were filed, the House of Representatives voted to delay the implementation of the new rules to June 1, 2017. Republicans voted unanimously for the bill along with five Democrats. The bill faces a tougher battle in the Senate, and President Obama has promised to veto the bill if it progresses.

While delay is possible, it seems unlikely. With less than 60 days until December 1, employers should plan on implementation of the new rule. This means analyzing their workforce to determine which employees are currently exempt and making less than \$47,476 and whether these employees work more than 40 hours. There are many options when it comes to compliance including

increasing an employee's salary, paying overtime, reducing an employee's hours, or implementation of the fluctuating work week which was previously mentioned.

EJCBA's Annual Holiday Toy and Book Drive to benefit Alachua County School's Headstart Pre-K program is underway! Last year, 120 gifts were given out by *Santa* at Terwilliger Elementary and 205 other Alachua County Headstart children received gifts, for a grand total of 325. In addition, all 35 Headstart classrooms received a gift of 12 books – "The 12 Days of Christmas." If you or your office would like to fill a box or donate a classroom bag, please let Jennifer Springfield (boxes) or Anne Rush (classroom bags) know and they will make it easy and convenient for you to participate in this wonderful EJCBA tradition – jennifer@springfieldlawpa.com or 352-562-9557 or anne.rush.1024@gmail.com. You have all been amazingly generous! The children who will receive the toys are 3 and 4 years old. Age appropriate educational toys are preferred. Thank you.

Third Annual Amaze-Inn Race

November 17, 2016

Please join the third annual Amaze-Inn Race on November 17, 2016. Registration starts at 5:30 p.m., with the race beginning at 6:00 p.m. The Amaze-Inn Race is a legal themed scavenger hunt where judges, lawyers, and law students are paired into teams to participate in activities challenging the body, mind, and taste buds throughout downtown Gainesville. Participants must solve clues to determine the locations of various challenges. Past challenges have included taking an immigration quiz, eating chicken feet, scoring points on a pinball machine, and singing in the Bo Diddley Plaza; there are challenges for every skill level and ability. The event is a collaborative effort between the Eighth Judicial Circuit Bar Association, Adkins Inn, and Bennett Inn and is a fundraiser for the EJCBA's holiday project. A reception and award ceremony will follow the event. Cost of admission is an unwrapped book and toy for the Holiday Project. Please email Kristine Van Vorst, vanvorstk@circuit8.org, if you are interested in participating.

The Florida Bar Board of Governors Report

By Carl Schwait



Dear Colleagues,

The Florida Bar Board of Governors met on September 30, 2016. The major actions of the Board and the reports received included:

[The Supreme Court approved a three-hour increase in CLE requirements](#) for each three-year reporting cycle and a new mandate to take

technology-related CLE courses. With the [September 29 opinion](#) in [case No. SC16-574](#), The Florida Bar becomes the first mandatory bar in the nation to require a CLE technology component because of the increased use of technology in law practices. Florida Bar members can take advantage of [free technology courses offered by the Practice Resource Institute](#). In addition, 197 Florida Bar-approved CLE courses have been awarded technology credit representing 437 hours currently available. As of the release of the opinion, more than 2,386 Bar members have already satisfied the new technology requirement as part of their mandatory hours. For continuing education courses and information, visit www.floridabar.org/CLE.

In addition to current member communications tools, Bar members will soon be able to view brief weekly news-style videos highlighting key [Florida Bar News](#) stories. Recognizing that video provides more engagement and awareness and is easily sharable and accessible, the Board of Governors Communications Committee is launching this project through social media, the website and digital platforms beginning in late October.

