Volume 5, Issue 2

May 2016

The Florida Public Interest Journal

A publication of The Florida Bar Public Interest Law Section

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Message from the Chair

Alice Vickers
2015—2016 Chair
Public Interest Law Section
The Florida Bar

My year as chair of the Public Interest Law Section has gone by quickly, especially looking back on it. At times, as Polonius points out to Hamlet, "though this be madness, yet there is method in't." I often felt a bit crazed in meeting deadlines and scheduling calls, dealing with issues and putting out fires, but hopefully some saw the method in my madness.

I am thrilled we accomplished what I hoped we would this year – the Public Interest Law Section now has a website – www.FlaPublicInterestLaw.org – and a twitter account - @FLPILS. Our committees are busy filling both with resources that will make it easier for our members to keep up with the excellent work everyone is doing. It seems odd in 2016 that either of these should be major accomplishments, but lacking the vast resources of many of the other Bar sections, these otherwise routine tasks take on bigger meaning. At the Council of Sections meeting, when section chairs share what they are accomplishing, I learned that there are sections able to spend the sum of our entire budget just on maintaining their website.

But more importantly than what I may have helped accomplish this year is what this experience has given me. I have been a Bar member for three decades but like many have mostly paid my dues, read the great publications, and moved on. As a part of section leadership, I had the opportunity to meet others in section leadership and learn that even though they may have access to greater resources, we all suffered from the same concerns – keeping membership strong, attracting the young attorneys to participate and making money off of section CLE events in the age of internet competition from everywhere. With the Bar, I have learned about the multifaceted functions the Bar covers and the services it provides to the sections – again sometimes at a steep cost for our section.

This year has also given me the opportunity to learn about the work of our different PILS committees. I have joined as many committee calls as possible and been amazed at the depth of knowledge on the different substantive issues our PILS members have. So many are volunteering their time to protect the rights of individuals in areas of children's rights, parents advocacy, homelessness, disability, civil rights, nonprofits, and consumer and tenant protection. Committee members volunteer hours creating trainings, pursuing legislative positions, appearing as amicus, and discussing in depth issues important to the various substantive areas.

Finally, I have enjoyed meeting and working with many new friends and colleagues I have met this year. Our section liaison, Calbrail Bennett, has been my wonderful guide this year and I could not have made it without her. I greatly enjoyed working with John Copelan, chair elect, and sad at his untimely passing, but look forward to the great plans ahead for our next chair, Sarah Sullivan.

Thank you everyone for putting up with my moments of "madness" – I hope you all saw a bit of method it in. I have enjoyed serving the PILS members this year. ▪

This publication was produced on behalf of The Florida Bar Public Interest Law Section by the Public Interest Law Society of Nova Southeastern University Shepard Broad College of Law.

Hot Topics: News from Practice

Consumer Financial Protection Bureau Considers Proposal to End Payday Loan Debt Trap

By **Rabab Hussain**
Student Writer

On March 26, 2015, the Consumer Financial Protection Bureau ("CFPB") announced that it is considering proposing rules to regulate predatory payday loans. The rules under consideration would apply to payday loans, vehicle title loans, deposit advance products, open-end loans, and certain high-cost installment loans. This proposal promotes the fundamental principle surrounding responsible lending: check the borrower's ability to repay the loan on the terms it is given. The rules would also avoid the excessive fees that accrue when lenders attempt to collect payment on the loans from the consumer's bank accounts. The proposals are aimed at targeting the detrimental practices associated with these loans, such as failure to underwrite for affordable payments, accessing the consumer's bank account for repayment, repeatedly rolling over/refinancing loans, and holding a security interest in the consumer's vehicle as collateral.

Scope Of The Proposal

The proposal consists of two parts. One part is directed to short-term loans of 45 days or less. The other addresses loans with a term of 45 days or more, in which the lender has access to the borrower's checking account or holds a security interest in the borrower's vehicle, where the all-in APR is over 36%. The proposal notes that the CFPB is considering providing lenders with an alternative to determining the ability to repay, for both the short-term and long-term loans. If this is adopted, it would completely undermine the ability to repay principle and the overall effectiveness of the regulations.

Short-Term Loans

The rules for the short-term loans would give the lender two options: (1) Based on the borrower's financial obligations, the lender would determine their ability to repay at the front-end, or (2) not determine the ability to repay at the front-end for loans of $500 or less, but limit refinancing the loans to two series of three loans. In regards to the second option, the total indebtedness in a twelve-month term would be limited to 90 days.

Long-Term Loans

The rules for the long-term loans would also give the lender two options: (1) Based on the borrower's financial obligations, the lender would determine their ability to repay at the front-end, or (2) For loans with a six months or less term: either (a) offer terms consistent with the National Credit Union Administration's existing small-dollar program, or (b) limit loan payments to 5% of the borrowers gross monthly income (with no consideration of current expenses).

Payment Collection Practices

The proposal also includes protections around lender collection practices. First, lenders would have to give at least three days notice to consumers before attempting to collect payment from the debtor's account. Second, there would be a limit on attempts to collect payment from the debtor's account.

