

FORUM 8

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Eighth Judicial Circuit Bar Association, Inc.

February 2017

President's Message

By Stephanie M. Marchman



Rekindling Professionalism and Civility

For more than twenty years, lawyers and judges across Florida have fought to rekindle professionalism by establishing new guidelines, regulations, centers, panels, mandatory training, mentoring programs, awards, and the like.

Additionally, in recent years, the Florida Supreme Court has sent a strong message to The Florida Bar that unprofessionalism and incivility will not be tolerated.

Take *The Florida Bar v. Norkin*, 132 So. 3d 77 (Fla. 2013), for example. This case involved a lawyer, who, without supporting facts, threatened a personal lawsuit against the judge and alleged a “cozy, conspiratorial” relationship between a judge and opposing counsel and his client. When the lawyer was not winning a particular hearing, he would raise his voice and behave in an angry, disrespectful manner. Indeed, two judges indicated that the lawyer was “screaming” at them during hearings. The lawyer also relentlessly disparaged and humiliated opposing counsel publicly and in written communications.

In reviewing this case, the Court recounted the long battle in our state to restore professionalism and civility in the legal profession:

In 1993 and 1995, The Florida Bar commissioned surveys of Bar members—the members reported that the most serious problems facing Florida lawyers are the lack of professionalism and the lack of ethics. In 1996, the Court issued an administrative order that established The

Florida Bar Center for Professionalism. In 2005, The Florida Bar Board of Governors passed a resolution that renamed the center the Henry Latimer Center for Professionalism. In addition, the Court has a Commission on Professionalism and the Bar has a Standing Committee on Professionalism. The Court and the Bar share the “overarching objective of increasing the professionalism aspirations of all lawyers in Florida and ensuring that the practice of law remains a high calling with lawyers invested in not only the service of individual clients but also service to the public good as well.” In re Code for Resolving Professionalism Complaints, 116 So.3d 280, 280 (Fla.2013). “Surveys of both lawyers and judges continue to consistently reflect that professionalism is one of the most significant adverse problems that negatively impacts the practice of law in Florida today.” Id. at 281. Over two-thirds of The Florida Bar members who responded to a 2011 survey agreed that, in recent years, relationships between attorneys have become more adversarial. Further, the “Results of the 2001 Membership Opinion Survey,” at p. 18, found that one-third of responding Bar members reported a lack of ethics or professionalism as one of the “most serious problems facing the legal profession today.” The Court is profoundly concerned with the lack of civility and professionalism demonstrated by some Bar members. The Court has repeatedly ruled that unprofessional behavior is unacceptable.

In this context, the Court found that the lawyer “conducted himself in a manner that is the antithesis of what this Court expects from attorneys.” The Court

Continued on page 9

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Contribute to Your Newsletter! From The Editor

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

About This Newsletter

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. 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.

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Deadline is the 5th of the preceding month

Alternative Dispute Resolution

By Chester B. Chance and Charles B. Carter



Lowering the Bar

Kevin Underhill is a lawyer in the San Francisco firm of Shook, Hardy & Bacon. He has a blog entitled "Lowering the Bar" and he writes about case decisions in various areas including civil law, criminal law, the legal profession, etc. If you are looking for some peculiar cases involving animal law,

"Circus and Carnival Litigation," civil procedure, contracts, estate planning, landlord tenant, tax law, torts, etc., go to his website www.loweringthebar.net. You will find case precedent including:

A Utah court says a woman can sue herself. A decedent's heir and the personal representative of his estate brought a wrongful death claim in a survival action in Utah against the driver alleged to have caused the accident. The case is *Bagely v. Bagely*, and Miss Bagely "finds herself on both sides of this dispute because not only is she her husband's heir and the personal representative of his estate, she is also the defendant driver whose negligence allegedly caused the accident." The court indicates Bagely is actually two plaintiffs (PR and heir) and the defendant. According to Mr. Underhill, the trial court ruled against Bagely (as the 2 plaintiffs) and in favor of Bagely the defendant. There was an appeal and Bagely as the two plaintiffs was the appellant and Bagely the defendant was an appellee. The court noted: *Barbara Bagely, acting in different capacities, appears as both the appellant and the appellee in this case... defendant's interests in this case are represented by her insurance carrier.* Bagely the PR is suing Bagely the defendant and because Bagely the defendant has insurance, her carrier is representing her because it would have to pay the judgment.

We could go on, but we direct you to the website.

Alas, the authors are aware of a plaintiff in a wrongful death action who was appointed (at the manipulation of his attorneys) as the personal representative of the decedent tortfeasor's estate. Thus, the plaintiff and the defendant were the same individual. This happened in Jacksonville, not in Utah, and we are not making it up.

Of course we had to look up the category "Circus and Carnival Litigation." We found numerous clown cases (no, not funny cases, but cases involving clowns) including a 2008 case where it is alleged

a clown negligently jumped on the plaintiff's chest causing him to fall to the ground and sustain substantial and permanent injuries.