[President Bill Schifino](#) has appointed a [Special Committee on the Constitution Revision Commission](#) (CRC) to focus on developing and delivering member and voter education about the process that occurs every 20 years in Florida. The [Chief Justice](#), Governor and Senate President have announced that they are now considering their CRC appointments. For appointment applications and other CRC information, visit www.floridabar.org/CRC. Scott Richardson, vice chair of the [Florida Board of Bar Examiners](#), praised increased cooperation between The Florida Bar and the bar examiners on a variety of issues. He said that law students are being encouraged to apply for the bar exam during their first year so that all investigations can be concluded before they graduate or seek legal internships. The Florida Bar is working with a software developer

to study the possibility of deploying an optional trust accounting software for members. The software would assist with trust accounting technical compliance issues (see Rules Regulating The Florida Bar [5-1.1](#) and [5-1.2](#)) that many small and medium size law firms have. More information will be available in future issues of [The Florida Bar News](#).

A new member benefit was approved by the board, eFileMadeEasy, which helps law firms with the state court system's electronic filing system. For a list of the more than 40 member benefits and discounts on bank programs, insurance, business needs, auto rentals and more, please visit www.floridabar.org/memberbenefits.

The Supreme Court received eight comments on proposed revisions to for-profit lawyer referral service rules that would create "qualifying providers." A response was filed by The Florida Bar on Oct. 5. Filings are available [on the case docket](#). Additional details on the proposed revisions are posted at www.floridabar.org/proposedLRSamend.

Letter from our Representative on the Florida Bar Board of Governors

Dear Colleagues:

I have been honored and humbled to have served as your representative on the Florida Bar Board of Governors for almost 12 years. My term expires at the end of June, 2017. I will not be seeking another term as your representative.

Your allowing me to be your spokesperson at the Florida Bar has given me one of the greatest experiences of my life. In my years on the Board of Governors, I have had the opportunity to chair the Board Review Committee on Professionalism and Advertising for 6 years; to co-chair the Bar's largest committee, the Disciplinary Review Committee, for 2 years; to serve on the Bar's Executive Committee for 3 years; to represent the Florida Bar at the Florida Supreme Court on 2 occasions; and to be awarded the Florida Bar's President's Award of Merit in 2011 and the General Practice, Solo, and Small Law Firm's Tradition of Excellence Award in 2015.

If you wish to seek this position on the Board of Governors, your petition can be procured on the Bar's website and must be submitted on or before December 15, 2016. Again, thank you for your confidence in my ability to be your representative on the Board of Governors of the Florida Bar.

Carl

Section 90.404(2)(a) Evidence in Civil Cases (Part II)

By Brad McVay



Last month we began a discussion of Section 90.404(2)(a), *Florida Statutes* (2016), which allows for the introduction of similar fact evidence of other crimes, wrongs, or acts “when relevant to prove a material fact in issue....” in the context of civil disputes. In Part I of this article, we concluded that §90.404(2)(a) is simply a special application

of the general rule that all relevant evidence is admissible unless specifically excluded by a rule of evidence, but that a special analysis by the court is required to determine admissibility. *Jacobs v. Atlantic Coast Refining, Inc.*, 165 So.3d 714 (Fla. 4th DCA 2015) is a case that illustrates what can happen when a trial court fails to conduct the proper analysis and incorrectly admits evidence under §90.404(2)(a).

In *Jacobs*, Atlantic Coast Refining (“ACR”) brought a civil theft action against Victoria Jacobs, alleging that Ms. Jacobs embezzled corporate funds while working as ACR’s bookkeeper. During trial, the judge allowed ACR to enter evidence, under §90.404(2)(a), of allegations that Ms. Jacobs had embezzled funds from her ex-husband’s business during and after their marriage, including evidence of a post-dissolution motion filed on behalf of the ex-husband. *Id.* at 716. The allegations contained in the post-dissolution motion were never subjected to trial, however, as Ms. Jacobs and her ex-husband entered into a settlement agreement. *Id.* Additionally, Ms. Jacobs’ ex-husband was deposed during the trial and repudiated the allegations contained in the motion. *Id.* Nevertheless, the jury returned a verdict in favor of ACR. Ms. Jacobs appealed the denial of her motion *in limine* to prevent reference to, or evidence of, the prior lawsuit and allegations involving her and her ex-husband.

