The Florida Bar Family Law Section

COMMENTATOR

Volume XXIX, No. 1 Julia Wyda, Esq., Editor Fall 2015

www.familylawfla.org

Section calendar

Look for information on the Family Law Section's website: www.familylawfla.org.

2016

SAVE THE DATE!

January 28, 2016
Midyear Committee Meetings
(Thursday)
Hilton Bonnet Creek
Orlando, Florida

January 29-30, 2016
2016 Marital & Family Law Review Course
Hilton Bonnet Creek
Orlando, Florida

January 30, 2016
Executive Council Meeting
(Saturday)
Hilton Bonnet Creek
Orlando, Florida

Details and registration at www.familylawfla.org

COVER PHOTO

Cover photo taken by

Sarah E. Kay, Esq.
Ritz Carlton Key Biscayne, Florida

INSIDE THIS ISSUE:

The *Commentator* is prepared and published by the Family Law Section of The Florida Bar.

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Articles and cover photos to be considered for publication may be submitted to Sarah Kay, Vice Chair of the *Commentator*, at *Sarah@mbc-lawoffice.com.* MS Word format is preferred for documents, and jpg images for photos.

Chair's Message

Maria C. Gonzalez
Section Chair

Dear Section Members,

As I am writing this commentary, the Bar Board of Governors has recommended a requirement that all attorneys take three hours of technology-related CLE courses. Although the matter is now pending before the Supreme Court for review and approval of the Bar Rule amendment, I predict that the requirement will, in fact, pass. In recognition that technological competence is a necessity in the practice of law, the Section has been ahead of the curve and working hard to create CLE opportunities for all members in this area. Nicole Goetz (Chair of our Spring Retreat in Sanibel) will feature two excellent speakers on issues of cyber security, protecting sensitive office and client data, and other relevant technology concerns for your law practice. Join us from March 31 to April 2, 2015 for what promises to be an informative lecture, while enjoying some fun and camaraderie with your fellow colleagues. Likewise, CLE Committee Co-Chairs, Luis Insignares and Heather Apicella, and Technology Committee Co-Chairs, Eddie Stephens and Jack Mooring, are hard at work crafting creative technology CLE webcasts on everything from social media, e-discovery, and metadata to the cloud.

Becoming board certified means you have been "evaluated for professionalism and tested for expertise" by The Florida Bar. In 2015, nine attorneys earned the designation of board certification in marital and family law. At the present time, there are only 277 Florida board certified attorneys in our specialty area. The promising news is that the number of applicants for board certification has increased by 11% compared to last year. In order to appreciate why such a select few may consider themselves "specialist" or "expert," one merely needs to look at the small percentage (only 4.7%) of Florida attorneys who have earned the designation of board certification. In recent years, we have recognized that marital and family law continues to evolve and become increasingly specialized. As a result, we now have board certification in the areas of adoption law and juvenile law. If you have heard me speak at any Section or other events, I know I may sound like a broken record... but I encourage those of you who have only contemplated the thought of applying for board certification to take the initiative and actually apply. Elevate your knowledge and skill while also elevating practicing with professionalism.

I would like to recognize all Nomenclature Committee members (Co-chaired by Christopher Rumbold and Douglas Greenbaum) and all Bylaws Committee members (Chaired by Douglas Greenbaum) for their outstanding and relentless work on two very important and demanding projects this year. Our Membership Committee members Lori Caldwell-Carr, Avery Dawkins and Lisa Franchina have truly outdone themselves this year and it is only Fall. Not only did they implement my vision of having the first Membership and Mentoring reception hosted by the Section in both Orlando and Fort Lauderdale, but they accomplished placement of a wonderful poster representative of the many positive benefits Section membership can offer law students in all twelve Florida law school campuses! The response to promoting membership and mentoring has been overwhelmingly positive. This year, the Section will also once again sponsor and attend the KMMF 12th Annual Minority Picnic.

Our Publications Committee members Julia Wyda, Sarah Kay, Ronald Kauffman, and Cash Eaton are doing an outstanding job across the board with relevant and cutting edge articles in FAMSEG, the Commentator, and the Florida Bar Journal. A special 'thank you' to our volunteer guest editors who have assisted with our Section publications. The Legislation Committee, through its leadership with Christopher Rumbold and Philip Wartenberg, will soon be reviewing and monitoring any proposed bills this legislative session affecting Florida's families.

Don't forget to register in time for this year's Marital and Family Certification Review Course which is scheduled for January 29th and 30th at the Hilton Bonnet Creek in Orlando before it is sold out! Last year, we had a record breaking 1,400 *plus* in attendance! Aimee Gross (Ft. Lauderdale), Philip Wartenberg (Tampa) and Bonnie Socket-Stone (Miami) have put together an incredible group of speakers for this year's program. The Section will once again offer multiple scholarships of ($1,000.00) towards the registration fees and hotel room expenses to those who would otherwise be unable to attend the Certification Review Course. Please check out our web-

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site at www.familylaw.org for the scholarship application and to also register for the Certification Review Course.

I am pleased to report that, once again, the Section has donated multiple sets of its Certification Review "Red Books" to the Thunderdome program in Tallahassee. The Thunderdome training program is sponsored by the Legal Aid Foundation and offers young lawyers an opportunity to learn trial skills while also promoting leadership. Our next live Committee meetings and Executive Council meetings coincide with our Certification Review Course. I invite you to join us on January 28th for the Committee meetings in Orlando.

I look forward to seeing you at these events.

Sincerely,

Maria C. Gonzalez
Chair, Family Law Section

Comments from the Chair of the Publications Committee

Welcome to a new year of the *Commentator*. This year, we will explore Maria Gonzalez's theme of professionalism, while increasing our efforts to bring you more of the articles, handy tips and useful information you have come to rely on the *Commentator* for. I look forward to working with our Vice Chair of the *Commentator*, Sarah Kay, as well as our guest editors and authors to provide you with another year of resources to assist you in your practice. As we are always trying to improve your *Commentator* experience, please do not hesitate to e-mail me at julia.wyda@brinkleymorgan.com with any questions, comments or suggestions. Thank you to everyone who helped make this first edition possible!

Welcome to the Chair

By G.M. Diane M. Kirigin, Palm Beach Gardens, FL

"There are 2 kinds of people,
those who do work
and those who take the credit.
Try to be in the first group,
there is less competition there."

– Indian Prime Minister Indira Ghandi

D. KIRIGIN

Maria Gonzalez has always been in the first group, and never in the second. She is a worker bee who is humble in the extreme. She is adroit at balancing her responsibilities as a wife, mother, daughter, attorney, guardian ad litem and Section member with the calmness, warmth and inclusiveness that are her hallmark. I am proud to call her a friend and that is why I am so very happy to author this "Meet The Chair" article for the *Commentator* welcoming Maria as Chair of the Family Law Section and serving as an introduction to those of you who don't have the good fortune to know her.

When I interviewed Maria for this article I realized that despite knowing her for 10 years or so, there was so very much about her that I did not know, both professionally and personally. I would like to take this opportunity to share with you now some of what I learned.

Maria came to the U.S. from Havana, Cuba with her Parents and her 2 year old Brother when she was 9 months old in search of the American Dream. {Yes, this makes Maria the first Hispanic female to Chair the Section}. Maria grew up in Hialeah, Dade County, Florida. She was precocious. She graduated from Miami Lakes High School at age 16 years. She graduated from the University of Miami with a B.S. in Chemistry (Biology & Sociology). After her graduation she worked at the University of Miami Mailman Center for 13 years in the area of Pediatric Biochemical Genetics (research pediatric hereditary genetic diseases).

I was fascinated that Maria had this science background I never knew about and asked her how she transitioned her career from the area of medical research to the law. She explained that the summer before her senior year in high school she participated as a Court Observer, together with other students, in a program that required them to observe judicial proceedings, take notes and give reports on what was observed. She was assigned to Judge George Orr's courtroom. That experience stimulated her interest in the law. In the "small world department" during her 2nd year in law school, Maria clerked for Judge Orr.

Her interest in the law became so well known within her family that one day her cousin had told her "You should consider becoming a lawyer." While working at the University of Miami Mailman Center, Maria attended a Paralegal Program merely because of her interest in the law. Maria got certified as a paralegal although she never worked as one.

Thereafter, Maria took the LSAT, applied for and was admitted to the University of Miami Law School. When she was in law school her goal was to be a transactional attorney; however, once she took a family law class, Maria reports that she was "hooked" and she knew that was the area of law that she wanted to practice in. After her graduation, she went to work at a small boutique law firm that specialized in administrative and family law matters. She worked there together with 2 associates well known to all of us - the late, great Judge Amy Karan and former Section Chair, Scott Rubin, and learned much from the partners at the firm, and Amy and Scott.

One day Maria met Burton Young while serving as a Guardian Ad Litem in a case she covered for Amy Karan. Maria recollected that Burton was kind and understanding in his dealings with her as a "newbie baby lawyer." Maria and Burton connected during this initial meeting and 2 years later Maria ended up joining Burton's law firm. She has since worked with him for the ensuing 21 years. Maria is now a name partner in the Law Firm of Young, Berman, Karpf & Gonzalez, P.A. where Maria is a name partner. Maria views her meeting Burton Young as a major landmark in her legal career. She told me that "I lucked out when I got Burton Young as my mentor. He is a teacher who constantly challenges you to make yourself a better attorney."

I first met Maria when she came to the then Section Chair, Tom Sasser, with an idea for new legislation. She recognized that there was a void in the then existing law regarding electronic communication. She had a vi-

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sion that resulted in her formulating the concept and then language that would authorize Florida courts to order what was then called virtual visitation but is now called virtual time-sharing. At the time I was the Chair of the Legislation Committee, so I had an opportunity to work closely with her. Typically it takes several years to craft a bill, obtain sponsorship and ultimately have legislation enacted. Maria's concept became law within 1 year – primarily because of her extraordinary efforts. No pun is intended but the speed with which this legislation was enacted as law is *virtually unheard of*.

Maria has co-chaired the Section's Legislation Committee for 2 years, chaired Children's Issues, was intrinsically involved in the production of the Section's Guardian Ad Litem manual and D.V.D. and has served on innumerable committees and subcommittees within the Section which are too numerous to name in this article. Maria is board certified in Marital and Family Law. She served for 6 years and she chaired The Florida Bar's Marital and Family Law Certification Committee. That experience has strengthened her belief in the process of board certification and she is a strong and vocal proponent of the benefits of board certification. Maria is also a Fellow of Florida Chapter of the American Academy of Matrimonial Lawyers; a current member and Past President of The First American Inns of Court; and is on the board of the Women's Fund of Miami-Dade.

To borrow a line from Rogers and Hammerstein, when I asked her about a few of her favorite things, she described her favorite color as light purple; favorite musical group/music the Supremes and "anything Motown"; and her favorite food as Greek. When I asked her for a surprising tidbit that most people do not know about her, Maria informed me that she is a skilled, professional cake decorator. She has made (and delivered) wedding and many other special event cakes and enjoys the challenge of cake decorating.

Maria's most admired person is her mother, Maria Metropolous. I asked her why and she recalled the travails that her Mother faced when immigrating to the U.S. with her Husband and 2 young Children, to build a life for her family with no money and no fluency in English. Despite those challenges, her Mother became a beautician and a small business owner. Maria described her Mother as warm, loving, but strong and resilient. All of these are traits echoed in Maria herself.