Why Regulations Are Needed

The CFPB's data shows that 75% of all payday loans are from borrowers with more than 10 loans per year, with four out of five of them being rolled over or renewed within two weeks basis. For most consumers, what starts out as a short-term solution to a financial shortcoming can turn into a long-term debt trap.

Payday lenders promote their two-week loans as the solution to short-term financial problems, and about half of the initial loans are repaid within a month. What is more troubling is the 20% of new payday loans are rolled over six times, in which case the borrower ends up paying more in fees than the original principal. It is evident that lenders earn a substantial amount of revenue from loan flipping. This occurs when the loan is not affordable and the lenders actually are disincentivized to lend to borrowers who do have the ability to repay. An ability to repay requirement is essential for payday loans, where the market incentive to underwrite is nonexistent on the lenders part because the lender has direct access to the borrower's checking account. This means that the lender is not relying on the borrower's ability to repay, but the ability to collect on the loan whether the borrower can afford it or not.

The regulations proposed by the CFPB will have a widespread impact and protect borrowers from these predatory loans. The rules have two different approaches—prevention and protection. The first approach require lenders to initially determine that the borrower is not taking on debt they cannot handle as a result of their current financial obligations. Under the second approach, lenders would have to comply with many restrictions designed to ensure that debtors can afford to repay their debt. The only downfall is lenders can choose which set of requirements to follow in regard to determining the ability to repay for both the short-term and long-term loans. ▪

Coming Soon to a Courtroom Near You: Juvenile Law Certification

Introduction

After years of advocacy by the Public Interest Law Section and the Legal Needs of Children Standing Committee, in 2014, the Florida Bar Board of Governors approved a new area of board certification: Juvenile Law.

Rule 6-29.2(a) defines "juvenile law" as the practice of law that inherently and directly impacts children. This certification is unique to Florida because it covers two distinct areas of the law: dependency (including termination of parental rights) and delinquency. Although Florida is home to a number of practitioners who regularly handle delinquency and dependency matters, they are the exception. More commonly, attorneys who practice juvenile law focus their work solely in dependency or delinquency, but not both.

The inaugural certification committee, led by long-time PILS Executive Council members, Robin Rosenberg (chair) and Rob Mason (vice-chair), has the challenging task of writing policies to implement the standards approved by the Supreme Court of Florida, drafting the examination, and reviewing the initial class of applicants while being mindful that many applicants will have little experience in one of the areas of law covered by the certification. The exam specifications are expected to be released no later than the end of March 2016 with the applications being due this fall.

PILS's Children's Rights Committee is working with advocates in both fields from around the state to ensure that attorneys who are interested in becoming certified are able to obtain the necessary CLEs and prepare for the exam. Stay tuned for further details.

By **Samantha Evans**
Student Writer

Summary of Rule Requirements

The standards for board certification in juvenile law are enumerated in subchapter 6-29.3 of the Rules Regulating the Florida Bar. Fl. Bar. R. 6-29.3 sets out the minimum requirements in order to quality for certification.

(a) Minimum Period of Practice: Rule 6-29.3(a) states that that the minimum period of practice for an applicant is substantial involvement in the practice of law for at least five years immediately preceding the application.

(b) Practice Requirements: Rule 6-29.3 (b) states the practice requirements are as follows: (1) substantial involvement: must demonstrate substantial involvement in the practice of juvenile law during three of the last five years, immediately preceding application; (2) practical experience: must demonstrate substantial practical experience in juvenile law by providing examples of service as the lead advocate in a minimum of 20 fully adjudicated trials arising from petitions for dependency, termination of parental rights or delinquency. If at least 10 of the trials occurred during the five years immediately preceding application, the requirements of rule 6-29.3(b)(1) are met; (3) other experience: on good cause shown, the juvenile law certification committee may substitute other experience in juvenile law as defined for the portion of the trials as it deems appropriate.

(c) Peer Review: Rule 6-29.3(c) states that the applicant must submit the names and addresses of six lawyers, non-relatives, current associates, partners or anyone who practices in the same governmental entity as the applicant. At least four must be members of Florida Bar. The attorneys must have experience in juvenile law and be familiar enough with the applicant to attest to their special competence in juvenile law as well as their character, ethics and reputation for professionalism in the legal field. The applicant must also submit the name and address of one judge before whom they've appeared in juvenile law matter within the five-year period immediately preceding.

(d) Education: The applicant must show a completion of 50 credit hours of approved continuing legal education in juvenile law during the three-year period immediately preceding date of application.

(e) Examination: Finally, the applicant must pass a uniformly administered examination.

(f) Exemption: However, if the applicant meets the above standards plus the requirements set forth in 6-3.5(d), the applicant is exempt from having to take the examination.

The need for certification in this area is pivotal because certification brings a higher level of accountability to the field. It ensures the public that the board certified attorney is competent and committed to excellence in the field. This is especially important with children, the most susceptible clients. Board certification recognizes the excellence of lawyers in a field of law and professionalism and ethics in the area of law. Certification also serves a great importance to the public and the Florida Bar by helping clients choose a lawyer they know strives for quality, as well as practicing with professionalism in their practice. The need for certification in juvenile law was a long time coming, and after implementation of the new standards will prove to be worth it in the future. ▪

To read more about Florida's new certification requirements, visit: https://www.floridabar.org.

