What is a Guardian Ad Litem?– Understanding the Proper Role of a Guardian in Family Cases

by Anastasia Garcia, Esq., Coral Gables


A. GARCIA

A Guardian Ad Litem ("Guardian") serves an important fact-finding role in cases that involve minor children.[1] Generally, a Guardian is appointed to investigate issues so that the court, armed with as much information as possible, can safeguard the best interest of the minor children in the case. A judge once described the role of a Guardian as "having boots on the ground" to assist the Court. Sadly, the family courts frequently become battlefields with minor children as the innocent victims in a tug-of-war fueled by resentment and animus. Especially where timesharing is hotly disputed, or in cases where relocation is sought, a Guardian can be an invaluable foot soldier assisting the court in gaining a more complete and impartial perspective.

However, frequently, the parties do not understand the true role of a Guardian, and more surprisingly, neither do many lawyers. This article addresses the proper function of a Guardian, distinguishes a Guardian from an Attorney Ad Litem, and explores some situations where it may be more appropriate to appoint an Attorney Ad Litem than a Guardian.

Perhaps the best place to start as far as what a Guardian should be is to establish what a Guardian is not. A Guardian is not a case manager. While case management is one of the more tedious and least glamorous tasks in the legal profession, it is an onus that properly falls on others and should not be assigned to the Guardian. A Guardian is also not a vehicle to subvert the hearsay rules, which have the laudable purpose of excluding unreliable testimony not subject to the rigors of cross-examination. Parties often subvert the proper role of a Guardian by attempting to employ him or her as a conduit for the introduction of hearsay evidence through their testimony or written report. A Guardian is also not a parenting coordinator or a mediator of children's issues (unless there is a court-approved agreement so stating), and despite a common misconception to the contrary, a Guardian is not the child's "advocate."

So then, what is a Guardian Ad Litem? In answering this question, the appropriate place to start is Section 61.401 of the Florida Statutes, which governs the appointment of Guardians in family cases and, on its face, dispels the misconception that a Guardian is appointed to act as an advocate for the minor children. That provision sets forth that a Guardian is to be appointed as "next friend of the child, investigator, or evaluator, [but] a [G]uardian shall not act as attorney or advocate but shall act in the child's best interest." As the Third District Court has made clear, a Guardian is "regarded as the agent of the court,"[2] a far different role than that of an advocate.

Section 61.401 further distinguishes between a Guardian and an advocate for the child by providing that a court "in its discretion may also appoint legal counsel for a child to act as attorney or advocate" and prohibiting the same person from assuming both roles. It is critically important that lawyers understand and explain this distinction to their clients. Often times, parents call the Guardian and request that a pleading or motion be filed asking for relief they believe will benefit their child. Other times, they ask a Guardian to assist them in resolving an issue. While there are instances where a lawyer or a party may reach out to a Guardian, inquire as to the Guardian's investigation on a given issue, and use that information in an effort to reach a resolution, it is impermissible for a Guardian to become involved in championing a particular party's cause. When the Guardian attempts to explain that such matters are beyond the scope of their appointment, the clients sometimes become frustrated or irate. If the Guardian's proper role is explained to them from the onset, it would temper their expectations to a realistic level and help avoid such negative interactions between Guardians and parties.

Thus, it is advisable that during the initial meeting with each parent, a Guardian inquire as to what the parents believe his or her role to be. A majority of the time, they believe the Guardian's role is that of the child's attorney. Assisting the parents in understanding the Guardian's role will assist them in explaining the role correctly to their children.

The role of a Guardian has been the subject of much analysis. For example, in *Perez v. Perez*, the Third District Court of Appeals indicated that a basic function of a Guardian is to "protect the best interests of children"

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in custody disputes.[3] The Court recognized "society's interest in protecting children from the traumas of divorce and custody disputes."[4] The Court also indicated that a Guardian's role is to function as a "representative" of the child.[5] There is, however, a clear distinction between serving as a representative of a child and advocating on behalf of a child. Although the Court recognized that the authority of a Guardian may include requesting evaluations or discovery as part of the Guardian's investigation, it was careful to point out that "the duties and responsibilities of a Guardian Ad Litem are not coextensive with those of an attorney."[6] Moreover, the Court in *Perez* also made clear that the Guardian is to act in the best interests of a child, even if the Guardian's actions are against the child's wishes.[7]

Another commonly held belief is that a Guardian is a "party" in the proceedings. While Section 61.401 does state that a Guardian appointed to a case is a "party" thereto until discharged, a Guardian is clearly not a "party" in the traditional sense of the term. According to the *Perez* case, as children are not "parties" in their parents' divorce, the Guardian acting to represent the child's best interests is not a party either.[8] While a Court will often order that a Guardian be present at hearings, at depositions, and be served with pleadings as if they were a party, this is done solely for the purpose of ensuring the Guardian has the necessary tools for the investigation. It does not make the Guardian a "party" to the litigation in the traditional sense. Therefore, while lawyers and pro se litigants often reach out to the Guardian to try and make sure they attend every hearing and participate in all case proceedings, such universal participation is typically unnecessary and beyond the scope of the Guardian's appointment.

While many non-attorneys are routinely appointed as Guardians in family cases, the confusion regarding the Guardian's proper role is highest where the person appointed is a lawyer. As the Court stated in *Perez*, "the lines separating the functions of an attorney as [G]uardian and an attorney as advocate, can become easily blurred."[9] The American Bar Association has promulgated standards for lawyers representing children in family cases (the "ABA Standards").[10] In the commentary to the ABA Standards, it is suggested that when a court appoints a lawyer as Guardian in the typical investigatory capacity, it should "make clear that the person is not serving as a lawyer, and is not a party".[11]

The ABA Standards go on to distinguish between a "Child's Attorney," which is routinely referred to as an Attorney Ad Litem, and a "Bests Interests Attorney," which is analogous to a Guardian Ad Litem.[12] The Bests Interests Attorney as contemplated by the ABA Standards provides the services for the child's best interests, but is not "bound by the child's directives or objectives."[13]

Generally, an Attorney Ad Litem should be appointed to protect the minor child in cases where the child's rights or interests are directly conflicting with the interests of the parents. Although it could be argued that in all timesharing matters that are litigated, parents are unable to elevate their children's interests above their own, for the most part, parents litigate in a manner consistent with what they believe is best for their children. Accordingly, the appointment of an Attorney Ad Litem is not typically appropriate in the run-of-the-mill divorce case. Instead, an Attorney Ad Litem is generally appointed in "dependency, abuse and neglect proceedings, termination of parental rights proceedings, and juvenile delinquency proceedings."[14] Such matters are beyond the scope of this article.

However, situations do arise in divorce proceedings where the appointment of an Attorney Ad Litem is warranted. For example, a child has a right to confidentiality as to the child's relationship with a psychologist or psychiatrist. If the child's parents desire to pierce that confidentiality in order to obtain information to use in the proceedings, but the child wishes to preserve confidentiality, then an Attorney Ad Litem should be appointed as an advocate for the child, not to ensure the child's best interests per se, but rather to protect the child's wishes.

Where a lawyer is functioning as a Guardian Ad Litem rather than an Attorney Ad Litem, it is important to explain to the child precisely what the Guardian's role is so as not to create unreasonable expectations on the part of the child. The Guardian should explain to a child that he or she is there to aid the Court in its efforts to resolve the parents' issues. A Guardian has to be mindful of not making the child feel overly empowered, which could very well worsen an already difficult situation.

In promulgating the ABA Standards, the ABA decided to eschew the concept of a Guardian Ad Litem entirely, opining that "[t]he role of 'guardian ad litem' has become too muddled through different usages in different states, with varying connotations .... [and] has often been stretched beyond recognition to serve fundamentally new functions, such as parenting coordinator, referee, facilitator, arbitrator, evaluator, mediator and advocate."[15]

In order to preserve the Guardian's efficacy in its invaluable role as an impartial fact-finder for the courts, it is absolutely imperative that everyone involved understand the precise nature of the Guardian's function, including Judges, practitioners, litigants and their children. It is equally imperative that the Guardian's critical fact-finding role not be diluted and undermined through the imposition and assignment of new and additional extraneous functions, tasks and obligations. As cogently stated by the American Bar Association, "[a]sking

one Guardian Ad Litem to perform several roles at once, to be all things to all people, is a messy, ineffective expedient."[16]

Anastasia M. Garcia was admitted to the Florida Bar in 1992 and practices in Coral Gables Florida, concentrating her practice on Family Law, Guardian Ad Litem work as well as Family Mediation. She obtained her JD from The George Washington University. She is a past recipient of the Ray H. Pearson Guardian Ad Litem Award. She is a Supreme Court Certified Family Mediator as well as a Florida Supreme Court Certified Arbitrator. She presently serves on the Alumni Board of Florida International University and she serves on the Board of KidSide, where she is an immediate past President.

Endnotes

1 *Millen v Millen*, 122 So.3d 495, 497 (Fla. 3rd DCA 2013).

2 *Franklin & Criscuolo/Lienor v. Etter*, 924 So.2d 947, 949 (Fla. 3d DCA 2006).