Maria's partner in life, her husband, is Frank Gonzalez, Sr. In the

Remember When ...

small world department, their Mothers knew each other and Maria was friendly with Franks' Brother and Sister-in-law long before she and Frank ever met. They have been married for 21 years. Frank sells heavy equipment parts. Maria readily acknowledges that without Frank's support, encouragement, and assistance, she could not balance her professional, volunteer and family activities. He is "100% invested" in her Section involvement and that makes all of her activities possible. Maria proudly informed me that Frank makes everything "easier" because they "talk about everything." Maria and Frank have 2 children. Their daughter, Catherine, is an accomplished professional dancer encompassing various dance genres from ballet to modern. She is a high school senior this year. Catherine was elected President of her school's National Honor Society. Catherine is currently looking at colleges with her ultimate goal to become a neurologist and to continue her studies in dance. Their son, Frank, Jr., 6'1". Frank, Jr. was a very successful varsity pitcher as a freshman this past year and an honor roll student. He is in the 10th grade at Flannagan High School where he will continue to pursue his passion for baseball and pitching in particular. Maria and Frank's Gonzalez family is completed by their 4 legged "child," their beloved dog, Root Beer.

When I asked Maria to prognosticate the future of the practice of marital and family law during the next decade she had several concerns and observations. In her role as both an attorney and Guardian Ad Litem she views the increasing unfettered use and abuse of social media and the internet by parents engaged in dissolution of marriage, modification or paternity proceedings as detrimental to the family unit and the Children in particular because damaging accusations, statements, and photographs occurring during the heat of the parties' disputes with one another are preserved and disseminated through modern technology and accessible by the parties' Children and other years later. She believes the trend toward "paperless" will continue to evolve in Florida's Court system with most exhibits being admitted digitally rather than tangibly in the future. Maria also expressed concern that the good intentions behind unbundled legal services may not have evolved as intended and that it should be revisited by the Big Bar and ultimately the Supreme Court to better effectuate same.

This year, Maria's theme is Professionalism and the pursuit of same in your practice, through mentoring and helping others, and by challenging yourself to be better through education and board certification. One of her other stated goals is to attempt grow diversity within the Section and its committees. If you wish to enhance yourself professionally, I urge you to join Maria during the forthcoming year and become actively involved in the Section. For a full schedule of Section seminars, meetings and retreats, as well as information on various Section committees go to the Section's website at www.familylawfla.org. **Your next opportunity for Section involvement is to attend the January 2016 Committee Meetings being held January 28, 2016 and the Executive Council Meeting on January 30, 2016 at the Hilton Bonnet Creek in Orlando, Florida. Maria, the Executive Committee and members of Executive Council look forward to seeing you there.**

Rise to the occasion and accept Maria's challenge to enhance yourself professionally because:

"Without continual growth and progress, such words as improvement, achievement and success have no meaning."

– Benjamin Franklin

Vice Chair of the Commentator's Corner

By Sarah E. Kay, Esq.

I am honored to serve you as Vice Chair of the Family Law Section's *Commentator* for 2015-2016. Our Section Chair, Maria Gonzalez, has chosen the theme of professionalism for this year. Professionalism is "the skill, good judgment, and polite behavior that is expected from a person who is trained to do a job well."[1] This edition of the *Commentator* is replete with opportunities for you to enhance your professionalism. First, you can hone your skills by reading the articles in this edition addressing various topics relevant to the practice of marital and family law. Second, you can foster your good judgment and training by taking advantage of the Section's outstanding CLE opportunities such as the bi-annual Trial Advocacy seminar, which is featured in this edition, the Certification Review Course offered every January, and the various live, telephonic, and web-based CLEs offered throughout the year. And, finally, you can cultivate respect for and positive relationships with your colleagues by actively engaging in the Section's committees. As Vice Chair of the *Commentator*, I especially hope to see YOU promote professionalism through submitting your articles for publication in FamSeg, the Commentator, and the Florida Bar Journal this bar cycle!

[1] Merriam Webster Dictionary, Professionalism, http://www.merriam-webster.com/dictionary/professionalism (accessed Sept. 16, 2015).

GUEST

Editor's Corner

Andrea Reid, Esq.
Boca Raton, FL

As I write this column, football season has begun and gone are the days of baseball dominating Sports Center. My lawyer friends are all back in town and back to business and the kids are back in school. It is the beginning of the fall season in Florida and I can't help but file my Notice of Unavailability for the 2016 Marital & Family Law Review Course in January in Orlando. But, before I do that, first things first. Allow me to introduce you to the Fall edition of the *Commentator*.

Traditionally, the guest editor's corner has been an introduction to the entire *Commentator*. This edition is more than just that afternoon distraction you love to receive in the mail every quarter. It is packed-full of substantive articles on a variety of topics relevant to the practice of marital and family law. Articles that encourage you to be the best marital and family law attorney you can be including Ron Kauffman's article on Florida's adoption of the *Daubert* standard, Magistrate Alijewicz's article differentiating Florida Family Law Rules 12.490 and 12.491, Dr. Hohnecker's article on screeing for interpersonal violence for collaborative divorce, Julia Wyda's article on stripping metadata from files, and Sam Troy's "top 10" list of things to know about the spying spouse in family law cases. I am confident you will find an article or two that you will refer to down the road.

The guest editor's corner is also an opportunity to thank those who have contributed their time and efforts in writing an article or editing the entire issue. And I, like the guest editors before me, am extremely grateful to everyone who worked to make this issue fantastic. A special thank you to Sarah Kay and Julia Wyda for all you did to make this come together!

This year, Maria Gonzalez, one of the most welcoming members of the Section, is leading us. As mentioned in Magistrate Kirgin's Welcome to the Chair and in the Chair's message by Maria, Maria has chosen the theme of professionalism for 2015-2016. What better way to promote professionalism than taking advantage of the many opportunities the Family Law Section offers to be a better marital and family law attorney? In the welcoming spirit of Maria, I welcome you to become active in the section events.

To some, the Family Law Section is simply the host of a great conference at the end of January. To others, it is merely a generator of those CLE credits we all need. But the Family Law Section of The Florida Bar offers so much more: it gives us all the opportunity to be better professionals, fine-tuning not only our careers but our profession as a whole. For example, spend time perusing the various articles in this edition of the *Commentator* written by Cynthia Pyfrom, Henny Shomar, and Jennifer Burns, all attendees of the 2016 Trial Advocacy Seminar and read about how that single event has served as a spring-board for not only their advocacy skills but their overall careers.

Being active in the Section is as easy as attending a committee meeting or attending the in-state or out-of-state retreat. There are three opportunities annually (January, June, and September) where each of the Section's committees meets in-person to talk about the latest trends in case law, the future of the statutes we work within every day, and the course of legislation for the upcoming or current session. These meetings are the front line, the place where the big ideas are generated, the bad ideas are defeated, and the everyday problems are addressed. Check out the Section website, http://www.familylawfla.org/, to find a committee that interests you and attend in January. Also on the website is the Section's event schedule which includes details on the upcoming retreats and CLEs. If you missed the out-of-state retreat to Washington DC, stay tuned for information on the upcoming in-state retreat in Spring 2016.

It has been an honor to guest edit this edition of the commentator, particularly in a year when the first Hispanic female section chair has taken the helm. I hope to see all of you promoting professionalism by attending a CLE, a committee meeting, or a retreat this coming year!

Intimate Partner Violence And Collaborative Practice

By Laura C. Honecker, Ph.D., Ft. Lauderdale, FL

L. HOHECKER

Understanding Intimate Partner Violence

The first theoretical approaches to understanding domestic violence began with Dr. Lenore Walker in in 1979 with the publication of The Battered Woman (Walker, 1979). With time the term meant not only violence between partners but also violence between other members of the family, e.g, adolescent son and mother. The term, Intimate Partner Violence (IPV) was developed to focus solely on violence between partners. Along with the research came the need for determining who might be at risk to be a victim of IPV. Thus, various checklists, questionnaires, and screening devices have been developed for use by law enforcement and medical professionals Psychologists and other mental health professionals were cautioned to screen clients for the domestic violence as part of their treatment protocols. Recently, the Association of Family & Conciliation Courts released a draft of *Guidelines Supplementing the Model Standards of Practice for Child Custody Evaluation: Determining and Accounting for the Effect of IPV on Children and Parenting* (AFCC, 2015) to address the need for social investigators to properly evaluate for IPV as part of their work.

There are a number of risk screening devices available; most of which are for specific purposes, e.g., medical screening, psychological treatment, or law enforcement. (Rabin, RF et. al., 2009). However, screening remains controversial. The US Preventive Services Task Force cautions against depending on these screening devices to successfully detect risk of violence. In fact, the existing screening devices may have only a 50/50 prediction rate. This is in line with the prediction success of mental health professionals. Nonetheless, screening can provide valuable information to aid in the safety of individuals involved in abusive relationships in divorce and, more specifically, in the collaborative process.

IPV is often precipitated by stress in an ongoing or developing intimate relationship. Approximately 25% of women experience some sort of IPV in their lifetimes. There are an estimated 960,000 incidents of IPV against women each year in the US. (Statistic Brain).

The pioneering work of Dr. Lenore Walker (1979) provided the first research-based understanding of battering against women. In her early work, she focused on the most severe forms of physical violence which sometimes resulted in the death of the victim, perpetrator, or both. This cycle of violence included a period of increased tension which resulted in an episode of violence and a resulting "honeymoon" period in which the perpetrator was penitent and loving. After an undefinable period of time, the cycle would begin again. This was and is still a description of IPV that is found in some intimate relationships but it does not describe the other types of violence.

Stark (2007) and Kelly & Johnston (2008) developed subtypes of domestic violence that are relevant to the field in general and to divorce in particular.

- Coercive controlling violence is a pattern of power and control which takes the form of intimidation, emotional abuse, physical abuse, threats, coercion, economic abuse, isolation, denying, minimizing, assertion of male privilege, and sexual abuse. The victim may attempt to decrease the risk or impact of this form of violence by complying with demands and threats of the perpetrator and avoid or decrease the potential of violence and abuse. The victims may use various tactics to avoid, tolerate, minimize, or survive the impact of the coercive control. This is typically the most serious form of violence and requires a carefully thought out safety plan. Many researchers , practitioners, and family courts state that victims of coercive control are not suitable candidates for mediation, collaborative divorce, parenting coordination, marital or couple's counseling, and similar other forms of intervention. This is often a correct finding in that individuals in this kind of relationship do not have the ability to make an informed and free decision without fear of retaliation or threats.

  Victims who stay in these relationships may do so out of the threatened loss of financial resources, fear of being "tracked down" by their former partners, feeling "safer" with the victim close at hand rather than being stalked, lack of social support and job skills, and a fear of the children being taken or alienated by the perpetrator.
- Violent Resistance is the act of a victim who vigorously defends or fights back and may be seen as "self-defense" or "standing your ground". Hohnecker (1994), Browne (1987), and others have reported the following when comparing victims of coercive violence who have resisted their violent partners aggressively to women who have

not experienced coercive control as follows: 1) these victims have experienced more severe violence, requiring medical attention (even if not provided), 2)were sexually abused, 3) were threatened with weapons, 4) were more depressed, 5) used alcohol and drugs more frequently, 6) had violent partners who threatened suicide more often and 7) had attempted suicide themselves. The use of alcohol and drugs by the victims appears to be a failed coping mechanism rather than a triggering mechanism as it is with the perpetrators. Women who are pregnant or have a young child are at a higher risk for severe violence than women who are not pregnant. Women who have left a violent relationship or announce a divorce are 23% more likely to be killed or severely injured after they leave the relationship. Sadly, we are seeing an increase of children who are killed or injured as part of timesharing conflicts.