The court in *Jacobs* began its analysis by examining the evidence that the trial court admitted under §90.404(2)(a). *Id.* The court made it clear that it was not satisfied with the “bare allegations” that the trial court admitted as evidence under §90.404(2)(a). *Id.* (“In this case, because [ex-husband], as well as Appellant, rejected the allegations set forth in the [] motion, and there was no verdict rendered...evidence of the charges set forth in that motion was incapable of proving or disproving any material fact.”) The Court stated, “[i]t is fundamentally unfair to force Appellant

to resurrect a defense to a case she had settled years earlier when the facts of the earlier accusation are not at issue and, in fact, have been disputed by the individual in whose name the motion was filed.” *Id.* at 717-718.

The *Jacobs* court also commented that the reason ACR was introducing the evidence related to the previous embezzlement allegations was not to prove knowledge, preparation, plan or identity, as ACR suggested, but rather, to show that Ms. Jacobs had bad character and the propensity to commit the particular act with which ACR had accused her of committing. *Id.* at 716. The Court pointed out that there was little or no probative value in the post-dissolution motion as “the motion contained bare allegations against the Appellant in the form of rank hearsay.” *Id.* In the end, the *Jacobs* court reversed the entry of final judgment against Ms. Jacobs and remanded the case back to the trial court for a new trial. *Id.*

Jacobs serves as a reminder that in order to admit collateral act evidence under §90.404(2)(a), the offering party must be able to prove that the opposing party committed the collateral act by clear and convincing evidence. See *McLean v. State*, 934 So.2d 1248, 1256 (Fla. 2006). Bare allegations that have been contradicted by other testimony or evidence, such as the allegations contained in the *Jacobs* motion, will not suffice under §90.404(2)(a).

In *Newberry Square Development Corp. v. Southern Landmark, Inc.*, 578 So.2d 750 (Fla. 1st DCA 1991), an Eighth Judicial Circuit Court case, Southern Landmark entered into a contract to build a shopping center for Newberry Square, but did not complete the construction until after the scheduled dates contained in the contract. *Id.* at 752. As a result, Newberry Square withheld payment of the outstanding contract balance. *Id.* Southern Landmark filed suit and alleged that Newberry Square delayed approving plans and specifications, delayed executing charge orders, and delayed making timely payments as required by the contract. *Id.* The issue to be determined in the case was whether Newberry Square actively impeded, or willfully and knowingly delayed, Southern Landmark’s ability to timely perform under the contract. *Id.* During the presentation of evidence, the trial court allowed Southern Landmark to present evidence under §90.404(2)(a) as to the delays and difficulties which occurred on two other construction

Continued on page 12

Professionalism Seminar – Save The Date Inexpensive & Enlightening CLE Credits

By Ray Brady

Mark your calendars now for the annual Professionalism Seminar. This year the seminar will be held on Friday, February 10, 2017 from 8:30 AM until Noon at Trinity United Methodist Church on NW 53rd Avenue. Our speaker will be Henry M. Coxe, III of Bedell, Dittmar, Devault, Pillans & Coxe, past President of The Florida Bar.

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 January. Questions may be directed to the EJCBA Professionalism Committee chairman, Ray Brady, Esq., at 373-4141.

ADR

Continued from page 3

because that is the coverage, and then settle for \$32,500, it may not be a productive place to start. Again (notice how we keep saying that), there should not be a rule one way or the other. Think a bit and change your game plan when the situation calls for it.

The above situations or questions occur all the time. We cannot do justice to each item above given the limited space of this article, but, if you have thoughts, ideas, questions or slings and arrows, email us and we will try and address your ideas in a future article.

Circuit Notes

Congratulations to Gainesville attorneys **Kristofer W. Eisenmenger** and **Matthew David Landsman** – they both recently earned board certification in Criminal Trial Law.

