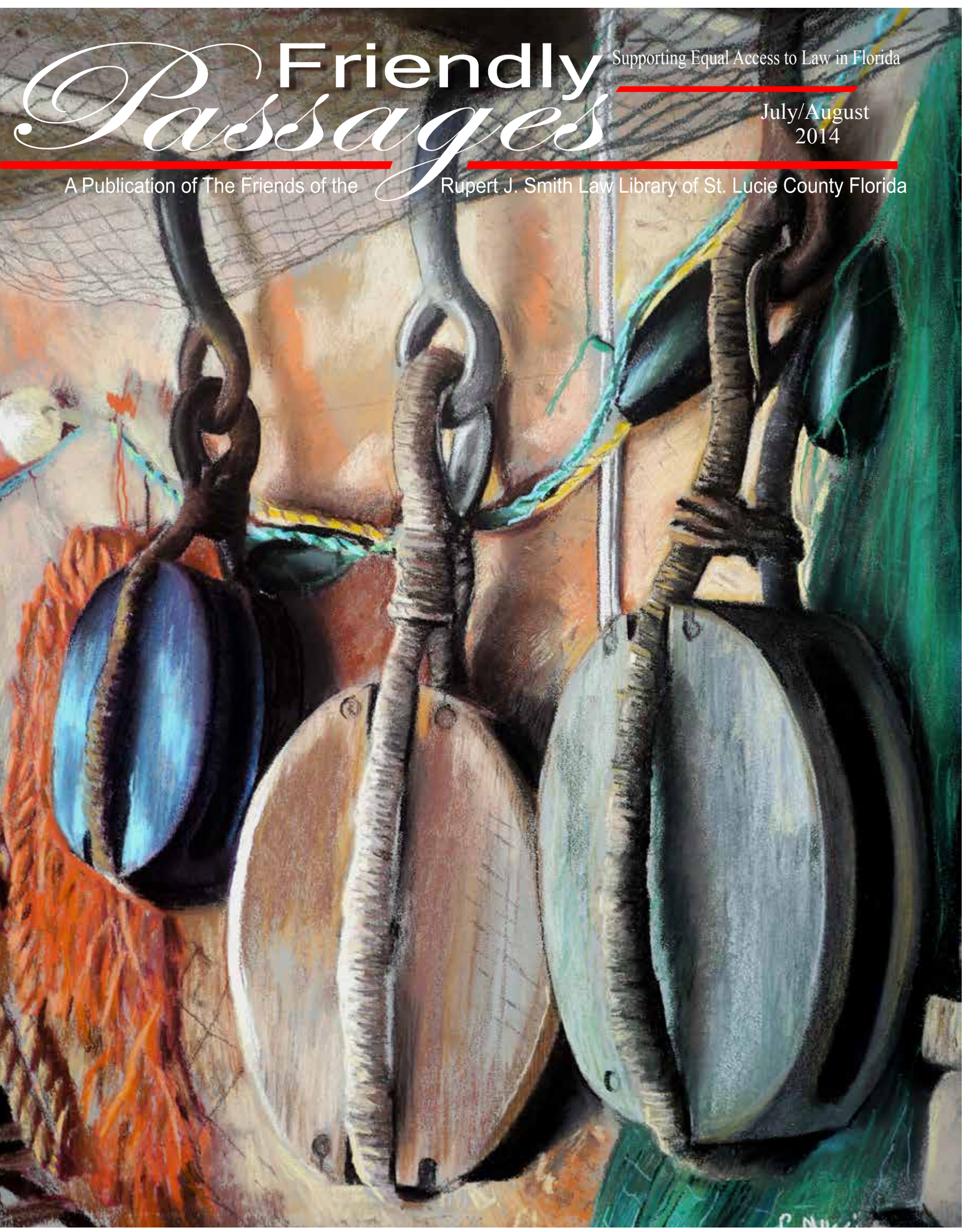
Friendly Passages

Supporting Equal Access to Law in Florida

July/August
2014

A Publication of The Friends of the Rupert J. Smith Law Library of St. Lucie County Florida



July/August 2014

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A Publication of The Friends of the Rupert J. Smith Law Library of St. Lucie County Florida

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We wish to thank our authors and other contributors for making this issue a success!
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On The Cover

"*Three Blocks",* Pastel on Paper. *By Paul Nucci*

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On Behalf of the Publisher

By James T. Walker
President, Friends of the
Rupert J. Smith Law Library

"Though he flick my shoulders with his whip, I will not tell him which way the fox ran.
With his hoof on my breast, I will not tell him where the black boy hides in the swamp.
I shall die, but that is all that I shall do for Death; I am not on his pay-roll.

I will not tell him the whereabouts of my friends nor of my enemies either.
Though he promises me much, I will not map him the route to any man's door.
Am I a spy in the land of the living, that I should deliver men to Death?
Brother, the password and the plans of our city are safe with me, never through me
Shall you be overcome." -- Edna St. Vincent Millay, from "Conscientious Objector"

The last preceding issue of ***Friendly Passages*** was distinguished by a contribution from Mark Harllee, former Chief Assistant Public Defender for the Nineteenth Judicial Circuit. Mr. Harllee's article was entitled "Florida's death penalty: A haunting experience". His topic was capital punishment. He noted that so far in 2014 Florida leads the nation in executions, with four to date.

He raised this question: "what of the **innocent** human being who is pumped full of sodium thiopental until all breathing and heart-beating ceases?" Mr. Harllee was well-qualified to pose it. A 1984 graduate of the University of Florida Law School, he spent twenty-five years of his career in the public defender's office. His experience included two-hundred jury trials. He was death penalty certified, and in 2012 his peers awarded him the Jim Slater "Life Over Death" Award as the top Death Penalty Lawyer in Florida. He knew what he was talking about.

There must have been a lot he was thinking about on the subject. Perhaps he brought up the point over awareness of a national study from the University of Michigan Law School wherein one Professor Samuel Gross determines that nationally 4.1% of all criminal defendants sent to death are falsely convicted. He may have known of the study's conclusion that there are more than twice as many inmates wrongly convicted and sentenced to death as have been exonerated and freed.

He must have been troubled by the knowledge that, if this is actually true here in Florida, then of the three hundred and ninety-seven inmates now reportedly on death row, according to the Florida Department of Corrections, sixteen of them are assuredly innocent. Maybe he wondered how many such deaths can fairly be tolerated in the name of justice. Mr. Harllee no doubt read of the claims bill recently passed in favor of James Richardson, previously sentenced to death for allegedly poisoning his seven children. Our writer must have known that The Innocence Project has led efforts to win exoneration, on the basis of DNA, of three-hundred and sixteen inmates, each of whom spent an average of thirteen and a half years in prison. He probably knew about a National Institute of Justice study which shows that, in criminal investigations where there is DNA, the DNA ends up excluding twenty-five percent of the suspects. His dreams must have been troubled by the faces in the many post-execution case studies which show the doubtful guilt of the defendants, including—to name a few—Larry Griffin; Rubin Cantu; Lionel Herrera; David Spence; Jesse Tafero, Ellis Felker, Leo Jones; Claude Jones; Cameron Willingham; Joseph O'Dell; Troy Davis; George Stinney. Perhaps the final words of Lionel Herrera rang in his ears: "I am innocent, innocent, innocent. Make no mistake about this. I owe society nothing. Continue the struggle for human rights, helping those who are innocent, especially Mr. Graham. I am an innocent man, and something very wrong is taking place tonight. May God bless you all. I am ready."

But Mr. Harllee chose to focus instead on a former client, a man now in his '70s and on dialysis. Unfortunately, our writer reports, there was no DNA in that case to save his client. Nor were there any fingerprints. There were no witnesses. Nor was there a confession. There was however evidence that the crime –a ghastly crime—was committed by someone else. But the client is nevertheless under sentence of death. Harllee wondered about the day when the warrant is finally executed: "Do I want to subject myself to attend the execution of my spirit-haunting client when his time comes? He continues to protest his innocence in Christmas cards he sends to me every year. Will I be witness to him being strapped to a gurney and given a series of injections until the heart monitor stops bleeping? Until the muscle contractions and cramping ceases? Until the last gasp of air escapes his lungs and hangs in the air of that black-curtained room? I don't know –would you?"

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Another Botched Execution...

The Los Angeles Times reports on the two hour execution of James Rudolph Wood's execution: http://www.latimes.com/nation/nationnow/la-na-nn-arizona-io-140723-story.html

This link will take you to a transcript of the Diane Rehms show and discussion on the latest botched execution in Arizona. Wednesday, July 23: http://thedianerehmshow.org/shows/2014-07-25/friday-news-roundup-domestic/transcript

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On Behalf of the Publisher

Our Mark Harllee will never actually have to make that decision. He is spared what may be the most terrible choice any lawyer can possibly confront. Mark Harllee died in an accident on May 11, 2014, before the article came out.