3 769 So.2d 389, 393 (Fla. 3rd DCA 1999).

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.* at 394.

8 *Id.*

9 *Id.* at 395.

10 American Bar Association, Section of Family Law Standards of Practice for Lawyers Representing Children in Custody Cases (2003).

11 *Id.* at 2.

12 *Id.*

13 *Id.*

14 *Representing Children: Standards for Attorneys for Children in Custody or Visitation Proceedings with Commentary*, 22 Jour. Amer. Acad. Matrimonial Lawyers 227, 233 n. 9 (Dec. 2009).

15 American Bar Association, Section of Family Law Standards of Practice for Lawyers Representing Children in Custody Cases, at 2 (2003), at 2.

16 *Id.*

Unshackling Guardians Ad Litem from the Constraints of Florida's Hearsay Rule

By Anastasia Garcia, Coral Gables


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Commentators, courts and state legislatures have reached an almost universal consensus recognizing the pivotal role played by Guardians Ad Litem ("GALs") in the administration of justice by protecting vulnerable children.[1] The GAL's role has been alternatively described by the courts as "important," [2] "vital," [3] "critical,"[4] "crucial,"[5] "integral"[6] and "essential".[7] Since 1974, the appo intment of GALs to safeguard the interests of minor children "has proliferated."[8] "GALs now play a central role in the family and juvenile courts of every state."[9]

Pursuant to Florida Statute §61.403 ("Florida's Family GAL Statute"), GALs are appointed as agents of the Court, serving as the next best friend of a child, and as an investigator and/or evaluator in proceedings pursuant to Chapter 61.[10] In their investigative capacity, GALs are entrusted to assess the allegations that impact the child raised by the parties, review pleadings, depositions and other filings, interview the child, the parents, and any other person having information concerning the child's welfare, and review any pertinent documents possessed by such persons, including the child or parents' medical and mental health records.[11] The GAL may "make written or oral recommendations to the court [and] shall file a written report which may include recommendations and a statement of the wishes of the child."[12] In performing this investigative role, the GAL is said to function as the "the eyes and ears of the Court."[13]

The family courts' need for an unbiased and independent third-party to champion the interests of the minor child and serve as the court's "eyes and ears" in gathering, reviewing and presenting the relevant facts is the product of an unfortunate truth: In family cases, a GAL is crucial because the acrimony and distrust between the parents is so prevalent that it often times prevents the parents from perceiving and acting in the best interest of their children.[14] In such cases, the GAL "serves a vital role ... [by rising] above the fray of the contending parties to ensure that the interest [of their minor children] are 'represented and protected.' "[15]

We have to examine, however, the effectiveness of a Guardian if this unique set of eyes and ears is silenced when the GAL is prevented from informing the Court of what was seen and heard during its investigation. Unfortunately, that is precisely what is transpiring in family courts throughout Florida. The hearsay rule is routinely successfully deployed by whichever parent is unsatisfied with a GAL's conclusions and recommendations to prevent the admission of the GAL's report into evidence and to preclude the GAL from testifying regarding the statements made to the GAL during the investigation. This makes no sense in light of the fact that hearsay evidence is admissible when a social investigation is completed pursuant to Florida Statute 61.20

Florida's District Courts of Appeal have consistently held that the hearsay rule is applicable to a GAL's report and to any testimony by the GAL based on, or regarding, out-of-court statements made to the GAL during the investigation.[16] For instance, in Scaringe, the father appealed a final order granting the mother sole parental responsibility.[17] The GAL appointed in the case testified during the final hearing as to matters that were hearsay, and the GAL's report, which contained hearsay, was admitted into evidence.[18] The Second District Court of Appeal reversed, holding that, while section 61.403(a)(5) mandates that a GAL file a written report, the report was not automatically admissible, and the hearsay rules still applied.[19] The Court then went on to conclude that, "when a guardian attempts to testify to hearsay statements and a valid hearsay objection is raised, that objection should be sustained."[20]

These Court holdings have effectively eviscerated Florida's Family GAL Statute because, "[b]y necessity, the [GAL's] report will usually contain hearsay."[21] "GAL reports commonly contain important information gathered from [various] collateral sources—family members, teachers, and treatment providers who provide invaluable insight to the court."[22] Given the impracticality of having all of these collateral sources appear in court, much of this invaluable information simply will not be available to the Judge if an ordinary hearsay objection is all that it takes to thwart

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the GAL from carrying-out his or her essential function.[23]

As noted by the Court in Scaringe, the root cause of the current predicament is the legislature's failure to expressly exclude GAL reports and testimony from the application of the hearsay rule.[24] In contrast, Florida Statute §61.20, which authorizes the trial court to order a social investigation and study,[25] specifically provides that "[t]he court may consider the information contained in the study in making a decision on the parenting plan, and the technical rules of evidence do not exclude the study from consideration."[26] However, the underlying social investigation must "be conducted by qualified staff of the court, a child placing agency pursuant to s. 49.175, a psychologist pursuant to chapter 490 or a clinical social worker, marriage and family therapist, or mental health counselor licensed pursuant to Chapter 491."[27] Conspicuously missing from this list are GALs.

Accordingly, "[d]espite all of the well-intended powers enacted for guardian ad litems, the lack of a statutory hearsay exception has a stifling effect on their ability to protect Florida's children at the most critical stage of the process—in court."[28] It is time to unshackle the GALs from the constraints imposed by the hearsay rule and finally permit GALs to properly perform their critical investigative role laid-out in Florida's Family GAL Statute. This outcome can be accomplished by amending section 61.403 in order to include language similar to that contained in the social investigation statute—that "the technical rules of evidence do not exclude the [GAL's report and testimony]."[29] Alternatively, the Florida Legislature can borrow from GAL statutes in other states that have already anticipated the hearsay problem and included language aimed at specifically avoiding the evidentiary pitfall suffered by Florida's Family GAL Statute. For instance, §61.403 could incorporate the language used in Montana's family GAL statute, which sets forth that "[i]nformation contained in a report filed by the guardian ad litem or testimony regarding a report filed by the guardian ad litem is not hearsay when it is used to form the basis of the guardian ad litem's opinion as to the best interests of the child."[30]

The interests served by the hearsay rule, ensuring that inherently unreliable statements do not come into evidence, is critically important. However, this needs to be weighed against the necessity of a Guardian to bring to light for the Court, details of an investigation from collateral sources who are available to testify. This factor has been considered by some Courts.

Moreover, in balancing these competing interests, the fact that family cases are always heard by a Judge militates heavily in favor of admitting the GAL reports into evidence and permitting the GALs to testify in full regarding their investigations. "Because of the nature family court proceedings, where judges rather than juries predominate, the rules of evidence are often relaxed."[31] As one Court aptly put it, "[d]uring a nonjury trial, it is presumed that the court is able to sift the wheat from the chaff and select only the legal evidence."[32]

The Florida appellate courts seem overly concerned that trial courts will abdicate their responsibility by simply adopting the GAL's report and recommendations,[33] but "properly understood, the guardian ad litem does not usurp the judge's function; he aids it."[34]

Certainly, the hearsay concerns raised by GAL's report and testimony are no greater than those from social investigations, or "home studies," as they are commonly called. The Florida Supreme Court has held that the unreliability concerns associated with hearsay in general are greatly minimized in the context of social investigations because "[t]he dangers of faulty perception and narration seem alleviated by the social workers' special skills and training; falsification seems unlikely; and memory is unimportant if the report is more or less contemporaneous."[35] These same factors are present in connection with hearsay statements under § 61.403 because "GALs generally have expertise as lawyers, mental health professionals, or both."[36] Presumably, an attorney would be much more qualified than a social worker to identify and ferret-out unreliable information obtained during their investigations on behalf of the courts. If family court judges are capable of properly receiving and considering the investigations and studies conducted by social workers despite their hearsay content, then why would they be any less capable of properly assimilating the GAL reports conducted by lawyers and mental health professionals?

There is a way to address concerns about admitting potentially "unreliable" statements through a Guardian's testimony. As the current GAL statute requires the filing of a Guardian Report 20 days before a final hearing, if the time required for the filing of a report is largely extended, let's say to 60 days, any lingering concerns about unreliable statements unduly influencing the courts' decision-making process can be conclusively laid to rest if there is more than sufficient time for the party questioning the Report to independently confirm the information contained in the Report. If there is an amendment to Florida's Family GAL Statute to require that the GAL report and a list identifying the witnesses and documents upon which it is based be served on all parties at least 60 days prior to any hearing in which the report will be presented, any source can be deposed or subpoenaed to testify. By providing the

opportunity for cross-examination, which the U.S. Supreme Court has referred to as "the greatest legal engine ever invented for the discovery of truth",[37] any appreciable risk of unreliability will be eliminated.[38]

By adopting the amendments proposed herein, "the legislature can ensure that GALs are

not silenced in the very proceedings in which children most need them to speak."[39] Only by unshackling GALs from the stifling and purpose-nullifying constraints of the hearsay rule can GALs finally fulfill their vital mission of serving as the eyes and ears of the Family Court Judges, "instead of merely engaging in what might otherwise be an exercise in futility."[40] Although it is generally recognized that a Guardian's recommendations will inevitably include hearsay testimony and that by identifying the collateral sources of an interview a Court can infer what information was received by the Guardian, it only makes sense to allow the Guardian to provide complete information to a Court just as the person who conducts an investigation pursuant to Florida Statute 61.20 is permitted to provide to the Court.