"The Lender's Risk of Not Being Repaid"

The following draws in part from a previously published section of the same title in a book published by the American Bar Association in 2015. See Dennis J. Wall, Lender Force-Placed Insurance Practices § 2.2 (American Bar Association 2015).

By **Dennis J. Wall, Esq.**
Guest Writer

Dennis J. Wall, Attorney at Law
A Professional Organization

There are cases when the present value of collateral is not enough to guarantee that you or I, or our clients, or any other borrower will repay a loan. Even if we are the type of persons who are used to making sacrifices in order to pay our debts, there are two important realities at work here: First, although lenders may or may not know that individual borrowers are willing to make sacrifices to pay ***our*** debts, lenders certainly know that there are many people who are unwilling to make the same kinds of sacrifices in order to pay ***their*** debts. Second, on some future day it is conceivable that ***any*** borrower may be unable to repay a loan depending on circumstances.

To protect lenders against the risk that collateral will decrease in value, lenders and borrowers contract for insurance to protect the collateral. This insurance, simply enough, is called collateral protection insurance.

If the borrower does not pay the insurance premiums, or if the collateral protection insurance is no longer in place to protect the lender for any other reason, lenders and borrowers further contract for lenders to place the insurance on the collateral at the expense of the borrowers. This is called lender-placed insurance if you are a lender, or force-placed insurance if you are the borrower, or "lender force-placed insurance" or "LFPI" for short.

The lender force-placed insurance ("LFPI") will generally protect the lender's interest in the property, not ours. ***However, whenever we borrow money we will pay the premium whether we choose the insurance in the first place, or whether a lender places the insurance.***

Further, the premium for lender force-placed insurance is almost always ***much greater than the premium on our own homeowner's policy, for example,*** but at least the fact that the LFPI premium is so high comes to us and our clients as no surprise because we agreed to it.

In three years of research for my book, "Lender Force-Placed Insurance Practices" (American Bar Association 2015), I came across dozens of cases in which homeowners complained, not about premiums, but about abusive practices based on unauthorized charges hidden by lenders in force-placed insurance premiums. Lenders call these charges "commissions" and "reinsurance premiums." In their lawsuits, homeowners call these unauthorized charges "kickbacks."

I discovered that these hidden "add-ons" in LFPI premiums, whatever they might be called, quickly add up to a financial tipping point. In the case of mortgage loans, these hidden charges often cause homeowners to lose their homes. Moreover, many of the practices are still in full force by loan servicers and investors which long ago bought the loans and replaced the original lenders.

The history of force-placed insurance abuses did not begin in 2007 or 2008, which is roughly when the Great Recession began. We are, most of us, still living through the Great Recession in 2016.

The misuse of force-placed insurance in order to make a profit is part of a business model that has been around a long time. It is a part of the cost of doing business in the eyes of many who follow that business model. It all starts with a contract which is often written in a "language" that is difficult for homeowners or car buyers or many other borrowers to understand. The number one reason that many people do not even read their loan contracts is that the contracts are written in such a way as not to be understood by average people. Many lenders know and rely on this well-known fact.

That is a good reason to read the contract even if it takes assistance to understand what you are reading. Understanding the basic "costs of doing business," moreover, is essential in order to assist people in keeping their homes and goods off the auction block and away from a sheriff's sale on the courthouse steps. ▪

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Outlook: Perspectives on Law and Practice

Q & A with Sarah Sullivan: *PILS Chair-Elect, Professor of Professional Skills at Florida Coastal School of Law*

By **Shantanu Patel**
Student Writer

Sarah Sulluvan, Esq.
2016-2017 PILS Chair-Elect
Professor of Professional Skills at
Florida Coastal School of Law

How long have you been involved with the Public Interest Law Section (PILS) of The Florida Bar?

I have been a member on and off since I became a member of the Florida Bar almost 20 years ago, but I got involved in committee work and the Executive Council about four years ago.

What are you most excited about as the new PILS Chair-Elect?

I am excited about leading the diversely talented group of advocates that work for the Section. As Disability Chair, I was always amazed at the depth of talent as well as the breadth of experience my colleagues brought to make differences in the lives of those individuals that need representation the most.

What are your goals for the upcoming year as the PILS Chair-Elect?

Access to justice is an issue that I have been passionate about for several years and PILS is in a great position strategically to be a part of the movement to address this crisis in our profession.

What other PILS committees have you been involved with?

I have chaired the Disability committee for several years.

What have you learned from being involved in those committees?

I have learned that we have such a talented group of members throughout Florida who have given up pecuniary gain to help the most vulnerable citizens and they not only are leaders in their organizations, they are leaders in the Bar.

Where are you currently working?

I am a clinical professor at Florida Coastal School of Law.

How long have you been working there?

Since August 2009, before that I worked as a Senior Staff Attorney with Jacksonville Area Legal Aid, Inc. doing elder law, public benefits and family law.

What will you most miss about your previous position?