So what of the innocent whose veins are injected with sodium thiopental in the name of justice? Mr. Harllee never got to finish answering that question. His death came before he was able to complete a second installment of what was intended as a series on the subject. Perhaps as a small tribute to this man, a little thanks for his commitment on behalf of the ideals that we each of us honors however imperfectly, I might offer a response. Or rather, the response comes from one Charles Peguy, on the wrongful conviction of a Jewish army officer, Alfred Dreyfus, for treason in turn-of-the-century France: "We said that a single injustice, a single crime, a single illegality, particularly if it is officially recorded, confirmed… that a single crime shatters and is sufficient to shatter the whole social contract, that a single legal crime, a single dishonorable act will bring about the loss of one's honor, the dishonor of a whole people." That's what happens when innocent life is taken in the name of the State. Crime decouples from its punishment. Vindictiveness is substituted for retribution. Shakespeare's Cassio describes the effect: "Reputation, reputation, reputation! Oh, I have lost my reputation! I have lost the immortal part of myself, and what remains is bestial."

Mark Harllee did everything he was capable of doing within the bounds of the law to prevent this. It is left to his loved ones to now add up the pieces of his life and assign such meaning to it as they are able. None are so aware as they of the loss he leaves behind, the hole that will ever remain unfilled. But if we are measured by the nobility of the purpose that sustains us through life, and the fidelity with which we struggle to fulfill that vision for ourselves and others, then surely it must be said of Mark Harllee that so far as anyone can, he stood courageously for life, fought hard for it, worked to pull others back from the darkness. There is no higher calling. Of such individuals Stephen Spender wrote:

"Near the snow, near the sun, in the highest fields
See how these names are feted by the waving grass
And by the streamers of white cloud
And whispers of wind in the listening sky.
The names of those who in their lives fought for life
Who wore at their hearts the fire's centre,
Born of the sun they travelled a short while towards the sun
And left the vivid air signed with their honour."

We will miss you Mark Harllee. May you find peace for ever more. Amen.

-- JimW

Have You Visited the Law Library Web Site Recently?

At http://www.rjslawlibrary.org you can find:

An updated listing of all our current CLE programs

Local Administrative Orders from 1975 forward

Some really cool Historical Photos

Directions to the library as well as opening & closing times

All back issues of "Friendly Passages!" See an interesting article that you'd like to share? Send the link.

Our website gets thousands of hits every month coming from near and far. Take a peek. We hope it is useful to you. Suggestions? We would like to hear them.

What's New at the Library?

We shall soon receive a new edition of:
the **Bankruptcy Rules** and Daniel Raab's **Dictionary of Transportation Terms.**

We have had several calls at the library in the last week asking if we have a specific title and if it is current. We are always happy to take these calls before you make a special trip to the library. If you feel our collection would be improved by adding something you would use, let us know. Depending on the cost and the topic, we may be able to order it for the library.

We have just received twenty new Florida Bar CLE tapes for you to borrow. Please see the last page of this issue to read our policy of lending tapes by mail to any Florida Bar member.

We could use a little help!

As many of you know, we never charge to use our CLE tapes or for the mailing of the tapes if you aren't convenient to downtown Fort Pierce. We have been doing this for more than a year and have watched our postage expenditures grow with the popularity of the program! We will be enclosing a request for a donation with each CLE program that we mail in hopes of offsetting some of our postage. We don't need a lot but a little would sure help! Most of all, we want to support all of our patrons near and far. If you can help defray your postage charges, we would be very grateful for your contribution.

The Friends are presenting three live CLE programs in the fall. Bring your lunch and earn CLE credit and learn about timely topics!

Preparing for a Family Law Trial

By The Hon. F. Shields McManus, Circuit Judge

Part II *Admissibility of Expert Opinions*

Proof sometimes requires expert opinions. Testimony from psychotherapists, physicians, substance abuse counselors, appraisers, accountants, business evaluators, and other experts may be appropriate. Attention to the Code of Evidence regarding opinion testimony, privilege, and hearsay will be important.

In 2013, the Florida Legislature amended section 90.702, Florida Statutes, *Testimony by Experts*. The former version of 90.702 required that the knowledge required be specialized, that is, beyond common knowledge, that the witness be qualified in that knowledge, and that the opinion can be applied to evidence. The new version deletes "the opinion is admissible only if it can be applied to evidence at trial" and adds that it is only admissible if:

(1) The testimony is based upon sufficient facts or data;
(2) The testimony is the product of reliable principles and methods; and
(3) The witness has applied the principles and methods reliably to the facts of the case.

It is generally thought that the Legislature intended to adopt a more stringent test for admission of expert testimony modeled on the federal rule as interpreted in *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 587, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). The Florida Supreme Court has repeatedly resisted interpretation of 90.702 consistent with *Daubert*. It continued to follow *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

If the expert is using a novel test or approach to analysis, the testimony will be subject to objection that it is not "the product of reliable principles and methods." Even under the *Frye* standard, however, such an objection was possible. Unlike improper bolstering, when such an objection is made, published materials may be introduced into evidence to prove the principles and methods are not unreliable. No longer can an expert testify when challenged that his/her opinion is just based on personal experience. *Perez v. Bell South Telecommunications, Inc.*, --- So.3d ----, 2014 WL 1613654 (Fla. 3d DCA, April 23, 2014) (after amendment of statute governing admissibility of expert testimony to replace the *Frye* test with the *Daubert* test, a physician's subjective belief and unsupported speculation are henceforth inadmissible.) The *Perez* court also said:

> Thus, "a key question to be answered" in any *Daubert* inquiry is whether the proposed testimony qualifies as "scientific knowledge" as it is understood and applied in the field of science to aid the trier of fact with information that actually can be or has been tested within the scientific method. *Id.* "General acceptance" [from the *Frye* test] can also have a bearing on the inquiry, as can error rates and whether the theory or technique has been subjected to peer review and publication. *Id.* at 593–594, 113 S.Ct. 2786. Thus, there remains some play in the joints. However, "general acceptance in the scientific community" alone is no longer a sufficient basis for the admissibility of expert testimony.

It remains to be seen how the Florida Supreme Court will interpret the statute. If 90.702 is interpreted as an adoption of all *Daubert* principles as the Third District Court now has, the trial courts will be required to act as a gatekeeper, assuring that only expert opinions which have "applied the principles and methods reliably to the facts of the case" be admitted.

In other states where *Daubert* has supplanted *Frye*, major efforts have been put into disqualifying experts and expert opinions, although the appellate courts have applied *Daubert's* requirement of reliability with less rigor to mental health opinions than to the "hard sciences." Nelson, Clark, and Delipsey, "Use and Abuse of Mental Health Experts after Daubert," *State Bar of Texas, 28th Annual Advanced Family Law Course*, Ch. 37 (2002). www.aaml.org/library/article-category/trial-techniques-and-procedure Nevertheless, close attention must be given to selecting an expert with relevant qualifications and with an opinion that is based on protocols accepted in the profession, following ethical standards, and using the established instruments of the profession as they were designed to be used.

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Preparing for a Family Law Trial

In cases where the parenting plan is an issue, the court may appoint a qualified person to conduct a social investigation per section 61.20, Florida Statutes. Since the statute provides, "[t]he court may consider the information …, and the technical rules of evidence do not exclude the study from consideration", it is unlikely section 90.702 will be an obstacle to use. Rule 12.363, Florida Family Rules, provides further details on use of experts for examination, evaluation, testing, interview of a minor child, or to conduct a social or home study investigation.

The practice has developed of asking the court to appoint an attorney as a guardian ad litem to investigate the family. A guardian ad litem who is not a licensed mental health professional per chapter 490, 491, or 458, Florida Statutes, however, will probably be found not qualified to give an opinion on parenting fitness or a parenting plan and cannot give hearsay testimony.

Be careful about using a treater to give opinion testimony. A treating mental health professional has legal and ethical restrictions on becoming a forensic witness for the patient. Rule 12.363(c) states: "Any other expert who has treated, tested, interviewed, examined, or evaluated a child may testify only if the court determines that good cause exists to permit the testimony. The fact that no notice of such treatment testing, interview, examination, or evaluation a child was given to both parents shall be considered by the court as a basis for preventing such testimony."

If the treater is subpoenaed to be a witness against the patient, the patient may invoke the psychotherapist-patient privilege, section 90.503, a sexual assault counselor-patient privilege, section 90.5035, or a domestic violence advocate-victim privilege, section 90.5036, Florida Statutes (2013). A patient can waive the privilege by consent or by placing his or her own mental or emotional condition at issue by conduct. The court has the option of ordering a mental health evaluation per Rule 12.360 instead of ordering production of the party's mental health treatment records. There is no privilege for court-ordered examinations. Sec. 90.503(4)(b) Fla. Stat. (2013).

A child has a privilege with respect to his or her communications with his or her psychotherapist. In litigation between the parents regarding the child's best interests, neither parent may assert or waive the privilege on the child's behalf. The court may appoint a guardian ad litem to assert or waive the privilege, but this is not required. *Hughes v. Schatzberg*, 872 So.2d 996 (Fla. 4th DCA 2004). The psychotherapist may assert the privilege for the child. Sec 90.503(3) Fla. Stat. (2013).