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Endnotes

1 Marcia M. Boumil, Cristina F. Freitas & Debbie F. Freitas, *Legal and Ethical Issues Confronting Guardian Ad Litem Practice*, 13 J.L. & Fam. Stud. 43, 43-44 (2011).

2 *See Perez v. Perez*, 769 So. 2d 389, 393 (Fla. 3d DCA 1999) ("Guardians ad litem serve an important role ... by acting as representatives of children and promoting society's interest in protecting children from the traumas commonly associated with divorce and custody disputes.").

3 *See In the Matter of M.N. & S.N.*, 950 P.2d 674, 676 (Col. App. 3d 1997); *In the Matter of Stephanie Myer*, 1981 Ohio App. LEXIS 4942, at *9 (Ohio 5th App. Dist. 1981); *Wiencko, Jr. v. Takayama*, 745 S.E. 2d 168, 176 (Va. App. 2013).

4 *See Isaacson v. Isaacson*, 792 A.2d 525, 536 (N.J. Super. App. Div. 2002).

5 *See Auclair v. Auclair*, 730 A.2d 1260, 1268 (Md. App. 1999).

6 *See Pizzino v. Miller*, 858 N.E.2d 1112, 1121 (Mass. App. 2006).

7 *See Miller v. Miller*, 788 A.2d 717, 725 (Md. App. 2002); *In re Adoption of D.P.E.*, 2006 Tenn. App. LEXIS 551, at *7 (Tenn. App. Aug. 22, 2006); *K.C. Clark v. Alexander*, 953 P.2d 145, 153 (Wyo. 1998).

8 Boumil, et al., supra, note 1, at 44.

9 *Id.*

10 Fla.Stat. §61.403.

11 Fla.Stat. §61.403(1)-(3).

12 Fla.Stat. §61.403(5).

13 *French v. French*, 452 So.2d 647, 651 n.2 (Fla. 4th DCA 1984); *In re Marriage of Wycoff*, 639 N.E.2d 897, 904 (Ill. App. 1994); Chambers, *The Ambiguous Role of the Lawyer Representing the Minor in Domestic Relations Litigation*, 70 Ill. B. J. 510, 511 (1982).

14 *See, e.g., Ford v. Ford*, 371 U.S. 187, 193 (1962) ("Unfortunately, experience has shown that the question of custody, so vital to a child's happiness and well-being, frequently cannot be left to the discretion of parents. This is particularly true where, as here, the estrangement of husband and wife beclouds parental judgment with emotion and prejudice."); *Auclair v. Auclair*, 730 A.2d 1260, 1268 (Md. App. 1999) (noting that the courts were imbued with the power to appoint GALs based on the recognition that children often end up as "pawns in their parents' fight to prevail on issues such as custody, visitation, or child support"); *Perez v. Perez*, 769 So. 2d 389, 393 (Fla. 3d DCA 1999) (noting that litigation involving custody and visitation issues "can be particularly acrimonious", with children, who "are particularly vulnerable to the harms commonly associated with hostility and conflict between parents" at times used as "if in a game of ping-pong where the parent with the greater resources to serve the greatest number of motions wins"); *Owens v. Owens*, 685 So. 2d 1038, 1040 (Fla. 4th DCA 1997) (noting that the GAL's investigative function is fundamental "in discovering information relevant to the best interests of a child, which neither parent wishes to disclose or neglects to disclose"); Emile Kruzick & David Zemans, *In the Best Interest of the Child: Mandatory Independent Representation*, 69 DEN. U. L.R. 605, 610-12, n.7 (1992) (parents in a custody battle typically don't act in the best interest of their children).

15 *Wiencko, Jr. v. Takayama*, 745 S.E. 2d 168, 176 (Va. App. 2013).

16 *See, e.g., Scaringe v. Scaringe*, 711 So.2d 204 (Fla. 2d DCA 1998); *C.J. v. Dept. Child. & Fams.*, 756 So. 2d 1108 (Fla. 3d DCA 2000) (trial judge erred in making findings based on the GAL's report, which was hearsay); *Alexander v. Alexander*, 2007 Fla. App. LEXIS 2789, at *8 (Fla. 4th DCA Feb. 28, 2007) (finding that the admission of GAL's report over the mother's hearsay objection was erroneous).

17 *Scaringe*, 711 So.2d at 204.

18 *Id.*

19 *Id.* at 204-05.

20 *Id.* at 205.

21 *Id.* at 204.

22 Boumil, et al., *supra*, note 1, at 61.

23 *Id.* at 62.

24 *See Scaringe*, 711 So.2d at 205.

25 *See* Fla.Stat. §61.20(1).

26 Fla.Stat. §61.20(2).

27 Fla.Stat. §61.20(1).

28 Johnson-Weider, *Guardians ad Litem: A Solution Without Strength in Helping Protect Dependent Children*, 77 Fla. B.J. 87 (Apr. 2003).

29 Fla.Stat. §61.20(2).

30 Mont. Code Ann. § 41-3-112 (3).

31 Peskind, *Evidentiary Opportunities*, 25 J. of Amer. Acad. of Matrimonial Lawyers 375, 397 (May 2013).

32 *In the Interest of T.D.B.*, 597 S.E.2d 537, 543 (Ga. App. 2004).

33 *See Roski v. Roski*, 730 So.2d 413, 414 (Fla. 2d DCA 1999) ("[W]e have previously cautioned trial judges against abdicating their decision-making responsibility to a guardian ad litem... We strongly encourage trial judges to jealously guard the court's authority in such matters.").

34 *Shainwald v. Shainwald*, 395 S.E.2d 441, 444-45 (S.C. App. 1990).

35 Kern v. Kern, 333 So. 2d 17, 20 (Fla. 1976).

36 Boumil, et al., *supra*, note 1, at 44.

37 *Cal v. Green*, 399 U.S. 149, 158 (1970).

38 *Florida v. Freber*, 366 So.2d 426, 427 (Fla. 1978) (noting that the prime concern of the hearsay rule is that that the out-of-court declarant is not subject to cross-examination).

39 Johnson-Weider, *supra*, note 29, at 78.

40 *Id.*

WESTLAW

West's Florida Statutes Annotated
Title VI. Civil Practice and Procedure (Chapters 45-89) (Refs & Annos)

61.403. Guardians ad litem; powers and authority
FL ST § 61.403 West's Florida Statutes Annotated Title VI. Civil Practice and Procedure (Chapters 45-89) *(Approx. 2 pages)*

West's F.S.A. § 61.403

61.403. Guardians ad litem; powers and authority

Currentness

A guardian ad litem when appointed shall act as next friend of the child, investigator or evaluator, not as attorney or advocate but shall act in the child's best interest. A guardian ad litem shall have the powers, privileges, and responsibilities to the extent necessary to advance the best interest of the child, including, but not limited to, the following:

(1) The guardian ad litem may investigate the allegations of the pleadings affecting the child, and, after proper notice to interested parties to the litigation and subject to conditions set by the court, may interview the child, witnesses, or any other person having information concerning the welfare of the child.

(2) The guardian ad litem, through counsel, may petition the court for an order directed to a specified person, agency, or organization, including, but not limited to, hospitals, medical doctors, dentists, psychologists, and psychiatrists, which order directs that the guardian ad litem be allowed to inspect and copy any records and documents which relate to the minor child or to the child's parents or other custodial persons or household members with whom the child resides. Such order shall be obtained only after notice to all parties and hearing thereon.

(3) The guardian ad litem, through counsel, may request the court to order expert examinations of the child, the child's parents, or other interested parties in the action, by medical doctors, dentists, and other providers of health care including psychiatrists, psychologists, or other mental health professionals.

(4) The guardian ad litem may assist the court in obtaining impartial expert examinations.

(5) The guardian ad litem may address the court and make written or oral recommendations to the court. The guardian ad litem shall file a written report which may include recommendations and a statement of the wishes of the child. The report must be filed and served on all parties at least 20 days prior to the hearing at which it will be presented unless the court waives such time limit. The guardian ad litem must be provided with copies of all pleadings, notices, and other documents filed in the action and is entitled to reasonable notice before any action affecting the child is taken by either of the parties, their counsel, or the court.

(6) A guardian ad litem, acting through counsel, may file such pleadings, motions, or petitions for relief as the guardian ad litem deems appropriate or necessary in furtherance of the guardian's function. The guardian ad litem, through counsel, is entitled to be present and to participate in all depositions, hearings, and other proceedings in the action, and, through counsel, may compel the attendance of witnesses.

(7) The duties and rights of nonattorney guardians do not include the right to practice law.

(8) The guardian ad litem shall submit his or her recommendations to the court regarding any stipulation or agreement, whether incidental, temporary, or permanent, which affects the interest or welfare of the minor child, within 10 days after the date such stipulation or agreement is served upon the guardian ad litem.