I was looking forward to John Copelan's leadership as chair of the Section and having the time under his mentorship to further the efforts of PILS. We will miss him dearly and I hope that as chair, I can honor him and his vision for the Section.

Do you have any life experiences which you feel will help you as the PILS Chair-Elect?

I have worked at legal aid, for a state agency, in private practice and now at the law school. Having had those experiences will provide me with different perspectives and policies within public interest law. I'm also a professional woman with a young family, so I have become a whiz at multi-tasking, as well as not taking myself too seriously. When you are in leadership, those are two qualities that will serve you well! ▪

Personal Questions:

Q: Favorite food?

A: Sushi

Q: Favorite book?

A: Wuthering Heights

Q: Favorite TV show?

A: Game of Thrones

Q: Favorite sports team?

A: New England Patriots

Low Bono Legal Aid:

The Ethical Implications and Recommendations

By **Jeffrey Fromknecht, Esq.,**
Guest Writer
Managing Attorney at Side Project Inc., and
Leighton Regis,
Student Writer

There is an overwhelming need for more affordable legal services in Florida. The Florida Access to Justice Commission reported that "Less than 20 percent of the legal needs of low income Americans are being met." "Florida Commission on Access to Civil Justice Interim Report" 1 Oct 2015 (http://www.flaccesstojustice.org/wp-content/uploads/2016/01/Florida-Commission-ATJ-Interim-Report.pdf). With 87% of attorneys in Florida charging more than $150 per hour, people with low and medium incomes often choose not to hire a lawyer due to the cost. Ibid. This results in a disproportionate number of individuals going through legal proceedings without representation, especially in areas such as family law, landlord-tenant issues, and debtors rights. Wright, Sam. "Florida Legal Aid Funding Proposal Fails." Above the Law 14 July 2015. Too many individuals are stuck between not qualifying for legal aid and lacking the resources to engage a traditional attorney. The lack of legal services for this large population caught in the middle is known as the "Justice Gap" and has been well documented and studied by the Florida Bar Access to Justice Commission. "Florida Commission on Access to Civil Justice Interim Report" 1 Oct 2015 (http://www.flaccesstojustice.org/wp-content/uploads/2016/01/Florida-Commission-ATJ-Interim-Report.pdf). The Access to Justice Commission has focused on five areas to combat civil justice gaps:

1. Outreach
2. Access to and the delivery of Legal Services
3. Continuum of Services
4. Technology
5. Funding

Ibid. This article builds on the ideas and spirit of the Access to Justice Commission and describes the *low bono legal aid* model, a new option for the delivery of legal services for those caught in the justice gap. The *low bono legal aid* model is a hybrid between pro bono legal services offered at no cost and the $150+ per hour rate charged at most law firms. Health and human service nonprofit organizations have been using similar models for decades and many states and university and nonprofit based public interest programs have started to explore this type of model to improve access to justice in their communities. After describing the model, the article discusses potential ethical implications and strategies to mitigate potential ethical concerns.

Many legal aid organizations do not have the financial resources to provide free legal aid services to all of the people in the community in need of civil legal services, and grant dollars for legal services are not able to fully meet the existing need. Low bono legal aid describes the practice of a legal aid nonprofit organization charging a sliding fee to clients for the services of a staff lawyer at the legal aid organization. A sliding fee scale allows the client to contribute what they can afford and is based on the clients adjusted gross income; a practice that is often used by social and medical providers for low and middle-income families. By purchasing the service, the client now has a stake in the outcome. This serves to empower the client and make them feel a part of the process. The low bono legal aid model is a sustainable program that serves the legal needs of low-income families and can supplement existing legal aid programs without competing for legal aid grant dollars. This model is currently being used in many jurisdictions. In Utah, Open Legal Services of Utah ("OLS") is one example of a growing trend of lawyers who are choosing to practice law for the public good, not just for a profit. *See* http://openlegalservices.org/about/. OLS is a 501(c)(3) registered nonprofit public charity. The organization serves individuals who cannot afford a traditional attorney and charges them a fee based on their income. Clients must be between 125% and 400% of the federal poverty level to qualify for the program. The organization does not seek grant funding and has been self-sustainable for several years. In Washington D.C., The DC Affordable Law Firm is a 501(c)(3) public charity whose mission is to serve individuals and families whose income level is between 200% and 400% of the federal poverty level, charging reduced rates for legal services. The DC Affordable Law Firm provides representation in four areas: 1. Family Law, 2. Business Law, 3. Housing Law, and 4. Immigration Law. *See* http://www.dcaffordablelaw.org/. There are similar organizations in Chicago, Minnesota, Seattle, and New York. In Florida, support for the concept is growing and there are a few organizations beginning to explore the model. However, the question remains in Florida and other jurisdictions: Does a low bono legal aid model violate the Rules of Professional Conduct?

