

SPEAKING OF JUSTICE

News From The Florida Bar Foundation

volume 2

issue no. 1

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Help for Floridians lost in the health-care system

by Nancy Kinnally

For five years, Jodi Guin sat on a busy Tallahassee, Fla., street corner selling peanuts to earn enough money to buy the shady lot where she would later put the yellow doublewide that is now her home.

Sometimes it got so hot, she'd put her feet – shoes and all – into a bucket of ice.

"On the bank it showed it was 105 a lot of times, and we'd be sitting down there selling peanuts," Guin remembers.

After she bought the trailer with a small inheritance, she lived there alone until one night, she went to a dance at the American Legion Hall, and she met Bobby.

"I walked in, and there she was, and I said, 'Are you married?' and she said, 'No,'" Bobby Guin recalls. "I said, 'You got a boyfriend?' and she said, 'No.' I said, 'I'll be right back,' and I went over and got me a drink."

Jodi interrupts her husband's yarn to interject: "And he's been here ever since."

Bobby, 75, is a retired plumber; Jodi, 80, a former restaurant manager. Their life together goes back more than 20 years,



RAY STANFORD

Jodi Guin, 80, and her husband Bobby, 75, credit Florida Legal Services for ensuring they received the proper Medicare and Medicaid prescription drug benefits.

and although declining health has brought them hardship, theirs is still a warm, happy home filled with small tokens of their love for each other – artificial flowers, tiny figurines, and their Chihuahua, Bobbie Joe.

Living on Social Security, they were getting by in spite of Bobby's diabetes and Jodi's congestive heart failure. Then in early 2006 they went to the pharmacy to fill their prescriptions and were told their new Medicare Part D plan wouldn't pay for them.

Meanwhile, Jodi's monthly drug premiums were deducted from her Social Security check, even though she wasn't supposed to pay a premium under Part D.

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Message from the President

Last fall I had the chance to speak to law students at Florida State University and to the members of the Tallahassee Bar Association, and it was such a pleasure to hear how appreciated The Florida Bar Foundation is for its support of the local legal aid community. In turn, I was impressed with the Tallahassee Bar Association's exemplary commitment to pro bono service, which is, in fact, a requirement of membership. I was equally impressed with the commitment of the faculty and students at the FSU College of Law to their clinical programs. The Foundation is proud to support both the law school's civil clinic and FSU's Center for the Advancement of Human Rights, which was recently funded by the Foundation to develop a plan to combat human trafficking in Florida.

While in the capital I was reminded of the vital importance of the support of our legislators, who signed into law the Florida Access to Civil Legal Assistance Act in 2002, which authorizes state funding for civil legal assistance. Sixty-

four legislators co-sponsored the act, which was passed unanimously by each subcommittee that reviewed the bill and received only one dissenting vote before the full Legislature.

Since that time, many legislators have supported funding for FACLA each year. **Sen. Mike Fasano** and **Rep. Richard Glorioso** played key roles in securing \$1 million in funding for FACLA during last year's legislative session. I would like to take this opportunity to thank them and the other members of the Florida Legislature for bringing Florida into the company of the vast majority of states that provide state funding for legal assistance for the poor.

The FACLA funds support the work of Florida's legal aid organizations, which are confronting ever-increasing demands from Floridians facing the impact of a fragile economy, including job loss, foreclosure and domestic violence. The availability of legal assistance to families in crisis serves to stabilize those families and strengthens our communities.



Adele I. Stone, Esquire

We will again be counting on our legislators to support our request for increased FACLA funding in the 2010 legislative session. More funding is needed to meet the needs of the thousands of Floridians suffering the effects of the recession. If you have the opportunity, please tell your local legislators how important FACLA is to your local legal aid organization. And when they tell you they support FACLA, please thank them.

A handwritten signature in blue ink that reads "Adele I. Stone".

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Members of the Foundation's Legacy for Justice make planned gift commitments such as bequests, charitable gift annuities or trusts to sustain the critical work of the Foundation into the future. Gifts of life insurance or appreciated securities qualify as well.

Establish your legacy as a proud member of your profession and a firm believer in the principles upon which it is founded.



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COURTESY OF FLORIDA LEGAL SERVICES

Florida Legal Services Executive Director Kent Spuhler presents a statue of Lady Justice to Paul Doyle. On the base are inscribed the names of those who contributed to the Building Justice capital campaign in honor of Doyle, for whom the new FLS headquarters is named.