NOTES OF DECISIONS (17)

Credits

Laws 1990, c. 90-226, § 3; Laws 1994, c. 94-204, § 5; Laws 1995, c. 95-147, § 1368.

Notes of Decisions containing your search terms (0) View all 17

West's F. S. A. § 61.403, FL ST § 61.403
Current through the 2019 First Regular Session of the 26th Legislature.

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NOTES OF DECISIONS (1)

Construction and application

West's Florida Statutes Annotated
Title VI. Civil Practice and Procedure (Chapters 45-89) (Refs & Annos)

61.404. Guardians ad litem; confidentiality
FL ST § 61.404 West's Florida Statutes Annotated : Title VI. Civil Practice and Procedure (Chapters 45-89) *(Approx. 2 pages)*

West's F.S.A. § 61.404

61.404. Guardians ad litem; confidentiality

Currentness

The guardian ad litem shall maintain as confidential all information and documents received from any source described in s. 61.403(2) and may not disclose such information or documents except, in the guardian ad litem's discretion, in a report to the court, served upon both parties to the action and their counsel or as directed by the court.

Credits
Laws 1990, c. 90-226, § 4.

Notes of Decisions containing your search terms (0) View all 1

West's F. S. A. § 61.404, FL ST § 61.404
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APPENDIX

* These materials are written as bullet point checklists for ease of reading and future use.

TRANSPARENT LAWYERING DEFINED

In its simplest form, transparent lawyering means that there are almost no secrets from the other side. Specifically, it encompasses:

1. There is only one set of facts, which are openly and completely communicated to whoever is listening – **TRANSPARENCY – TRUST – CONFIDENCE.**

2. Maintain a proactive approach of transparency with opposing counsel. For example:

2.1 Reveal ongoing facts and case developments as they occur – you are the first person to reveal breaking news and events.

2.2 Tell the other lawyer about pleadings to be filed before they are filed.

3. Provide documents as soon as they are received, without formal requests.

4. Make sure your client participates in all events. Use conference calling.

5. Never exclude a mediator from a conversation with your client. The mediator is there to learn everything and determine what is useful to get to settlement.

6. Copy the client on all outgoing and incoming communications, including e-mails.

INITIAL CLIENT INTERVIEW – BASIC "MUSTS"

7. New client telephone call

   7.1 Don't get on the phone

   7.2 Experienced assistant speaks to caller

   7.3 Use New Client Telephone Interview form (Appendix "1")

8. Initial client interview being the single most important event in attorney-client relationship

   8.1 Be prepared to say "No"

   8.2 Take control of interview

9. Learn **OPERATIVE** facts and explain probable range of results

   9.1 Apply law

   9.2 Client hearing same "story" at initial interview, mediation, and/or trial

10. Suggest **PROCESS** to get to mediation and/or trial

11. Assemble team

   11.1 Retain experts

   11.2 Define goals

12. **PROVIDE VOLUNTARY**, early, and frequent **"ROLLING" DISCOVERY.** Everyone knows what is required

13. Explain **TRANSPARENCY** - Outline benefits of transparency

14. Game plan to closure

15. Ethics, rules, and "by the book"

16. Cost-benefit analysis

16.1 Newly educated client

16.2 Internet almost replacing friends, beauticians, and barbers

17. Take action in client's presence

17.1 Call other lawyer (use speakerphone – reveal at outset)

17.2 Dictate letter to other party

18. Executed fee agreement (Appendix 2)

18.1 Large percentage of bar grievances involving complaints related to legal fees in family law matters

18.2 No work commenced until after execution of fee agreement and payment of retainer fee

19. Not filing a petition for dissolution of marriage, unless there is a reason to file – a judge being needed (urgency re: money or children)

19.1 An act of war

19.2 Potentially irreparable harm regarding finances, children, and dynamics

DUTY OWED TO CHILDREN

20. Family law attorneys must take lead in protecting children

20.1 Vast majority of children who experience divorce process do not have any representation

20.2 Lawyers have an absolute duty to protect children

20.3 Protecting children and developing a game plan should be openly discussed between counsel and, when appropriate, with the Court

20.4 Determine the need for experts

CLIENT CONTROL AND CASE MANAGEMENT

21. The saying: "Plan the work and work the plan," is perfect for family law cases

22. Make sure client understands and totally agrees with the game plan

23. Copy client on all outgoing and incoming communications

24. Return all telephone calls and reply to e-mails within 24 hours

25. Schedule case management conferences to control process

26. Always discuss and take action, which will move case to closure

27. Schedule team conference calls as needed, assign responsibilities, and set deadlines

28. Go to *www.FreeConferenceCall.com* and secure your own free conference calling number

USEFUL CLAUSES FOR LATE NIGHT DRAFTING

29. Waiver of Further Financial Disclosure (Appendix 3)

30. The Kutner Klauses (Appendix 4)

    30.1 Waive confidentiality of mediation process

    30.2 The mediator arbitrates interpretation disputes

NEW CLIENT TELEPHONE INTERVIEW

Good morning/afternoon, my name is _____, how may I help you?

Would you please tell me who referred you to our firm or how you heard about us?

Mr. Kutner's initial consultation fee is $_____ and it is payable at the conclusion of the initial interview. He does not accept credit cards for a number of reasons, which he will explain to you during the consultation. He will spend as much time with you as necessary, to evaluate the circumstances of your case and provide you with his opinions about your situation or circumstances. If you decide to retain our law firm, the minimum retainer is $_____, which sum is all credited toward time spent on your case. There is also a $_____ cost deposit, which is deposited into our trust account to pay for out-of-pocket expenses and court costs.

If you would like to schedule an appointment, let me know when you are available, and I will check with Mr. Kutner as to when he can meet with you. It would be helpful if you provided me with 2-3 dates that you are available.

Note: ***APPOINTMENTS MUST BE CLEARED WITH MJK BEFORE BEING SET.***

Always schedule new client appointments for the earliest possible date and time. If MJK is unable to meet client immediately, schedule appointment before or after regular business hours.

Date:	***Time:***	***By:***
Name of Caller:		***Phone:***
Statements of Caller:		
By Whom Referred:		
County Where Caller Resides:		
Reaction to Consultation Fee:		
Reaction to Retainer:		
Opposing Party's Attorney:		
Other Information:		
Results of Telephone Interview:		

CONTRACT FOR LEGAL SERVICES

THIS IS A CONTRACT for legal services involving a family law matter, entered into between [redacted] ("You"), and KUTNER AND ASSOCIATES ("We").

1. This contract contains the entire understanding between us and may only be modified in writing and signed by the parties. If any term, provision, or condition of this contract is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining provisions shall continue to be in full force and effect.

2. You acknowledge that we have made no guarantees in connection with the outcome of your case. All expressions which relate to the possible results in your case are based strictly on our opinions.

RETAINER AND ATTORNEY TIME

3. You agree to remit the sum of $_____ which is a non-refundable fee, on or before [redacted], 20[redacted].[1] That sum will be applied on account of legal fees, which will be credited to your bill. The retainer will be credited against hourly rates of $_____ for Maurice Jay Kutner and $_____ to $_____ for associates. Paralegal and law clerk rates will be charged at $_____ per hour. In the event of an increase of the hourly rates charged by any member of the firm, this contract will be governed by the new hourly rate. You will be charged for all attorney time expended in connection with your file, including telephone calls and travel time. The members of our firm frequently meet to discuss, evaluate, and decide how to approach various issues. When two or more of us meet, you will be billed for the time expended by the lawyers attending said meeting. Maurice Jay Kutner will spend, at least, a nominal billable time in reviewing work product prepared by associates

COSTS AND SUIT MONIES

4. You agree to remit a cost deposit in the sum of $____, on or before [redacted], 20[redacted], and such additional cost deposits requested by us. Those sums will be deposited in our trust account, and disbursed on your behalf for out-of-pocket expenses related to your case, including, but not limited to, postage, photocopies, facsimiles, e-mails, long distance telephone charges, out-of-town travel expenses, deposition expenses, court costs, fees for accountants, appraisers, actuaries, physicians, or our firm. You agree that we may impose a charging lien to collect the unpaid fees and costs of these other professionals.

[1] The amount of $_____ will be held back and applied toward payment of the final statement in this matter. Accordingly, you will be required to remit additional monies to our firm when the sum of $_____ has been exhausted.

_____
CLIENT

5. We shall have the authority to make advances (costs, suit monies, etc.) on your behalf, as enumerated in paragraph 4, in amounts we deem necessary for the preparation, trial, and proper handling of your case. You shall reimburse us on a current basis for all advances, none of which shall be deducted from the initial retainer. You are personally liable for payment to all experts hired on your behalf.

LEGAL FEES

6. If a statement is not paid by you within 15 days from the date of the statement, we have the right to terminate work on your case and withdraw as your attorneys. We also retain the right to withdraw from your case if you have misrepresented or failed to disclose material facts to us, if you fail to timely and completely disclose your financial circumstances, if you fail to follow our advice, or if you fail to attend conferences, depositions, or hearings.