Prepare Expert Witnesses

Prepare the examination of the expert with the expert. If there is an opposing expert, ask your expert to help you prepare for cross examination. You will learn about the subject matter and what the witness can and cannot say. You can instruct the expert on legal terms and how to state the opinion testimony in a legally sufficient manner. Phrase the questions so the expert will feel comfortable giving the answer you are seeking. You can only be sure of this by discussing the questions with the expert in advance. If you use words that are not used by the particular school of knowledge, the expert cannot readily answer. Experts have to give opinions in the language of their field. Then ask the expert to explain the opinion in layman's terms. But do not overdo this. An experienced judge will have heard testimony of many similar experts and read many similar reports. Spare the judge from questions like, "What is a psychologist?" or "Doctor, you are not a medical doctor, are you?"

The testimony should start with qualifications. A *curriculum vitae* may be placed into evidence. It is not necessary to ask the court to find that the witness is qualified as an expert. Then establish the foundation of the opinion. What information has the expert collected, reviewed, or created by interviewing, testing, or analyzing? Did the expert follow the protocols and use testing instruments commensurate with the expert's licensure, training, and which were relevant to the issue? Did the expert apply the principles and methods to the facts of the case? Has the expert formed an opinion to a reasonable degree of scientific/medical/psychological/accounting likelihood? Some experts will not say "certainty". Since the burden of proof is the greater weight of the evidence, "more likely than not" is legally sufficient. Finally, what are the witness's conclusions and recommendations?

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By The Honorable Judge Mark W. Klingensmith

Justice Robert H. Jackson:
A Retrospective

While some U.S. Supreme Court Justices of the 20th Century such as Earl Warren, Thurgood Marshall, and Sandra Day O'Connor are so well known that most schoolchildren would easily recognize their names, few figures in American legal history can match the lasting influence of one whose name may be less familiar: Justice Robert H. Jackson, Jr. Sixty years after his death, it would be unusual to find anyone today (even a lawyer) who knows very much about his extraordinary life and career.

Robert Houghwout Jackson, Jr. was born in Spring Creek, Pennsylvania on February 13, 1892. He took the New York State Bar exam at age 21, and became a prominent trial lawyer in Jamestown, New York where he practiced for 20 years, and was an active member of the American Law Institute and chairman of the ABA's Conference of Bar Association Delegates. In 1934 he began his career in government, with an appointment from President Franklin Roosevelt as general counsel of the Bureau of Internal Revenue (now known as the IRS), then as assistant attorney general heading the tax and antitrust departments, and serving for two years as United States Solicitor General from 1938-1940, arguing over 40 cases and winning almost all. He also served as United States Attorney General for eighteen months before Roosevelt appointed him as an Associate Justice of the Supreme Court in 1941.

Two years later in 1943, Jackson wrote the majority opinion in *West Virginia State Board of Education v. Barnette*,[1] which overturned regulations making it mandatory for public school students to salute the flag under penalty of expulsion and prosecution for non-compliance. That case overturned a Supreme Court opinion issued only a few years before,[2] and in doing so, Justice Jackson's opinion defended free speech and the constitutional rights of a minority religious group, writing:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections….
>
> …To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

Justice Robert H. Jackson

In 1945, President Truman appointed Jackson, who took a 15-month leave of absence from the Supreme Court, to serve as U.S. chief of counsel for the prosecution of Nazi war criminals. His appointment was meant to send a message to the other world powers about the importance of the proceedings, as he was already considered a figure of distinctly high national and international reputation and experience.[3] His opening and closing arguments before the Nuremberg court are widely considered among the best speeches of the 20th century. Some in the United States, including fellow members of the Supreme Court, criticized Jackson's decision to go to Nuremberg, yet he believed that it was a mission important to the nation and to the world. Jackson later said the most important work of his life was his role at Nuremberg.[4]

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Justice Robert H. Jackson

In doing so, he changed the face of international criminal law and established the foundation of subsequent war crimes tribunals. In his opening statement to the tribunal, Justice Jackson set the tone for the proceedings against the former Nazi leaders, reminding the world that "the record on which we judge these defendants today is the record on which history will judge us tomorrow":The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.[5]

Justice Jackson addressing the Nuremburg Tribunal

In closing, he argued that an acquittal of the defendants would be tantamount to a denial of the facts of World War II: It is against such a background that these defendants now ask this Tribunal to say that they are not guilty of planning, executing, or conspiring to commit this long list of crimes and wrongs. They stand before the record of this trial as blood-stained Gloucester stood by the body of his slain King. He begged of the widow, as they beg of you: "Say I slew them not." And the Queen replied, "Then say they were not slain. But dead they are…." If you were to say of these men that they are not guilty, it would be as true to say there has been *no war***,** there are *no slain***,** there has been *no crime***.**[6] (Emphasis in original).

Jackson had a lasting influence on modern Constitutional interpretation, with several of his non-majority opinions still considered as models of scholarly analysis. He disagreed strongly with the majority in *Korematsu v. U.S.*[7] where he was one of only three dissenters voting against the internment of Japanese-Americans during the war. His vociferous dissent continues to be cited in legal texts as a definitive statement regarding the rights of the individual (even in wartime) versus the power of the government.[8] Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer* (the Steel Seizure case)[9] remains to this day the constitutional lodestar for assessing the proper scope and limitation of presidential power:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.
2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.
3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.[10]

Justice Jackson was also a member of the Court that unanimously decided *Brown v. Board of Education.*[11] On March 30, 1954, a few weeks before the decision was announced, Justice Jackson suffered a heart attack. Although still recovering in a hospital, he left his bed on Monday morning, May 17, 1954 to be physically present on the bench for the formal announcement of the *Brown* decision. Unfortunately, Justice Jackson suffered another heart attack a few months later, and passed away on October 9, 1954 at the age of 62, after serving only thirteen years on the Court.

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Cryptoquote

RCCW BPRHD, RCCW BPRHD! XGLDPBR PJ JKIH JNSSD JCLLCN, DHGD P JHGTT JGE RCCW BPRHD DPTT PD ZS OCLLCN.

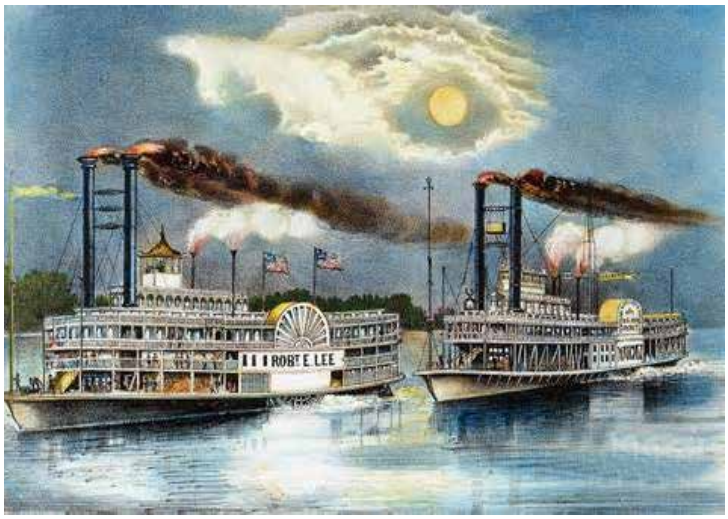
- NPTTPGO JHGFSJXSGLS

For the impatient, e-mail your answer to: nora@rjslawlibrary.org for confirmation. For the patient, the decoded quote will appear in the next issue.

The Great Steamboat Race

By Richard Wires

For much of the nineteenth century the navigable rivers of America were crowded with various side- and stern-wheel paddle steamers. They were the principal carriers of the nation's cargo and people before the railroad network grew and largely replaced them. In the highly competitive and free-wheeling world of steamboating some spirited captains displayed a daredevil streak. Impromptu races often developed between boats on the major rivers either to obtain some business edge or demonstrate skill or pride. It was also an era fascinated with both speed and gambling. Concern for the safety of passengers, cargo, and the steamboats themselves was ignored. Accidents of all sorts were common in steamboating, especially from hitting underwater obstructions or straining boilers until they exploded, and racing increased the likelihood of tragic mishaps. Losses of lives, freight, and boats mounted. Only later were new laws to stop racing enforced. The greatest of all steamboat races took place on the Mississippi in summer 1870 and captured attention from across the nation and far abroad. Currier & Ives commemorated the occasion in one of their famous lithographs entitled "Great Race on the Mississippi." The race was one of the few that was planned. Its story reveals much about the steamboat years.



The Robert E. Lee and the Natchez

The Civil War's long disruption of river commerce was only one hardship for steamboat owners and especially for those on the lower Mississippi. Both sides had commandeered steamboats to move troops and supplies; the superstructures made attractive targets for the enemy even though some were covered in sheet iron; many steamboats had accidents and fires or simply wore out. Postwar competition from railroads for both freight and people promised to intensify. Pessimists thought it was the end of steamboating. But instead in the years following the Civil War new steamboats plying the Mississippi would again be the "floating palaces" that most people now associate with steamboats. They were nevertheless a gamble that travelers would prefer them over noisy and dirty trains and that moving cargo on the river would remain more economical than by railroad. Clearly the new boats were meant to impress. They were big and carried huge amounts of cotton and other freight, still their principal purpose and business, but the accommodations for passengers were grand, with a style and level of comfort that trains could not provide. The new side-wheelers were also designed for efficiency and speed, a source of pride, since as packets they normally followed set routes and fixed schedules. Among the new steamboats were the *Natchez* and the *Robert E. Lee* whose captains were long at odds. The conditions for the "Great Race" lay in their rivalry.