Attorney **Howard Rosenblatt** is newly certified as an accredited estate planner designee by the National Association of Estate Planners & Councils.

Laura R. Gross, Managing Partner of Donnelly + Gross, has been elected as a Fellow of the College of Labor and Employment Lawyers, the highest peer-reviewed distinction in the United States.

Upchurch Watson White & Max Mediation Group



Carl Schwait
cschwait@uww-adr.com

welcomes Carl Schwait
to its distinguished panel of neutrals.

- » Carl is a North Central Florida mediator, educator and Florida Bar leader.
- » He served as senior and managing partner for Dell Graham, P.A., in Gainesville.
- » As a mediator, he is respected by claimant and defense attorneys alike.

MEDIATION | ARBITRATION | E-DISCOVERY | SPECIAL MASTERS

Successfully Resolving Conflicts in Florida,
Alabama & Nationwide Since 1988

CALL TOLL FREE: 800-863-1462 | READ MORE & SCHEDULE: WWW.UWW-ADR.COM



[linkedin.com/company/upchurch-watson-white-&-max](https://www.linkedin.com/company/upchurch-watson-white-&-max)

www.facebook.com/UWWMMediation

@UWWMmediation

Low Income Taxpayer Clinic Now in Gainesville

By Marcia Green

Staff attorney LaKesha Thomas has transitioned into directing the Low Income Taxpayers Clinic [LITC] at Three Rivers Legal Services. This project covers all 17 counties in our service area and provides free assistance to individuals and families needing legal help with tax issues.

Clients who come to TRLS for assistance have received a notice from the IRS stating taxes are due and are often facing collection action by the IRS (filing of a tax lien or issuance of a levy). "Receiving a notice from the IRS is very alarming," states Thomas. "Taxpayers should not go-at-it alone and should take advantage of the local LITC offered at Three Rivers Legal Services." The LITC program represents low-income taxpayers before the Internal Revenue Service [IRS] with audits, collections, identity theft and tax preparer fraud claims and provides representation before the United States Tax Court. In 2015, Three Rivers' LITC project recovered more than \$250,000 for clients seeking relief from the IRS.

Additionally, many individuals and families are eligible for the Earned Income Tax Credit, a benefit for working people with low to moderate income. If specific requirements are met, the EITC reduces the amount of tax owed and may provide a refund to individuals with earned income. Some eligible individuals, however, are either unaware of this benefit or make mistakes while filing. One task of Three Rivers' LITC project is to educate local residents about the EITC and other tax issues.

The LITC project includes the involvement of pro bono attorneys and student volunteers. Since much of the advocacy takes place over the phone and involves federal law, both groups are an excellent resource for the project.

Establishing the project in the Gainesville office enables Three Rivers to work closely with the nationally recognized Levin College of Law students and Graduate Tax Program students and faculty. Thomas has an LL.M. in Taxation from the program which is currently ranked third in the nation. Since joining the staff at Three Rivers in 2013, working with tax clients has been a dream for Thomas.

Thomas invites local pro bono attorneys and students to volunteer with the LITC. With your help, Three Rivers Legal Services will guide clients through the IRS tax process and build the clinic to become a staple for tax relief for members of the local community and surrounding counties.

Please note: The Project is not funded to prepare individual tax returns.

November Luncheon Speaker: The Honorable Nikki Ann Clark, Retired First District Court of Appeals Judge



On November 4, 2016, Judge Nikki Ann Clark will speak about access to justice in Florida. Judge Clark is a member of the Florida Commission on Access to Civil Justice and is directly involved in the work that is being done to address how to respond to the unmet needs of low to moderate-income Floridians. She was appointed to the First District

Court of Appeals in January 2009 by Governor Charlie Crist after serving as a Circuit Court Judge in the Second Judicial Circuit of Florida from 1993–2009. During her time on the Circuit Court bench, Judge Clark presided in the felony, civil, family and juvenile divisions handling numerous high profile cases – including the 2000 Bush-Gore absentee ballot issue.