7. Simple interest,[2] at the rate of 1.5% per month, will be added to all accounts not paid within 15 days from the date of each statement (the "date of statement" is the date of postmark or e-mail). Accounts with a previous balance are not entitled to a grace period.

8. You agree to carefully read all billing statements and promptly notify us, in writing, within 15 days from the date of the statement, of any claimed objections, errors, or discrepancies. Failure to do so creates an irrebuttable presumption that you agree with the correctness, accuracy, and fairness of the billing statement, and constitutes a waiver of your right to contest it. To comply with this agreement, you must set forth the precise billing item to which you have an objection, including the language, and state specific reasons why you claim there is an error, discrepancy, or objection.

9. It is impossible to determine the nature and extent of the necessary legal services required in your case. Your cooperation in providing us information and working with us can considerably expedite matters and help reduce fees.[3] To minimize attorneys' fees and to preserve the relationship between you and the opposing party (and children), we will try to effect an amicable settlement. However, settlement efforts do not always succeed, and it may be necessary to litigate, in which event legal fees and costs will be greater.

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[2] We much prefer that you pay your bill on time and "borrow" elsewhere. We cannot and will not "finance" your case.

[3] Your cooperation is very important. You must inform us immediately of any change of address, phone number, employment, or financial circumstances. Full disclosure of all facts is essential to enable us to properly represent you. You must properly fill out and return all documents sent to you.

_____

CLIENT

10. Following entry of a final judgment in your case, whether it is settled or tried, you understand that an additional fee may be requested from you, based upon: a) the significance of, or amount involved in, the subject matter of your case and the attendant responsibility involved in our representation; b) the novelty, complexity, and difficulty of the issues; c) the time, labor, and skill required to properly perform the legal services; d) the experience, reputation, diligence, and ability of the firm; e) the likelihood that our acceptance of your case precludes other profitable employment for the firm; f) the time limitations imposed by you, or by the circumstances of your case, and any additional or special time demands or requests of us by you; and, g) the nature and length of the professional relationship. The amount of any additional fee will be determined at the conclusion of your case, and will only be paid if you agree. This means that the payment of any "additional" fee is strictly voluntary.

11. We may seek legal fees from the opposing party, which may be paid by agreement or court order.[4] Any agreement or award of fees shall not determine the amount owed by you or earned by us. You remain primarily liable for payment of all fees and costs. Amounts received on your behalf will be credited to your account.[5] The time and costs necessary to collect the sums from the opposing party will be charged to you. Interest will be charged until we are paid in full, whether it be by you or the opposing party.

12. At our election, all sums due us shall be paid from the proceeds of any recovery, protection, or preservation of assets, which are recovered, distributed, or retained by you, as a result of any settlement, compromise, or final judgment obtained in your case, as held by the Florida Supreme Court in ***Sinclair v. Baucom*, 428 So.2d 1383 (Fla. 1983)**. This procedure is known as a charging lien. You authorize us to collect funds due to you and deduct and retain our fees and costs from our Trust Account prior to disbursing the balance to you. We shall hold a lien on all your documents, property, or money in our possession or the payment of all sums due us under the terms of this contract. We shall also have the right to collect our fees and costs from third parties who are holding or maintaining any funds for you.[6]

13. You agree to pay the attorneys' fees and costs (based on then current rates) for our involvement in any litigation or other matters, which take place subsequent

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[4] The provisions of this contract may be disclosed to the court in connection with any application to attorneys' fees and costs; and, we have the right to advise the court and/or opposing counsel or any amounts received from or owed by you.

[5] Payments received from you will be applied first to interest, if any, then to outstanding costs, if any, and then to legal fees.

[6] For example, in the event your spouse's attorney is holding any funds which belong to you, we shall have the right to collect our fees and costs from those funds.

_____

CLIENT

to our representation, based on the terms of this agreement, including, but not limited to, preparing for and testifying in court or deposition, attending meetings, responding to subpoenas and compliance with any discovery requests. If an employee of our firm is required to provide testimony, you shall compensate us for the employee's time, including costs.

EXPERT TESTIMONY NOT REQUIRED

14. In the event there are any hearings or litigation in any court, involving the collection of fees, suit monies, and costs owed by you to our firm, it is agreed that we will not be required to present expert testimony relating to the reasonableness of our fees. This agreement relating to expert witness testimony means that you are waiving a right that may exist according to Florida law.

15. Expert witness testimony means that another lawyer would present testimony to the court as to whether the fees billed to you are reasonable. You are waiving that right.

LIEN ON REAL AND PERSONAL PROPERTY

16. You specifically consent to the imposition of a lien on all real and personal property owned by you individually or jointly with others, to secure sums owed to our firm. This contract may be recorded with the Clerk of Court in the dissolution of marriage proceedings; and, may also be recorded with the clerk of any court, for the purpose of securing payment of legal fees, suit monies, interest, and costs. This provision shall not apply to homestead property.

17. You authorize Kutner and Associates to attach to this contract the legal description of any and all of your real property and/or a description of your personal property, and you understand that said description will become part of this lien.

POST-JUDGMENT PROCEEDINGS

18. Whether interlocutory or plenary, post-judgment proceedings, or enforcement action, any appeal subsequent to the final judgment in your case or on any other matter, may require a separate fee agreement. However, in the event we render services subsequent to the final hearing, the terms and conditions of this contract shall govern and control the rights and liabilities of the parties.

ARBITRATION PROVISION

19. **NOTICE: This contract contains provisions requiring arbitration of fee disputes. Before you sign this contract you should consider consulting with**

_____

CLIENT

another lawyer about the advisability of making an agreement with mandatory arbitration requirements. Arbitration proceedings are ways to resolve disputes without use of the court system. By entering into contract that require arbitration as the way to resolve fee disputes, you give up (waive) your right to go to court to resolve those disputes by a judge or jury. These are important rights that should not be given up without careful consideration. (Florida Bar Rule 4-1.5(i)).

20. In the event of a timely objection, in accordance with paragraph 8, to any statement for services rendered, the resulting fee dispute, including costs, suit monies, and interest, shall be resolved through binding arbitration by a Miami-Dade County attorney, who is a board certified family lawyer or certified family law arbitrator, who will hear and rule on the dispute. In addition, any claims concerning the performance or breach of performance by Kutner and Associates, or their failure to comply with the prevailing standard of care, including, but not limited to, any claims for negligence, breach of fiduciary duty, or breach of contract, shall also be resolved by binding arbitration.

21. It is agreed that any litigation arising out of this Contract for Legal Services, or the enforcement of the arbitration provisions, shall be brought in Miami-Dade County, Florida, where both parties agree to submit to jurisdiction and venue.

22. In the event it becomes necessary to enforce the terms of this contract, through arbitration or litigation, you agree to pay attorneys' fees and costs to our firm, based upon the rates set forth in this contract, including any appeals. The arbitrator will adjudicate the amount of fees to be awarded to Kutner and Associates, resulting from enforcement and collection proceedings. You agree to pay the fees for the services of the arbitrator.

YOUR FILE

23. Copies of all documents received and generated by our office will be provided to you and you should retain them. At the conclusion of the case, and following payment of all amounts due to our firm, you agree to provide us with an address where we can deliver the files at your expense. If you do not make arrangements to take delivery of the files after the case is concluded, you authorize us to destroy the files after representation has concluded.

PROFESSIONALISM

24. Attorneys are officers of the court and are bound by the rules regulating The Florida Bar and Florida law. There are no warranties, representations, or guarantees regarding the outcome, result, or successful termination of the representation, and this contract is not "contingent" on "results." You agree to fully cooperate and to do nothing

_____

CLIENT

which would compromise our professional ethics or violate the Code of Professional Responsibility. If you misrepresent or fail to disclose any material fact, refuse to follow our advice, or fail to be available for preparation, conferences, depositions, hearings, or other court proceedings, or fail to comply with the terms of this Contract, we will withdraw from your case. Our law firm takes great pride in being forthcoming with the relevant facts of every case, and being "transparent."

WARNING

25. This is a legal binding contract. Before signing, please read it carefully, and be sure you understand its contents. If there is anything you do not understand, ask about it. You acknowledge that you have had the opportunity to take this agreement, unsigned, and returning it to our firm, after reflecting upon its terms and/or consulting with an attorney before signing it.

(SPACE INTENITIONALLY LEFT BLANK)

_____

CLIENT

DATED this [redacted] day of [redacted], 20[redacted].

KUTNER AND ASSOCIATES

By:_____
MAURICE JAY KUTNER

READ, UNDERSTOOD, AND AGREED

_____
[redacted]

VERIFICATION

STATE OF FLORIDA)
: SS:
COUNTY OF MIAMI-DADE)

BEFORE ME, the undersigned authority, personally appeared, [redacted], who is personally known to me, or has produced _____ as identification, and who, after first being duly sworn, deposes and states that she has read the foregoing document and fully understands that it creates a lien for security, similar to a mortgage, on all real and personal property owned by her, for the purpose of guaranteeing payment in full of all amounts owed to Kutner and Associates.

WITNESS my hand and official seal, this [redacted] day of [redacted], 20[redacted].