- Situational Couple's Violence is probably the most common form of violence in the general population and occurs in the context of a conflict that escalates to aggression. It is not a mild form of coercive controlling violence because the dynamics are different. This form of violence occurs when one or both parties have trouble with frustration tolerance and anger management and the violence is "minor". A history of fear of the other party is not characteristic although in a divorce situation fear can be exaggerated in an effort to obtain a restraining order or in an effort to gain or deprive the other of timesharing, residence in the marital home, etc. This form of violence does not include repeated intimidation or stalking. Situational Couples Violence is less likely to escalate and more likely to stop after the separation although there are cases where situational violence has escalated to dangerous levels. Men and women are almost equally likely to instigate Situational Couples Violence as opposed to Coercive Control.
- Separation-Instigated Violence is precipitated by separation or the initiation of divorce proceedings in relationships where there was no violence in the relationship. It is seen almost equally in men and in women unlike the other forms of violence discussed. The violence is not typical of the relationship and represents a serious loss of control and may occur once or twice during the separating/divorcing period. Incidents include destruction of personal property, throwing objects, vandalism, and brandishing of weapons.
- Other general risk factors for violence include 1) prior history of violence, 2) experience of violence as a child or in a prior relationship, 3) substance/alcohol abuse, 4) history of mental, criminal acts especially those involving violence, 5) stalking, 6) access to weapons, 6) having a child or children from a prior relationship, and 7) failure or inadequate response to a prior offender intervention program (Starke, 2007).

Collaborative Divorce Process & Intimate Partner Violence

Domestic violence advocates have long argued that victims who are involved in family court are placed in a potentially lethal situation by their counsel and mental health professionals who do not understand the dynamics of intimate partner violence. In some states, if there has been domestic violence" the victim may be deemed unsuitable for parenting coordination or mediation services which results in further litigation and is likely to increase the potential for domestic violence between the couple. (Goldenberg, 2014; Salem & Ver Streegh & Dalton, 2008).

Collaborative divorce was defined by Tessler and Thompson (2006) as the

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ANNOUNCEMENTS

Congratulations to Chelsea Furman!

The Law Firm of Elisha D. Roy P.A. is pleased to announce that Chelsea Furman has joined the firm. The firm will continue to specialize in complex marital and family law cases.

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"shared belief of the participants that it is in the best interest of the (divorcing) parties and their family to commit themselves to avoiding adversarial legal proceedings and to adopt a conflict resolution process that does not rely on a court imposed resolution".

With proper training, screening, and meetings between and among the parties, the Mental Health Professional (MHP), counsel, and other members of the collaborative team, those couples with Situational and Separation-Instigated Couple's Violence may be appropriate for collaborative divorce.

Proper Training: Collaborative teams require a small group training to understand the types and indicators of IPV. Included in the training are interviewing skills for men and women, perpetrators & victims; types of violent acts and their psychological impact on the victim(s), behavioral signs of stress and fear, safety plan development, and team communication pertinent to IPV issues.

Proper Screening: Effective, valid, and reliable assessment instruments for IPV are difficult if not impossible to find at this stage of understanding (Rabin, Jennings & Campbell, 2009). The author has developed a screening tool for investigatory use. A copy of this instrument is included with this Article in Appendix A. This instrument has not been validated and is intended to be used by the professional to gain information to and to guide the collaborative team in their work. Screening should take place before the first team meeting by the MHP who confers with the other team members regarding IPV and the appropriateness of the couple for collaborative process. At all times, the collaborative team should have the ability to consult with an outside MHP to provide additional input and monitoring if needed. If a couple in this category is seeking the collaborative process for their divorce, careful and repeat screening must take place. The Mental Health Professional (MHP) is tasked with the initial screening of the parties in individual interviews. Behavioral observations with the parties alone and together can provide important data as to expressions of anxiety, fear, anger, and loss of control. Following the initial interview, the MHP should fully brief the team as to his/her observations, hypotheses, interventions, and whether the collaborative process can safely continue or needs to be terminated. The team also needs to consider how each professional shall signal to each other (safety word) should there be a concern and the parties be separated. This process of observation and data collection should be part of the debriefing that occurs after the meeting is completed. It is appropriate to approach working with this couple in a conservative manner to prevent acting out and protect the parties and any children. Dr. Hohnecker has devised a screening instrument for use in determining for use in collaborative and litigated forms of divorce.

Decision-Making: The decision to accept the couple is a team decision. At the meeting before the first group meeting, the team should discuss the results of the screening conducted by the MHP, decide if the couple can benefit from the collaborative process, and how the MPH will monitor both parties for any signs of fear, intimidation, threats, etc. A means for the couple to indicate that the situation is becoming "hot" must also be developed for the each member of the couple to privately indicate to the team that a break is needed. This is an ongoing process. The team, in conjunction, with the victim(s) must decide when and if the case is no longer appropriate. This may include an actual act of violence or it may be the *potential* for such an act to occur. The decision to terminate the collaborative process, initiate immediate safety plans, make referrals to other counselors and, (most importantly), terminate the case to protect the victim-partner is essential. Close and frequent communication and debriefing by the team and the parties is required to provide the security for the process to move forward.

Settlement: Each member of the couple must be capable of making settlement decisions without the fear of retaliation, coercion, and intimidation. The team must determine whether the parties are able to do this before their clients consider signing. It is important that the MHP provide input after each assessment/interview which includes evaluating the couple's concerns/fears for what might happen after the agreement is signed.

Conclusion

With the increased research and understanding of the types of IPV, it is now possible, with the appropriate training, experience, and safeguards in place to work with couples in the collaborative law process who have a history of IPV. However, the reader is also cautioned that although our understanding of violence between partners has grown from the 1970's when women were thought to be masochistic to the current understanding of the dynamics of different forms of IPV, it is clear that the final word is not in. It is not a time to become complacent and rely on a test "score" to determine whether a victim is safe or not in the collaborative, or in fact, in any litigation process. The key to determining whether a couple is appropriate for the collaborative process lies within an informed collaborative team with the necessary interview skills which include ongoing monitoring to make the divorce process successful and safe.

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Dr. Laura Hohnecker *has worked with families and children for over 40 years. Her interest in domestic violence began in the 1970's when she helped to transport women from one safe house to another in private cars because there were no shelters or services. She has served as a clemency evaluator for battered women seeking release from prison under three Florida governors. Dr. Hohnecker has earned three advanced degrees, including earned a doctorate in clinical psychology. Her dissertation focused on the traumatic effects of battered women who killed their abusive partners. Dr. Hohnecker is trained in collaborative divorce, mediation, and high conflict psychotherapy. She is also a guardian ad litem, parenting coordinator, and social investigator.*

Individuals wanting to contact Dr. Hohnecker may contact her by email at psychalliance@bellsouth.net.

INTIMATE PARTNER VIOLENCE INTERVIEW FOR COLLABORATIVE DIVORCE*

These questions relate to certain behaviors or incidents that may have occurred during your relationship. It is important that you answer these questions openly and are willing to discuss them with your attorney and the mental health professional on your team. Our goal is to make sure the collaborative process is the safest and best for you and your children. We will not share your answers with your partner.

Circle **Yes** or **No** for each of the following:

1. **Yes** **No** Are you afraid of your partner?
2. **Yes** **No** Have you ever been injured by your partner during your relationship?
3. **Yes** **No** Has your injury required medical care (even if you did not receive it)? **(CCV, VR)**
4. **Yes** **No** Have you been afraid that your partner would seriously harm or kill you, your child(ren), your pets, or another family member? **(CCV)**
5. **Yes** **No** Have you been forced to have sex when you didn't want to or to perform sexual acts you didn't want to do? **(CCV)**
6. **Yes** **No** Have your child(ren) tried to get between you and your partner during an argument?
7. **Yes** **No** Has your child(ren) been injured in the process? **(CCV)**
8. **Yes** **No** Has your partner ever tried to hurt you while you were holding a child? **(CCV)**
9. **Yes** **No** Has your partner threatened to use a weapon or has a weapon present during a dispute?
10. **Yes** **No** Has your partner threatened or attempted suicide? **(CCV)**
12. **Yes** **No** Has the intensity of the abuse, violence, threats increased over time during your relationship or since you or the other partner has left? **(CCV)**
11. **Yes** **No** Has your partner stalked you, gained access to your personal email or texts, or has in some way traced your whereabouts? **(CCV)**
12. **Yes** **No** Have your fought back during a violence incident involving yourself and/or the child(ren)? **(VR)**
13. **Yes** **No** Have you used a weapon or threatened the use of a weapon to force your partner to back off? **(VR)**
14. **Yes** **No** Have you injured your partner as part of defending yourself, your child(ren), a pet or another person? **(VR)**
15. **Yes** **No** Has your partner isolated you from your family and friends ?
16. **Yes** **No** Has your partner been arrested/charged/jailed for domestic violence in a prior relationship or during this relationship? **(CCV)**
17. **Yes** **No** Occasionally when you and your partner disagree, do you and/or your partner push, shove, grab, and/or slap, etc. each other or one to the other? **(SCV)**
18. **Yes** **No** Are you afraid of your partner during these arguments? **(CCV IF YES, SCV IF NO)**
19. **Yes** **No** Is your partner jealous of any of your relationships and believes that you have "cheated"?
20. **Yes** **No** Has the aggression, violence or threats begun only since the relationship failed? **(SIV)**
21. **Yes** **No** Have the incidents started by sudden lashing out, destruction of personal property, throwing things, threatening with weapons or other unexpected events during the period of time the relationship was ending? **(SIV)**
22. **Yes** **No** Has your partner taken control of the family finances and taken you're your access to money before the relationship ended?**(CCV)**
23. **Yes** **No** Has your partner locked you in or out of the house when angry?
24. **Yes** **No** Have you or your partner attempted to hit you with a car? **(CCV)**

Collaborative Divorce Questions

1. **Yes** **No** Have you decided to enter the collaborative process of your own free will?
2. **Yes** **No** Do you feel that you can express yourself with your partner in the room without fear of retaliation, threats, or possible harm to you, your child(ren), your pets, and other people you care for?
3. **Yes** **No** Have you been told that this is the only way you can end this relationship?
4. **Yes** **No** Should the collaborative process not work, do you feel or believe that you will be punished by your partner?
5. **Yes** **No** Do you believe you can leave a team meeting with your partner safely?
6. **Yes** **No** Is there or has there been any restraining orders on injunctions be either party even if they have been dismissed?
7. **Yes** **No** Do you feel able to able to let your attorney or the MHP know that you are feeling uncomfortable in a team meeting?

Definitions:

In any situation, violence can escalate either purposely or accidentally to serious or even lethal levels of threat or actual violence, even if the level if typically not associated with dangerous levels of violence.

Coercive Controlling **(CCV)**: A pattern of power and control which takes the form of intimidation, emotional abuse, physical abuse, threats, coercion, economic abuse, isolation, denying, minimizing, the physical/psychological abuse of children, assertion of male privilege, sexual abuse, and use of weapons.

Violent Resistance **(VR)**: The act(s) of a victim who vigorously defends or fights back, often seen as self- defense.

Situational Violence**(SV)**: Likely the most common form of intimate partner violence. It is not a "mild" version of coercive control because of a difference in dynamics. This form of violence occurs when one or both of the partners have trouble with frustration tolerance and anger management and the violence is "minor" Fear of the other is not a characteristic although in a contested divorce one party or the other may express fear of the other in order to gain or deprive the other of timesharing, financial support, etc. SV does not include stalking, repeated intimidation, or similar CCV tactics. The violence is less likely to escalate. Men and women are almost equally likely to instigate SV as opposed to CCV which is 85% male-instigated.

