

FORUM 8

Volume 78, No. 9

Eighth Judicial Circuit Bar Association, Inc.

May 2019

President's Message

By Cherie Fine



I hope all of you have enjoyed the 2018-2019 EJCBA year as much as I have. I am very proud of all the things the local bar association is involved in and all the ways we provide for the local bar to come together and Give, Grow and Gather!

The Professionalism seminar held March 29th is still fresh in my mind and it gives me great pride to serve as your President. I really appreciate the local bar's commitment to professionalism. It has been a very inspiring year with the investiture of our new Judges; each of them have taken very interesting paths to the bench. The Holiday Toy Drive and the Annual Golf Tournament are testaments to the local bar's dedication to helping the community. I know the Spring Fling and the annual Leadership Round Table, which have not occurred as I write this, will have been fabulous and I hope you were able to attend. The May luncheon promises to be inspiring, as well, as we have the pro bono recognition ceremony and a speaker from the Florida Bar Foundation. I have enjoyed filling in for the remainder of Judge Gloria Walker's presidential year and I am looking forward to serving as your President for the 2019-2020 year!

The annual evening meeting of the EJCBA will be held on Thursday, June 13, 2019 at the Cade Museum and I hope you can all attend! As we finish this calendar year and begin the next, I would ask any of you who wish to serve in any capacity to please let me know. If you have ideas for programs or can think of a need you feel the bar should investigate filling, let us know. Being involved is fun, meaningful

and important to keeping our circuit second to none. Thank you to everyone for your help and support this year; I am excited to see what next year will bring.

EJCBA Charity Golf Tournament

"The Gloria" in Memoriam of Gloria Fletcher, Raises \$18,000 for Guardian Ad Litem Program

The Eighth Judicial Circuit Bar Association held the Charity Golf Tournament, "The Gloria" in Memoriam of Gloria Fletcher, at UF's Mark Bostick Golf Course on Friday, March 1, 2019. Over 90 golfers competed in the "Player's Choice" tournament. Thanks to these golfers and our 29 incredible sponsors, the EJCBA was able to exceed its prior checks to The Guardian Foundation, with a donation this year of \$18,000. The Guardian ad Litem program is a volunteer-based organization that provides representatives to children involved in court proceedings, primarily as a result of alleged abuse or neglect. Thanks to the generous contributions of everyone involved, the EJCBA was able to once again donate an estimated 30% of The Guardian Foundation's annual budget to help the children in our community. Event sponsors included:

Avera & Smith, LLP
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(State Attorney, Eighth Judicial Circuit)
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Continued on page 5

2018 - 2019 Board Officers

Cherie H. Fine

President
622 NE 1st Street
Gainesville, FL 32601
(352) 372-7777
cfine@fplaw.com

Philip Kabler

President-Elect
2700 NW 43rd St, Suite C
Gainesville, Florida 32606
(352)332-7688
pkabler@boginmunns.com

Sharon T. Sperling

Treasurer
2830 NW 41 St., Ste C
Gainesville, FL 32606-6667
(352) 371-3117
sharon@sharonsperling.com

Dominique Lochridge-Gonzales

Secretary
1000 NE 16th Avenue
Gainesville, FL 32601
(352) 415-2324
dominique.lochridge-gonzales@trls.org

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.

Members at Large

Kirsten Anderson

1229 NW 12th Ave
Gainesville, FL 32601
(352) 271-8890
kirsten.anderson@southernlegal.org

Jan Bendik

1000 NE 16th Avenue
Gainesville, FL 32601
(352) 372-0519
jan.bendik@trls.org

Robert M. Birrenkott, Jr.