In 2010 Sherri Perper sued a costume company and other businesses for injury she sustained at a Halloween party in 2008. She allegedly sustained leg fractures after a fall she says was caused by defective and dangerous clown shoes. In an interview, her attorney would not disclose the amount of money his client was demanding, and reasoned "she does not want any additional publicity."

Of course we had to look up "Mascot Law." We were pleased to learn that a jury found the Kansas City Royals and their mascot Sluggerrr were not liable for Sluggerrr hitting a fan in the eye with a hot dog. Closer to home, a man who portrayed Tigger at Disney World was acquitted of charges that while dressed as Tigger he had groped a 13 year old. The jury determined the plaintiff had no evidence to support the claim and could not even prove who was actually the Tigger in question on the particular day. The defense attorney put on the Tigger costume during the closing argument to illustrate that the costume severely limited the wearer's vision and arm movements thus making the argument that any contact was inadvertent.

In what the above-referenced website determines to be a civil procedure matter: in a Federal District Court of Nebraska a case was filed "*Driskell v. Homosexuals*." Ms. Driskell states in the lawsuit she is bringing the case on behalf of the actual plaintiffs, God and Jesus Christ. Interestingly, Ms. Driskell lists herself as a representative of the plaintiffs but she does not represent herself as their lawyer since she is not a lawyer in the State of Nebraska. This class action on behalf of God and his Son was dismissed last year and the federal judge opined Ms. Driskell had not alleged any basis for federal jurisdiction, did not ask for remedy under any federal statute and determined the lawsuit involved a religious dispute rather than a "case in controversy." Pursuant to Rule 8 of the Federal Rules, the judge noted the complaint was not a "short and plain statement" of the plaintiff's claim and did not set forth any specific relief.



Continued on page 7

Criminal Law

By William Cervone



It's February so I bring you a Valentine's story. She loves me, she loves me not. She's testifying against me? Then I'll write her a love letter begging for mercy, hoping for pity. Surely no harm can come of it. Oh, wait, that's the crime of witness tampering. Yes, says the prosecutor! Yes, says the jury! Yes, says the sentencing trial court judge! But

NOOOOOOOOO says the 4DCA.

Raul Banegas-Membran was charged with multiple sex crimes against a minor. While in jail he wrote the victim's mother, his girlfriend (albeit no longer so to everyone except him), a letter. In the letter he expressed his undying and unchanging love for her, adding that he would never forget her, and would love her with heart, body and soul, forever, in this life and in eternity. Oh, by the way, he added, all he asked was that she "just don't talk to anybody, absolutely anybody, nobody, your silence is all I ask ... in the name of the love you said you had for me." Otherwise, he mentioned, a trial might involve unpleasant (for him) testimony (from her) that could cause her problems with custody of the victim. Unmoved, she immediately turned the letter over to the prosecutor, who promptly added a witness tampering count, having noticed the not coincidental fact that the letter had arrived on the eve of the mother's scheduled deposition in the original sex crimes case.

Raul was "tugging at the heartstrings," the prosecutor argued at trial, and "manipulating" the victim's mother, that being a way to intimidate her. And therein lies the DCA's objection, and Raul's ultimate salvation. For manipulation is not intimidation.

The salient words of the witness tampering statute require that someone "knowingly use intimidation" to induce someone else to not testify. And intimidation, the DCA says, "necessarily includes an element of fear. If one is not afraid, one is not intimidated, and if one does not intend to cause fear, one does not intend to intimidate. Nothing about 'tugging at the heartstrings' indicates an attempt to instill fear - in fact, fear would be counterproductive" to such an endeavor. So, the court concluded, while intimidation is a possible form of manipulation because it is an attempt to affect the recipient's future actions, the reverse is not necessarily so and manipulation is not automatically intimidation.

But what of the fact that the mother had testified that the letter had in fact frightened her, making her

fear that the defendant would indeed cause some sort of custody battle for her if she testified? Surely that would suffice? No, said the DCA, because her reaction is legally of no consequence. What matters is that the statute focuses on a defendant's knowing use of intimidation, not on his successfully pulling off his plan to intimidate. A reasonable person could not conclude, said the DCA, that the defendant had any means or desire to initiate or encourage a custody battle. Especially since Raul closed his letter, not with the x's and o's of his eternal hugs and kisses but with the reminder that the mom should "just stop. I don't hate you, I love you, I know we [illegible] going to get back together but you will always be in my heart take care of you of the kids of the family Love you."

So, miraculously, all ended well for Raul, for the rest of the story is that even before his trial for witness tampering, which was severed, he had been acquitted of the sex charges, and while once sentenced to life for the witness tampering charge that sentence evaporated in the mists of the DCA's direction that he be acquitted of that crime as well.

While it is unknown from the opinion, one assumes that he has moved on to other romantic interests, hopefully not again including molestation of the object of his heart's affection's children.