Separation-Instigated Violence **(SIV)**: This is precipitated by the separation of the partners or the initiation of the divorce proceedings where there has been no prior violence. It is seen almost equally in men and women and represents a serious loss of control "going ballistic" and may occur once or twice during the separation/divorce proceedings. Typical acts include destruction of personal property, throwing objects, abusive language, and threats. (Kelly & Johnson, 2008; Stark, 2007).

*This screening instrument may be used by family law participants. It is important to note that this instrument has not been researched to determine validity, reliability, or any predictive possibility. It is an effort to find information that can ensure the safety of the individuals participating in the process. Users are urged to contact police authorities if there is a reasonable concern for the safety of the parties, their child(ren) or other individuals related to the case.

There is no absolute scoring for any item although some items are more associated with one form of IPV as found with others. Careful interviewing may assist in determining which category the violence is more likely to belong to.

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Starke, E. (2007). *Coercive Control: How Men Entrap Women in Personal Live.* NY: Oxford Press.

All items answered **YES** require further interviewing and follow up questions.

This is Version 2.0. The user is invited to provide feedback to Dr. Hohnecker at psychalliance@bellsouth.net or by telephone at (954)440-0528. Dr. Hohnecker is available for training and consultation.

~ 2015 Trial Advocacy Workshop ~

Valuable Real Life Experience in a Mock Trial Setting

By Cynthia M. Pyfrom, Esq., Boynton Beach, FL


C. PYFROM

The Florida Bar's Family Law Section held its biennial Family Law Trial Advocacy Workshop this year at the Ritz-Carlton Key Biscayne in Miami, Florida on August 6 – 9. This first-class event is the product of countless hours of dedication by hardworking practitioners and judiciary who managed to coordinate, prepare and execute a well-organized educational workshop while still maintaining each of their own day-to-day professional and personal lives. Participation was limited to the first eighty (80) registrants. When registering, attendees chose either the Financial Issues track or the Child Related Issues track. The Section recruited family law litigators to volunteer as the mock witnesses, as well as highly qualified mental health professionals to volunteer as the mock experts for the Child Related Issues track and accomplished forensic accountants to volunteer as experts for the Financial Issues track. These volunteers gave the participants an opportunity to examine actual third parties as opposed to each other (which was done in previous years).

Each participant was teamed up with another participant as opposing counsel and required to utilize the fact pattern and evidence provided. Registrants were then divided up into small groups of eight (four pairs in each group), which were observed and critiqued by two mock judges who were consummate and experienced family law practitioners and judiciary.

The weekend was structured to provide each registrant a concentrated real-life experience including preparing and presenting an opening statement; conducting direct and cross-examination of the parties as to temporary relief issues, as well as a separate direct and cross-examination of the parties as to all issues set for trial; conducting direct and cross-examination of the experts (either a mental health professional or forensic accountant); and, presenting a closing argument. In between these intense workshops, some of Florida's most prestigious family law practitioners and judiciary presented educational lectures, offering insight and tips on enhancing trial advocacy skills.

This hands-on workshop is beneficial for all practitioners, new and seasoned. Whether you have been to trial hundreds of times, or have not yet had your first trial, this workshop allows you to refine your skills, work under pressure and offers real-time feedback to hone trial techniques. This workshop also counts as a trial for purposes of Board Certification and is a great opportunity to network with attorneys and judiciary from across the State of Florida.

Cynthia M. Pyfrom, Esq*. is president and owner of Cynthia M. Pyfrom, P.A. in Boynton Beach, Florida. She provides high quality legal representation in Matrimonial and Family Law matters in Palm Beach, Broward, and Martin Counties. Cynthia holds a Bachelor of Arts degree from Florida Atlantic University and a Juris Doctor degree from Nova Southeastern University, Shepard Broad Law Center.*

~ 2015 Trial Advocacy Workshop ~

By Jennifer Burns, Esq., Sarasota, FL


J. BURNS

This workshop had so much real life application. I learned many new skills that I now use every day in my practice. Not only did we receive advice and critique on our work, but in between we gained a lot of useful practice tips. Ms. Nutter and Magistrate Kirigin gave us their opinion on the practice of family law, like how to present evidence and work with clients as well as opposing counsel. It was basically a full weekend of being able to pick the brains of some of the best attorneys in Florida. Also, what a great networking experience! In my small group alone I met people from Miami, Flagler Beach, Orlando, and Sarasota, where I practice. Not only did I meet the people in my small group, but I ran into so many different people at the lectures and cocktail hour. It was a lot of fun to meet so many people in our great profession.

The workshop is only offered every other year, which makes sense when you see the amount of manpower that goes into it. But the great thing is that, since there are two different tracks to choose from, that's two different chances to attend. If you haven't attended in the past or if there is a track that you didn't get to do last time, I highly recommend that you attend! It was a great experience and one that I am looking forward to again in the future.

Jennifer Burns, Esq. *received her Bachelor of Arts degree in International Studies and a minor in French, cum laude, from the University of South Florida in Tampa in 2009 and her Juris Doctor, cum laude, from Stetson University College of Law in May 2014.*

By Henry L. Shomar, Esq., Ft. Lauderdale, FL


H. SHOMAR

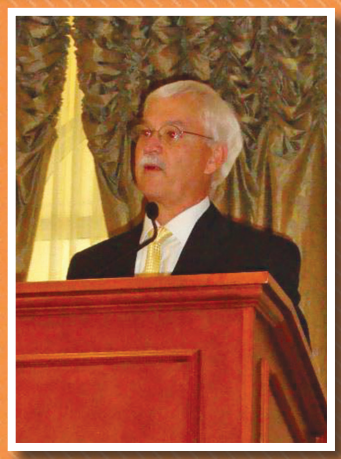
The Trial Advocacy Workshop is not just classes as we had the opportunity to network with colleagues from across the state during meals and over drinks. We even had the distinct honor to hear from Florida Supreme Court Justice Polson during a lesson. It was amazing that the Florida Bar Family Law Section offered such an opportunity like this, and I would encourage this workshop to any practicing trial attorney in the future. The growth I felt in my abilities as a trial attorney through the weekend of the workshop was what would otherwise have taken a year of practice to achieve. The workshop stimulates your mind, challenges your skills, and offers you a platform to get better at your game. I can honestly say I am a better lawyer today after having participated in such a great event.

Henny L. Shomar, Esq. *is an associate attorney at Tripp Scott, P.A. in Fort Lauderdale, Florida. He focuses his practice in complex litigation matters, including marital and family law, probate litigation, creditor's rights, and general commercial litigation, in state and federal court throughout the great State of Florida.*

Trial Advocacy Workshop

August 6-9, 2015
Ritz Carlton Key Biscayne
Key Biscayne, FL

Trial Advocacy Workshop



Why Do They Do It That Way There? Practice And Procedure Before General Magistrates and Child Support Hearing Officers

By G.M. Sara Alijewicz, West Palm Beach, FL

"Everyone is entitled to his own opinion, but not his own facts."[1]

Although the utilization of General Magistrates/Child Support Hearing Officers varies greatly statewide, the rules behind the use of the General Magistrate, and the procedures related to their function are straightforward. For those who do not practice before General Magistrates and Child Support Hearing Officers on a routine basis, there seems to be certain misconceptions that lead to unnecessary confusion, extra work, and generalized frustration.

Jurisdiction is conferred upon General Magistrates and Child Support Hearing Officers to hear cases by Florida Family Law Rules of Procedure and local administrative orders. For example, the 15th Judicial Circuit's administrative order specifically authorizes each General Magistrate to function as a Child Support Hearing Officer consistent with Florida Family Rule of Procedure 12.491, as well as a General Magistrate pursuant to a valid Order of Referral in accordance with Rule 12.490.[2] Therefore, in all cases that do not involve the Department of Revenue, the General Magistrates are also Child Support Hearing Officers. Not all circuits "cross-purpose" General Magistrates as Child Support Hearing Officers. Additionally, each circuit's administrative order is drafted differently which leads to differing procedural protocols depending upon the jurisdiction in which you are practicing.

Florida Family Law Rule of Procedure 12.491 (Child Support Enforcement) permits the use of Child Support Hearing Officers when their use is invoked through an "administrative order of the chief justice[3] for a particular county or circuit." This rule permits the Child Support Hearing Officer to establish, enforce, or modify child support. The only matter a Child Support Hearing Officer cannot hear are contested paternity matters. This rule does not limit child support matters to Department of Revenue (DOR) proceedings.[4] If a particular administrative order designates the use of Child Support Hearing Officers, then they are able to hear all child support matters under 12.491. The practice of how this referral/assignment occurs varies among circuits. For example, in the 15th Judicial Circuit, no additional order or referral for child support matters is required because the administrative order automatically refers/assigns child support, and child support related issues in a case to a General Magistrate/Child Support Hearing Officer. However, in the 11th Judicial Circuit, the Administrative Order requires that the judge issue an Order of Referral under 12.491. This referral differs entirely from a referral under 12.490 in that the parties do not need to consent to the referral, and therefore there can be no objection to this order. That is also the practice in some other jurisdictions.

When a proceeding is held before a Child Support Hearing Officer under 12.491, the Hearing Officer does not need to prepare a report and recommendation; they are to prepare recommended order to the Court.[5] Rule 12.491 specifically states that the Child Support Hearing Officer "shall evaluate the evidence and promptly make a recommended order to the court." After the Hearing Officer submits the recommended order to the court, the judge "shall enter an order promptly unless good cause appears to amend the order, conduct further proceedings, or refer the matter back to the hearing officer to conduct further proceedings."[6] There is no provision or requirement whatsoever that requires the preparation of a report and an exceptions period when the case is heard under Rule 12.491. The remedy when the litigant believes that there is an error is a timely motion to vacate, not an exceptions motion. A motion to vacate must be filed within 10 days from the date of entry of an order, and a cross-motion to vacate must be filed within 5 days of the service of a motion to vacate.[7] The filing of a cross-motion to vacate does not delay the hearing on the motion to vacate unless good cause is shown, and a motion to vacate the order must be heard within 10 days after the movant "applies for hearing on the motion."[8]

In contrast, Florida Family Law Rule of Procedure 12.490 permits the designation of General Magistrates by the judges of the circuit courts. This rule does not specifically state that the use of the General Magistrate must be invoked by Administrative

Order, however most jurisdictions have these Orders to delineate what is appropriate to be referred to a General Magistrate, and what is not. If an administrative order does not permit a particular matter to be referred, it is incorrect to submit an Order of Referral under 12.490 to the judge. Matters that most jurisdictions have deemed inappropriate for referrals are issues of an emergent, time sensitive nature, i.e. pick up orders, etc. The rule specifically prohibits General Magistrates from presiding over injunctions for protection against domestic, repeat, dating, and sexual violence, and stalking.[9] The rule is explicit about the method for the entry of an order of referral. Because this rule requires consent (implied) it is especially important to remember that all parties must be served with the order of referral, and that includes any Guardian ad litem assigned, or any corporations that may have been joined as parties to the case. Any objection should be a timely written objection to the order in the event that the litigant does not consent to the jurisdiction of the General Magistrate.[10] Orders of referral must specifically state the matter to be heard, and be specific as to the name of the specific general magistrate.[11] This Rule was amended in 2015 to include the language that it must be the name of the specific general magistrate, and the Committee Notes indicate that the clarification was necessary because concurrent referrals to multiple general magistrates were inappropriate.