ETHICAL CONCERNS

There are no rules within the Florida Rules of Professional Conduct that specifically prohibit or allow a nonprofit legal aid organization to operate a low bono legal aid program for individuals from low income and underserved communities who do not qualify for Legal Aid and cannot afford a private attorney. It should be noted, that many legal aid organizations may be restricted by grant requirements from providing a low bono option. This is a critical issue, but is not within the scope of this article which focuses on the ethical implications of a low bono model. The following Rules of Professional Conduct could be implicated by the low bono model:

1. RULE 4-8.6 AUTHORIZED BUSINESS ENTITIES
2. RULE 4-5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

Florida Bar rule, *4-8.6 Authorized Business Entities* does not specifically authorize a nonprofit legal aid organization as a type of authorized business entity, nor is it addressed in the comments. However, *Florida Bar Opinion 72-69* does allow for the formation of a nonprofit corporation to provide free legal assistance to persons who, although unable to employ counsel, do not qualify for Legal Aid. (See: http://www.floridabar.org/TFB/TFBETOpin.nsf/ca2dcdaa853ef7b885256728004f87db/6c368e3ca01259b885256b2f006cb5e9?OpenDocument). This opinion, from 1972, examines the issue of whether the formation of a nonprofit corporation with the purpose of providing legal assistance to those in the

community who are otherwise unable to secure the services of an attorney violates the Canons of Ethics. This opinion predates the current Rules of Professional Ethics, but is still in force as an advisory opinion. The majority of the committee approved the proposal and found it permissible under the Canons of Ethics in place at the time. Moreover, the United States Supreme Court in *United Mine Workers v. Illinois State Bar Association* upheld, as a matter of constitutional law, the right of a nonprofit organization to employ staff attorneys to provide legal representation to certain groups of people. *See* United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967). From a practical perspective, the work of nonprofit legal aid organizations and the hiring of lawyers by a nonprofit organization is well known and supported by the Florida Bar and the Florida Bar Foundation (*See* Florida Bar Foundation: https://thefloridabarfoundation.org).

The overarching purpose of Florida Bar rule *4-5.4 Professional Independence Of A Lawyer* is to protect the lawyer's professional judgment. Rule 4-5.4(d) prohibits a lawyer from allowing "a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." Legal services programs, government agencies and corporations often employ lawyers who are supervised by non-lawyers. Florida Rule 4-1.8(f) allows a lawyer to "accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent." Many legal aid organizations already deal with this issue and some organizations have implemented corporate policies to prevent such interference. The Board of Directors of these organizations should be permitted to set the general organizational policies that identify the types of cases that the organization is willing to provide representation on. However, once a case is selected and assigned to a lawyer, the Board of Directors and management team should not interfere with the objectives, strategy, tactics or any other aspect of the professional judgment of the lawyer handling the case.

Rule 4-5.4(a) is of more concern to a low bono program run by a nonprofit legal aid organization. The rule governs sharing of fees and generally prohibits the sharing of legal fees with a non-lawyer, subject to five exceptions. The sharing of fees with a nonprofit legal aid organization is one of the exceptions provided by the rule. To wit, Florida Rule 4-5.4(a)(5) provides that "a lawyer may share court-awarded fees with a nonprofit, pro bono legal services organization that employed, retained, or recommended employment of the lawyer in the matter." This exception falls inline with The ABA Model Rules and other jurisdictions who apply similar fee sharing restrictions only "to corporations and associations organized to practice law for a profit." ABA Formal Op 93-374 (1993). This opinion was later added by amendment to ABA Model Rule 5.4 Professional Independence of a Lawyer.

Does charging of an income-contingent and minimal fee, which is well below market value, change this analysis? While the 4-5.4(a)(5) exception is not squarely on point with a low bono legal aid model, the spirit of this exception should also permit an exception for a low bono legal aid program. Many scholars and commentators distinguish the practice of law "for a profit" from the practice of law "for the public good" and often exclude nonprofit legal aid organizations from fee sharing restrictions, as they are not engaged in the practice of law "for a profit." Legal aid organizations serve the public good by working to ensure that everyone has access to justice, a right that should not be determined by your annual income and ability to hire a lawyer. A low bono legal aid program is not the practice of law for profit, but rather the practice of law for the public good. ABA Formal Opinion 93-374 notes that there "is less of a threat to the lawyer's independent judgment" when a nonprofit organization is involved in the fee sharing arrangement. A nonprofit has neither legal owners nor shareholders, and no financial incentive to try to influence the lawyer's professional judgment. Its assets are in the public trust overseen by an independent and uncompensated Board of Directors. The economics of the client population prevent the charging of unreasonable fees. The low bono legal aid fee model is significantly discounted from market rates, and determined based on an individual's ability to pay. Economic considerations are of relative unimportance in the relationship between the lawyer, the legal aid organization and the client, and unlikely to control the professional judgment of the lawyer. The danger of improper lay interference in this situation is minimal.