And in case that isn't all absurd enough, to follow up on last month's promise of an Absurdity of the Month, there is this. Some students at George Washington University have declared the presence of campus police to be an "act of violence." Their position is that the local police union had supported Donald Trump and thus they were all a part of some inherently racist power structure that must be shunned. One wonders, should these students encounter actual violence as happens on our campuses too frequently now, if they will simply run to their campus safe space or call the school diversity officer rather than the police.

Classified Ad

Bogin, Munns & Munns, P.A. is seeking an attorney with five years litigation experience (real estate, business, probate, and/or guardianship). Please send a cover letter and resume to Angie Tipton at ATipton@boginmunns.com.

Professor Paul Ortiz is speaker for February Luncheon



Paul Ortiz, the director of the award-winning Samuel Proctor Oral History Program and Associate Professor of History at the University of Florida, will join us as the luncheon speaker on February 17, 2017. He will focus his remarks around the topic, "Storytelling, Law, and Civic Engagement: Oral History and the Pursuit of Truth." His

publications include *Emancipation Betrayed*, a history of the Black Freedom Movement in Florida from Reconstruction to the Great Depression (University of California Press); and the co-edited volume, *Remembering Jim Crow: African Americans Tell About Life in the Jim Crow South* (New Press), which recently went into its 4th printing. Professor Ortiz's publications have garnered numerous honors, including the Southern Regional Council's Lillian Smith Book Award. He is past president of the Oral History Association, and currently 1st vice-president of the *United Faculty of Florida-UF (FEA/AFT/AFL-CIO)*. Professor Ortiz received the 2013 César E. Chávez Action and Commitment Award for "Outstanding leadership through engaging in activities which dignify workers and by making notable contributions to the labor movement & demonstrating resilience in organizing workers, especially those who have been traditionally disadvantaged," awarded by the Florida Education Association. In 2014 he was one of the recipients of the Rosa Parks Quiet Courage Award for contributions to civil rights and social justice. Professor Ortiz is currently finishing a book titled: *An African American and Latinx History of the United States* which will be published by Beacon Press for its Re-Visioning American History Series in 2017. Under his leadership, the Samuel Proctor Oral History Program received the Oral History Association's 2013 Stetson Kennedy *Vox Populi* Award for outstanding achievement in using oral history to create a more humane and just world.

Source: Biography provided by Professor Paul Ortiz

The following speakers have been confirmed for the remaining 2017 Luncheons:

March 17: Dr. Jackson Sasser, President of Santa Fe College

April 21: The Honorable Peggy A. Quince, Florida Supreme Court

May 19 : UF Basketball Head Coach Michael

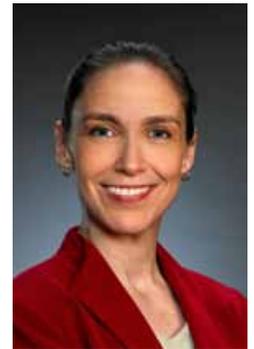
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To register for the EJCBA Luncheon visit www.8jcba.org. Luncheon prices for 2016-2017 are: \$17 for EJCBA Members, \$25 for Members who do not register by the deadline, and \$25 for Non-Members.

Peg O'Connor Receives the 2017 Florida Bar President's Pro Bono Service Award

By Marcia Green

Gainesville attorney Peggy-Anne "Peg" O'Connor received the Florida Bar President's Pro Bono Service Award representing the Eighth Judicial Circuit at a ceremony in Tallahassee on January 19, 2017.



Nominated for her work with the Ask-A-Lawyer project serving the local homeless population, Peg has met with more than 30 clients to discuss a variety of questions, primarily related to criminal issues. The homeless tend to face greater barriers to employment, housing, and access to resources. Peg's availability to answer questions, give advice and look for solutions is an invaluable resource to the individuals, the other volunteer attorneys, and the health of our community as a whole.

Project coordinator Ray Brady commented "I cannot think of anyone in the 8th Judicial Circuit more deserving of the President's Pro Bono Service Award than Peg O'Connor. Since the inception of the 8th Circuit's Ask-A-Lawyer program that provides free legal services to our area's homeless population, Peg has been one of its greatest supporters and lawyer volunteers. She doesn't miss an event. Peg provides compassionate and highly skilled advice and legal representation to every person she sits down with at the Ask-A-Lawyer events. It is no doubt very difficult to live with the stigma of being homeless. But when these clients meet Peg, they are greeted with a friendliness and dignity that assures them that they are just as important to Peg as any of her other clients. The 8th Judicial Circuit is privileged to call Peg O'Connor one of our own."