PO Box 117630
Gainesville, FL 32611
(352) 273-0860
rbirrenkott@law.ufl.edu

Raymond F. Brady

2790 NW 43rd St, Ste 200
Gainesville, FL 32606
(352) 373-4141
rbrady1959@gmail.com

James Bush

203 NE 1st Street
Gainesville, FL 32601
(352)416-0090
james.bush@dellsalter.com

Jodi H. Cason

PO Drawer 340
Starke, FL 32091
(904) 966-6319
Casonj@circuit8.org

Katherine L. Floyd

201 East University Avenue
Gainesville, Florida 32601
Phone: (352)384-3093
floydk@circuit8.org

Allison Derek Folds

527 E. University Ave.
Gainesville, FL 32601
(352) 372-1282
(352) 375-9960 (fax)
derek@foldsandwalker.com

Norm D. Fugate

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

Dean Galigani

317 NE 1st Street
Gainesville, FL 32601
(352) 375-0812
dean@galiganilaw.com

Evan Minton Gardiner

151 SW 2nd Ave
Gainesville, FL 32601-6229
(352)338-7385
gardinere@pdo8.org

Frank E. Maloney, Jr.

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

James H. McCarty Jr. (Mac)

2630 NW 41st St Ste A
Gainesville, FL 32606-6666
(352)538-1486 - cell
jhmccjr@gmail.com

Eric Neiberger

203 NE 1st Street
Gainesville, FL 32601
(352)372-4831
eric.neiberger@dellsalter.com

George Nelson

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

Peg O'Connor

102 NW 2nd Avenue
Gainesville, FL 32601
(352) 372-4263
peg@turnerlawpartners.com

Monica Perez- McMillen

101 NW 75th St, Ste 1
Gainesville, FL 32607
(352) 335-2393
m.perez@foryourlaw.com

Dawn M. Vallejos-Nichols

Editor
2814 SW 13th Street
Gainesville, FL 32608
(352) 372-9999
(352) 375-2526 (fax)
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



Fairness/Mediation/ Negotiation

We have often referenced and recommended the book Lawyer Negotiation: Theory, Practice, & Law by Folberg and Golann. We assure you it is the Bible with respect to negotiation theory and practice, especially at mediation.

The above referenced book has an interesting section on the impact of perceived fairness in negotiation.

The authors refer to classroom experiments (usually psychology classes at universities) which illustrate the importance of *perceived fairness* in negotiations. In these role-playing games, Player A is given a fixed amount of play money or chips, usually \$100.00, and the amount is described as a windfall that the player has found on the street while walking with Player B. Player A is asked to propose a division of the \$100.00 with Player B. In the role-playing, Player A has complete discretion to split up the money as he/she wishes. Player B can choose whether to accept or reject Player A's proposal. If Player B accepts the proposal, both players will keep the money which was allocated to each. If Player B rejects the offer, neither player will receive anything.

The authors suggest that economic theory would compel Player A to offer only a little more than zero to Player B and that Player B should accept this amount as better than nothing. However, in the experiments, Player A generally offers between 30 – 50% of the sum to Player B. Oddly, when less than 50% is offered, a large number of Player B recipients will reject the offer and thus prefer to walk away with nothing rather than accept what they *perceive* to be an unfair result.

The point: The results of this role-playing game reflect the importance of our innate value of being treated fairly (according to the authors Folberg and Golann).

Your authors have done role-playing of this game and it's our opinion that when playing with "fake money" the results are different than if you actually use real money.

So, let's switch to a real-life situation involving real money. In 2001 Barry Bonds hit a record-breaking home run in San Francisco. Mr. Popov and Mr. Hayashi were two fans in the right field standing

room section who actually were there hoping to catch just such a home run ball. Bonds hit his 73rd home run that day and the ball landed in Popov's glove. Immediately Popov fell to the ground and a number of people converged on him and the ball. After security officers arrived and when Popov was pulled from the pile of fans, the ball was no longer in his glove, rather, Mr. Hayashi emerged with the ball in his hand. Both men claimed ownership of the quite valuable home run ball. Both thought the ball was worth more than a million dollars given a sale three years early of a Mark McGuire record-breaking home run ball that sold for 3 million dollars. Each man offered the other \$100,000.00 to relinquish any claim on the ball. Each expressed *strong public* views that they were both "entitled" to total ownership and that the offer by each was "generous and fair." They also engaged in public insults referring to each other as a liar and thief. Of course, both hired lawyers and filed suit.