To encourage innovation, the Florida Bar could take the proactive step of amending the Rules of Professional Conduct to include an additional exception to the 4-5.4 fee sharing restriction allowing for low bono legal aid models operated by tax-exempt nonprofit organizations. Consistent with the existing exception in 4-5(a)(5), the low bono exception could provide that "a lawyer employed by a 501(c)(3) public charity may share fees with a nonprofit, pro bono legal services organization as part of a low bono legal program." The Florida Bar already has a process for certifying legal aid organizations, allowing them to then employ certified legal interns, out-of-state attorneys, and retired, volunteer lawyers on a part-time basis. See Rules Regulating the Florida Bar (https://www.floridabar.org/tfb/TFBLawReg.nsf/9dad7bbda218afe885257002004833c5/4586762990367be185256e4300524284!OpenDocument), Chapter 11 (Rules Governing the Law School Practice Program); Chapter 12 (Emeritus Attorneys Pro Bono Participation Program); Chapter 13 (Authorized Legal Aid Practitioners Rule). This certification process could be extended to any legal aid organization seeking to implement a low bono legal aid program. There are many items the Bar would want to consider, but the certification process could include:

1. Proof of 501c3 tax exempt status;
2. Registration under the Florida Solicitation of Funds Act;
3. Copy of Board Policy on ensuring the independent, professional judgment of the lawyer
4. The establishment of a separate fund for the collection of the low bono fee, with the proceeds of the fund to be used exclusively for the unmet legal needs of poor and working poor.
5. The publication of an annual report that documents the number of low and middle income clients served, the income limits of the program, a copy of the fee schedule, and the number of both pro and low bono legal hours performed by the organization.

With these provisions in place, the provision of low bono legal aid services does not threaten the underlying purpose of rule 5.4 to protect the lawyer's professional judgment.

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Low Bono Legal Aid:

The Ethical Implications and Recommendations

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All Floridians, regardless of their socio-economic status, deserve to have access to justice. The low bono legal-aid model is a simple solution to the access to justice issue: a compromise between the Bar and the people. The low bono solution shares the burden of providing legal services between both the lawyer and the client. This approach results in the client not only having his or her legal issues resolved, but also feeling empowered by the process. This model is tried and tested, and has been shown to improve access to qualified attorneys and help people resolve their legal problems and concerns. While the Florida Bar Rules of Professional Conduct and the Ethics Opinions do not specifically address low bono legal aid services; public policy strongly suggests the Florida Bar would not only welcome such a novel approach to address the access to justice crisis in a sustainable way, but should also consider taking a leadership role in the development of this and other innovative legal aid models. ▪

Disability Rights Florida, Florida Justice Institute, and Morgan & Morgan, P.A. Join Forces to Assist Florida's Prisoners with Disabilities

By **Dakeitha Haynes**
Student Writer

Felix Garcia, an incarcerated hearing impaired man, was denied hearing assistance to watch television, a right Florida prisoners without this disability are granted. Mr. Garcia filed suit, pro se, against the Florida Department of Corrections ("FDOC") for denying him rights that were protected by federal disability law. He was later assisted by the Florida Justice Institute ("FJI") and the Jacksonville Area Legal Aid's Deaf/Hard of Hearing Legal Advocacy Program ("JALA"). His case was settled at mediation and has shed light on an ongoing issue involving the FDOC and their continuous refusal to comply with instructions set forth in federal law to protect incarcerated individuals with disabilities. *Garcia. vs. McNeil, et al,* Case No. 4:07-cv-00474-SPM-WCS.

FJI, JALA, and Disability Rights Florida ("DRF"), the statewide designated protection and advocacy system for individuals with disabilities in the State of Florida, conducted further investigation into the FDOC's treatment of persons with disabilities. FJI began collecting letters and sending public record requests in mid to late 2012. This led to FJI corresponding and speaking with more prisoners through mid-2013. DRF became involved in the investigation in early 2014. The organizations found that there were problems in the Florida prisons that went beyond that of Mr. Garcia's case. The investigation revealed that the FDOC is denying adequate accommodations to prisoners who are deaf, hard of hearing, blind, have low vision, and have mobility impairments. These disabled prisoners expressed they are being denied aids and services needed to gain equal access to facilities and programs other non-disabled prisoners are systematically granted. The investigation revealed how indifferent the FDOC and its staff are to the primary consideration for prisoners' needs. In addition, specific incidents where prisoners with disabilities were denied jobs, unable to benefit from educational programs, and not provided aid during medical appointments were discovered.

As a result of this discovery, DRF, FJI, and Morgan & Morgan, P.A. filed a federal lawsuit against the FDOC on January 26, 2016. The suit was filed in the United States District Court in the Northern District of Florida, for failing to follow laws set forth under the Americans with Disabilities Act ("ADA"), the Rehabilitation Act, the Eighth Amendment, and the Due Process Clause to protect prisoners with disabilities. *Disability Rights Florida v. Jones*, Case No. 4:16-cv-00047-WS-CAS. The Complaint references instances where prisoners with mobility impairments are denied wheelchairs. Others who are given wheelchairs are given the wrong sizes, wheelchairs without assistance or "pushers," causing them to miss meals, or wheelchairs that are rotting and molding. Those prisoners who are hard of hearing or deaf are denied interpreters, are not supplied hearing aids, and are given only one hearing aid or broken hearing aids. Blind prisoners are not allotted the opportunity to access law library materials because institutions are not equipped with speech-to-text software that allows computer text to be read out loud.