Both captains were legendary figures. Thomas P. Leathers had already had successive steamboats built for him, each called the *Natchez* in its turn, the most recent vessel having been burned in the Civil War. A captain since his twenties who often raced, enjoying the attention, he had sometimes been reckless in pursuing wins. Keeping up with the new designs and technology was essential for owners to make profits in the competitive field. So when the *Natchez* of race fame was constructed for him in Cincinnati in 1869, with eight boilers and 301 feet in length, Leathers gave the *Natchez* speed and capacity for 5500 cotton bales rather than great luxury.

The *Robert E. Lee* was completed in 1866 at a cost of over $200,000 by builders in New Albany, Indiana. It offered the opulence and grandeur that appealed to travelers of the times. The focal point was a grand saloon with a specially manufactured carpet 225 feet long, with custom-made "modern" furniture, chandeliers, a stained-glass skylight, mirrors, and overall décor described as Oriental splendor in a newspaper story about the new steamboat. Passengers dined at twenty long tables, each for twelve, with leisurely meals and good wines. They could choose between fine staterooms and more modest cabins and store their unneeded bags in two guarded rooms. And yet the *Robert E. Lee* could also carry 5700 bales of cotton. Soon known on the river as the "Monarch of the Mississippi" it was the special pride of owner Captain John W. Cannon.

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Last Issue's Cryptoquote Answer

W RKFS NQHEY VRKV VRS DSIV AKT VQ GWFS KYFWZS VQ TQHP ZRWLYPSE WI VQ NWEY QHV ARKV VRST AKEV KEY VRSE KYFWIS VRSJ VQ YQ WV. - RKPPT I. VPHJKE

I have found that the best way to give advice to your children is to find out what they want and then advise them to do it. - Harry S. Truman

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Justice Robert H. Jackson

The accused at the Nuremburg Tribunal 1945

During his time on the Court, he delivered 154 majority opinions, 46 concurring opinions, 115 dissents, and 15 separate opinions concurring in part and dissenting in part. Another facet to the legacy of Justice Jackson's service on the Court is that one of his former law clerks later achieved the distinction of being appointed to the Supreme Court in his own right -- Chief Justice William H. Rehnquist.[12]

In the sixty years since his death, Justice Jackson has been recognized by legal scholars for setting a high standard for judicial writing, and an unwavering commitment to civil liberties, due process, and public service. Described by Professor John Barrett of St. John's University School of Law as an "eloquent, practical, independent Justice of permanent greatness and influence",[13] Justice Jackson is also remembered for his keen insight about the role of the Supreme Court in American society, famously writing in one case, "We (the Court) are not final because we are infallible, but we are infallible only because we are final."[14]

What is perhaps most extraordinary is that this "county-seat lawyer" who later became a Solicitor General, an Attorney General, an Associate Justice of the Supreme Court and, notably, the Chief American Prosecutor at the Nuremberg War Trials, someone considered by many to be one of the great legal minds of the last century, had two things missing from his impressive resume of life-long legal service and accomplishments. Justice Jackson never attended college, and never graduated from law school.[15]

(Endnotes)
1 319 U.S. 624 (1943).
2 Minersville School District v. Gobitis, 310 U.S. 586 (1940).
3 John Q. Barrett, The Nuremberg Roles Of Justice Robert H. Jackson found at https://law.wustl.edu/WUGSLR/Issues/Volume6_3/barrett.pdf
4 http://www.roberthjackson.org/the-man/nuremberg-trial/
5 Opening Statement Before the International Military Tribunal, Nuremberg, Germany, November 21, 1945, found at http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/opening-statement-before-the-international-military-tribunal/
6 Closing Address Before the International Military Tribunal, Nuremberg, Germany, July 26, 1946, found at http://www.roberthjackson.org/files/theman/speeches-articles/files/closing-arguments-for-conviction-of-nazi-war-criminals.pdf
7 323 U.S. 214 (1944).
8 The nation's wartime security concerns, he contended, were not adequate to strip Korematsu and the other internees of their constitutionally protected civil rights. Further, Jackson believed that the Courts should not merely ratify or enforce unconstitutional military orders, even if there was little the judicial branch could do to stop them after they are issued: A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period, a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes.
9 343 U.S. 579 (1952).
10 See, e.g., Medellin v. Texas, 552 U.S. 491 (2008).
11 347 U.S. 483 (1954).
12 Rehnquist served as Jackson's law clerk during the court's 1952–1953 term. What is also remarkable is that Chief Justice Rehnquist himself also hired a law clerk during his tenure on the Court who was later appointed to the Court -- Chief Justice John Roberts.
13 Remarks given at the 10th Anniversary Celebration of the Dedication of the Robert H. Jackson Center, May 17, 2013.
14 Brown v. Allen, 344 U.S. 443, 540 (1953) (concurring).
15 See "Jackson's Life", available at http://www.roberthjackson.org/the-man/timeline (last visited April 17, 2014).

Judge Klingensmith is a judge in the Fourth District Court of Appeals, 4th Judicial Circuit. He serves on the UF Law School Board of Trustees,is the Treasure Coast District Chairman for the Boy Scouts of America Gulf Stream Council, and is a member of the local chapter of the Major Harding Inns of Court.

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The Great Steamboat Race

Underlying the captains' rivalry was a combination of business factors, concern for prestige, and personal antagonism that had already kept them from speaking. The feelings and contest grew more intense after the *Natchez* made a round-trip to St. Louis in very quick time and Leathers claimed his vessel was the fastest on the river. Such boasting struck Cannon as a challenge. And soon for the first time both steamboats were scheduled to leave port at about the same hour.

There was no official announcement of a race. Both captains remained tight-lipped and pretended in public that things were normal. So there was neither an agreement on terms and rules, except reliance on each man's personal honor, nor clarity about a set distance or the terminal point. But the eager public seems to have decided such matters by people just talking among themselves. The buzz about the expected event spread quickly, stories being sent by telegraph to distant newspapers and even abroad, people everywhere placing wagers on the likely winner. Excitement and hoopla built steadily. Meanwhile the captains quietly prepared their steamboats and planned their strategies. Decisions were made about how much freight to carry, the number of passengers to take aboard, and whether usual stops should be retained or dropped. Leathers declined to alter substantially his boat's regular service, boarding some passengers and cargo, and scheduling many landings normally made by the *Natchez*. He seemed confident that the *Natchez* could not really be beat. Cannon booked no freight and also removed other items to reduce his steamboat's weight; without cargo and only about sixty passengers he could limit calls along the Mississippi. But would he divert his steamer from its expected Ohio River run to go on to St. Louis and what everyone thought would be the race's finish point? Certainly few people knew how carefully he had made secret arrangements.

The big day came. About 5:00 p.m. on 30 June 1870 the *Robert E. Lee* pushed away from its wharf in New Orleans and within minutes Captain Leathers took the *Natchez* out as well. Crowds aboard other boats in the river cheered, guns were fired, and whistles sounded in a lively sendoff. The race was on. Into the night and for about a hundred miles the *Robert E. Lee* retained its small lead, both boats passing excited crowds at Baton Rouge despite their arrivals at well after midnight, and sometimes during daylight on 1 July those aboard could easily catch glimpses of the rival vessel. At times the *Natchez* trailed by just under an hour and at Memphis it still remained about that far behind the *Robert E. Lee.*

Soon evidence of Cannon's foresight was revealed. To avoid time-consuming fueling stops he had arranged that at various places coal-laden barges would await the *Robert E. Lee* out in the river channel and be lashed alongside it for unloading while the steamboat and barge kept moving. Then each barge would be set free. Under a second plan the steamboat *Frank Pargoud* met the *Robert E. Lee* with a cargo of pine knots. Because of their resin content they burned very hot. Again the boats were tied together, with both then keeping the same speed, until the fuel had been transferred. Cannon's third surprise came near Cairo where the Ohio flows into the Mississippi. The *Robert E. Lee's* usual route would have taken it up the Ohio to Louisville, where some passengers indeed expected to go, but Cannon had asked the *Idlewild* to meet his steamboat in the river below Cairo. With the boats lashed together the passengers and their belongings were placed aboard the other steamer. Cannon then headed to St. Louis. He lost time freeing his boat from a sandbar, however, and his rival was almost able to close the gap.

During the night a thick fog engulfed the river and Cannon had to slow his steamer until it was barely moving. The *Natchez* had remained close behind, by only twenty-five or thirty minutes, as Leathers learned during a stop. Thinking the fog must also have prevented the *Robert E. Lee* from pushing forward he decided not to depart. But during the early hours of the next day a breeze began to clear the fog farther north. The *Robert E. Lee* quickly resumed speed while Leathers and the *Natchez* had to wait until about 6:00 a.m. And there would be no time or chance to close the big gap.

On the Fourth of July Cannon and the *Robert E. Lee* reached the St. Louis waterfront. They had won the race. The holiday ensured the presence of big crowds and a very noisy reception. People cheered and shouted, other boats blew their whistles, nearby churches rang their bells, cannons roared a salute. Cannon so enjoyed his triumph that he first took his steamboat right past the riverfront, then turned it, and steamed back down river before finally typing up at the wharf in St. Louis. He and the *Robert E. Lee* were great heroes. Six and a half hours later the *Natchez* as well made it into the port. But it too was greeted by a large crowd. Both captains were honored at a gala followed by a lavish banquet.