Newspaper editorials, talk show hosts, several mediators and even Barry Bonds suggested the ball should be sold and proceeds be split by the men, or, the money be given to charity. Neither Popov or Hayashi thought that splitting any sale proceeds was "fair" because each asserted they were entitled to the entire amount. Moreover, both continually referred to the insults thrown at them by the other.

After 18 months of litigation the Judge ordered the ball be sold and the proceeds evenly split. The ball was sold at auction and the final bid was \$450,000.00. Popov and Hayashi each received \$225,000.00 minus auction expenses and each incurred attorney fees exceeding the balance. Popov was sued by his attorney for fees of over \$470,000.00 and also for \$19,000.00 by his expert witness.

In the end both Popov and Hayashi lost everything because of several factors, including their individual concepts of fairness. The fairness concept was aggravated and inflamed by the public insults which were exchanged. Emotional, psychological and social perceived factors by Popov and Hayashi totally outweighed any economic and legal negotiation factors. As a result, *non-monetary components* arising in the conflict led to an impasse.

Continued on page 12

Criminal Law

By William Cervone



I swear, you cannot make this stuff up. If a book were to be written about a career of prosecution, it would have to be billed as fiction because no one would believe it could be fact.

Michael Fernandez is an ordinary criminal who is currently doing time. His record is impressive in volume, spanning some 35 years and culminating in a 10 year sentence from Tampa that is due to end in August of 2019. Here's where it gets interesting: Michael does not want out.

So determined is he to remain in prison that he recently filed a Motion For Extension of Prison Time. Yes, you read that correctly.

In his motion, he alleges, and I am quoting, that he is "enjoying his stay" because he gets "free meals, free room and board, free clothing, free laundry service, free color TV to watch, free recreational services, an excellent outdoor view if one is into razor wire, lots of congenial people to socialize with, free medical and dental, armed guards to keep unwanted visitors out and to protect him from bodily harm, free library services, free lawn maintenance, and lots of free activities to keep his days full of wonder and amusement."

The problem that Michael has is that if released on schedule he "will be forced back out into multiple high-risk situations, i.e. social pressures, people, places, relationships, boredom, loneliness, anger, negativity towards ex-cons, major life changes, life threatening situations, negative thinking, and problems that are very stressful." Further, he believes that he is "inadequately prepared for re-entry into the free world as he has no marketable job skills" and "will be forced to return to his former illegal activities in order to have the same benefits that the Department of Corrections now provides him for free." Summing up, he asserts that he "is almost completely innocent of any sense of responsibility." Not only is he incapable of supporting himself thru gainful employment, but it never occurred to him that he was under any obligation to do so. His prayed for relief is that the court leave him in prison "rather than forcing [him] back into society where he will face multiple barriers such as rejection, employment for ex-cons, stereotyping, inadequate housing, drugs, relapse dynamics, responsibilities, prejudice, and

other problems associated with living in the free world."

Michael does seem to be remarkably self-aware and to possess pretty keen insight into his reality. Certainly, he has had decades of time, much of it in prison, to engage in the self and sociological analysis his motion reflects. Either that or he's tired of spending his time adding tattoos (DOC records indicate probable full body expositions of spiders, skulls, smiley faces, dragons, and prophetic sayings such as Smile Now Cry Later) and decided to explore creative writing.

Regardless and regrettably for what will no doubt be some future victim, the Circuit Judge in Tampa upon whose desk this all fell could find no way to help Michael. Again quoting, "Although the Court is sympathetic to Defendant's concerns related to his future release from prison, the Court finds that it does not possess any authority to extend Defendant's prison sentence." Thus, as it is so often said, "Motion Denied."