Continued on page 12

“THE GLORIA”

In Memoriam of Gloria Fletcher Benefiting the Guardian ad Litem Foundation

Player’s Choice: Two-person or Four-Person Scramble

Mark Bostick Golf Course Friday, March 3, 2017

\$130/golfer (\$115/golfer early registration)



2800 SW 2nd Avenue
Gainesville, FL 32607
Phone: 352-375-4866

Cost: \$130 per golfer
\$115 Early Registration
Registration/Lunch: 11:30 AM
Tee Time: 12:30 PM
Reception following

To register online:
[www.guardian8foundation.org/
2017-ejcba-charity-golf-
tournament-registration/](http://www.guardian8foundation.org/2017-ejcba-charity-golf-tournament-registration/)

OR, please return this form
with payment to :

The Guardian Foundation, Inc.
3919 W. Newberry Rd, Ste 3
Gainesville, FL 32607



SIGN –UP
DEADLINE FOR
EARLY DISCOUNT
FEBRUARY 17, 2017



The cost of this event is **\$130 per golfer with an early registration discount of \$115 per golfer** for those who register and pay by February 17, 2017. This price includes 18 holes of golf, riding cart, lunch, reception, and various awards and/or prizes. All net proceeds of this charity tournament benefit the Guardian ad Litem Program of the

8th Judicial Circuit through the Guardian Foundation, Inc.

The EJCBA Charity Golf Tournament benefitting The Guardian Foundation, Inc. has been named in honor of the late Gloria Fletcher. While the names of Professional Golf Association tournaments, such as “The Masters,” are synonymous with the best in the field, Gloria Fletcher’s name, and her legacy, represent the pinnacle for children’s advocacy. Gloria was a dedicated champion for vulnerable children in the 8th circuit and across Florida. The EJCBA tournament bears Gloria’s name to ensure her example, passion, and work on behalf of abused, neglected, and abandoned children will continue.

To register, please click [here](#) or return this form with payment. All checks must be made payable to the Guardian Foundation, Inc. Please fill out the corresponding number of spaces below and check the appropriate box indicating whether you wish to play as a 2-person or 4-person scramble.

Entry Fee: \$130 per golfer (\$115 if registered & paid by February 17, 2017)

_____	_____
Name (Golfer 1)	Name (Golfer 2)
_____	_____
Email	Email
_____	_____
Phone	Phone
_____	_____
Name (Golfer 3)	Name (Golfer 4)
_____	_____
Email	Email
_____	_____
Phone	Phone

The Florida Bar Board of Governors Report

By Carl Schwait



Dear Colleagues,

The Florida Bar Board of Governors met on December 9, 2016. The major actions of the Board and reports received included:

[Legislative positions](#) for 2016-18 were approved including opposing term limits for any Florida judges; supporting adequate funding of the state court system;

maintaining control by the Supreme Court over the practice of law and the discipline of lawyers; maintaining the Supreme Court's authority over procedural court rules; and supporting allowing state agencies to pay Bar membership fees and CLE costs for attorneys they employ. The 2017 legislative session begins on March 7. For information on legislation of interest to the legal profession, key session dates, Bar and section positions, links to email House members and Senators and other legislative resources, visit www.floridabar.org/legislativeactivity.

A new rule that would allow the [lawyer spouses of military personnel](#) stationed in Florida to practice in the state if they meet certain conditions was approved. Those conditions include being a member in good standing in another jurisdiction with a clear record, passing a Florida Board of Bar Examiners character and fitness review, paying Bar annual membership fees, agreeing to follow Bar rules, being subject to Florida Supreme Court jurisdiction, and having a Bar member as a mentor if the spouse has been practicing for less than three years. The rule, drafted by the [Military Affairs Committee](#), was noticed for comments in the [January 1 Florida Bar News](#) and then will be sent with the comments to the Supreme Court for its comment period, review and approval.

The [Technology Committee](#) reported that it continues to work on an [incubator project](#) to assist new lawyers and lawyers transitioning from public service to private practice in creating law firms to offer affordable services. The overall goal of the project is to teach lawyers how to run profitable law firms serving low- and moderate-income clients. The committee is also studying cyber security to help law firms protect their electronic records and communications.

The [Professional Ethics Committee](#) was directed to draft an opinion guiding Bar members who may in some cases [split fees with out-of-state attorneys who work in firms that have non-lawyer owners](#). The opinion

will address the issue with the caveat that non-lawyer ownership of law firms is not allowed in Florida. The issue was published in the [January 1 Florida Bar News](#) and will be discussed during the committee's January 27 meeting. The proposed advisory opinion will be published for member feedback.

An update on a project [to develop trust accounting software for Florida Bar members](#) was given. Recognizing that technical compliance with trust accounting rules is difficult for small firms and solo practitioners, the software will address required trust accounting records and procedures now required by Chapter 5. Lawyers would provide information when they use their trust accounts and all necessary trust accounting paperwork would be done by the program. The software is expected to be very affordable. Florida Bar members currently have approximately 33,000 IOTA trust accounts.