Paul Doyle Justice Center dedicated

by Gabrielle Davis

When it came to naming the new home of Florida Legal Services, only one person would fit the bill, said FLS Executive Director Kent Spuhler.

"There was only one name that could go on the state capital justice center," said Spuhler at the Dec. 10 unveiling of the Paul Doyle Justice Center in Tallahassee. "That's the name of the man who has devoted 40 years of his professional career to the oppressed and those who weren't able to get a fair deal out of our legal system."

For 35 years, FLS has been the voice for Florida's poor and disadvantaged. Over the years, its role has grown, both in the courtroom and in the Capitol, but its attorneys and staff were still working in cramped, rented basement offices. The need became apparent for a larger, permanent space with more room for statewide training programs, as well as workspace for legal services staff visiting the capital. As a way of honoring Doyle and helping FLS purchase a more suitable building, 175 donors contributed more than \$625,000 through the FLS Building Justice capital campaign.

About 150 of Doyle's colleagues, family and friends traveled from as far as

Portland, Ore., to attend the dedication of the new FLS headquarters.

"[Doyle] has served in many roles, but in all those roles he has been a leader, an encourager and a person that says we can never be satisfied," Spuhler said. "There's more to do, there is more we can do, no matter if the money's up or the money's down. The job is in front of you and the job is making a difference."

Doyle's commitment to legal services began in the 1970s when he served as executive director of Jacksonville Area Legal Aid.

For 18 years, Doyle has served as director of The Florida Bar Foundation's Legal Assistance for the Poor and Law Student Assistance grant programs, working to fund legal aid organizations in Florida and to foster a love of public service among tomorrow's lawyers.

The impacts Doyle's efforts have made are nationwide, said Foundation Executive Director Jane Curran.

"I get a chance to travel all over the country and tell people what Paul has told me to say and I get such recognition for it, but it's all Paul," Curran said.

In accepting the honor, Doyle said the most important word in the building's name is "justice."

"For the poor, justice is not vague or dispassionate, general justice for all, but a living, ambitious, sometimes controversial and dedicated quest. We owe the FLS staff and the staff of legal aid programs throughout Florida our support, respect and enduring debt of gratitude for the shouldering of this challenge."

— Paul Doyle

December 10, 2009

How the Foundation helps

The Shirley Spuhler Health Care Fairness Project is just one of many programs at Florida Legal Services supported by The Florida Bar Foundation, whose support for FLS in 2009-10 includes:

General Support
\$3.04 million

Migrant Farmworker Justice Project
\$861,052

Affordable Housing Advocacy
\$377,160

Staff Attorney Salary Supplement
\$210,088

Children's Legal Services
\$159,650

Pilot Pro Bono Project
\$156,255

Statewide Pro Bono Project
\$108,000

For more information visit:
www.floridalegal.org

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With more than \$3,000 in monthly medication costs dwarfing their meager income, Jodi spent hours on the phone trying to get help. A newspaper reporter documenting their plight called Florida Legal Services (FLS) to ask if they could intervene.

FLS attorney Anne Swerlick helped the Guins wade through the intricacies of Medicaid, which still pays for certain classes of drugs for low-income Medicare recipients, and the more convoluted Medicare Part D. She also got the Guins into the Medicare Part D low-income subsidy program.

Today, the Guins pay about \$6 every three months for their medications through a mail-order pharmacy.

"I tell you what happened," Bobby said. "We got lost in the system when they come out with this [Medicare Part D]..."

"And they fished us out," said Jodi, pointing to Swerlick and Bonnie Koon,

who coordinates the Florida Medicare/Medicaid Prescription Drug Helpline at FLS.

The helpline is part of the Shirley Spuhler Health Care Fairness Project, named for its founding director, who lost her own battle with cancer just over a year ago. The project uses strategies including class action litigation, fair hearings, outreach and education, attorney and paralegal training, and policy advocacy.

Through the helpline, Koon assists low-income Florida residents whose prescription drug claims are denied by Medicaid or Medicare, or who have questions about the low-income subsidy.