_____
Notary Public, State of Florida

_____
Print Notary Name

Commission Expires: _____

4/28/04 DIVORCE & FAMILY LAW OVERVIEW
ABA FAM. LAW CONF. SAN JUAN, PR

04- [illegible] - substance - let's talk about process

I. Problem Solvers, Integrity, Reputation — all we have
   A. Asked to speak — always approach the topic from a "how to do - what to do" analysis & presentation
   B. What happens in the real world & what to do about it

II. Start typical setting — have this person sitting in front of you — for typical — initial client interview - single most imp.
   A. - Shock - atty office 1st time meeting
   B. - Client terrible - non - issues
   C. - Focus - how - listen and get
      (1) operative facts - b4 you can listen — length / marr
      children
      employment - income
      residence
      separation
      assets
   D. Realistic projected outcome
   E. Reconciliation?
   F. Apt. being pd to w - will not react

TOP TEN LIST FOR PRACTICE IN FAMILY LAW

BY GENERAL MAGISTRATES SINGER AND MENDEZ-LOCKE

1. Remember that for your client, this is his or her only case. But this is only one of many cases you will have during your legal career. Be honest, be credible. The most valuable thing you have is your reputation and your word. Judges will notice and remember.

2. The first thing the judge sees when she reviews the file is the pleading or motion you filed. You can use the forms in the Family Law Rules of Procedure but make sure your pleadings look as good as anyone else's (double spaced, blocked). Most importantly, be sure you plead all the elements necessary to grant you relief.

3. Be prepared. And never take a case assuming that you will get a continuance because you're new to the case. You may not get the continuance.

4. Do not use the sole practitioner excuse. And don't blame your staff.

5. Go to family law seminars. If you learn one thing at a seminar that will help you better represent your client, then it was worth the price of admission.

6. Network with the family law organizations such as Inns of Court.

7. Know the Rules of Evidence. Don't assume that because it is a family matter the Rules of Evidence don't apply. They do.

8. If you want to submit a memorandum of law and/or case law for the judge to read, be sure to submit it in advance, so the Judge has the opportunity to read it prior to the hearing. DO NOT SUBMIT IT THE DAY BEFORE OR THE MORNING OF.

9. If you yell, people will hear you. If you speak in lower tones, they will listen.

10. You are not in court to demean anyone or bicker with opposing counsel or her client. You are in court to represent your client and persuade the judge. Do so passionately, but ethically. Judges will notice and remember.

RMM

RISK MANAGEMENT MEMO
RUMGER INSURANCE COMPANY
7677 DR. PHILLIPS BLVD., SUITE 201, ORLANDO, FL 32819-7231 1-800-237-6870

November / December, 1989

Opening Statement

How to Use the RISK MANAGEMENT MEMO

By Duane H. Crone
President

I'll admit it. Insurance, if it's done correctly, is pretty dull stuff. Premiums come in, claims get handled, contingency reserves are established, and so on.

The fun part is "sharing information", something few companies do well, or at all. We try harder.

Confidentiality rules make professional liability claims against lawyers mostly invisible, and many attorneys still think "it'll never happen to me". But with the **RISK MANAGEMENT MEMO**, we open the door a crack to let those at risk take a peek at what really does happen. We're providing a service to the profession by shedding some light on the darker side of practicing law.

Why? Simple. *Nothing teaches like experience.* If your brother burns his hand on the stove, you can learn the lesson without ending up with a scar of your own.

All of the **RMM** "tips", "hints", "suggestions" and "advice" are the latest stuff -- it's "what's happening now", as they say. But it can only help if you make the connection; you have to consider whether or not any of the situations remind you of something in your own firm.

And yes, it's perhaps more akin to product manufacturing or health care delivery than we'd like to admit. Doctors now practice defensive medicine: engineers build redundancy into product safety designs. And the wise lawyer now practices "defensive law".

Yes, such precautions drive up expenses. But today, the goal is more than "making it" -- it's also "keeping it". There's no use working hard if someone else can take away all you've worked hard to build.

The **RMM** is designed to help. But you have to take it personally. Don't assume that someone else in the firm is "taking care of things." The responsibility is yours.

Expert Witness

Positive Client Control: How To Gain It, How To Keep It

By Maurice Jay Kutner, Esq.
Maurice Jay Kutner is one of the nation's most successful and respected trial and family law practitioners and frequently lectures on the subject of client and practice management. He has practiced Marital and Family Law in Miami for more than 20 years and is currently Chairman of the Continuing Legal Education Committee, Family Law Section, American Bar Association. He is also past Chairman of the Florida Bar Family Law Section, Board Certified in Marital and Family Law by the Florida Bar, and A-V rated by Martindale-Hubbell. A text he has authored for the ABA, Managing Clients and Cases, provides a comprehensive guide for the development of all aspects of a family law practice. Mr. Kutner credits his wife, Marisol, who is also his paralegal and office manager, with much of the development of his client management procedures and materials.

What is "Positive Client Control?"

Essentially, "positive client control" means **anticipating what can go wrong** -- what serious client objections, problems and crises may arise -- **and preparing for them** so well that they rarely occur, or can be managed effectively when they do happen. It means building such a strong aura of competence, communication and preparation that your client doesn't feel pressured to go "out of control".

It Starts Before You Start

Positive control begins even before the client has retained you, with their first contact with your office, because this is where the tone of the entire relationship is established.

Prospective clients should speak with someone who is specifically trained for initial client contact, working with a standard, written format. Unless you work on a contingency fee, you should charge at least a minimum consultation fee for the first attorney conference, and this should be explained to the client prior to setting an appointment. If the client can get free advice and leave with no commitment, they're in control from the outset, and they know it.

The Crucial Initial Interview

The initial interview with the attorney is the single most important client contact, and it should accomplish many things. The structure established here can make or break the entire case, as well as the attorney-client relationship.

First -- establish that, when you are with your client, they will have your total attention. Avoid greeting them across a desk stacked with files, or signing letters, reviewing files or otherwise dividing your attention while you talk with them. In their presence, ask your secretary to hold your regular calls, but explain that you will take urgent calls from clients, just as you would take theirs.

Second -- tell and show your prospective clients that you won't pressure them to hire you. Encourage them to interview other lawyers and come back to you later. Names of other attorneys may even be mentioned (the client probably has them anyway). In the long run this approach will make them far more committed to their decision.

Third -- have a frank, detailed fee discussion, and give them a copy of your contract. The time to make the financial rules clear is when there's no outstanding bill or dispute.

Fourth -- know when to send them home. Encourage your potential clients to be realistic.

. . .continued on P. 2

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Expert Witness

Positive Client Control

. . .continued from P. 1

When there isn't a solid case, when you can tell the marriage is still intact, or when the client really won't benefit from the action they want to take, say so. A well-recommended practice comes from a realistic, fair and ethical approach, and not from opportunistically accepting a case. Strive to be professional; the legal community is small and reputation is all we possess.

The Client Says 'You're Hired'. Now What?

First things first. *Get a contract or retainer agreement signed.* This requires the client to make a moral, legal and financial commitment to the effort, and lets them know the clock has started. Take no action until the contract is signed and the full retainer is paid.

Second, *give them a client kit, review its contents with them, and get a signed receipt for it* so the client realizes it contains important information they must read. Our kit now weighs in at more than two pounds and contains about 24 different kinds of information. At a minimum, yours should contain the following:

1. **An explanation,** in non-legal language, of how they can expect their case to proceed and what they may be expected to do, provide or encounter (answers a multitude of questions and displays your knowledge).
2. **Your resume** and any background materials you'd like them to see, plus those of any other attorney who may be officially assigned to the case (builds confidence and tells the client about you).
3. **Forms** for any specific information they need to furnish to you (simplifies fact gathering).
4. **A glossary of legal terms** they may encounter (educates the client).
5. **A copy of their retainer agreement** (reminds them they are obligated to pay).
6. **Specific information on how to communicate** with you and your office (decreases unnecessary calls and encourages communication with staff).
7. **A list of all kit contents** (a copy of which is your receipt).

A carefully-developed, thoughtful and complete client kit says, very powerfully, "we know exactly what we're doing, and we're totally prepared to do it well; now you have to do your part because we're a team".

Third, *get a written list of priorities the client wants to achieve.* If they go off on a tangent later, you can remind them of their original, more realistic goals.

Fourth, *explain that the success of their case depends largely on their active participation.* They can't simply leave the case with you and walk away.

Fifth, *explain that their case is a team effort, and introduce them to the team members.* I introduce the client to every member of my staff, emphasize that each one is highly trained and expert at their job, and tell the client they should feel comfortable communicating with any staff member. Unless a client believes there's a strong team, they can waste a vast amount of time making the attorney call back on "urgent" and "confidential" matters that could have been handled by a staff member.

Caring's Important -- But So Is Your Bill

Regular billing and collection is an important part of client control, for several reasons.

First, it lets the client know that there's a cost for the action they're taking.

Second, it often decreases frequency and duration of telephone calls since they're all billed.

Third, it avoids surprises and disputes over a large bill following several months of work.