The moral of the story, if there is one, may be that there is indeed an un-explored area of "criminal justice reform," the current legislative buzz words for "lunacy," yet to be plumbed by all those who currently spend so much time decrying the poor state of affairs they perceive our criminal justice system to be in. Free Michael? No! Do Not Free Michael! Let him be the master of his own fate. Pass a law allowing him to get the relief he seeks. And while you're at it, give me the Motion For Directed Verdict of Guilt that I've longed for all of these years.

Conflict Counsel Registry Application Available

The Conflict Counsel Registry Application for the 2019-2020 fiscal year is now available. Current registry attorneys who wish to continue serving on the registry should complete the shorter form, "Renewal Registry Application 8th Circuit." If an attorney is currently on the registry and would like to add a category, they can complete the "Renewal Registry Application 8th Circuit" form and the portion of the long form, "Registry Application 8th Circuit," that applies to the category they wish to add. Further instructions are available at <https://circuit8.org/court-appointed-counsel>.

EJCBA Charity Golf Tournament

Continued from page 1

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(Public Defender, Eighth Judicial Circuit)
The Fletcher Family Companies
The Liquor and Wine Shoppe at Jonesville
UF Mark Bostick Golf Course
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Mac McCarty stepped in on the day of the tournament and volunteered to lead the tournament day activities and ensured everyone had a great day (despite a brief weather delay). Following a catered lunch by Zaxby's, the tournament golfers of ALL skill levels began with a shotgun start at 12:30 p.m., competing against other two-person and four-person teams in this multi-format tournament. Golfers competed in two additional competitions thanks to our local YLD—the "Lacrosse Examination," where golfers used a lacrosse stick for their tee shot, and the "Preside and Putt," where golfers had to use a gavel to putt (congratulations to Dan Glassman for making the putt!). The post-round reception food was delivered by Mojo Hogtown BBQ and adult beverages were provided by the Liquor and Wine Shoppe at Jonesville. Also, a special thank you to Michael Barbarette, an attorney with Barbarette & Quirk, for donating this year's signature raffle prize.

In total, it was a great day enjoyed by all, but more importantly, the EJCBA and all the participants were able to raise money for this great cause that benefits the children within our community.

Signature Sponsor:

2019 EJCBA Charity Golf Tournament
in Memoriam of Gloria Fletcher

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Florida Credit Union
Stacy Scott, Public Defender, 8th Circuit
Wershow and Schneider P.A.

---- Special Thanks ----

UF Mark Bostick Golf Course
Renaissance Printing

Thank you to all of the participants and volunteers. Your invaluable support helped to make the 2019 tournament one of the most successful tournaments to date.

DOL Proposes \$35,000 Salary Threshold for Overtime Exemptions

By Laura Gross



In 2016, the US Department of Labor was planning to implement new modernized overtime rules which promised to expand overtime eligibility to 5 million workers, including nearly all salaried employees who earn up to \$47,476. Those plans were enjoined by a federal district court in late 2016. The former administration's appeal of

this enjoinder was held in abeyance by the Fifth Circuit Court of Appeals pending further rulemaking under the current administration. Recently, on March 7, 2019, the DOL proposed a more modest update to the salary threshold for overtime exemptions.

Under the current regulations which date back to 2004, workers making less than \$23,660 per year or \$450 per week must be paid overtime for hours worked over 40 per week. The DOL's 2016 proposal would have increased that threshold to \$47,476 or \$913 per week. Under the new regulations, workers making less than \$35,308 per year or \$679 per week must be paid overtime for hours worked over 40 per week. To be exempt from overtime, those making over the \$35,308 threshold must also pass a "duties" test to establish them as exempt administrative, executive or professional employees.

The salary for "highly compensated employees" who are exempt from overtime will be increased from \$100,000 to \$147,414 which, interestingly, is \$13,000 higher than the DOL's 2016 rule.