Approval was given to negotiate a license agreement with the ABA for its [Free Legal Answers](#) platform, launched in September, to be implemented in Florida. Geared to expand legal services for low-income communities, the web-based program gives income-eligible users the ability to pose civil legal questions to volunteer attorneys. The virtual legal advice clinics at ABAFreeLegalAnswers.org are now available in 42 jurisdictions including Georgia, South Carolina, Alabama, Mississippi and Louisiana.

ADR

Continued from page 3

In Halifax County, North Carolina, Raylon Parker served on a grand jury that entered an indictment against him. The clerk of the court noticed the various indictments and pointed out that a defendant in one of the cases had the same name as a grand juror. The indictment was for assault with a deadly weapon with intent to kill, but we think Raylon Parker should point out his compliance with the civic responsibility of serving on a grand jury. The Assistant District Attorney commented that if he did vote to indict himself and people found out about it, "that would certainly look bad at trial."

We could go on and on with crazy criminal cases because there are about 8 sub-categories under criminal law, 10 or 12 categories under government law, the legal profession, etc. etc. We think you should call in sick one day and sit at home on your computer just going through this wonderful, hysterical, scary and sad website. We salute Kevin Underhill for his wit, hard work and research abilities.

Clerk's Corner

by J.K. "Jess" Irby



I'm happy to report the transition to a new Clerk has been smooth and we're off and running.

There has been limited shake-up in staff, but as many know Chief Deputy Mary Grace Curtin has retired after 48 years of dedicated service in the Clerk's office. She's a tough one to replace, but

we have a great staff that is ready to rise to the occasion.

In that respect, we have a new #2 at the office, as I have appointed Chuck Stiles as my Chief of Staff. Beyond his problem solving and administrative duties, Chuck will serve as the point-man on many of the office's upcoming projects. Chuck's 30+ years of experience in nearly every area of the office make him a tremendous asset, and I am thrilled he has agreed to his new role.

Another change is we now have two Court

Directors. Carol Ford has been named Criminal Court Director, and Marynelle Hardee has been named Civil Court Director. Both have extensive experience in the courthouse and bring a deep depth of knowledge to their positions. Marynelle is a fellow Bar member, so keep an eye out for her at the luncheons. Please go to both Carol and Marynelle freely with any issues you may have in each respective court.

I have been meeting one on one with every member of my staff to get their input on what they feel we may be able to do better. You may also see me in court or at the front counter as I plan to get hands on experience with every facet of the clerk's office. We're working hard internally to see where we can improve, but I'd love to hear from you as well. If you have any suggestions, questions, or concerns please come and visit me at the courthouse. We want to be the best Clerk's office in the state, so don't hesitate to let me know where you think we can make advances. I look forward to working with everyone, and hope to see you soon.

Reserve Now for the 2017 Professionalism Seminar

<p>WHEN: Friday, February 10, 2017 – 9:00 a.m. – 12:00 NOON</p> <p>WHERE: Trinity United Methodist Church 4000 NW 53rd Avenue, Gainesville, FL 32653</p> <p>PROGRAM: Henry M. Coxe, III of Bedell, Dittmar, Devault, Pillans & Coxe, past President of The Florida Bar, speaking on "Civility, the Legal Profession and Public Perception—The Stakes are High"</p> <p>COST: EJCBA paid members: \$50, Non-Members: \$100</p> <p>CLE: 3.5 Hours of CLE is expected</p> <p>DEADLINE: Register on or before Monday, February 6, 2017 at: http://www.8jcba.org/event-registration/2017-professionalism-seminar/</p>	<p>When registering online, you will need to select your first and second choices for your area of specialty for small group discussions from the following four options:</p> <p>Family/Domestic Relations Law</p> <p>Criminal Law</p> <p>Civil Trial (e.g. Torts, Commercial & Government)</p> <p>Civil Non-Trial (e.g. Transactional, Estates and Trusts, & Real Estate)</p>
<p>Parking:</p> <p>Free parking is provided. Arrive early to allow sufficient time to check-in and find your seat.</p>	

opined that “[b]y his unprofessional behavior, he has denigrated lawyers in the eyes of the public.” The Court ruled that the lawyer’s “violations of the Bar rules and unprofessional behavior merit a two-year suspension and a public reprimand [and] direct[ed] [the lawyer] to appear personally before th[e] Court to receive the public reprimand.” The Court concluded that “[h]is unprofessional conduct is an embarrassment to all members of The Florida Bar.”

This is not the end of the story though. Ultimately, the lawyer was disbarred because he subsequently practiced law during his suspension, referred to bar counsel as “evil” and “despicable,” called the suspension proceedings “the most unjust act in judicial history,” and intentionally smirked and stared down each justice one by one during the public reprimand administered by the Court. See *The Florida Bar v. Norkin*, 183 So. 3d 1018 (Fla. 2015).

Despite monumental efforts by the Court and the Bar, unprofessionalism and incivility is seemingly on the rise. And not just in the legal profession, but in our society as a whole.