If a particular jurisdiction uses Child Support Hearing Officers, under Rule 12.491 and General Magistrates under Rule 12.490, parties cannot object to a Child Support Officer hearing a child support matter. As a result, when a timely objection is made to the portions referred pursuant to Rule 12.490, and that objection is sustained, the issues are then bifurcated before the judge (non-child support) and General Magistrate/Child Support Hearing Officers (child support). This can result in more case management for the court, because when timesharing is at issue, the time-sharing issue must be determined prior to any hearing about child support. This also results in more expense to the litigants because there could be two court appearances on the same petition or motion.

Due to the lack of statewide uniformity in the assignment process of General Magistrates and Child Support Hearing Officers, it can be very difficult for attorneys who practice in multiple jurisdictions. Individual Circuit websites have the local administrative orders, and contain "divisional" instructions, which clearly state what is required to get your case properly set on the General Magistrate/Child Support Hearing Officer's docket. An additional resource to each of the jurisdictional websites is a website created by the Statewide Director of General Magistrates and Child Support Hearing officers at www.familylawfla.org/gmcseho/directory.pdf.

There issue of making the process and rules of the appointment and use of General Magistrate/Child Support Hearing Officer uniform statewide has been discussed periodically over time with little progress toward change. The current rules permit each jurisdiction to customize how they utilize the resource of the General Magistrates and Hearing officers, and there is certainly a great benefit to that given the diverse needs of the courts statewide. While that fact is appealing, and each jurisdiction is of the opinion that their method is the best method, the fact remains that the current process is not efficient, causes a substantial workload for the court, and is confusing.

The confusion that sometimes ensues because of these procedures occasionally causes litigants and attorneys to comment to the Court that the procedure is "crazy," which always causes me to think of a quote by Hunter S. Thompson: "'Crazy' is a term of art; 'Insane' is a term of law. Remember that, and you will save yourself a lot of trouble." So, to answer the question posed by the title of this article, even though it may seem the way they do it there is "crazy", there is a method to the madness. You just need to learn the administrative orders, the Family Law Rules, and study circuit websites so that you can regain your sanity.

Sara Alijewicz *graduated from Illinois Wesleyan University in 1984 with a B.S. in Natural Science, and Nova Law School in 1994. She practiced at the Legal Aid Society of Palm Beach County from 1995-1999 and 2003-2010, with a brief stint as a sole practitioner. Sara practiced family law, juvenile dependency among other civil matters. In 2010 she was appointed a General Magistrate and handles family, juvenile dependency, mental health, and guardianship cases. Sara has been married for 31 years to Alex, has a son, Michael, who is PhD in English and an adjunct professor and student advisor at Vanderbilt University, and a daughter Katie, who is an Assistant Budget Director at the Executive Office for Administration and Finance, Commonwealth of Massachusetts.*

Endnotes

1 Daniel Patrick Moynihan

2 *See* 15th Judicial Circuit of Florida Administrative Order 5.104-5/09, *In Re: Appointment of Magistrates in Unified Family Court Cases*.

3 Florida Family Law Rule of Procedure 12.491 (a) specifically states: "This rule shall be effective when specifically invoked by administrative order of the chief justice for use in a particular county or circuit." Rule 12.491(c) states that "The chief judge of each circuit shall appoint such number of support hearing officers…"

4 Caveat: a "DOR-Title IV-D Hearing Officer" cannot hear any other matters other than Department of Revenue Cases under any circumstances.

5 *See A Judge's Guide to the Practices, Procedures, and Appropriate Use of General Magistrates, Child Support Hearing Officers, and Special Magistrates Serving Within the Florida State Courts System*, 65 (August 2014).

6 Florida Family Law Rule of Procedure 12.491(f) (2015).

7 *Id.*

8 *Id.*

9 Florida Family Law Rule of Procedure 12.290 (c) (2015).

10 Florida Family Law Rule of Procedure 12.290 (b)(3).

11 *Id.*

The *Daubert* Crucible

By Ronald H. Kauffman, Esq. Miami, FL


R. KAUFFMAN

For residents of the Massachusetts Bay Colony in 1692, life was rough: French and Indian raids, disease, and death. The devil-fearing Puritans thought witchcraft was to blame. So they fought back, using the legal system as their weapon. After all, being a witch was not only a sin it was a crime.[1]

In May 1692, the Massachusetts Governor established the Court of Oyer and Terminer. The Puritans were enlightened for the time, scrupulous about fairness, and looked down on European "folk methods" of proof. Gone were the days of "trial by ordeal" to unmask witches.[2]

These new trials would be different. The Court required indictments and held public hearings.[3] Qualified experts on witchcraft were introduced, rendering opinions based on body marks, observed behaviors, learned treatises, and more controversially, "spectral evidence".[4]

The testimony by the experts at Salem may be a case where reliability is wholly lacking, but there is no denying that the witnesses were experts.[5] However, there was little the accused could do about dubious evidence and opinions, as there was little precedent on the admissibility of expert testimony.

Since 1923 though, courts have relied on the *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) "general acceptance" standard as the talisman for the admissibility of expert testimony.[6] In 1993, the U.S. Supreme Court adopted a new standard in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) which requires trial judges to screen expert testimony for relevance and reliability. The *Frye* rule was simple, but there has always been debate over whether *Frye* or *Daubert* was the stricter standard.[7]

In 2013, the Florida Legislature ended any debate[8] by amending Sections 90.702 and 90.704 of the Florida Statutes to bind Florida courts to the *Daubert* standard for the admission of expert testimony and the basis for an expert's opinion.[9]

Several articles on the new *Daubert* test were published after the legislative change.[10] Since then, application of the new expert witness rules has been reviewed by only a few District Courts of Appeal. This Article is a primer on the *Frye* and *Daubert* cases, and discusses expert testimony under the amended evidence rules.

The *Frye* Test

Until the 2013 amendment, Federal and Florida courts used different standards to admit expert testimony into evidence. It was not always this way. For almost 70 years, both court systems used the same test established in *Frye*.[11]

In *Frye,* a defendant on trial for murder wanted to offer an expert witness to testify about the results of an early version of a lie detector test. The trial judge denied the request. The appellate court affirmed: ". . . while courts will go a long way in admitting expert testimony . . . the thing from which the deduction is made must . . . have gained *general acceptance* in the particular field in which it belongs."[12]

The Federal Evidence Code was established in 1975. The Florida Evidence Code followed in 1979, and adopted the same numbering system and significant portions of the Federal Code. There was a dispute as to whether establishment of evidence codes replaced the *Frye* standard. The U.S. Supreme Court held that the Code supersede *Frye.* However, the Florida Supreme Court never addressed whether Florida's Evidence Code superseded *Frye*.[13]

Until 2013, Florida was one of the few remaining jurisdictions still applying the *Frye* test. The Florida Supreme Court announced in *Brim v. State*, 695 So.2d 268, 271 (Fla. 1997), that "despite the federal adoption of a more lenient standard in *Daubert* . . . we have maintained the higher standard of reliability as dictated by *Frye*."[14]

However, the *Frye* rule was always applied very loosely in Florida. For instance, the Florida Supreme Court held in *Marsh v. Valyou*, 977 So.2d 543 (Fla. 2007), that if an expert relies only on his or her personal experience and training, "pure opinion", then the testimony is admissible without the need for a *Frye* hearing.[15]

Marsh also created an exclusion from *Frye* by limiting it to opinions involving "new or novel scientific techniques." As most expert testimony does not involve new or novel scientific techniques, the "vast majority" of expert testimony in Florida was never even subject to *Frye*.[16]

Amended Sections 90.702 and 90.704, Florida Statutes

The bill amending Sections 90.702 and 90.704, Florida Statutes, became effective July 1, 2013, and fundamentally changed Florida law on testimony by experts. However, there is still a simmering controversy about the way the bill became effective.

Generally, legislation which encroaches on the Supreme Court's power to regulate courtroom practice and procedure is unconstitutional, but the Legislature can enact sub-

stantive law.[17] When one branch of government encroaches on another branch, Florida traditionally applies a "strict separation of powers doctrine."[18]

Given that the Evidence Code contains both substantive and procedural provisions, there is still lingering suspicion that the Legislature violated the separation of powers doctrine.[19] However, that issue has not been accepted by the Florida Supreme Court to date.[20]

Florida's expert witness rules, as amended, state:

> Section 90.702, **Testimony by experts**. – If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, 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.
>
> Section 90.704, **Basis of opinion testimony by experts**. – The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence. 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.

The preamble to House Bill 7015 (2013) states the legislative intent was to pattern our expert witness rules after the Federal Rules of Evidence, adopt the *Daubert* standard, banish the *Frye* rule, and prohibit "pure opinion testimony" in Florida courts.[21]

The *Daubert* Test

The *Daubert* test developed in three product liabilities cases in which the main issue was causation. The plaintiffs in each case tried to introduce expert testimony to prove products caused their damages. The courts ultimately rejected each of the plaintiffs' experts. The result was a coven of opinions which increasingly tightened the rules for admitting expert testimony. The three cases, and their impact on existing Florida law are examined below.

Daubert

The trilogy began in 1993 with *Daubert*.[22] *Daubert* was a toxic tort case against the maker of the morning sickness drug Bendectin. The plaintiffs alleged Bendectin caused limb reduction birth defects.[23]

Recall that *Frye* admitted all expert testimony as long as it was based on a science generally accepted in the scientific community. After *Daubert,* a judge has to ensure that expert testimony is both *relevant* and *reliable*. This requires establishing the expert's theory or technique is scientifically valid, and can "fit" to the facts in issue.[24]

Daubert requires that the evidence be relevant, that it prove or disprove a material fact in the case. For example, an expert on the phases of the moon may be relevant to prove it was dark, if visibility is in dispute. However, if the evidence of a full moon is used to prove why someone was acting strangely, it would be inadmissible.[25] Relevance requires a valid scientific connection as a precondition to admissibility.

Daubert also requires that the expert testimony be reliable. This requires a showing that the testimony is based on "scientific knowledge." The Court listed four non-exclusive factors to consider when applying the reliability test: (1) whether the theory or technique can be tested; (2) whether the theory or technique has been peer reviewed; (3) what the "potential rate of error" is; and (4) whether it has widespread acceptance.

The fourth *Daubert* factor, "widespread acceptance", is essentially the *Frye* test. In Florida, that used to end the inquiry. The *Daubert* test requires consideration of at least three additional factors, and is "flexible" enough to consider even more.[26]

Joiner

The second case in the trilogy was *General Electric Co. v. Joiner*, 522 U.S. 136 (1997).[27] The plaintiff was an electrician who claimed his exposure to polychlorinated biphenyls (PCBs) caused his lung cancer. The Plaintiff's expert testified that it was "more likely than not that lung cancer was causally linked to PCB exposure" by extrapolating from animal studies in which mice were injected with PCBs. The trial judge excluded the expert's testimony because the studies did not sufficiently support the expert's conclusion that PCBs caused cancer.

The U.S. Supreme Court held that the "abuse of discretion" standard should be applied to rulings on the admissibility of expert testimony. This is another split from the former rule in Florida. The abuse of discretion standard is far more deferential than the *de novo* standard we had been using in Florida.[28]

Joiner also resolved the challenge to the underlying expert testimony by requiring the trial judge to sit as "gatekeeper" to screen testimony. Moreover, *Joiner* made inadmissible "pure opinion" testimony, finding: "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert."[29] This means that trial courts are free to exclude testimony when "there is

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simply too great an analytical gap between the data and the opinion proffered."[30]

Kumho Tire Co.