Under the new rules, to meet the salary threshold, employers may count certain nondiscretionary bonuses and incentive payments like commissions towards 10% of the threshold salary. If an employee does not earn sufficient bonuses and incentives to reach the threshold in a given year (any 52 week period), then the employer can make a "catch-up" payment within the first pay period of the following year to count toward the prior year's salary.

No changes to overtime protections are made for police officers, fire fighters, paramedics, nurses, laborers, and non-management employees in maintenance, construction and similar occupations.

Updates to the salary levels would be made every four years. The rules are anticipated to take effect in January 2020.

Driver License Clinic

There will be a Driver License Clinic to assist individuals whose licenses have been revoked, suspended, or cancelled on Thursday, June 13, 2019, in the Jury Assembly Room of the Alachua County Criminal Justice Center. The event will be held from 9 a.m. to 2 p.m.

Staff from the Alachua County Clerk of Court, Alachua County Tax Collector, Alachua County Sheriff's Office, Department of Highway Safety and Motor Vehicles, Office of the Public Defender, Office of Regional Counsel, Office of the State Attorney, along with judges and court staff, will be on hand to assist registrants and provide individualized information relevant to each participant's personal circumstances. The goal of the clinic is to provide "one-stop shopping" for citizens to interact with the appropriate state agencies and/or the court, so they can determine how to regain their driving privileges. Registration is limited to the first 125 registered participants. If you need additional information click on this [link](#).

The Resolution Center

Is Pleased To Announce:

Toby S. Monaco

(Certified/Circuit Civil Mediator)
Will be available for mediations
starting May 1, 2019

The Resolution Center Contact Information:

(352)381-9991

cdpa@resolutioncenter.org

Resident Mediators

Charles B. Carter
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Educate the Eighth:

A Demonstration of Trial Skills

Friday, May 17, 2019 1:00 – 5:00

The Eighth Judicial Circuit is pleased to present “Educate the Eighth: A Demonstration of Trial Skills” on Friday, May 17, 2019, from 1:00 p.m. - 5:00 p.m. in Courtroom 4A at the Alachua County Family and Civil Justice Center.

The material will be presented by experienced trial attorneys and members of the judiciary in a “show and tell” format using a mock case as a guide. Presiding will be Ret. Chief Judge Toby Monaco and several members of the judiciary will be in attendance to provide critique and commentary. This year our fact pattern will involve a contested probate case with experienced trial attorneys Jennifer Lester and Robert Rush. The event will also feature a presentation and question and answer session with Judge Ferrero and Civil Staff Attorneys about court procedure.

Topics to be Covered will Include:

- Testimonial Evidence - Direct and Cross-Examination
- Using Real and Demonstrative Evidence
- Common Objections, Responses and How to Avoid Them
- Impeachment
- Hearsay
- Using and Properly Admitting Business Records
- Proper Admission of Text Messages
- Motions in Limine
- Panel Discussion with Staff Attorneys
- Questions and Answers

Whether you are a seasoned litigator or are looking to learn your way around the courtroom, this presentation will have something for everyone. All practitioners, family law, civil, criminal and transactional attorneys will find benefit.

This course is expected to be approved for five (5) hours of CLE credit, including 1 hour of ethics. All are welcome to attend.

Register online at www.8jcba.org



Nominees Sought For 2019 James L. Tomlinson Professionalism Award

Nominees are being sought for the recipient of the 2019 James L. Tomlinson Professionalism Award. The award will be given to the Eighth Judicial Circuit lawyer who has demonstrated consistent dedication to the pursuit and practice of the highest ideals and tenets of the legal profession. The nominee must be a member in good standing of The Florida Bar who resides or regularly practices law within this circuit. If you wish to nominate someone, please complete a nomination form describing the nominee’s qualifications and achievements and submit it to Raymond F. Brady, Esq., 2790 NW 43rd Street, Suite 200, Gainesville, FL 32606. Nominations must be received in Mr. Brady’s office by Friday, May 3, 2019 in order to be considered. The award recipient will be selected by a committee comprised of leaders in the local voluntary bar association and practice sections.