This is concerning, given the consequences. [According to Georgetown Professor Christine Porath](#), “[i]ncivility is proven to be distracting and debilitating. It inhibits problem-solving and collaboration, and diminishes our wellbeing. Thoughtful debate, real understanding, and problem solving plummets. Motivation and engagement wanes. And, it unfortunately has a way of silently spreading like a virus.” In short, it prevents us from doing our job and makes us miserable. Moreover, the lack of professionalism undoubtedly erodes the public’s confidence in the justice system and interferes with the proper administration of justice.

Fortunately, here in the Eighth Judicial Circuit, we enjoy a high standard of professionalism and civility. Indeed, many of us choose to practice law here for this very reason. We understand that these attributes make the practice of law fun and rewarding. We get that professionalism and civility allow us to develop meaningful relationships based on trust and respect and solve complex problems in our community. We are a leader and role model for the state and, frankly, the nation.

But we care about what’s happening, occasionally in our Circuit and with increasingly damaging consequences, beyond. Because of this, I encourage you to attend the EJCBA’s Professionalism Seminar on February 10th to discuss recent professionalism quagmires in Florida and their impact on the public’s confidence in the justice system.

Henry M Coxe, III, a well-known criminal defense lawyer at Bedell, Dittmar, DeVault, Pillans & Coxe, P.A., former state prosecutor, and past President of The Florida Bar, will lead us in our discussion.

Mr. Coxe is a true lawyer in every sense of the word. Despite his extraordinary ability and experience as a lawyer and leader of the bar statewide, he takes the time to take on injustices, especially those involving children, without compensation because he believes it’s the right thing to do. And he always does so with humility, wit, and, most importantly, professionalism and civility. His reputation is as a lawyer who cares – and acts to correct – unprofessionalism and lack of civility in the administration of justice.

During the Professionalism Seminar, Mr. Coxe will share with us a very real and recent story involving a lawyer who disclosed his juvenile client’s confidences, and not accurately. After a media storm, this juvenile’s life is forever impacted by the lawyer’s disclosures as they are permanently documented on the internet. Further, as a result, the public lost confidence in this lawyer and the justice system as a whole was undermined.

A weighty topic for sure, but no doubt Mr. Coxe will find a way to make us laugh a little and appreciate the silver lining to these fundamental questions. I look forward to seeing you there.

Suds and Songs Night for Three Rivers

By Marcia Green

Three Rivers Legal Services will hold an event at the First Magnitude Brewery on Thursday, February 23rd from 5:30 to 8:30 pm featuring music, refreshments, amazing artwork, an auction and a raffle. First Magnitude is located at 1220 SE Veitch Street in Gainesville (off of South Main Street). Food trucks will be available for this family-friendly, fundraising event.

Music will be provided by Other Voices, a local acoustic rock band featuring tight vocal harmonies; they will perform original tunes and special covers from a variety of artists such as Crosby, Stills, and Nash, the Beatles and the Byrds.

Please join us and support the work of Three Rivers Legal Services. Three Rivers Legal Services, Inc. is a local non-profit law firm dedicated to the provision of quality legal assistance to the poor, abused, disabled and neglected, and to empowerment through preventive legal education.

Wave Your Sword and Waive Your Shield: Application of the “At Issue” Doctrine in the Civil Context

By Krista L. B. Collins



Since at least 1957, Florida has recognized and applied the sword and shield, or “at issue,” doctrine with regard to the waiver of privileges. In *Savino v. Luciano*, 92 So.2d 817, 819 (Fla. 1957), the Florida Supreme Court noted that all personal privileges can be waived, holding that “when a party has filed a claim, based upon a matter ordinarily privileged, the proof of which will necessarily

require that the privileged matter be offered in evidence, we think that he has waived his right to insist, in pretrial discovery proceedings, that the matter is privileged.” Stated even more simply, when the party himself ceases to treat a matter as confidential, it loses its confidential character. *Id.*

Some courts have found that privileges may be waived even where the party is not bringing an affirmative claim. In *First S. Baptist Church of Mandarin, Florida, Inc. v. First Nat. Bank of Amarillo*, 610 So.2d 452 (Fla. 1st DCA 1992), the First District Court of Appeal rejected the defendants’ claim that they did not waive the attorney-client privilege by raising affirmative defenses. The Court stated that “If a party ‘has injected into the litigation issues going to the very heart of the litigation,’ such party cannot avoid discovery into such issues by invoking the attorney-client privilege.” *Id.* at 454 (quoting *Home Ins. Co. v. Advance Mach. Co.*, 443 So.2d 165, 168 (Fla. 1st DCA 1983)); also see *Lender Processing Services, Inc. v. Arch Ins. Co.*, 183 So.3d 1052 (Fla. 1st DCA 2015) (holding that a privilege may be implicitly waived where a defendant asserts a defense that in fairness requires examination of privileged communications); cf. *DeLisi v. Bankers Ins. Co.*, 436 So.2d 1099 (Fla. 4th DCA 1983) (holding that petitioner’s assertion of affirmative defenses does not constitute voluntary application for affirmative relief and therefore the sword and shield doctrine cannot be used).