The third case in the trilogy was *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).[31] The plaintiffs sued after a tire blew out on their minivan, causing a fatal accident. The plaintiffs' expert, a tire-failure analyst, testified that the tire was defective after visually inspecting it. The trial judge excluded the expert's testimony.

The appellate court reversed, limiting *Daubert* to cases where an expert is applying scientific principles, rather than personal observation. The U.S. Supreme Court reversed, and extended the *Daubert* test to all expert testimony.[32]

Kumho marks another difference with Florida case law. Remember, *Marsh* limited the *Frye* test to "new or novel scientific techniques", rendering it "inapplicable in the vast majority of cases." By contrast, *Kumho* extended the new *Daubert* standard to all expert testimony, forcing experts to apply the same "intellectual rigor in their field" to the courtroom.[33]

Expert Testimony Post-*Daubert*

The *Daubert* test is new to Florida, and few Florida cases have addressed it.[34] Qualifying an expert witness, the relevancy and reliability prongs of *Daubert,* and the grounds for excluding experts, are best illustrated in analyzing the few Florida appellate opinions to apply the new evidentiary rules.

Relevancy, Reliability & *Perez*

In *Perez v. Bell South Telecommunications Inc.*, 138 So. 3d 492 (Fla. 3d DCA 2014), the plaintiff became pregnant while employed as a call center operator by Bell South. Plaintiff's doctor, Dr. Isidro Cardella, a board-certified obstetrician and gynecologist, classified plaintiff's pregnancy as "high risk", and recommended bed rest, limiting her work hours, and allowing frequent bathroom breaks.[35]

The plaintiff had also had a prior medical history which contributed to her high-risk pregnancy: she was obese, and had gastric surgery due to her obesity, she had suffered two herniated discs, had back surgery, and had her gall bladder removed prior to her pregnancy.

On August 11, 2004, the plaintiff was fired for non-performance. Two days later, she suffered a placental abruption and delivered her child twenty weeks early. Dr. Cardella opined in his deposition that workplace stress, exacerbated by Bell South's alleged refusal to accommodate Ms. Perez's medical condition, was the causal agent of the abruption. Dr. Cardella's testimony was the only testimony linking the premature birth to Bell South.

However, Dr. Cardella also testified there was no way of ever knowing for sure what caused the placental abruption, and that his conclusions were purely his own personal opinion, not supported by any credible scientific research.

Interestingly, the trial court dismissed Dr. Cardella's testimony under the *Frye* standard.[36] In affirming the lack of admissibility of the plaintiff doctor's testimony, the *Perez* panel held that under *Daubert:*

> "the subject of an expert's testimony must be 'scientific knowledge.' "[I]n order to qualify as 'scientific knowledge,' an inference or assertion must be **derived by the scientific method**."
>
> The touchstone of the scientific method is empirical testing—developing hypotheses and testing them through blind experiments to see if they can be verified. "[S]cientific method [is][a]n analytical technique by which a hypothesis is formulated and then systematically tested through observation and experimentation."). As the United States Supreme Court explained in *Daubert*, "This methodology is what distinguishes science from other fields of human inquiry."
>
> 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. "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.
>
> 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 "is simply one factor among several." Subjective belief and unsupported speculation are henceforth inadmissible.[37]

In finding Dr. Cardella's testimony inadmissible, the *Perez* panel found that Dr. Cardella never before related a placental abruption to workplace stress, and knew of no one who had. There was no scientific support for his opinion, and his opinion was a classic example of the common fallacy of assuming causality from temporal sequence.

Perez established three things: (1) the Legislature intended to "tighten the rules for admissibility of expert testimony", (2) the *Daubert* standard applies retroactively to all cases, and (3) an expert's subjective, unsupported belief – the so-called "pure opinion" testimony – is inadmissible.

The *Perez* case applied *Daubert* to testimony involving obstetrics and gynecology. Medicine is a natural science, and therefore considered one of the "hard sciences." Psychology, political science, and sociology are considered "soft sciences".[38] Soft sciences are the type routinely relied on in family law cases. Left unresolved by the Court in *Perez* was how the

Daubert test could be applied to testimony involving the soft sciences.

Excluding Expert Testimony: *Booker*

In the recent case of *Booker v. Sumter County Sheriff's Office / N. Am. Risk Services*, 166 So. 3d 189 (Fla. 1st DCA 2015), the Court added two new tasks to a trial judge's "gatekeeper" role.[39] First, determine the timeliness of the objections to expert testimony. Second, decide whether the objection is sufficient to put opposing counsel on notice to address any defect in the expert's testimony. *Booker* also important helps define "pure opinion" evidence, and raises the "judicial notice" exception to *Daubert*.

In *Booker,* the appellant was aware in April that the opposing expert was relying on various studies in support of his opinion.[40] The appellant raised a *Daubert* objection in September, two weeks before the final hearing. The trial judge ruled the objection untimely. The First District affirmed, finding that the *Daubert* challenge should have been made when the report was received, or promptly thereafter.

Finding the *Daubert* objection to the testimony was insufficient, the *Booker* opinion held that the objections must be directed to "specific opinion testimony," and "state a basis for the objection beyond just stating she was raising a *Daubert* objection."

The Court defined "pure opinion" as testimony based only on an expert's clinical experience and training. For example, if an expert was asked how he arrived at an opinion, and his response was that "when I was asked and thought about it, that is the answer that I came up with", *Booker* concludes the opinion is inadmissible because it: "provides no insight into what principles or methods were used to reach his opinion, and did not demonstrate that he applied any such principles or methods to the facts of this case."[41]

Finally, the *Booker* panel discusses an exception to *Daubert*. The exception is based on judicial notice, which "permits a judge to take judicial notice if the expert testimony has been deemed reliable by an appellate court."

As the majority opinion in *Daubert* itself noted, certain scientific theories are so firmly established as to "have attained the status of scientific law, such as the laws of thermodynamics, properly are subject to judicial notice under Federal Rule Evidence 201."[42]

While it would be a stretch for a court to take judicial notice that "PCBs do not cause lung cancer," the judicial notice exception relieves the burden of the proponent of objectionable testimony, and shifts the burden to the opponent to prove that such evidence is otherwise flawed or inadmissible.

Conclusion

By the time the Salem witch trials were stopped in October 1692, testimony by experts helped send nineteen people to Gallows Hill.[43] It was only after four months of hearings that people began to loudly question the evidence.[44] The Governor acted swiftly, and dissolved the Court.[45] The Governor also prohibited further use of spectral evidence. Not surprisingly, the remaining defendants were acquitted.[46]

The amendment to the expert witness rules brings Florida's expert testimony rules into line with the Federal Rules of Evidence and most state codes. The new rules bolster the reliability of expert testimony by requiring it to be based on the scientific method. The recent *Perez* and *Booker* cases show that a working knowledge of the *Daubert* standard, and how to apply it, is vital to every family law practice.

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Endnotes

1 The General Court of the Massachusetts Bay Colony adopted a statute in 1641 which is a mix of biblical passages and colonial statutes: "If any man or woman be a WITCH, that is, hath or consulteth with a familiar spirit, they shall be put to death. Exod. 22. 18. Levit. 20. 27. Deut. 18. 10. 11." *See* Lyonette Louis-Jacques, *The Salem Witch Trials: A Legal Bibliography,* University of Chicago, available at http://news.lib.uchicago.edu/blog/2012/10/29/the-salem-witch-trials-a-legal-bibliography-for-halloween/.

2 *See generally,* Jane Campbell Moriarty, *Wonders of the Invisible World: Prosecutorial Syndrome and Profile Evidence in the Salem Witchcraft Trials*, 26 Vt. L. Rev. 43, 58 (2001). (European witch trials relied on trial by ordeal. The "water ordeal", for instance, involved binding the accused's thumbs to their toes, then tossing them into water. If they floated, they were guilty. If they sank, they were innocent.)

3 *See Id.* at 60.

4 Spectral evidence refers to testimony by witnesses that an accused's spiritual form appeared to them in visions and dreams. Rev. Cotton Mather, an expert witness, testified that spectral evidence is suitable in cases of necessity. *See* Peter Charles Hoffer, *The Salem Witch Trials: A Legal History*, University Press of Kansas (1997) p. 79.

5 *See e.g.* Fla.R.Civ.P. 1.390 (generally an expert witness is a person duly and regularly engaged in the practice of a profession who holds a professional degree from a college or one possessed of special knowledge or skill about the subject.) Rev. Cotton Mather, for instance, was from a prominent Puritan family, earned his M.A. at Harvard College, wrote over 400 works on witchcraft and a variety of scientific studies, and was elected to the Royal Society of London. *See* Rachel Walker, *Cotton Mather,* University of Virginia Documentary Archive and Transcription Project, available at *http://salem.lib.virginia.edu/people/c_mather.html*

6 *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

7 *See* Stephen E. Mahle, *The "Pure Opinion" Exception to the Florida Frye Standard*, 86 Fla. B.J., Feb. 2012, 41.

8 *See* §90.702, Fla. Stat. (2014).

9 The bill amended both §90.702 and §90.704, Florida Statutes. References to the expert witness rules in this article are sometimes referred to as Rule 702 for simplicity.

10 *See e.g.* Ronald H. Kauffman, *Out of the Frye Pan? Expert Witness Testimony Under New Rule 702*, The Commentator, (Fall 2013).

11 293 F. 1013 (D.C. Cir. 1923).

12 *Id.* (emphasis added).

13 *See Sikes v. Seaboard Coast Line R.R.,* 429 So.2d 1216, 1221 (Fla. 1st DCA 1983) (citing Charles W. Ehrhardt, *A Look at Florida's Proposed Code of Evidence*, 2 Fla. St. U.L.Rev. 681, 682–83 (1974)).

14 *Brim v. State*, 695 So.2d 268, 271 (Fla. 1997). Ironically, scholars have concluded that *Daubert* is the stricter standard. *See* Stephen E. Mahle, *The "Pure Opinion" Exception to the Florida Frye Standard*, 86 Fla. B.J., Feb. 2012, 41; Edward Cheng & Charles Yoon, *Does Frye or Daubert*

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Matter?: A Study of Scientific Admissibility Standards, 91 Va. L. Rev. 471, 472 (2005).

15 977 So.2d 543 (Fla. 2007).

16 *Id.* at 547.

17 *See* Fla. Const. Art. V, §2 ("The supreme court shall adopt rules for the practice and procedure in all courts . . ."). *See also Massey v. David,* 979 So.2d 9314, 936 (Fla. 2008).

18 *Bush v. Schiavo,* 885 So.2d 321, 329 (Fla. 2004).

19 *See In re Amendments to the Florida Evidence Code*, 782 So.2d 339, 341 (Fla. 2000) (recognizing that the Florida Evidence Code contains both substantive and procedural provisions, and that the Florida Supreme Court regularly issues opinions adopting or refusing to adopt the procedural rules enacted as amendments to the Florida Evidence Code).

20 *See Perez v. Bell S. Telecommunications, Inc.*, 153 So. 3d 908 (Fla. 2014) (The Florida Supreme Court declined to accept jurisdiction.) *See also Perez v. Bell S. Telecommunications, Inc.*, 138 So. 3d 492, 498, n. 12 (Fla. 3d DCA 2014). ("We take comfort here in the fact that the Florida Supreme Court periodically adopts all legislative changes to the Florida Evidence Code to the extent they are procedural . . . and has already stricken all references to the Frye test from the Florida Rules of Juvenile Procedure . . .").