It’s that time again! The Eighth Judicial Circuit Bar Association Nominations Committee is seeking members for EJCBA Board positions for 2019-2020. Consider giving a little time back to your local bar association. Please complete the online application at <https://goo.gl/forms/0rYVqBeg1u4XuwLR2>. The deadline for completed applications is May 6, 2019.

Immigration and Litigation

By Krista L. B. Collins



In today's political climate, immigration issues are becoming more and more prevalent. Even those of us who don't practice in the immigration arena may find that our clients are touched by these issues. After all, being the victim of a crime or being injured in a car accident doesn't depend on a person's immigration status.

Unfortunately, undocumented immigrants can often face the *in terrorem* effect: the fear that their immigration status will be weaponized in a case that has absolutely nothing to do with the issues and facts at hand.

But fear not, case law is clear that a party's immigration status is generally considered to be irrelevant and therefore not within the proper scope of discovery. For instance, in *E.E.O.C. v. DiMare Ruskin, Inc.*, 2:11-CV-158-FTM-99, 2012 WL 12067868 at *5 (M.D. Fla. Feb. 15, 2012), a case dealing with sexual harassment and unlawful termination for refusing to comply with a supervisor's sexual advances, the Court found that the claimants' immigration status was irrelevant to the issue of the defendants' liability because both citizens and immigrants are protected by law from employment discrimination. The Court went on to state:

...the limited probative value that Claimants' immigration status has on this case lies only with the issue of Claimants' credibility, which is far outweighed by other competing concerns.... Good cause exists to issue the protective order over the revelation of Claimants' immigration status... Most importantly, discovery of the Claimants' immigration status would cause them embarrassment and, if their status is found to be illegal, could subject them to criminal charges and, possibly, deportation.

Id.; also see *O'Neil v. Gilbert*, 625 So.2d 982, 983 (Fla. 3d DCA 1993) (holding that cross-examination of a witness regarding her immigration status did not reflect on her credibility but was nothing more "than an impermissible attempt to embarrass the witness on an immaterial matter").

Likewise, in *DaSilva v. Lamberti*, 08-62106-CIV, 2009 WL 3617991 (S.D. Fla. Oct. 29, 2009), the

defendants argued that the plaintiff's immigration status was relevant because he pled unspecified damages and alleged that he lost seven months' employment. The defendants argued that if the plaintiff was in the country illegally, his employment was illegal and they were entitled to discovery about the plaintiff's status. The Court held that the plaintiff's immigration status was irrelevant because he did not seek lost wages as a measure of damages. The Court further held that plaintiff's immigration status was irrelevant to the question of the defendant's qualified immunity.

Finally, in *Topo v. Dhir*, 210 F.R.D. 76 (S.D.N.Y. 2002), which was cited in *DaSilva*, the Court noted "the *in terrorem* effect of inquiring into a party's immigration status when irrelevant to any material claim. In particular, courts have noted that allowing parties to inquire about the immigration status of other parties, when not relevant, would present a 'danger of intimidation [that] would inhibit plaintiffs in pursuing their rights.'" *Id.* at 78 (quoting *Liu v. Donna Karan International, Inc.*, 207 F.Supp.2d 191, 193 (S.D.N.Y. 2002)).