The exciting and colorful great steamboat race on the mighty Mississippi in 1870 remains a memorable part of the nation's history and imagination. It provided welcome entertainment for the public, offered people a chance to debate and bet, and appealed to the era's fascination with speed. Two steamboats had ascended the river from New Orleans to St. Louis in less than four days; reported figures for that distance vary between 1150 and 1210 miles depending on the river channels measured. And both captains claimed speeds of 20-22 miles an hour during some stretches. An average hourly speed of 5-6 miles had therefore been achieved. The race's publicity and records so helped the steamboat business that it remained strongly competitive for another two or three decades. But the coming end of passenger service

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The Great Steamboat Race

on "floating palaces" was already clear to observers of river life. Better prospects still existed for moving cargo: compared to railroads the high-capacity steamboats could transport bulk freight much more economically. That saved many steamboats for years. Even today barges still carry huge river cargoes.

After the race the *Natchez* continued in service until 1879 when an elegant new *Natchez* took its place. The old steamboat was scrapped. Leathers ran its successor until both he and it retired in 1887. The *Robert E. Lee* steamed the midland rivers until it burned during early morning on 10 September 1882. Flames started in the pantry and spread rapidly but the fire's cause would remain in dispute. By then its captain was the owner's son, W.C. Cannon, who steered the big vessel to the river bank. Despite acts of heroism 21 people had still perished. And the steamboat itself, with its cotton and mail, became a total loss. It was just such tragedies, common enough in steamboat travel that helped end passenger service.

Richard Wires holds a doctorate in European History and a law degree. He served in the Counter Intelligence Corps in Germany and is Professor Emeritus of History at Ball State University, where he chaired the department and later became Executive Director of the University's London Centre. His research interests include both early spy fiction and actual intelligence operations. His books include "The Cicero Spy Affair: German Access to British Secrets in World War II. "

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Preparing for a Family Law Trial

Per section 90.704, expert witnesses may rely on hearsay if the facts or data are of the type reasonably relied upon by such experts. The expert cannot be a mere conduit for hearsay, however. The hearsay can only be disclosed in direct testimony if it has probative value in evaluating the expert's opinion. Section 90.704 was also amended in 2013 to add:

> Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

On cross examination, however, the expert can be required to state the otherwise inadmissible data and facts on which the expert's opinion was based. Sec. 90.705(1), Fla. Stat. (2013).

A comment about presentation

Coming from a personal injury trial practice, and serving in family court now, I see a contrast in the visual presentations. Many times in bench trials a lawyer will be questioning the witness about photographs, financial records, time-sharing calendar, telephone logs, texts, emails, et cetera, and the judge is struggling to follow along. Jury trial lawyers use blow ups on boards, writing on flip pads, digital projections, and even individual monitors for the witness, judge, and jury to show not only photographs and videos, but witness examination quotes, power point presentations, and documents. This can be done in bench trials, too, not only to show photographs and videos but also to display documents and summaries of evidence as the witness is examined. It can be effective for opening statement and closing argument. It will keep you and the judge focused.

Consider using a projector. With current technology it is much cheaper than big printed boards, and flexible enough to change as the trial progresses. It is also makes persuasive impact if done well. Make a copy of the presentation in a reduced 8 by 11 inch size for the judge. It is a way to preserve your argument. It is appropriate to have it marked for identification and filed to complete the record of the trial. Consider the use of methods to emphasize facts such as charts for key facts and numerical calculations on flip pads. If nothing else, try to reduce your client's case to a one page summary of ultimate facts. If you cannot do that, you have not focused your case.

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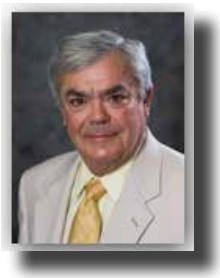
Maximizing Recovery Through Medical Coding



By Robert W. Hamilton, Jr. and Edmund J. Sikorski, Jr., J.D.

For better or for worse the information age is governed in every respect by the binary code of 0's & 1's, NOT X's & O's.

In almost all non-catastrophic auto crash cases, the insurance carriers now use computer software programs to evaluate injury claims. There are reportedly over 84 different programs now in use throughout the insurance industry. 70% of auto crash cases in the U.S. are evaluated utilizing these programs.

AllState uses a program aptly named Colossus. State Farm uses a program called TEACH. Other popular programs are called Injury IQ, Decision Point, Claims Outcome Advisor, Injury Claims Evaluation, MYND, AIM, and ICE.

The developer and licensor of Colossus is a publicly traded company (NYSE: CSC). It claims that 50 of the major insurance companies, who account for over 60% of all U.S. direct written premiums for personal auto insurance, are licensees of its proprietary software Colossus.

These programs are founded on the concept that "Big Data" always produce the best results. In May 2012, Danah Boyd and Kate Crawford published "Critical Questions for Big Data" in Information, Communications, and Society. They define big data as "a cultural, technological, and scholarly phenomenon that rests on the interplay of: (1) Technology: maximizing computation power and algorithmic accuracy to gather, analyze, link, and compare large data sets. (2) Analysis: drawing on large data sets to identify patterns in order to make economic, social, technical, and legal claims. (3) Mythology: the widespread belief that large data sets offer a higher form of intelligence and knowledge that can generate insights that were previously impossible, with the aura of truth, objectivity, and accuracy."

The software developers and their customer licensees' are exceptionally protective of their programs' designs and databases. Information for this article comes from relatively few published and private articles and interviews with disaffected adjusters and former executives with AllState and State Farm and from a wealth of motions and orders relating to discovery issues on how these programs work in bad faith cases.

Regardless of the name of the evaluation software program, for the purposes of this discussion and presentation, the use of the term "Colossus" will be used in a generic sense to include the known evaluation software currently in use.

These evaluation programs are relational data bases containing huge amounts of information tailored on two levels: 1) a standardized model for a regional claim pay out for specific injuries compiled by the software developer; and 2) the standardized model is then further tailored by each licensee to reflect that carrier's version of what the payout should be for the injuries involved in their regions.

This process is the flip, but mirror, image of the calculation necessary to set premiums. Predictability and standardization of payout is the theoretical end goal. To that end, these programs are designed to remove the individuality of a claim and simply break the claim down into factors which will be evaluated identically regardless of the insurer, adjuster, or claimant. They are in actuality powerful tools to regulate claim valuation consistency, increase claim handling productivity, and contain costs and payouts. When fine-tuned by each carrier, these programs are in reality a mechanism to regulate payouts to match premiums and hence guarantee the profitability of the carrier.

The developer of Colossus cautions that because the database is not big enough at this time to make standardized forecasts, the software cannot assist in assessing the following: Brain damage, spinal cord trauma, fatalities, food poisoning, heart attack, chemical substance inhalation, dental trauma, or excessive disfigurement and scarring such as burns and dog bites.

The Colossus software uses common law compensation to measure general damages under 4 broad categories:

1. Trauma - pain and suffering including all factors on diagnosis, prognosis, treatment, duration, etc.
2. Permanent Impairment.
3. Disability –now called Duties Under Distress.
4. Loss of Enjoyment of Life.

These general categories are then broken down into 600+ injuries and 10,000+ factors to determine severity. These factors are called Value Drivers (Up or Down).

Trauma

The Colossus equation is designed to establish general damages on top of economic damages, but economic damages do not become part of the weighted variables unless the duration of the medical treatment is not accepted in the system.

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Maximizing Recovery Through Medical Coding

The input process depends on the input of the claims handler. All information not included in the medical records and hence entered into the equation does not exist and has no value. Therefore it is imperative that each specific injury is input separately.

This is accomplished by entering Diagnostic Codes (ICD-9 (soon to be ICD-10)), and Current Procedure Terminology Codes (CPT-4) which describe medical procedures and physician services. This is also the code employed in physician billings. These codes must match in the evaluation software or that entire specific injury will be rejected in the process.

The first and last rule of Colossus is that it will only recognize diagnosed injuries found in the claimant's records. Gaps or delays in medical treatment must also be explained in those records.

This feature depends on how well the medical community does its job or more precisely how the legal community communicates to the medical community what is needed to maximize the claim and also how the patient, physician, medical facility, and attorney will be compensated.

Permanent Impairment

This item is the second most powerful value driver. impairment ratings are allowed by the system only if made by a medical doctor based on tests and A.M.A. guidelines. impairment ratings must be in whole person percentage.

There are certain injuries which in and of themselves carry a permanency rating such as a non op compression fracture of the cervical spine if supported by an angulation test under A.M.A. guidelines.

Duties Under Distress

Duties under distress is an area which is designed to acknowledge the day to day living duties which have become painful or difficult as a result of the injuries. These could be the household responsibilities of the housewife, the responsibilities of the husband or other household or work responsibilities performed by the patient/claimant. If the injuries are such that complaints arise from vacuuming, picking up the children, dusting, making dinner or other domestic responsibilities, these should be documented in the chart notes. It's not necessary that a prescription be made for the patient to refrain from these duties. Documenting the difficulty and reason for the difficulty in performing the duties is all that is needed. The duration is also necessary to add value to the claim. This has to be clearly acknowledged in the charts. It may be necessary for the patient/client to go to work for whatever reason. But, if the responsibilities at work are difficult or painful, this adds value to the claim. Of course the duration of the distress is significant to value as well.