21 *See* Fla. HB 7015 (2013) at 1-3.

22 509 U.S. 579 (1993).

23 Interestingly, Bendectin is returning to the marketplace under a new name with a new maker. The FDA never required Bendectin's removal, it is just that no one wanted to risk litigation. *See* Amy Orciari Herman, *Morning-Sickness Pill Bendectin Back on the Market with a New Name,* http://www.jwatch.org/fw201304100000001/2013/04/10/morning-sickness-pill-bendectin-back-market-with (April 10, 2013).

24 *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590–591 (1993).

25 *Id.*

26 *See Id.* at 579.

27 522 U.S. 136 (1997).

28 *See Castillo v. E.I. Du Pont De Nemours & Co., Inc.,* 854 So.2d 1264, 1268 (Fla. 2003).

29 *Joiner*, 522 U.S. at 146. *Ipse dixit* is Latin for "he himself said it".

30 *Id.*

31 526 U.S. 137 (1999).

32 *Id.*

33 *Id.* at 152.

34 *See Conley v. State*, 129 So. 3d 1120, 1121 (Fla. 1st DCA 2013), (remanding for a determination of the admissibility of the evidence under the *Daubert* standard codified by section 90.702). *See also Booker v. Sumter County Sheriff's Office/N. Am. Risk Services,* 166 So. 3d 189 (Fla. 1st DCA 2015).

35 *Perez v. Bell S. Telecommunications, Inc.*, 138 So. 3d 492 (Fla. 3d DCA 2014).

36 Section 90.702 of the Florida Evidence Code was held to be applied retrospectively. *See Id.* at 498.

37 *Id. at* 498-99 [internal citations omitted].

38 *See* Pamela Frost, *Metanews: Columbia University*, available at http://www.columbia.edu/cu/21stC/issue-1.1/soft.htm

39 166 So. 3d 189 (Fla. 1st DCA 2015).

40 *See Id.*

41 *See Giaimo v. Florida Autosport, Inc.*, 154 So.3d 385, 387-88 (Fla. 1st DCA 2014).

42 *See Daubert*, 509 U.S. at 592, n.11.

43 Experts disagree over the actual location of Gallows Hill. *See* http://historyofmassachusetts.org/where-is-the-real-gallows-hill/

44 *See* Moriarty, *supra* n.2 at 80-81.

45 The Governor's alacrity may stem from the fact that his wife was taken in for questioning about witchcraft. *See* Juss Blumberg, *A Brief History of the Salem Witch Trials*, The Smithsonian, available at http://www.smithsonianmag.com/history/a-brief-history-of-the-salem-witch-trials-175162489/?page=1.

46 *See* Sarah Kreutter, *The Devil's Specter: Spectral Evidence and the Salem Witchcraft Crisis*, The Spectrum: A Scholars Day Journal: Vol. 2, Article 8. Available at: http://digitalcommons.brockport.edu/spectrum/vol2/iss1/8

Top Ten "Need To Knows" About The Spying Spouse

By Samuel R. Troy, Esq., Boca Raton, FL


S. TROY

In 2009, I published an article about inter-spousal spying in a divorce setting. The article focused on different types of spying, the admissibility of evidence discovered through spying as well as possible consequences for spouses that engage in this type of behavior.

In honor of David Letterman stepping down from his iconic television show, here at The Commentator we are revisiting the "Spying Spouse" with our own top ten list of Need to Knows about the spying spouse:

1. The constitution can protect us against ourselves.

There remains limited precedent in family court about the spying spouse as it relates to the use of communication through computers. Our success in arguing these cases begins with the basic understanding of our constitutional rights. The United States Constitution, as well as the Florida Constitution, protects us all against unlawful searches and seizures. Often times we think of this concept as it relates to governmental intrusions. These same concepts however, are the starting point for a proper analysis of certain evidence that may be acquired in a non-traditional way in a family case. The Constitution can protect all of us from not only our government, but from outside civilians and even family members.

Florida Constitution Article 1 § 12 Searches and Seizures provides us with: The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated.

2. Understand and be able to define "interception" as it relates to communication.

Florida Statute §934.02 defines the concept of "intercept" as: "... the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device."

Florida Statute §934.03, has a specific prohibition against any person who "… [i]ntentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire, oral, or electronic communication."

Intercepted communication was commonly thought of in terms of wiretapping phones or recording conversations. With the introduction of various forms of computer communication, the lines have been slightly more blurred. Applying the concepts of recorded conversation or wiretapping will still be critical in your analysis of the discovery of evidence related to more modern forms of communication.

3. Wire taping without a warrant or consent of the parties has long been considered illegal in the state of Florida.

In 1973, the Supreme Court of Florida in *Markham v. Markham*, 272 So.2d 813 (Fla. 1973), held that a husband had invaded the wife's right of privacy by utilizing electronic devices to listen the wife's telephone conversations. In the absence of court authorization, or the consent of the parties, the husband's recordings of telephone conversations coming into the marital home were inadmissible in a dissolution of marriage action. *Id.* at 814.

This case established the rule in Florida that you cannot tape another person's conversation without his/her permission. This is now a commonly known law in Florida. This law and the analysis behind it has had an enormous impact on many of the cases and concepts behind determining the legality of the evidence discussed in this article.

4. Florida Statutes establish a bright line rule distinguishing between communication that is intercepted intentionally and unintentionally.

In *Otero v. Otero*, 736 So.2d 771 (Fla. 3d DCA 1999), a conversation between a mother and her child was unintentionally recorded on an answering machine when the machine did not turn off. This message was presented to the court as relevant communication between the mother and child in a post judgment custody matter. *Id.* The court permitted the message to be entered into evidence as a recorded conversation. Although the parties did not know the machine was recording the conversation, the court reasoned that the recording was unintentional thus admissible. *Id.* The court's holding cites to Florida Statute Section §934.03 that specifically prohibits the "intentional" interception of wire oral or electronic communication.

5. Photographs or video images obtained unknowingly and without permission may still be proper evidence.

In this day and age when everyone on the street is an amateur director, the admission of video images has

becoming increasingly important. Whether it is a video obtained by a party, outside civilian or a private investigator, the admissibility of this evidence may be critical to any case.

In the case of *Minotty v. Baudo* 42 So.3d 824 (Fla. 4th DCA 2010), a group of doctors were unknowingly videotaped in a room together. For whatever reason, this evidence was relevant to the pending civil suit and was admitted at trial. The court reasoned that, so long as the video did not record the content of the conversation, it would be admissible evidence. *Id.* at 832.

The admissibility of videos and photographs taken by private investigators or other outside third parties is a common problem. How can a private investigator get away with videotaping or photographing people without their permission? *Minotty* answers this question by citing to the Federal Wire Tap Act 18 U.S.C. section 2510 as well as Chapter 934 of the Florida Statues. So long as the recordings or photographs do not reveal the content of a conversation, it is admissible evidence. (For additional information on Private Investigators refer to ss. 493.6201-493.6203: PRIVATE INVESTIGATIVE SERVICES).

It is important to keep in mind however, that not all oral communication is protected. In the *State of Florida v. Inciarrano*, 473 So. 2d 1272 (Fla. 1985), the court held Florida Statute 934.02 (defining oral communication) ". . . protects only those "oral communications" uttered by a person exhibiting an expectation of privacy *under circumstances reasonably justifying such an expectation." Id.* at 1275.

Although certain oral communication cannot be "intercepted" according to Florida Statutes; communications where there is no expectation of privacy are not protected and thus may be subject to discovery.

6. The split second difference between intercepted communication and stored communication makes all the difference.

What is far more common these days, with far less authority in family cases, is computer related spying. When a phone or recorded conversation is involved, defining what is "intercepted communication," is relatively black and white. Computers add an additional element simply because the communication does not disappear; it remains stored in the hard drive. The difference between "intercepted communication" and "stored communication" is miniscule in time but the distinction is huge.

Florida Statute §934.02 defines stored communication as:

(a) Any temporary intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof.

(b) Any storage of a wire or electronic communication by an electronic communication service for purposes of backup protection of such communication.

Florida Statute §934.21 reads as follows:

(3), whoever: (a) Intentionally accesses without authorization a facility through which an electronic communication service is provided, or (b) Intentionally exceeds an authorization to access such facility, and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system shall be punished as provided in subsection (2).

O'Brien v. O'Brien, 899 So.2d 1133 (Fla. 5th DCA 2005) remains the definitive cyber spying case in family law and in the State of Florida. In *Obrien*, the wife was found to have illegally "intercepted" husband's electronic communications with another woman via electronic mail and instant messaging. The wife accomplished this by installing a spyware program on the Husband's computer which simultaneously copied electronic communications as they were being transmitted. *Id.* at 1134.

The wife argued that her seizure of the information was not illegal as it was stored communication. *Id.* The court determined that because it was simultaneous transmission of communication it was in fact considered to be intercepted. *Id.* at 1136.

Since there was no precedent in Florida, the court looked to federal case law. The *O'Brien* court came to the conclusion that had the communication sat in the husband's hard drive for even a moment it would have been considered stored communication. *Id.* at 1136. The distinction between stored and intercepted communication is a millisecond. *Id.* Because the Wife picked off the communication in transit it was considered intercepted communication and thus illegally obtained and elected to exclude the evidence. *Id.* at 1137.

If this communication was stored, it would have fell under Florida Statute § 934.21 and it would have been the burden of the husband to prove the wife somehow exceeded her authorization to access the stored communication. The husband would then have to convince the court that the computer was in fact his own computer, the wife had no access to it and it was password-protected to thus trigger his right to privacy. It is unclear if the husband would be able to prove such a thing on a computer located in the home. Thus the difference between "stored" and "intercepted" communication is significant.

7. The expectation of privacy within a family is very different than with the public.

We can comb through numerous civil cases or criminal cases that discuss hacking or individuals exceeding the scope of their computer access. This will certainly help in our interpretation of Chapter 934 of Florida Statues, but facts will almost always be distinguishable. The challenge for us, is what is actually private in a family law setting? Is the work computer in the family room private? Is the personal computer in the home office private? Is there an expectation of privacy when the Husband "figures out" the Wife's password?

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Family cases are far less black and white than a civil or criminal matter on this similar subject.

In the New Jersey case, *White v. White*, 781 A.2d 85 (NJ Super. Ch. Div. 2001), the court addressed the issue of the expectation of privacy on a personal computer in a family law setting. The husband had been storing emails between himself and his girlfriend in the hard drive of the family computer. The computer was located in the room where he was temporarily living, but the family had regular access to the room and the computer. *Id.* at 215. The wife discovered this communication in the hard drive of the computer, not by using passwords, but by navigating in and out of different directories in the hard drive. *Id.* at 216.

The court found that the husband did not have an objective, reasonable expectation of privacy in e-mails stored on family computer's hard drive, and thus the wife did not commit tort of intrusion by accessing those e-mails. *Id.* at 218. By allowing the family to access this computer, the husband cannot now claim that he had a reasonable expectation of privacy over the information he stored in the computer. *Id.*

The court could not find the husband had an expectation of privacy over his own communication with the girlfriend. The computer after all, was located in a common area, the family was in and out of that area frequently and he knew the children and the wife may be using that same computer. The husband failed to properly protect the information he was trying to keep from his wife and as a result the material were properly discovered and admissible.

8. Think of the hard drive as a modern day file cabinet.

State v. Appleby, 2002 WL 1613716 (Del. Super. 2002) introduces an interesting and helpful analysis that may be used in a family law setting. In *Appleby*, the wife turned over a hard drive to authorities during a divorce proceeding which landed the husband in hot water with his employer and subsequently the law. *Id.* at 2. The husband had been improperly accessing his employer's network and evidence of this was stored on his now inoperable hard drive.