While the majority of cases dealing with this issue are in federal courts, Florida state courts agree that the refusal of a party to answer questions about immigration status does not automatically prejudice the opposing party, even in the employment context, where a party's immigration status is arguably more relevant than in a personal injury or wrongful death claim. In *Fernandez v. Blue Sky-Venecia Food Corp.*, 40 So.3d 779 (Fla. 1st DCA 2010), the First District Court reversed the Judge of Compensation Claims' ("JCC") dismissal of the claimant's petitions and claims for benefits. Claimant had invoked the Fifth Amendment when questioned about her immigration status and the employer subsequently moved for, and was granted, dismissal of all pending claims, alleging that its discovery had been thwarted by claimant's refusal to answer questions regarding her immigration status. *Id.* at 780. The First District disagreed, holding the JCC abused his discretion in dismissing all petitions and claims for benefits, because the employer failed to demonstrate any actual, meaningful prejudice from the claimant's invocation of the Fifth Amendment. *Id.* at 781-782.

The threat of an opposing party discovering or using the immigration status of a party or witness could easily have a chilling effect on the ability of

Continued on page 12

Immigration and Litigation

Continued from page 11

individuals to pursue their rights or to testify and would hamper the administration of justice. Parties should be – and under application of both federal and state case law are – free to pursue their claims without fear that irrelevant immigration issues will be thrust into litigation or used for intimidation, like a sword of Damocles hanging over their heads.

Alternative Dispute Resolution

Continued from page 3

Both Popov and Hayashi were more driven by internal “pushes and pulls” involving how they felt about themselves. They also placed high value on a social factor, e.g, how others would view what they did and how resolution would appear to a third party.

The bottom line: fairness perceptions are significant in understanding negotiations involving litigation settlements. Perceptions of fairness, both with respect to the merits *and* the mediation procedures, play a role in any negotiation outcome.

Many of you apply fairness in negotiation with respect to the following considerations: What offer shall we make? How should we respond to an offer? Should we settle, make a counter offer, call an impasse? All of these questions involve considerations of fairness despite the fact that clearly *fairness* is largely a matter of perception, and, all too often a distorted perception.



Professor Roberta Kemp Flowers and Professionalism Committee Chair Ray Brady at the Annual Professionalism Seminar held on March 29

Nursing Lounge at Civil Courthouse

The Eighth Judicial Circuit is proud to announce that nursing moms now have a place to privately pump and nurse in both the Alachua Family & Civil Justice Center and the Alachua Criminal Justice Center.

The Family & Civil Justice Center Nursing Lounge is located on the fourth floor in room 400. The Criminal Justice Center Nursing Lounge is located on the first floor of the Criminal Justice Center. The rooms are open to all employees and court users. There are flyers located in various places in each courthouse, including brochure displays, courtrooms, and information desks. For more information, please feel free to contact Court Administration at 352-374-3647.

May 2019 Calendar

- 1 EJCBA Board of Directors Meeting, Three Rivers Legal Services, 1000 NE 16th Avenue, 5:30 p.m.
- 3 Deadline to submit nominations for 2019 James L. Tomlinson Professionalism Award
- 6 Deadline to apply for 2019-2020 EJCBA Board of Directors
- 6 Deadline for submission of articles for June 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, Speaker TBD, The Woolly, 11:45 a.m.
- 21 Family Law Section, 4:00 p.m., Chief Judge's Conference Room, Alachua County Family & Civil Justice Center
- 27 Memorial Day, County & Federal Courthouses closed

June 2018 Calendar

- 12 Probate Section Meeting, 4:30 p.m., Chief Judge's Conference Room, 4th Floor, Alachua County Family & Civil Justice Center
- 13 EJCBA Annual Reception and Meeting, 6-8:30 p.m., Cade Museum
- 18 Family Law Section Meeting, 4:00 p.m., Chief Judge's Conference Room, Alachua County Family & Civil Justice Center
- 26-29 2019 Annual Florida Bar Convention, Boca Raton Resort and Club

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.



EJCBA President Cherie Fine, Julie Fine, Craig DeThomasis, Barbara Blount-Powell and Judge David Kreider at EJCBA's Spring Fling on April 10



EJCBA Board Member Mac McCarty and his wife, Teresa McCarty enjoy the Spring Fling.