As can be seen from the different results in *First S. Baptist Church* and *DeLisi*, courts can vary greatly in the application of the doctrine. In *Savino*, the Florida Supreme Court analyzed the invocation of the accountant-client privilege, and found that it had been waived, and therefore the cross-claimant could not assert the privilege with regard to an audit and report. *Savino* at 819. Other courts have found that, rather than deeming the privilege waived, the appropriate course of action is to impose a sanction against the party who raises the privilege while also attempting to raise issues involving facts and information covered by that privilege.

For instance, in *TheStreet.com, Inc. v. Carroll*, 20 So.3d 947, 949 (Fla. 4th DCA 2009), during discovery, the defendants asserted the journalist’s privilege with regard to sources. The trial court concluded that the privilege was being used as both a sword and a shield, but the District Court of Appeal disagreed, noting that the discovery related to an affirmative defense, not a claim for affirmative relief. *Id.* The Court further noted that even if the doctrine did apply, the proper remedy is not to compel production of the information claimed to be privileged, but rather to dismiss or strike the affirmative defenses. *Id.* According to the Middle District, courts may invoke a variety of sanctions, including preventing the introduction of evidence previously withheld on privilege grounds or ordering that the failure to produce the evidence gives rise to the presumption that the evidence is unfavorable. *Kearney Partners Funds, LLC ex rel. Lincoln Partners Fund, LLC v. United States*, 946 F.Supp.2d 1302, 1317 (M.D. Fla. 2013).

In *Brancaccio v. Mediplex Management of Port St. Lucie*, 711 So.2d 1206 (Fla. 4th DCA 1998), the Court applied the sword and shield doctrine to the claim of the Fifth Amendment privilege against self-incrimination in a civil case. Victor Brancaccio killed a woman after being released from a psychiatric hospital; he admitted the killing, but alleged it was induced by involuntary intoxication, due to medicines he was prescribed at the hospital. *Id.* at 1207. Brancaccio’s conviction for first-degree murder was overturned on appeal and was awaiting a new trial when he filed a civil suit against the hospital and his doctors, alleging they had negligently evaluated and treated him. *Id.* He provided the required notice of intent to initiate litigation prior to the two-year statute of limitations, but refused to provide a pre-suit statement to the defendants. *Id.* He also filed a motion to abate the civil action, pending a final resolution of the criminal case. *Id.* The trial court gave Brancaccio 60 days to provide the pre-suit statement and sworn deposition, at which time Brancaccio asserted his Fifth Amendment privilege. *Id.* The trial court dismissed the action based upon Brancaccio’s refusal to comply with the pre-suit discovery procedures and Brancaccio appealed. *Id.* After a lengthy discussion of the history of civil plaintiffs invoking their Fifth Amendment rights, the Court held that the sword and shield doctrine does not require dismissal of a civil action when a plaintiff raises the Fifth Amendment privilege. *Id.* at 1211. The Court stated that where, as in Brancaccio’s case, the statute of limitations has already run, and there is a reasonably foreseeable end in sight for the criminal exposure, then the civil court should await the final outcome in the

Continued on page 11

Waive Your Shield

criminal case before addressing whether dismissal is required. *Id.* at 1212.

Before attempting to use the sword and shield doctrine to show a waiver of privilege or to seek imposition of a sanction, the savvy litigator must be certain that the issue that is “at issue” requires proof through the privileged communication. If the issue can be litigated without resort to the privileged communication, it will be. For instance, in *Jenney v. Airdata Wiman, Inc.*, 846 So.2d 664, 666 (Fla. 2nd DCA 2003), the defendant contended that the plaintiff had waived his attorney-client privilege after testifying that he had discussed his intent regarding the rescission of a retirement agreement with his attorney. The Second District Court of Appeal agreed with the defendant that the plaintiff had injected the issue of intent into the litigation. *Id.* at 668. However, this is not sufficient to waive privilege under the sword and shield doctrine. *Id.* Nothing about the plaintiff’s claim regarding intent required him to resort to proof by way of the privileged communication with his attorney—the plaintiff himself could testify about his intent. *Id.* Therefore, the doctrine did not apply and there was no waiver. *Id.*

The conclusion to be drawn? Before waving one’s sword, it is important to make sure one will not also be waiving one’s shield—or be prepared for the consequences.

Save The Date -

Event With The Alachua County Medical Society

The EJCBA and the Alachua County Medical Society are participating in a joint dinner and panel discussion to be held on the evening of Tuesday, March 14, 2017, from approximately 6 to 8:30 p.m. The anticipated topic for the evening is:

“Collaborating to Meet the Legal and Medical Needs of Our Local Under-Served Populations”

Watch the *Forum 8* and your email for further information. Questions may be directed to the EJCBA Medical-Legal Committee chairman, Ray Brady, at 373-4141.