The husband argued the wife did not have the right to turn over the hard drive and he had an expectation of privacy to the contents within the hard drive. *Id.* at 2. The husband claimed the hard drive was considered "his" during the marriage. However, the court discovered that the wife had access to this hard drive and even stored her own information on the hard drive. The husband did say the hard drive was password protected, but the passwords were not being used. *Id.*

The court first held that the wife had the right to turn over the hard drive itself as she had used the hard drive during the marriage. *Id.* at 4. The court then held that the hard drive was akin to a file cabinet. The hard drive itself was the cabinet and the contents of the hard drive were considered the material inside this file cabinet. *Id.* at 3. The wife had materials inside that cabinet as well as the husband. Since the husband and wife admitted to not using the password, the court considered the analogized the password to a key and thus considered the hard drive to be an unlocked file cabinet. *Id.* Since the key is not being used, but the hard drive is broken, the cabinet is merely considered to be jammed shut. *Id.* The court held there is no expectation of privacy to contents of an unlocked, but jammed file cabinet, containing both the wife and the husband's information. *Id.*

This case is critical in analyzing the expectation of privacy in cases involving the use or misuse of passwords, as well as computer systems used by both spouses. Rest assured if the husband was the sole user of this hard drive and he utilized proper passwords, this file cabinet may have been considered locked and private.

9. Illegally obtained information may still be admissible discovery.

There are no other express statutory restrictions against the admission into evidence of electronic communication that is intercepted in violation of Florida Statutes Chapters §934.

Section 934.06, Florida Statutes, titled "Prohibition of use as evidence of intercepted wire or oral communications; exception," explicitly restricts *only* the admissibility of evidence obtained through the *interception of wire or aural communication*, but does NOT address electronic communication.

In *Potter v. Havlicek,* 2007 WL 539534 (S.D. Ohio Feb. 14, 2007), the parties were in the midst of a custody dispute. The husband accessed the wife's stored communication on her computer. The husband did not install spyware, but he did utilize other computer programs to obtain this information. *Id.* The husband submitted the evidence he recovered from the computer to the custody evaluator in their divorce proceedings. *Id.* The Ohio court ruled that the husband's actions violated their state statute against unauthorized use of stored communication. *Id.* The wife brought a separate civil action against the husband in federal court for injunctive relief to stop the husband's access to the computer as well as halting his ability to use the information he recovered in the divorce proceedings. *Id.* The federal court held that the legislature intentionally left electronic communication out of the statute that excludes illegally obtained wire communication, therefore the federal court in *Potter* elected not to suppress the evidence under the statute. *Id.* The court did acknowledge that the husband's activity violated state laws and he was susceptible to civil or criminal liability. *Id.*

This case may be helpful as the Ohio statute mimics Section 934, Florida Statutes. The *O'Brien* court had a simi-

lar holding stating that, Congress intended to leave out of the statute any express exclusion of improperly acquired electronic communication and left the admissibility of this evidence to the discretion of the court. *Id.*. In *O'Brien,* unlike in *Potter,* the court refused to admit the evidence.

10. Illegally obtained evidence may result in significant civil or criminal penalties.

The issues described herein are certainly interesting to read about and discuss, however they should not be taken lightly. A violation of any of the laws discussed could result in serious civil and/or criminal penalties.

Florida Statute §934.10 provides civil relief to the aggrieved party in the form of equitable, declaratory or injunctive relief, Actual damages, Punitive Damages, Attorney's fees and costs. A violation of Chapter 934 may result in one of the parties paying damages or more common in a family case, facing sanctions such as the payment of the other parties' attorney's fees and costs.

Criminal penalties can be harsh depending on the nature of the crime. **Florida Statute §815.06** addresses offenses against computer users. Exceeding the scope of authorization for certain computers or servers may result in a third degree felony charge carrying fines of $5,000 and up to 5 years in prison. If the computer is damaged or information is used to defraud, the charge may be a second degree felony carrying a $10,000.00 fine and up to 10 years in prison.

Florida Statute §934.03 addresses the interception of electronic communication. A violation of this statute is a third degree felony and carries fines up to $5,000 along with up to five year in jail. Florida Statute §934.21 lays out the most lenient penalties for unauthorized access of stored communication. For the unlawful acquisition of stored communication for commercial gain, it is considered a first degree misdemeanor and the court levies fines up to $1,000 with a maximum of one year in jail. If stored information is illegally acquired for any other purpose, the crime is considered a second degree misdemeanor carrying a $500.00 fine and/or a maximum 60 day prison sentence.

Conclusion

The basic concept of expectation of privacy is of primary importance in these types of cases. The line is obviously much more blurred when dealing with privacy amongst family members as opposed to the government. Consider who has access to the evidence, who should have access to the evidence, how was the evidence protected, where did the evidence come from and of course, how was the information obtained.

At the end of the day, it is the lawyer's job to perform the proper analysis of the evidence obtained and advise their client's accordingly. There is plenty of gray area in these cases so be sure you are not placing your client in harm's way before you try and admit the evidence.

Samuel R. Troy, Esq. *is the principle at Troy Legal, P.A. with offices in Boca Raton and Miami. He has been practicing family law for over 10 years, 5 of which have been with his own firm. Mr. Troy has been repeatedly recognized by Super Lawyers Magazine and Legal Elite as one of the top young lawyers in Florida. Mr. Troy originally published: "The Spying Spouse in the Computer Age: The Blurred Line Between Criminal Activity and Good Discovery", with the Commentator in 2009.*

Stripping Metadata From Documents To Be E-Filed

By Julia Wyda, Esq., Boca Raton, FL

J. WYDA

The July 2015 edition of FAMSEG included a link to a June 2015 Florida Bar News article written by Gary Blankenship regarding the responsibility attorneys have to strip metadata from all e-filed documents.[1] The article is especially relevant to family law attorneys as we routinely handle confidential information related to our clients' children, finances and personal information. Much of this information is required to be redacted from the court file or not included at all in order to comply with Fla. R. Jud. Admin. 2.420 and 2.425.[2] Though most of us edit our documents to remove confidential information, exclude the information required to be excluded by Fla. R. Jud. Admin. 2.425(a)(3), and/or alert the clerk to any confidential information to be redacted from the public court file, there is still the additional step of stripping the metadata from our documents that must be completed prior to e-filing.

Metadata is the information retained within a document as it is drafted and edited. It includes the formatting changes and all revisions to a document, as well as who made the revision(s) and when. It is akin to an invisible form of redlining that stays with the document. Turning off "Track Changes" on your document will not delete the metadata.

E-filing a document without first stripping the metadata will allow computer-savvy persons with ulterior motives to access the confidential information that was in the document prior to editing to removing it. If you cut and paste from documents in other cases in preparing your pleadings, the potential for compromised confidential information within the metadata multiplies.

The Florida Courts Technology Commission (FCTC) has proposed a warning to be used on the statewide e-filing portal, which will read "WARNING: Removal of document metadata is the responsibility of the filer. Any document metadata remaining may become part of the public record." In addition, the Florida Bar's Rules of Judicial Administration Committee is now considering a proposal to amend Fla. R. Jud. Admin. 2.515(a)(4) to provide that when an attorney signs a document that is to be filed, including by electronic signature, "the attorney agrees to indemnify the clerk of court for damages for any inadvertent release by the clerk of confidential information contained in the documents that was not: (i) minimized by the attorney as required by Rule 2.425, or (ii) specifically identified by the attorney pursuant to the notice requirements of Rule 2.420(d)(2), or (iii) not specifically identified by the attorney in a motion filed pursuant to the procedures set forth in Rule 2.420 subdivisions (e), (f) or (g)…"[3]

Never has stripping your documents of metadata been more important. Where Microsoft Word is a commonly used program, below is a chart to help you protect clients by removing metadata from Microsoft Word documents:

1.	Open the Word document you want to inspect for hidden data and personal information.
2.	Create a copy of the document by clicking "File," then "Save As," and give the document a new name. * Note that this step is important because it is not always possible to restore the data once you've scrubbed it.
3.	Once you've saved a copy of your document, click the "File" tab and then click "Info."
4.	Click "Check for Issues."
5.	Click "Inspect Document."
6.	In the Document Inspector dialog box, there will be boxes to select and/or deselect regarding the types of hidden content that you want to be inspected. Check the boxes for all of the types of hidden content you want to be inspected * It is recommended that all of the boxes be checked to ensure you've inspected all possible hidden content.
7.	Click "Inspect."
8.	Review the results of the inspection in the Document Inspector dialog box.
9.	Click "Remove All" to remove the metadata.
10.	Now the document is clean.
11.	Click "Close."
12.	Click "File," then "Save As" and convert the document to a PDF.
13.	Your document is now ready to be e-filed.

Other commonly-used software allow for the deletion of metadata. You should consult the "help" functions within the programs that you use to see how to remove metadata within each program. Also, there is now third party software, such as the PayneGroup Metadata Assistant, which eliminates metadata from any number of programs. All family law attorneys should inform themselves and their staff on metadata and how to appropriately manage it on documents being filed with the court.

Julia Wyda, Esq. *is an attorney with the law firm of Brinkley Morgan, P.A., with offices in Boca Raton and Fort Lauderdale. She is the Chair of the Florida Bar Family Law Section's Publications Committee.*

Endnotes

1 Gary Blankenship, Lawyers are Responsible for Stripping Metadata from All E-filed Documents, Fla. B.J. June 15, 2015.

2 For a refresher on the interplay between Fla. R. Jud. Admin. 2.420 and 2.425 and complying with both Rules, see Joey M. Lampert, Litigation Practitioners' Confusion: Fla. R. Jud. Admin. 2.420 and 2.425 and the Improper Filing of Sensitive Information, Fla. B.J. May 2015, Volume 89, No. 5 at 20.

3 Gary Blankenship, Proposal Would Indemnify Clerks if Lawyers Fail to Redact Documents, Fla. B.J. June 15, 2015.

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David L. Hirschberg, Esq., Program Chair, Boca Raton

8:45 a.m. – 9:45 a.m.
What Do You Mean, Sarah Won't Go With Her Dad? Understanding the Power of Parenting Relationships in Divorce.
Deborah O. Day, Psy.D., Winter Park

9:45 a.m. – 10:45 a.m.
Split Parenting Child Support Guidelines
Susan Savard, Esq., Orlando

10:45 a.m. – 11:00 a.m. **Break**

11:00 a.m. – 12:00 p.m.
Post-Obergefell: Parentage Issues for Same Sex Couples
Amy U. Hickman, Esq., Boynton Beach
David L. Hirschberg, Esq., Boca Raton
Christopher W. Rumbold, Esq., Wilton Manors

12:00 p.m. – 1:15 p.m. **Lunch**

1:15 p.m. – 2:15 p.m.
Expert Testimony Post-Daubert
Ronald H. Kauffman, Esq., Miami

2:15 p.m. – 3:15 p.m.
Ethical Considerations When Dealing with Children in Contested Family Law Matters
Evan R. Marks, Esq., Miami

3:15 p.m. – 3:30 p.m. **Break**

3:30 p.m. – 4:30 p.m.
A View from the Bench: How Judges Approach and Decide Contested Timesharing Cases
Honorable Reemberto Diaz, Miami
Honorable Alfred J. Horowitz, Fort Lauderdale
Honorable Scott Suskauer, West Palm Beach
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