Show The Client You're Taking Action For Them

A client can head out of control if they feel "nothing is happening on my case", so always try to show the client some results while they're in the office or on the phone. Here are three techniques I recommend:

-- Dictate a memo or letter while the client is in your office, then in the client's presence, ask your secretary to type it up right away and copy the client.

-- While a client is on the phone, conference them on a call to someone else for information, negotiations, disputes, and so on. This lets them know something's happening, and lets them hear and perhaps even participate directly. Always announce everyone's presence on the call.

-- Initiate a telephone call to the other side, in the client's presence.

Techniques like these are also far more time-efficient for you. Telephone conferencing lets you discuss business with the client, even while you're on hold. Immediate dictation dispatches the matter, rather than putting it off for later. Days and weeks of letters and telephone tag are reduced to one-step, immediate processes.

Client Communication Becomes Documentation

Frustrated, angry clients are almost always the result of inadequate communication, so send copies of virtually everything to the client. Stamp the original with *"copy sent to client on (date) by (person)"*, and send the client copies with that stamp. The client knows you have a record of it, and it also lets them know what's happening and keeps them on the team.

Defuse Those Always-Explosive Settlement Offers

All settlement offers must be thoroughly evaluated and communicated to the client in writing. There's no such thing as over-explanation or over-documentation of settlement offers. Your communication to the client must be as complete and comprehensive as the situation requires because, if settlement offers aren't handled with excessive caution, they can spell disaster.

And always, always have the client sign that they have received and understood your information, and then sign again indicating their response to it.

Client Control Begins Before It's Needed

Every client teaches us something about the next one. When a client says "I didn't know" or "why are (or aren't) you doing so and so", or even worse, "why isn't anything happening?", they're saying we didn't prepare them well enough at the beginning, or we haven't been communicating with them and keeping them involved.

Listen to each question and create an information piece, a process or a technique to prepare in advance for the next client. Positive client control -- and a more satisfying and safe practice -- will be the result.

. . .continued on P. 4

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Client Control

. . .continued from P. 2

The Result:
Client Confidence and Trust

The client must believe in you and the legal process. When the lawyer and client are a team, there is rarely a serious dispute between the players.

R U M G E R

RUMGER Insurance Company
7677 Dr. Phillips Boulevard
Orlando, FL 32819 - 7231

RISK MANAGEMENT MEMO

November / December, 1989

Positive Client Control:
How To Gain It, How To Keep It

-- By Maurice Jay Kutner, Esq.

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's Florida Statutes Annotated
Title XLVII. Criminal Procedure and Corrections (Chapters 900-999) (Refs & Annos)
Chapter 934. Security of Communications; Surveillance (Refs & Annos)

West's F.S.A. § 934.03

934.03. Interception and disclosure of wire, oral, or electronic communications prohibited

Effective: July 1, 2015
Currentness

(1) Except as otherwise specifically provided in this chapter, any person who:

(a) Intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire, oral, or electronic communication;

(b) Intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when:

1. Such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

2. Such device transmits communications by radio or interferes with the transmission of such communication;

(c) Intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

(d) Intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

(e) Intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication intercepted by means authorized by subparagraph (2)(a)2., paragraph (2)(b), paragraph (2)(c), s. 934.07, or s. 934.09 when that person knows or has reason to know that the information was obtained through the interception of such a communication in connection with a criminal investigation, has obtained or received the information in connection with a criminal investigation, and intends to improperly obstruct, impede, or interfere with a duly authorized criminal investigation;

shall be punished as provided in subsection (4).

(2)(a) 1. It is lawful under this section and ss. 934.04-934.09 for an operator of a switchboard, or an officer, employee, or agent of a provider of wire or electronic communication service whose facilities are used in the transmission of a wire or electronic communication, to intercept, disclose, or use that communication in the normal course of his or her employment while engaged in any activity which is a necessary incident to the rendition of his or her service or to the protection of the rights or property of the provider of that service, except that a provider of wire communication service to the public shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

2. Notwithstanding any other law, a provider of wire, oral, or electronic communication service, or an officer, employee, or agent thereof, or landlord, custodian, or other person, may provide information, facilities, or technical assistance to a person authorized by law to intercept wire, oral, or electronic communications if such provider, or an officer, employee, or agent thereof, or landlord, custodian, or other person, has been provided with:

a. A court order directing such assistance signed by the authorizing judge; or

b. A certification in writing by a person specified in s. 934.09(7) that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required, setting forth the period of time during which the provision of the information, facilities, or technical assistance is authorized and specifying the information, facilities, or technical assistance required.

3. A provider of wire, oral, or electronic communication service, or an officer, employee, or agent thereof, or landlord, custodian, or other person may not disclose the existence of any interception or the device used to accomplish the interception with respect to which the person has been furnished an order under this section and ss. 934.04-934.09, except as may otherwise be required by legal process and then only after prior notice to the Governor, the Attorney General, the statewide prosecutor, or a state attorney, as may be appropriate. Any such disclosure renders such person liable for the civil damages provided under s. 934.10, and such person may be prosecuted under s. 934.43. An action may not be brought against any provider of wire, oral, or electronic communication service, or an officer, employee, or agent thereof, or landlord, custodian, or other person for providing information, facilities, or assistance in accordance with the terms of a court order under this section and ss. 934.04-934.09.

(b) It is lawful under this section and ss. 934.04-934.09 for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his or her employment and in discharge of the monitoring responsibilities exercised by the commission in the enforcement of 47 U.S.C. chapter 5, to intercept a wire, oral, or electronic communication transmitted by radio or to disclose or use the information thereby obtained.

(c) It is lawful under this section and ss. 934.04-934.09 for an investigative or law enforcement officer or a person acting under the direction of an investigative or law enforcement officer to intercept a wire, oral, or electronic communication when such person is a party to the communication or one of the parties to the communication has given prior consent to such interception and the purpose of such interception is to obtain evidence of a criminal act.

(d) It is lawful under this section and ss. 934.04-934.09 for a person to intercept a wire, oral, or electronic communication when all of the parties to the communication have given prior consent to such interception.

(e) It is unlawful to intercept any wire, oral, or electronic communication for the purpose of committing any criminal act.

(f) It is lawful under this section and ss. 934.04-934.09 for an employee of a telephone company to intercept a wire communication for the sole purpose of tracing the origin of such communication when the interception is requested by the recipient of the communication and the recipient alleges that the communication is obscene, harassing, or threatening in nature. The individual conducting the interception shall notify local police authorities within 48 hours after the time of the interception.

(g) It is lawful under this section and ss. 934.04-934.09 for an employee of:

1. An ambulance service licensed pursuant to s. 401.25, a fire station employing firefighters as defined by s. 633.102, a public utility, a law enforcement agency as defined by s. 934.02(10), or any other entity with published emergency telephone numbers;

2. An agency operating an emergency telephone number "911" system established pursuant to s. 365.171; or

3. The central abuse hotline operated pursuant to s. 39.201

to intercept and record incoming wire communications; however, such employee may intercept and record incoming wire communications on designated "911" telephone numbers and published nonemergency telephone numbers staffed by trained dispatchers at public safety answering points only. It is also lawful for such employee to intercept and record outgoing wire communications to the numbers from which such incoming wire communications were placed when necessary to obtain information required to provide the emergency services being requested. For the purpose of this paragraph, the term "public utility" has the same meaning as provided in s. 366.02 and includes a person, partnership, association, or corporation now or hereafter owning or operating equipment or facilities in the state for conveying or transmitting messages or communications by telephone or telegraph to the public for compensation.

(h) It shall not be unlawful under this section and ss. 934.04-934.09 for any person:

1. To intercept or access an electronic communication made through an electronic communication system that is configured so that such electronic communication is readily accessible to the general public.

2. To intercept any radio communication which is transmitted:

a. By any station for the use of the general public, or that relates to ships, aircraft, vehicles, or persons in distress;

b. By any governmental, law enforcement, civil defense, private land mobile, or public safety communications system, including any police or fire communications system, readily accessible to the general public;

c. By a station operating on an authorized frequency within the bands allocated to the amateur, citizens band, or general mobile radio services; or

d. By any marine or aeronautical communications system.

3. To engage in any conduct which:

a. Is prohibited by s. 633 of the Communications Act of 1934; [1] or

b. Is excepted from the application of s. 705(a) [2] of the Communications Act of 1934 by s. 705(b) [3] of that act.

4. To intercept any wire or electronic communication the transmission of which is causing harmful interference to any lawfully operating station of consumer electronic equipment to the extent necessary to identify the source of such interference.

5. To intercept, if such person is another user of the same frequency, any radio communication that is not scrambled or encrypted made through a system that utilizes frequencies monitored by individuals engaged in the provision or the use of such system.

6. To intercept a satellite transmission that is not scrambled or encrypted and that is transmitted:

a. To a broadcasting station for purposes of retransmission to the general public; or

b. As an audio subcarrier intended for redistribution to facilities open to the public, but not including data transmissions or telephone calls, when such interception is not for the purposes of direct or indirect commercial advantage or private financial gain.

7. To intercept and privately view a private satellite video communication that is not scrambled or encrypted or to intercept a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted, if such interception is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain.