Reserve Now for the EJCBA February 2017 Luncheon

WHEN:	Friday, February 17, 2017 – 11:45 a.m.
WHERE:	The Woolly – 20 N. Main Street, Gainesville, FL 32601
PROGRAM:	Paul Ortiz, Director of the award-winning Samuel Proctor Oral History Program and Associate Professor of History at the University of Florida—“Storytelling, Law, and Civic Engagement: Oral History and the Pursuit of Truth”
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, February 13th at Noon at http://www.8jcba.org/event-registration/feb-2017-luncheon/

*\$25.00 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.



Reserve for Upcoming Events

Professionalism Seminar—Friday, February 10, 2017 from 9:00am – 12:00pm.

(<http://www.8jcba.org/event-registration/2017-professionalism-seminar/>)

EJCBA Charity Golf Tournament benefiting the Guardian ad Litem Program—Friday March 3, 2017. Lunch and Registration at 11:30am and Tee Time at 12:30pm

(<http://www.guardian8foundation.org/2017-ejcba-charity-golf-tournament-registration/>)

Pro Bono Service Award

Continued from page 5

Ask-A-Lawyer is a collaborative effort of the 8th Judicial Circuit Bar Association, Three Rivers Legal Services, Southern Legal Counsel and volunteer law students from the University of Florida Levin College of Law. In addition to her direct interaction with clients, Peg is available to the law student volunteers for advice and mentoring. She also participated with other Ask-A-Lawyer volunteers in serving a meal at Grace Marketplace where some of those in line said "Hey, that's my lawyer!"

In an example of her other pro bono work, Peg prepared and filed a petition for a 73-year-old federal inmate in South Carolina seeking clemency; he had been sentenced to 262 months in prison on a conspiracy to import marijuana charge. "Inexplicably, despite letters of support from his classification officers, his petition was denied, so we are pursuing compassionate release avenues on his behalf." She has also partnered with the ACLU and another local attorney to take on the Florida Department of

Corrections for brutal beatings and mistreatment inflicted on inmates by guards at Suwannee Correctional Institution.

Peg, a University of Florida Levin College of Law graduate and a member of the Florida Bar since 1999, is involved in many community and legal associations, including the North Central Florida and the National Chapters of the Federal Bar Associations, the Eighth Judicial Circuit Bar Association, the James C. Adkins Jr. American Inns of Court, and the Florida Bar Professional Ethics Committee. She is Board Chair of the statewide public interest law firm, Southern Legal Counsel. SLC Executive Director, Jodi Siegel, stated "Peg O'Connor is always available to SLC no matter what we need, even playing a part in a play we produced for a fundraiser."

Peg's comment "Oh, dear! I'm not at all deserving, as there are others who do so much more, but I am humbled that you thought of me" is typical of her commitment and graciousness.

February 2017 Calendar

- 5 Deadline for submission to March Forum 8
- 8 Probate Section Meeting, 4:30 p.m., Chief Judge's Conference Room, 4th Floor, Alachua County Family & Civil Justice Center
- 8 EJCBA Board of Directors Meeting – Faculty Dining Room, UF Law, 5:30 p.m.
- 10 EJCBA Professionalism Seminar, Henry M. Coxe, III of Bedell, Dittmar, Devault, Pillans & Coxe, past President of The Florida Bar, "Civility, the Legal Profession and Public Perception – The Stakes are High." Trinity United Methodist Church, 9 a.m. – 12 noon.
- 14 *Valentine's Day – show the love!*
- 17 EJCBA Luncheon, Professor Paul Ortiz, Director of the Samuel Proctor Oral History Program, The Woolly, 11:45 a.m.
- 20 President's Day Holiday – Federal Courthouse closed
- 21 Family Law Section Meeting, 4:00 p.m., Chief Judge's Conference Room, Alachua County Family & Civil Justice Center
- 23 Suds & Songs Night for Three Rivers Legal Services – First Magnitude Brewery, 5:30-8:30 p.m.
- 25 2017 Law & Justice Youth Conference, UF Levin College of Law, 9 a.m. – 3 p.m.

March 2017 Calendar

- 1 EJCBA Board of Directors Meeting – Faculty Dining Room, UF Law, 5:30 p.m.
- 3 EJCBA Annual Charity Golf Tournament – "The Gloria," benefiting the Guardian ad Litem Program, UF Golf Course
- 5 Deadline for submission to April Forum 8
- 8 Probate Section Meeting, 4:30 p.m., Chief Judge's Conference Room, 4th Floor, Alachua County Family & Civil Justice Center
- 17 EJCBA Luncheon, Dr. Jackson Sasser, President of Santa Fe College, The Woolly, 11:45 a.m.
- 21 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 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.