Judge Clark began her legal career at Legal Services of North Florida in 1979. She later went on to serve as an Assistant Attorney General in the Office of the Florida Attorney General from 1981-1991, the Policy Development Director at the Florida Department of Environmental Regulation from 1991-1993 and the Chief Cabinet Aide for the Office of the Governor in 1993.

Judge Clark has received numerous awards for her contributions to the legal profession, including the Florida Supreme Court Chief Justice's Distinguished Judicial Service Award, 2010; Rosa L. Parks Servant Leadership Award, (Florida State University); and the Rosemary Barkett Outstanding Achievement Award, 2009 (Tallahassee Women Lawyers), just to name a few.

One of Judge Clark's most notable achievements is her dedication to improving justice in the area of family law, juvenile delinquency and juvenile dependency. She helped implement, and presided over, the Second Circuit's Unified Family Court Crossover Docket and was ultimately appointed as chair of the Florida Supreme Court Steering Committee on Families and Children in the Court in 2006. After serving 22 years as a Judge and 17 years as an attorney, Judge Clark retired in 2015.

Sources: www.1dca.org/judges/clark_and_www.floridabar.org

To register for the EJCBA Luncheon visit www.8jcba.org. Luncheon prices for 2016-2017 are: \$17 for EJCBA Members, \$25 for Members who do not register by the deadline, and \$25 for Non-Members.

Invitation To Renew / Join The 2016-17 EJCBA

The Eighth Judicial Circuit Bar Association (EJCBA) cordially invites you to either renew your membership or join the EJCBA as a new member.

To join, please visit: 8jcba.org/pay-dues/ to pay online or return the below application, along with payment, to the EJCBA at PO Box 13924, Gainesville, FL 32604. The EJCBA is a voluntary association open to any Florida Bar member who lives in or regularly practices in Alachua, Baker, Bradford, Gilchrist, Levy or Union counties.

Remember, only current EJCBA members can access a printable version of the complete member directory, edit their own information online, post photos and a website link, and be listed on results for searches by areas of practice. Additionally, our Forum 8 Newsletter, event invitations, and updates are all sent electronically, so please ensure we have your current email address on file and add execdir@8jcba.org to your email address book and/or safe senders list.

EJCBA Membership Dues:

Free - If, as of July 1, 2016, you are an attorney in your first year licensed to practice law following law school graduation.

\$55.00 - If, as of July 1, 2016, you are an attorney licensed to practice law for five (5) years or less following graduation from law school; or

If, as of July 1, 2016, you are a public service attorney licensed to practice law for less than ten (10) years following graduation from law school. A "public service attorney" is defined as an attorney employed as an Assistant State Attorney, or an Assistant Public Defender, or a full-time staff attorney with a legal aid or community legal services organization; or you are a Retired Member of the Florida Bar pursuant to Florida Bar Rule 1-3.5 (or any successor Rule), who resides within the Eighth Judicial Circuit.

\$75.00 - All other attorneys and judiciary.
Optional – YLD Membership Dues (in addition to your EJCBA dues above):

\$25.00 - EJCBA Young Lawyers Division (eligible if, as of July 1, 2016, you are an attorney under age 36 or a new Florida Bar member licensed to practice law for five (5) years or less)

* EJCBA voting membership is limited to Florida Bar members in good standing who reside or regularly practice law within the Eighth Judicial Circuit of Florida. EJCBA non-voting membership is limited to active and inactive members in good standing of the bar of any state or country who resides in the Eighth Judicial Circuit of Florida, and to UF College of Law faculty.

EJCBA Renewal/Application for Membership

Membership Year: 2016-2017

Check one: Renewal New Membership

First Name: _____ MI: _____

Last Name: _____

Firm Name: _____

Title: _____

Street Address: _____

City, State, Zip: _____

Eighth Judicial Circuit Bar Association, Inc.