The Complaint further states that prisoners are being retaliated against by FDOC staff after complaining about staff members failing to adhere to the laws set forth in the ADA. FDOC staff members interfere with prisoners ADA rights to report ADA violations by confiscating grievance documentation, attorney mail, and medical records, which are never returned to prisoners but instead destroyed. Other prisoners are physically assaulted by guards, and threatened with disciplinary reports. Prisoners are told to "shut up" during ADA review meetings, which are specifically set up for them to voice their concerns about the denial of ADA accommodations. After such meetings, prisoners are also forced to sign refusal forms to confirm they have no pending ADA issues.

Executive Director of FJI, Randall C. Berg, Esq. addressed the issue concerning prisoners with disabilities being denied their ADA rights, "even though they are in prison, the law requires that they be properly accommodated so that they can have equal access to programs, services, and activities. But the Florida Department of Corrections is not following the law." This lawsuit is the first necessary step to bring further awareness to this issue and eventually bring an end to the suffering and humiliation prisoners with disabilities wrongfully face in Florida prisons. The FDOC has not yet responded to the Complaint. The FDOC has filed a motion requesting an extension, however, the court has not ruled on that Motion. The court is expected to enter a new order on the final dates for this case soon. ▪

Case Note

Montgomery v. Louisiana:

U.S. Supreme Court Holds Sentencing Juveniles to Life Without Parole Unconstitutional, Redress for Former Juvenile Offenders

By **Nathan Nelson**
Student Writer

In 1963, Petitioner Henry Montgomery was found guilty of killing a sheriff in Louisiana. As a result, he was automatically sentenced to life in prison without parole. Mr. Montgomery was 17 years old—a juvenile at the time. Years later in 2012, the United States Supreme Court decided the case of *Miller v. Alabama*, which held that mandatory life without parole for juvenile offenders violates the Eighth Amendment's prohibition on cruel and unusual punishments. *Miller v. Alabama*, 132 S. Ct. 2455 (2012). After learning of the federal court's holding, the Petitioner moved for collateral relief from the state trial court, citing to the Supreme Court's holding in *Miller*. Both the trial court, and subsequently the Louisiana Supreme Court, denied his motion stating that the ruling in *Miller* does not have a retroactive affect. Through a writ of certiorari, Montgomery petitioned the United States Supreme Court to hear his case.

Upon granting the writ, the Supreme Court identified the two main issues that needed to be resolved. First, whether the Supreme Court had jurisdiction to review the Louisiana Supreme Court's decision and second, should the holding in *Miller* have been retroactively applied for Mr. Montgomery.

In his dissent, Justice Antonin Scalia wrote that the Court did not have jurisdiction to decide this case. He argues that Supreme Court cases on collateral review from state court decisions are to be viewed differently then those appealed directly from a federal court ruling. He suggests that a state court need only apply the constitutional rule that existed at the time of the conviction, and the Court lacks jurisdiction to review that decision.

In deciding both the jurisdictional and the substantive issues, the majority determined that the Court only needed to determine if the decision in *Miller v. Alabama* was a substantive rule of constitutional law. When a state court fails to apply a substantive rule, that decision becomes reviewable because failure to apply a substantive rule always results in the violation of a constitutional right. In contrast, failure to apply a procedural rule may or may not result in an illegitimate verdict. Because of this, a court denying a person's constitutional right is reviewable by the Supreme Court and grants them jurisdictional powers to review. This framework for what constitutes a substantive rule of constitutional law was outlined in *Teague* v. *Lane,* 489 U. S. 288 (1989). In *Teague* the Court stated that although new constitutional rules of criminal procedure are generally not retroactive, it recognized that courts must give retroactive effect to substantive rules of constitutional law. Substantive constitutional rules include "rules forbidding criminal punishment of certain primary conduct" and "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Penry* v. *Lynaugh*, 492 U. S. 302 (1989).

Ultimately, the Court in *Montgomery* held that, when the court establishes a substantive constitutional rule, that rule must apply retroactively. The Court also held that *Miller* established a substantive rule because it sentenced a juvenile offender to life without parole. The majority in *Montgomery* stated that because the Constitution treats children as different from adults for the purposes of sentencing, the ruling against the Petitioner was an unconstitutional punishment for a class of defendants based on their juvenile status. Because of this, the judgment of the Supreme Court of Louisiana was reversed and remanded. This decision will prevent juvenile offenders from being sentenced to life without the possibility of parole for offenses committed both in the future and those who were denied the right in the past. ▪

The Florida Public Interest Journal: *Call for Submissions*

Do you have a topic you want to write about? PILS is seeking interested members willing to write about public interest law issues. Send us tips about cases, issues, or topics we should be covering.

Contact Kathy Grunewald, Esq. if you are interested at Kathy@floridalegal.org.