Loss of Enjoyment of Life

Loss of Enjoyment of Life is considered a permanent loss. The loss of enjoyment of life valuation screen appears in a Colossus consultation only in cases of impairment and only after a certain threshold is passed. That threshold is determined by the Colossus program. Generally, Loss of Enjoyment value screens can only be accessed in Colossus if a "whole person impairment of 2% or more" is input in the evaluation.

There must be a claim allegation of loss of enjoyment of life for it to be considered. Specification must be made as to which phase of life is the subject of this type of claim. Choices are work, hobbies, domestic duties (outside the house), and household duties (inside the house). Additionally, there must be explicit statements in the medical records about the loss of enjoyment.

Loss of Enjoyment of Life encompasses the areas of life that the patient/claimant normally would have enjoyed had they not been injured. This includes athletics, vacationing, entertainment and socializing. It allows that the activity can be informal and amateur, competitive, semi-professional and professional. It should be clearly documented in the charts as to the activities and the duration. This could be documented in the original questionnaire completed by the patient/claimant and mentioned in the chart notes as to duration. This area has a significant effect on the value of the claim.

Special Damages

While Colossus considers all medical and wage loss to date, documentation from the treating physician regarding his opinion as to future duration of wage loss is required.

Special Factors

The two most aggravating factors which effect claims evaluation under Colossus are (1) whether the injured person was wearing a seat belt, and (2) whether the factors of aggravated liability, such as intoxication, exist.

Robert W. Hamilton, Jr. Litigation Consultant, President of Legal Consulting Services, Inc.

Edmund J. Sikorski, Jr., J.D. is a Florida Supreme Court Certified Circuit Civil and Appellate Mediator with Treasure Coast Mediation Services.

Veteran's Court: The Latest Diversion Court

By Diamond Litty,
Public Defender,
19th Judicial Circuit

Hot off the "press," so to speak is our latest in a series of successful diversion courts – Veterans Court! Veterans Court is up and running in Indian River County with Judge Hawley and it will be instituted August 8, 2014, in St. Lucie County with Judge Belanger.

The first Veterans Treatment Court was started in Buffalo, New York in 2008, by Judge Robert Russell, after he noticed a large amount of veterans being involved in his Drug Court and Mental Health Court. He wanted to make sure that the veterans were being connected to services they earned. There are currently 16 Veterans Courts operational in Florida.

A veteran who suffers from a military service-related mental illness, traumatic brain injury, substance abuse disorder, or psychological problem, is eligible for voluntary admission into a pretrial veterans' treatment intervention program.

The admission criteria for both felony and misdemeanor cases is very broad. The statute states that a defendant may be admitted on any party's motion, even the court's. The controlling statute is F.S.948.08(7). Any charges can come in as a diversion, except those listed in F.S.948.06(8)(c) which are very serious offenses. The only other exclusion when the court may deny participation to Veteran's Court as a diversion, is if the client has previously been offered and denied or previously participated in a pretrial veterans' treatment program.

While enrolled in Veterans Court, the participant shall be subject to a coordinated strategy developed by a veterans' treatment intervention team. The strategy is to provide treatment specific to the needs of the veteran. Jana Schiffert is the Veteran's Justice Outreach officer for the 19th Judicial Circuit. She has an office in the West Palm Beach Veterans Administration Medical Center. Her job is to check for eligibility, set up assessments, and be the court liaison with the Veterans Administration.

Services available in Veteran's Court are funded by the Veterans Administration and provided at the West Palm Beach Medical Center and local VA Clinics. Drug testing can also be done at the local VA Clinics at no cost to the court or the client. If a service cannot be provided locally by the VA, fee-based services can be utilized with local agencies.

In addition to drug and mental health treatment, the VA liaison can help guide clients in getting set up with medical care, or enrolling with the VA for the first time. She can also guide them to the proper channels for possibly upgrading a discharge status that is not honorable, therefore making the client eligible for VA services and therefore Veteran's Court.

Another big component of the court is Veterans Mentor Corps. These are volunteer veterans in the community who assist the defendant throughout the program. "Veterans Treatment Courts make use of the camaraderie that exists among all veterans. Veteran Mentors volunteer their time and energy to assist their fellow veterans with peer support, housing, employment linkages, job training, education, transportation, disability compensation claims, discharge status and other linkages available at the local, state and federal level." http:www.justiceforvets.org/veteran-mentors.

In summary, Veterans Court is brand new, but has tons of potential and even more support. Along with Drug Court, Mental Health Court, and the Re-entry Program, it's just another shining star in our circuit thanks to all the cooperation and collaboration that we are blessed to have!

Diamond Litty has been the Public Defender since 1992. Prior to her election she had a criminal defense practice and was with the State Attorney's office also in the 19th Circuit. A native Floridian, raised in Fort Pierce, she is married to the Honorable Thomas Walsh and has one son, Blaze. She formed with others LifeBuilders of the Treasure Coast, a 501(c)(3) which is designed to help those who have been touched by the criminal or dependency courts in the area.

Originalism, Living Constitutionalism, and Constitutional Oddities:

Issues with Adhering to the Text of Our Nation's Founding Document

By Ashley Walker

The Constitution has provided ample fodder for debate throughout our nation's history, even before its creation during the Constitutional Convention of 1787. Most recently, these debates have concerned the right to bear arms, to marry a person of one's choosing, to use birth control, and to observe religion according to one's beliefs. Many of these questions are unaddressed or left ambiguous by the Constitution.

In *Griswold v. Connecticut*, for example, a Connecticut law criminalizing the use of contraceptives was struck down because it violated the right to marital privacy. The Bill of Rights does not explicitly address privacy, but Justice William Douglas, writing for the majority, stated that the right was found within the "penumbras" and "emanations" of various amendments. Privacy, he wrote, was another way of referring to the right to "protect[ion] from governmental intrusion." Subsequently, *Lawrence v. Texas* overturned a Texas state law that prohibited sexual contact between two consenting adults of the same gender. Justice Anthony Kennedy, writing for the majority, declared that the "Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."

The Constitution was written almost 250 years ago, and though most scholars agree that there is an inherent value to a fixed constitution, the examples of *Griswold* and *Lawrence* illustrate that it is impossible for a document that was written so long ago to anticipate all of our contemporary struggles. Some constitutional provisos have been rendered archaic, or made much more controversial, solely as a result of the passage of time. Moreover, some elements of the Constitution seem odd even in context.

Before going any further, it is first helpful to define the theories of Constitutional interpretation known as Originalism and Living Constitutionalism. This may help provide a sense of what is at stake in deciding how closely to adhere to our nation's founding document. As the name might imply, "originalism" is a principle of Constitutional interpretation that tries to discover the original meaning or intent of the Constitution. Originalists assert that they can prevent judicial lawmaking by adhering to the fixed text of the Constitution and the intent of its founders. Preserving a fixed Constitutional meaning also helps to promote stability and popular understanding of the government and its legal system.

Justices Antonin Scalia and Clarence Thomas tend to fall into this school of Constitutional Interpretation, although it is important to note that there are nuanced differences between their viewpoints. More specifically, originalism should not be confused with strict constructionalism, although both theories are associated with textualist and formalist schools of thought. Justice Thomas is arguably the only true textual Strict Constructionalist on the Court at this time, as he firmly believes in upholding the text as it was interpreted by the founders.

Justice Scalia, on the other hand, is an Originalist. Scalia argues that strict constructionism is "a degraded form of textualism that brings the whole philosophy into disrepute." He points out that unlike an originalist, a strict constructionist would not recognize that '*he uses a cane'* means '*he walks with a cane*' (because strictly speaking, this is not what '*he uses a cane*' means). Thus, Scalia has declared that he is "not a strict constructionist, and no-one ought to be." Justice Scalia also tends to give more weight to precedent than Justice Thomas. According to Scalia, Thomas "doesn't believe in *stare decisis*, period.... If a constitutional line of authority is wrong, he would say let's get it right. I wouldn't do that."

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Originalism, Living Constitutionalism, and Constitutional Oddities:

These formalist schools of Constitutional theory may be contrasted with Living Constitutionalism, which holds that the Constitution has a dynamic meaning, and that it may evolve as our nation evolves. Therefore, the views of contemporaneous society should be taken into account when interpreting Constitutional text. Thomas Jefferson is often cited as a proponent of this theory. As he wrote in 1789, "laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times." Jefferson also noted that requiring citizens to stick firmly to the values of their ancestors was like "requir[ing] a man to wear still the coat which fitted him when a boy."