Telephone No: (_____) _____ - _____

Fax No: (_____) _____ - _____

Email Address: _____

Bar Number: _____

List two (2) Areas of Practice:

Number of years in practice: _____

Are you interested in working on an EJCBA

Committee? Yes No

Section 90.404(2)(a) Evidence in Civil Cases (Part II)

Continued from page 8

projects between the parties, but which were not a part of the contract in this case. *Id.* Ultimately a verdict was returned in favor of Southern Landmark and Newberry Square appealed the order.

On appeal, Newberry Square argued that Southern Landmark “should not have been allowed to present evidence as to the delays and difficulties which occurred on the other two construction projects which were not part of the contract at issue in the case.” *Id.* at 752. The First District rejected Newberry Square’s argument and held that the evidence was properly admitted under §90.404(2)(a). *Id.* The court pointed out that all three projects were bid during the same month and that the procedures in administering the contracts, including the payment process and change orders were identical. The court also found

that the evidence as to various delays which Newberry Square occasioned on the other two projects, and the manner in which those difficulties impacted Southern Landmark’s ability to perform under the contract at issue was “pertinent to Newberry Square’s motive, knowledge, and intent and thus admissible under §90.404(2)(a), *Fla. Stat.*, as it reflected the totality of the circumstances and the course of dealing between the parties as related to the dispute in the present case.” *Id.*

Although most of the cases in Florida involve the offer of similar fact evidence by the prosecution against a criminal defendant, §90.404(2)(a) is equally applicable to civil disputes. As the cases outlined above suggest, the true test for admitting similar fact evidence is relevancy.

November 2016 Calendar

- 2 EJCBA Board of Directors Meeting, Faculty Dining Room, UF Law, 5:30 p.m.
- 4 EJCBA Luncheon, The Honorable Nikki Ann Clark, Retired Judge, First District Court of Appeal and member, FL Commission on Access to Civil Justice, The Woolly, 11:45 a.m.
- 5 Deadline for submission to December Forum 8
- 5 UF Football at Arkansas, TBA
- 9 Probate Section Meeting, 4:30 p.m., Chief Judge’s Conference Room, 4th Floor, Alachua County Family & Civil Justice Center
- 10 Ben Overton Lectures in Florida Constitutional Law, Justice Barbara Pariente, 9:00 a.m., Martin H. Levin Advocacy Center Courtroom
- 11 Veteran’s Day Holiday – County & Federal Courthouses closed
- 12 UF Football v. South Carolina, TBA
- 12 EJCBA Fall Family-Friendly Social Tailgate, TBA
- 15 Family Law Section Meeting, 4:00 p.m., Chief Judge’s Conference Room, Alachua County Family & Civil Justice Center
- 19 UF Football at LSU, TBA
- 24 Thanksgiving Day – County & Federal Courthouses closed
- 25 Friday after Thanksgiving Holiday – County Courthouses closed
- 26 UF Football at FSU, TBA

December 2016 Calendar

- 3 SEC Championship Game, Atlanta, GA – 4:00 p.m.
- 5 Deadline for submission to January Forum 8
- 7 EJCBA Board of Directors Meeting, Faculty Dining Room, UF Law, 5:30 p.m.
- 14 Probate Section Meeting, 4:30 p.m., Chief Judge’s Conference Room, 4th Floor, Alachua County Family & Civil Justice Center
- 16 EJCBA Luncheon, Teresa Drake, UF Levin College of Law Professor and Dr. Nancy Hardt. UF College of Medicine, Co-Founders of Peace4Gainesville, The Woolly, 11:45 a.m.
- 20 Family Law Section Meeting, 4:00 p.m., Chief Judge’s Conference Room, Alachua County Family & Civil Justice Center
- 23 Friday before Christmas – County Courthouses closed
- 26 Christmas Day (Observed) – 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 to 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.