Call for Papers:

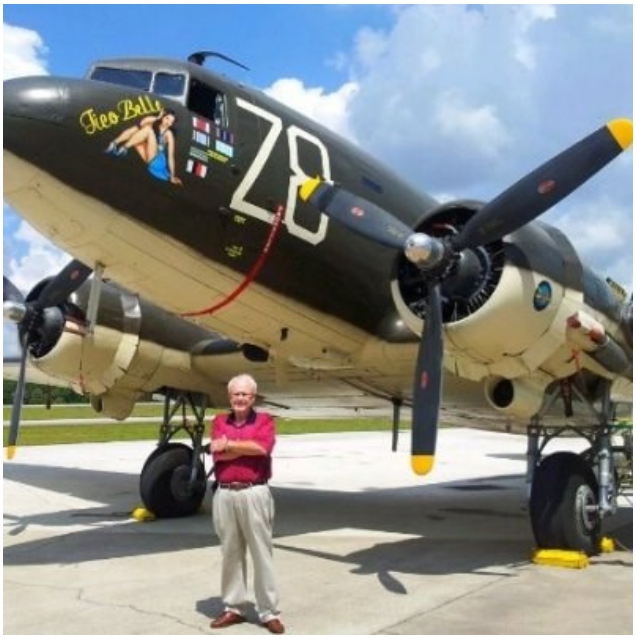
The Public Interest Law Section is pleased to once again cooperate with the Florida Coastal Law Review in the annual publication of scholarly legal articles and case notes for their 17th volume. The Public Interest Law Section of the Florida Bar is in its 27th year of being at the forefront of the Florida Bar as a forum for discussion and exchange of ideas leading to increased knowledge and understanding of the areas of public interest law with committees including a Civil Rights Committee, Consumer Protection Committee, Disability Law Committee, Homelessness Committee, Children's Rights Committee, Nonprofits Committee and Parents Advocacy Committee.

A special welcome to Christina L. Heath, Symposium and Submissions Editor for the 2016-2017 year who is a third year law student at Florida Coastal Law School who in the top five percent of her class and has served as a Research Assistant for the Public Interest Research Bureau.

The Florida Coastal Law Review invites submissions of articles, notes, essays, and other scholarly writing from practitioners, authors, and academia. Featuring legal scholarship highlighting public interest law for the 2016 Winter journal. Deadlines for abstracts are April 15 and completed manuscripts are July 1. All correspondence can be sent to Florida Coastal Law Review's Submissions and Symposium Editor,
E-mail: Christina.heath@law.fcsl.edu

The Review prefers manuscripts between eighteen to forty law-review pages in length or 9,000 to 20,000 words.
The Review requires the use of footnotes rather than endnotes. Footnotes should conform to the 20th edition of The Bluebook. Additionally, the Review strongly encourages authors to footnote all material not attributable to the author's own voice. Prospective authors may submit their manuscripts in Microsoft Word format electronically to the Submissions and Symposium Editor.

Remembering John Copelan, Jr.



John J Copelan, Jr., Chair Elect of the Public Law Interest Section passed away unexpectedly in March.

John practiced in the public sector for over thirty years at local, state and federal government levels and most of those years have been in management positions. Prior to entering private practice again in 2011, he served with the Department of Children and Families for the State of Florida serving as General Counsel under three Secretaries during the administrations of Governor Charlie Christ and Governor Jeb Bush, and as Director of Preventive Law where he managed a statewide preventive law program including representation in mediations, case reduction through risk management and on claims bills during the legislative session. As General Counsel he supervised legal offices statewide including attorneys at the State Hospitals, Regional Counsel offices and the General Counsel Office. For almost a decade he was the County Attorney for Broward County, the second largest County in Florida, serving as top legal advisor to the Broward County Commission and Government and supervising over forty attorneys. Before that he served as the Deputy City Attorney for the City of Miami with management responsibilities in the areas of Procurement and Commercial litigation, land use, recruiting and supervision of the Legal Intern Program and for legal advice to the Police and Fire Departments. He began his career as a trial attorney for the Army JAG Corps where he prosecuted cases on behalf of the United States Government. During the War on Terrorism he served on active duty as a Lieutenant Colonel with the 3rd Infantry Division as part of Operation Enduring Freedom in charge of legal operations for the Solider Readiness Center at Fort Stewart, Ga. He was a partner in the Government Practice Group for the Fort Lauderdale Office of Shutts & Bowen, LLP, a statewide law firm in private practice concentrating on government law and government relations after leaving the County. John was an active member of PILS and the Executive Council and was looking forward to serving as Chair of the Section. ▪

Get on board: *Join a Committee*

The Executive Council of PILS has established a **Long-Range Planning Committee** to develop a strategic plan to guide our Section over the next several years. Contact Alice Vickers, Chair, if you are interested (alicevickers@flacp.org).

The **CLE Committee** works to put together quality continuing legal education as a section service. Additional programs are in the planning stages. Contact Kathy Grunewald, if you are interested in joining the Committee (Kathy@floridalegal.org).

The **Legislative Committee is** responsible for the Section's legislative advocacy efforts. Contact Laura Boeckman, if you are interested in joining the Committee (laura.boeckman@myfloridalegal.com).

Our substantive committees are an excellent way to connect to other public interest lawyers and work together on relevant legal issues.

Please contact the Chair of the Committee you wish to join for further information:

Children's Rights

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Parents' Advocacy

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Interested in developing a new committee in an area of law not listed here?

Contact Alice Vickers, Chair of the Section. ▪

THE FLORIDA PUBLIC INTEREST JOURNAL

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