Most scholars and jurists believe in a kind of interpretative moderation, in which we give great weight to our Founding Fathers' intent but also consider our changing society. The recent Supreme Court case of *Jones v. New York*, decided in January of 2012, provides one example of a case that relied upon careful interpretation of terms and ideas in order to discern their meanings in Constitutional times and in the present. In *Jones*, the court held that long-term GPS surveillance of a suspect's automobile was a violation of the Fourth Amendment. Justice Scalia looked to the founders' intent for guidance, writing that attaching a GPS device to a car was the kind of physical invasion of property that the Bill of Rights was designed to prevent. However, Justice Samuel Alito facetiously suggested that the only 18th century equivalent to a GPS tracking device would have been a constable hiding in the back of someone's carriage. He then jokingly noted "this would have required either a gigantic coach, a very tiny constable, or both," and that this constable would have needed an "incredible" amount of "fortitude and patience."

Ultimately, using a fixed Constitution as the foundation for our government may occasionally have results that seem both baffling and hopelessly archaic. In 2007, Congressional Republicans criticized President Obama for authorizing an aide to sign an extension of the Patriot Act into law using an autopen. The question of what it means to sign a bill into law has proved problematic for presidents in the past. In 1984, a bill was flown to China so that President Reagan could sign it on a particular day, and similarly, one was flown to Turkey for President Clinton's signature in 1999. To some taxpayers, this seemed like a misuse of governmental funds, and a perfect example of how overly stringent Constitutional requirements are no longer responsive to the needs of our technological age.

To avoid this issue, President George W. Bush and President Obama both elected to sign bills with autopens, but only after President Bush's Department of Justice issued detailed briefs about the meaning of "sign." A 2005 Office of Legal Counsel memorandum found that the use of autopens was constitutional within the meaning of Article 1, Section 7 of the Constitution. However, they emphasized that "we are not suggesting that the President may delegate the decision to approve and sign a bill, only that, having made this decision, he may direct a subordinate to affix the President's signature to the bill."

This circumspection and attention to detail can be attributed to the seriousness with which our government should treat our founding document. It is sometimes prudent for the government to adapt founders' practices to our own, but it should only be done when we believe that our changes are in keeping with the Constitution.

Ashley Walker is a second-year law student at Duke University. Before coming to law school, she was a legal assistant with the firm Lichtman and Elliot, PC, in Washington, D.C., specializing in immigration and asylum law. She graduated from Dartmouth College in 2010 after studying English Literature and Arabic. While in college, she participated in Arabic language study abroad programs and held internships in Fez, Morocco, Cairo, Egypt, and Jerusalem, Israel. Subsequently, she was a paralegal with Cleary Gottlieb Steen & Hamilton, LLP, working primarily on antitrust litigation and securities.

The Lighter Side of the Law

"...you better be going somewhere with this counselor..."

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The Work of The Castle

By Theresa Garbarino-May

Petitions, judicial reviews, hearings, domestic violence orders, visitation schedules, child support, family court, and domestic disputes are all topics of discussion for parents and for young children once they have entered the world of CASTLE. Parent Educators explain the words and the meanings behind them to children as young as 5 years old. When life is changing for a child, it is traumatic. Their world as they knew it has come crashing down. It may never be the same again. We attempt to normalize a very abnormal situation for those going through divorce, domestic violence, and abusive situations.

CASTLE has the answer for just about every parenting need. Families can be court-ordered to participate in service or they can participate voluntarily. Many of the services are free or are subject to reduced fees. Our mission is to prevent child abuse and teach positive parenting skills to those in need.

Since 1981, CASTLE has been entering courtrooms, living rooms and classrooms to offer families a better way to deal with their children in a non-violent and nurturing manner. Why? Because 97% of the children who experience abuse never leave their homes. They stay in unsafe places, longing for good parents. Of those who are reported for abuse, less than 25% of them actually receive much-needed services.

At CASTLE, we strive to be available for families before the situation gets out of control. Our children dream of having loving parents and a safe night's sleep.

Families in transition can come to CASTLE in many different ways and with multiple needs. Often times, we are the fourth or fifth stop along the way for a family that is experiencing disruption and possible separation or dissolution. Parents are filled with distrust, anger, and a sense of hopelessness. The challenge is to sift through the court documents, case plans, and recommended programs of service, to see how we can aid in rebuilding the family while preventing the abuse and neglect to children.

Both positive and inappropriate parenting styles are handed down from one generation to the next. We inherit our ability to deal with our children from those who have raised us. Classes, counseling, and supportive friends and family can alter those early learned behaviors.

Parents who come to CASTLE have a need to replace inappropriate parenting techniques with healthy ones. Thirty-three years ago we began with basic classes to teach discipline, communication, and parent-child relationships. Today we see hundreds of parents a year throughout the Treasure Coast and Okeechobee County.

As the needs of families have changed over the years, so have the services available to them. CASTLE's home visitation service, known as Safe Families, has also been changing lives for 33 years. Degree-trained professionals visit in the home for a first-hand look at where the parents have gone off-course. A family plan is created to teach new skills, techniques and coping mechanisms, all to prevent child abuse. The children are in view and a part of the interactions. Hundreds of families each year benefit from this life changing program. Often times it is a last resort before a child is removed from the home and a judicial case plan is drafted. Unification and safety of the children are the overarching goals for this program that boasts a 98% success rate each and every year.

Domestic Violence and severe abuse are addressed through CASTLE's Valued Visits Program for supervised visitation. When law enforcement and the courts become involved they need a sense of security that children are safe in the presence of their parents. At Valued Visits, we provide that safety net. Weekly visits are conducted through a court order for service and can continue for a family for up to a year if needed. Professional staff members monitor the visits and the conversations so that they are conducted with the best interest of the children in mind. Security is present and central to the success of this program. Valued Visits has been cited as a best practice in Washington and is part of the National Supervised Visitation Network. Nearly 900 visits take place a year on the Treasure Coast through Valued Visits. Sadly, there are more that could occur.

CASTLE
TEACHING Safe PARENTING

CASTLE has been interacting with the courts and local attorneys for over 17 years, dealing with families experiencing dissolution of marriage. Parents are given the option to take Families First to satisfy an order for a program that deals with divorce. Thousands of participants have learned to put their children first and to not emotionally traumatize their children in the breakdown of their family. After surveying thousands of participants, High Hopes for Kids was created to serve the emotional needs of children who experience the dissolution of their family. Children who are successfully served in a supportive group environment such as High Hopes are less likely to drop out of school, abuse drugs, become depressed, need mental health counseling, and get divorced themselves years later.

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The Work of The Castle

Long term results are evident through CASTLE services as we put an end to the abuse and neglect of children. Every social ill can be traced to the breakdown of the family unit. We believe that we are making an impact not only today, but for generations to come. As we visit in homes and in classrooms, we are teaching communication skills, supporting a child's ability to learn and focus on education, we are decreasing depression and disruptive behaviors, keeping families together so that supervision is no longer an issue for delinquent children. Ultimately, today's children will grow and become effective and nurturing parents who will love and cherish their children of the next generation. They will take our places in this world as the teachers, lawyers, judges, and counselors - many productive caring people who will change lives.

Volunteer opportunities are available. Share your expertise with the CASTLE Board of Directors, CASTLE Foundation Board or programs and services. If your philanthropic dreams are a good fit for CASTLE visit our website at www.castletc.org or call (772) 465-6011 to see about a donation in support of our child abuse prevention efforts. You can turn the ordinary into the extraordinary by becoming part of the CASTLE family.

Theresa Garbarino-May is the Executive Director of CASTLE. She founded the organization twenty-seven years ago and has built it into an organization that serves families from Sebastian to West Palm Beach.

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Preparing for a Family Law Trial

Attorney's Argument

Finally, some thoughts on opening statement and closing argument. If possible, write them out entirely. At least, make an outline. When you write it down, that not only helps you to include all the essential information, it helps you exclude the unnecessary baggage. Put yourself in the fact-finder's shoes. As a judge, I am thinking at the end, "What should the judgment say?" I do not need you to repeat the evidence and shout about the justice of your cause. I need to know what you think the final judgment should say and why. I have guidance from the law. There are required findings, presumptions, definitions, and even formulas to guide me. Tell me specifically how the evidence met those standards or did not. Relate the evidence to the form of the family law forms of judgments. Jury trial specialists not only write down their closing argument, they blow up the jury instructions and verdict form on a board or two and fill it in during final argument. It makes it clear what the parties are asking the jury to do. In a bench trial, the judge has been measuring the evidence against legal standards all through the trial. Show the judge how the evidence filled in the blanks in the form final judgment. Be specific. Citations to case law are also useful. Provide the judge with copies of the most similar cases. This is appreciated.

It is appropriate to motivate the fact finder with some well-constructed rhetoric, but that is not enough. A logical, legally sound, evidenced-based presentation is required. That takes thoughtful preparation which is written down. Outlining the closing argument early in your trial preparation is also a good way to focus you on what evidence you need to present. If you understand what the goal is, you will have a better chance of reaching it.

Judge F. Shields McManus is a Nineteenth Judicial Circuit Court Judge appointed in 2007 and elected in 2010. Since then he has been assigned to many divisions and has a broad judicial experience. Judge McManus is a graduate of FSU and FSU College of Law. He is active in the legal community and has sat on several boards and served as president. Additionally, Judge McManus is active in educational, charitable and civic organizations in Stuart and Martin Counties.