(i) It shall not be unlawful under this section and ss. 934.04-934.09:

1. To use a pen register or a trap and trace device as authorized under ss. 934.31-934.34 or under federal law; or

2. For a provider of electronic communication service to record the fact that a wire or electronic communication was initiated or completed in order to protect such provider, another provider furnishing service toward the completion of the wire or electronic communication, or a user of that service, from fraudulent, unlawful, or abusive use of such service.

(j) It is not unlawful under this section and ss. 934.04-934.09 for a person acting under color of law to intercept the wire or electronic communications of a computer trespasser which are transmitted to, through, or from a protected computer if:

1. The owner or operator of the protected computer authorizes the interception of the communications of the computer trespasser;

2. The person acting under color of law is lawfully engaged in an investigation;

3. The person acting under color of law has reasonable grounds to believe that the contents of the communications of the computer trespasser will be relevant to the investigation; and

4. The interception does not acquire communications other than those transmitted to, through, or from the computer trespasser.

(k) It is lawful under this section and ss. 934.04-934.09 for a child under 18 years of age to intercept and record an oral communication if the child is a party to the communication and has reasonable grounds to believe that recording the communication will capture a statement by another party to the communication that the other party intends to commit, is committing, or has committed an unlawful sexual act or an unlawful act of physical force or violence against the child.

(3)(a) Except as provided in paragraph (b), a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient.

(b) A person or entity providing electronic communication service to the public may divulge the contents of any such communication:

1. As otherwise authorized in paragraph (2)(a) or s. 934.08;

2. With the lawful consent of the originator or any addressee or intended recipient of such communication;

3. To a person employed or authorized, or whose facilities are used, to forward such communication to its destination; or

4. Which were inadvertently obtained by the service provider and which appear to pertain to the commission of a crime, if such divulgence is made to a law enforcement agency.

(4)(a) Except as provided in paragraph (b), whoever violates subsection (1) is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, s. 775.084, or s. 934.41.

(b) If the offense is a first offense under paragraph (a) and is not for any tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, and the wire or electronic communication with respect to which the offense under paragraph (a) was committed is a radio communication that is not scrambled, encrypted, or transmitted using modulation techniques the essential parameters of which have been withheld from the public with the intention of preserving the privacy of such communication, then:

1. If the communication is not the radio portion of a cellular telephone communication, a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit, a public land mobile radio service communication,

or a paging service communication, and the conduct is not that described in subparagraph (2)(h)7., the person committing the offense is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

2. If the communication is the radio portion of a cellular telephone communication, a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit, a public land mobile radio service communication, or a paging service communication, the person committing the offense is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

Credits

Laws 1969, c. 69-17, § 3; Laws 1971, c. 71-136, § 1163; Laws 1974, c. 74-249, §§ 2, 3; Laws 1977, c. 77-104, § 249; Laws 1978, c. 78-376, § 1; Laws 1979, c. 79-164, § 187; Laws 1980, c. 80-27, § 2; Laws 1987, c. 87-301, § 1; Laws 1988, c. 88-184, § 2; Laws 1989, c. 89-269, § 2. Amended by Laws 1997, c. 97-102, § 1582, eff. July 1, 1997; Laws 1999, c. 99-168, § 18, eff. July 1, 1999; Laws 2000, c. 2000-369, §§ 7, 9, eff. June 26, 2000; Laws 2002, c. 2002-72, § 2, eff. April 22, 2002; Laws 2010, c. 2010-117, § 30, eff. July 1, 2010; Laws 2013, c. 2013-183, § 154, eff. July 1, 2013; Laws 2015, c. 2015-82, § 1, eff. July 1, 2015.

Footnotes

1 1. 47 U.S.C.A. § 553.

2 2. 47 U.S.C.A. § 605(a).

3 3. 47 U.S.C.A. § 605(b).

West's F. S. A. § 934.03, FL ST § 934.03

Current through the 2019 First Regular Session of the 26th Legislature.

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's Florida Statutes Annotated
Title XLVII. Criminal Procedure and Corrections (Chapters 900-999) (Refs & Annos)
Chapter 934. Security of Communications; Surveillance (Refs & Annos)

West's F.S.A. § 934.21

934.21. Unlawful access to stored communications; penalties

Currentness

(1) Except as provided in subsection (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).

(2) The punishment for an offense under subsection (1) is as follows:

(a) If the offense is committed for purposes of commercial advantage, malicious destruction or damage, or private commercial gain, the person is:

1. In the case of a first offense under this subsection, guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 934.41.

2. In the case of any subsequent offense under this subsection, guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, s. 775.084, or s. 934.41.

(b) In any other case, the person is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

(3) Subsection (1) does not apply with respect to conduct authorized:

(a) By the person or entity providing a wire or electronic communications service;

(b) By a user of a wire or electronic communications service with respect to a communication of or intended for that user; or

(c) In s. 934.09, s. 934.23, or s. 934.24.

Credits

Laws 1988, c. 88-184, § 9; Laws 1989, c. 89-269, § 9.

West's F. S. A. § 934.21, FL ST § 934.21
Current through the 2019 First Regular Session of the 26th Legislature.

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EVALUATION FORM

27th ANNUAL NUTS & BOLTS OF DIVORCE FAMILY LAW SEMINAR

Wednesday, December 4, 2019

Please rate each topic on a scale of 1-5 (1 being poor, and 5 being excellent)

* **Top Technology Tips** Jacqueline M. Valdespino, Esq.	*1__ 2__ 3__ 4__ 5__*
* **View from the Bench** Honorable Samantha Ruiz Cohen	*1__ 2__ 3__ 4__ 5__*
* **Role of the Guardian ad Litem** Anastasia Garcia, Esq.	*1__ 2__ 3__ 4__ 5__*
* **Mental Health and Wellness** Dori Foster Morales, Esq.	*1__ 2__ 3__ 4__ 5__*
* **Transparent Lawyering Client Management & Ethics** Maurice Jay Kutner, Esq.	*1__ 2__ 3__ 4__ 5__*
* **Questions for Mr. Kutner and More Ethics** Robert C. Josefsberg, Esq.	*1__ 2__ 3__ 4__ 5__*
* **Hot Tips on PreNups & PostNups** Michelle Gervais, Esq.	*1__ 2__ 3__ 4__ 5__*
* **Immigration** Patricia Elizee Saint Surin, Esq.	*1__ 2__ 3__ 4__ 5__*
* **Paternity** Marck Joseph, Esq.	*1__ 2__ 3__ 4__ 5__*
* **Overall, this seminar met my expectations**	**___Yes ___No**

* **What other topics would you like to hear about** _____

Other Comments:

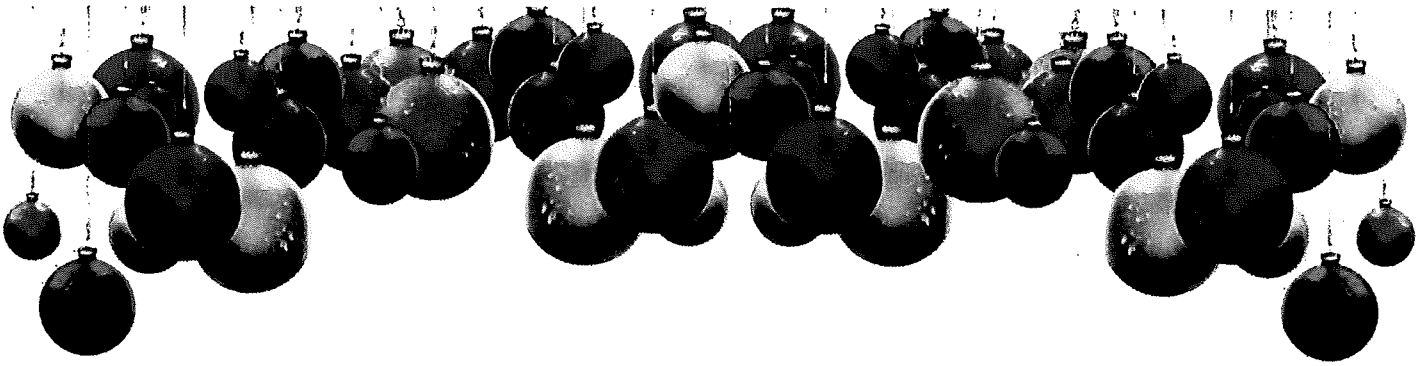
_____

_____

_____

_____

(Optional)
Name: _____



Happy Holidays!

Legal Aid Society is collecting toys and gift cards for our clients and their children ages 2 – 21 years old to be distributed at a holiday party for Legal Aid clients on Thursday, December 12th, 2019 from 2 pm - 4 pm. Please donate presents and gift cards for needy individuals and families and brighten their lives this holiday season. For most of these families, your gift is the only one they will receive. If you are interested in adopting a family, or making a donation so that we may purchase gift cards for them, please let us know. Donations may be dropped off at 123 NW 1 Avenue between 8:30 am – 4:00 pm by December 10. If you have any questions, please contact Vicky at 305-579-5733, ext. 2252 or psb@dadelegalaid.org.