Poet's Corner

Winter was hard
A season of beauty and fear
A season of confusion and wonder
Three different days of ice
Falling from the sky
Growing on the gutters
Coating the barren trees
Killing with its gelid fingers
As it rarely had done before
Silencing the highways
Silencing the streets
Silencing myself
Huddled at home
Wondering what was happening
What it meant
Loving a day off unexpected and restful
But now
The wheel has turned
And the cumulus clouds rise up
Into the sky
Blotting out the sun
Dropping water again but
This time
As so often in the past
Liquid and warm
Full of light and sound
Full of wonder and respect
Now I watch the banana leaves unfurl
Rising from the rotted stumps of Winter
Into the heat and warmth of Summer

Mark E. Martin

Mark E. Martin works for the libraries at Louisiana State University. He is an archivist specializing in historic photography. He has studied at Western Carolina University, University of Texas Austin as well as LSU. He has a Masters in Library Science.

More LIVE CLE programs sponsored by the Friends of the RJS Law Library!

Bankruptcy 101, Including the New Mortgage Modification Program in Ch. 13 September 19 - Colin Lloyd
Handling and Management of Discovery Disputes October 31 - Harold Melville
Motion Practice in the Fourth District: Before and After the Opinion is Released November 14 - Mark Miller
Each session begins at noon and provides one hour of general CLE credit. Call 772-462-2370 to reserve your spot today!

Florida Bar CLE Programs At The Law Library

CONTINUING LEGAL EDUCATION - New Acquisitions are at the Bottom of the List

The Rupert J. Smith Law Library of St. Lucie County will lend CLE disks to all Florida Bar Members. Please call us or email us if you would like to borrow one of our programs. If you are at a distance, we will mail them to you. You are responsible for mailing them back after having them a week. If you keep them longer, the overdue fine is $1 per day. Only one program at a time, please. We want to fulfill as many requests as soon as possible. We hope you are able to take advantage of this opportunity.

Recorded CLE Programs - Sorted by Expiration Date

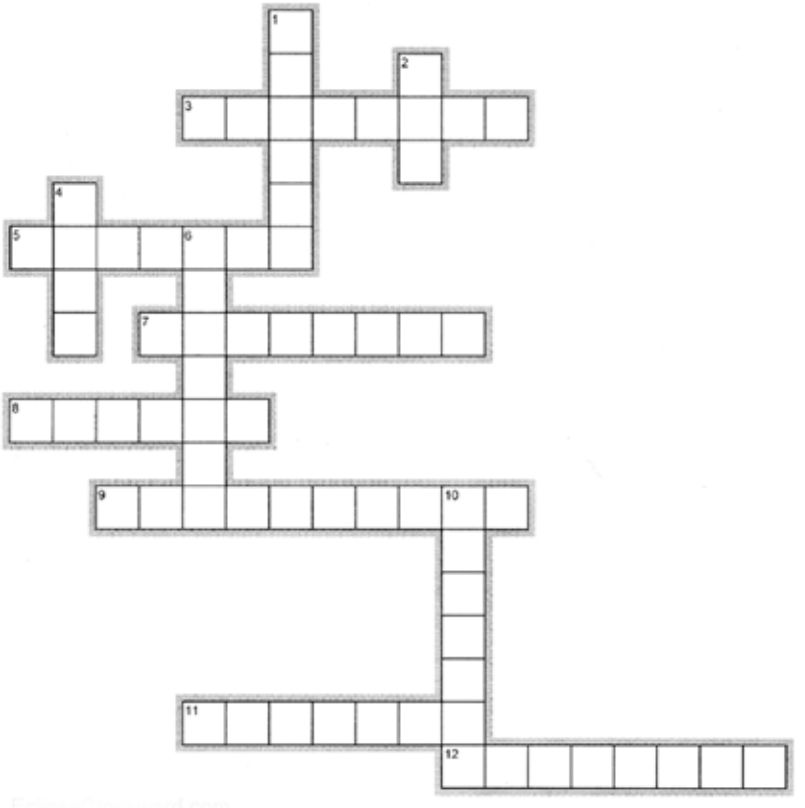
Course #	Title	Expiration Date	General Hours	Ethics Hours
1444C	Sunshine Law, Public Records & Ethics	8/8/2014	9	6
1510C	Probate Law 2013	8/21/2014	7.5	1
1494C	Masters of DUI 2013	8/22/2014	8	1.5
1557C	Till Divorce Do Us Part...The New Beneficiary Designation Legislation	8/26/2014	1	1
1495C	Topics in Evidence 2013	9/15/2014	7.5	2
1529C	Basic Criminal Practice	10/26/2014	7	2
1741C	Survey of Florida Law	10/30/2014	6	0
1459C	36th Annual Local Government in Florida	11/10/2014	12	2
1501C	Hot Topics In Appellate Practice 2013	11/17/2014	8	1
1482C	Beyond Ch. 61: Interrelated Laws Every Divorce Lawyer Should Know	12/5/2014	7	0
1094C	Building a Business in a Down Economy	12/26/2014	2.5	1
1503C	Florida Law Update 2013	12/27/2014	8	1
1741C	Survey of Florida Law 2013	2/8/2015	14.5	4
1612	Keeping Up With Changing Times: Same-Sex Issues and Beyond in Your Family Law Practice	2/7/2015	3.5	0
1617	ELULS Annual Update	2/8/2015	19.5	8
1660C	The Tangled Web of Ethics-Advertising Websites & Social Media	3/11/2015	2.5	2.5
1632	Practice Before DOAH: Judge Cohen's Opus	4/4/2015	7	1
1625	How NOT to Get Beaten Up in Domestic Violence Court	4/9/2015	8	1
1640	Current Development in Estate Planning Techniques	4/18/2015	8	1
1728	2013 Case Law Update: Stay Up to Date and …	4/23/2015	2.5	0.5
1623	Annual Ethics Update 2013	4/23/2015	4	4
1749	Get Ready for the LL "Sea" Change - Navigating the New Florida Revised LLC Act	4/24/2015	7.5	0
1633	39th Public Employment Labor Relations Forum	4/24/2015	11.5	2.5
1637	Bankruptcy Law & Practice: View From the Bench 2013	5/7/2015	4.5	0
1639	Agricultural Law Update	5/22/2015	5	1
1672	Probate Law Essential Issues and Development	6/6/2015	8	1
1540	Electronic Discovery in Florida State Court Navigating New Rules for New Issues	7/25/2015	3	1
1686	Advanced Administrative and Government Practice Seminar 2014	10/10/2015	7	1
1678	Art of Objecting: A Trial Lawyer's Guide to Preserving Error for Appeal	9/14/2015	7.5	1
1760	Professional Fiduciary: Responsibilities and Duties	11/2/2015	7	2
1883	Ethics for Public Officers and Public Employees 2014	8/7/2015	4	1

Florida Bar CLE Programs At The Law Library

Recorded CLE Programs - Sorted by Expiration Date

Course #	Title	Expiration Date	General Hours	Ethics Hours
1682	Hot Topics in Evidence 2014	9/21/2015	7.5	1
1670	Masters of DUI 2014	8/21/2015	8.5	2
1666	Divorce over 60	11/14/2015	2	0
1665	Guardian Ad Litem or Attorney Ad Litem: Making Informed Decisions About the Lives of Children	8/19/2015	2.5	0
1667	Representing the Military Service Member in Marital and Family Law Matters	12/4/2015	2	0
1898	Top 10 Things You Need to Know About Florida's New LLC Act	10/25/2015	1	0
1902	Maintaining a TRUSTworthy Trust Account: TRUST ME, IT'S NOT YOUR MONEY	11/4/2015	1.5	0
1375	Managing Business Risk in the Law Firm	12/25/2015	2	0.5
1539	Working in the Cloud: It's the Latest; It's the Greatest, or Is it?	9/5/2015	2.5	0
1702	Bursting Through the Technology Barrier - the RPPTL Edition	11/30/2015	3	2
1899	Drafting a Better Commercial Real Estate Contract - Standard Provisions and Pitfalls	11/15/2015	4	0
1687	The Ins and Outs of Community Association Law 2014	10/4/2015	8	1
1716	IRS: We got What it Takes to Take What You Got (Round 2)	10/25/2015	9	1
1700	Medical malpractice Seminar 2014	9/14/2015	6	1
1903	Survey of Florida Law 2014 (2 copies)	11/9/2015	12	3.5

Crossword: Justices of the Supreme Court



Across

3. Not his first choice, John Adams next chose this brilliant jurist who did much to make the judiciary a coequal branch

5. We are not final because we are infallible, but we are infallible only because we are final

7. As a clerk to Justice Jackson, he wrote a memo defending Plessy v Ferguson

8. Elevated by the same, he led the court to the unanimous decision in US v Nixon

9. Not surprising, this President appointed the most justices (eleven)

11. After a brilliant career on the NY Ct of Appeals, Hoover appointed him to the US Sup. Ct.

12. He left the Sup. Ct. but later returned as Chief Justice only for the Senate to reject him. He served for five months.

Down

1. He wrote the unanimous opinion in Brown v Board of Education

2. Our first Chief Justice

4. The only Chief Justice to have a state funeral

6. Another long serving justice, he wrote a cutting dissent in Bush v Gore

10. She sat on the court for twenty-five years