The Guins are among 6.4 million U.S. seniors and disabled individuals known as "dual eligibles," meaning they receive benefits through both Medicare and Medicaid. In 2006, when Part D was implemented, dual eligibles lost their Medicaid prescription drug coverage and had to choose a Part D plan.

As it turns out, the Guins weren't the only ones lost in the system. Through FLS, Jodi became one of the named plaintiffs in a nationwide class action to force the Secretary of Health and Human Services to provide dual eligibles with effective, timely access to prescription medication under Medicare Part D. The 2006 case, *Situ v. Leavitt*, was brought by the Center for Medicare Advocacy and the National Senior Citizens Law Center.

The U.S. Federal District Court in the Northern District of California allowed the case to proceed, noting that the computer system of the Centers for Medicare & Medicaid Services (CMS) could take up to 76 days to relay low-income subsidy information to a pharmacist's computer. A 2008 settlement agreement requires CMS to implement one-business-day processing and simplified documentation of eligibility for the low-income subsidy.

Meanwhile, Swerlick and FLS litigator Mariam Harmatz were working along with the Legal Aid Society of Palm Beach County and the National

Health Law Program on a class action against Florida's Agency for Health Care Administration. The case came in the wake of new requirements set by the Florida Legislature that certain prescriptions be "prior authorized," including those for patients on more than four brand name drugs, or those needing a drug not on the state's Preferred Drug List (PDL).

The case, *Hernandez et al v. Medows*, challenged the state Medicaid agency's failure to provide due process when denying prescription drug claims. Anthony Hernandez was a liver transplant recipient living on Social Security Disability income who had to be hospitalized after Medicaid stopped paying for Sporanox, which was helping prevent rejection of his new liver.

Discovery in Hernandez revealed that more than 50,000 prescriptions a month were being denied to Florida Medicaid patients and that while some received an alternative medication, 15,000 a month did not receive any drug that could treat their condition.

"Some of these are folks who may be on anti-psychotics – heavy-duty medications that help keep them out of institutions and nursing homes," Swerlick said. "And they are really living in fear of spiraling downward were they without these medications."

"Especially with mental health problems, it sometimes takes years for the doctors to try different things. It's very idiosyncratic whether something's going to work, what combination of medications, so if you start messing around with that, you're really going to be causing the recipient to be at risk."

Under a 2003 settlement agreement, the state Medicaid agency must ensure that recipients receive written notice at the time of drug coverage denials. For refills, the agency must ensure an immediate temporary supply and ongoing coverage pending the outcome of a fair hearing. Prior to *Hernandez*, these points of Medicaid law were untested.

A subsequent class action brought by FLS and other legal aid and advocacy organizations, *Edmonds et al v. Levine*, successfully challenged the state's denial of Medicaid prescription drug claims for the off-label use of Neurontin, a drug widely prescribed for pain and mood disorders.

FLS is now using the helpline to keep tabs on government compliance with the settlement agreements and to detect emerging trends. To address systemic issues, FLS often works first through administrative and legislative channels rather than the courts.

Recently, Swerlick wrote the Florida Medicaid Pharmaceutical and Therapeutics Committee, which makes recommendations to the Agency for Health Care Administration on prior authorization requirements, to urge that they provide continuity of care for patients on anti-depressants, anti-convulsants and anti-psychotics.

She requested that the committee recommend allowing these patients to continue coverage when such drugs are removed from the PDL, provide 60 days' written notice to patients and their doctors when affected by elimination of

a medication from the list, or provide a transitional benefit to allow the physician time to pursue prior authorization.

Drug substitutions and denials can be life-threatening to the patient as well as costly to the state when the result is a hospitalization or emergency room visit.

Swerlick cited the case of a 19-year old developmentally disabled man whose mother called the helpline after his seizure medication was taken off the PDL. She resorted to taking him the emergency room to get the drug, as the last time his doctor had tried to switch his medication, he'd had a dozen seizures in one day.

"In addition to anti-convulsants, of particular concern are PDL changes relating to psychotropic medications," Swerlick wrote the committee. "When these changes have been made in the past, we have received heartbreaking calls, typically from distraught family members whose loved ones have ended up in a hospital because they could not get their medications."

It remains to be seen what action, if any, the committee will take based on Swerlick's advocacy. Although her arguments on behalf of Florida's medically needy are backed by hard evidence, both

legal and medical, Swerlick often struggles to be heard by legislators, agency heads and other decision-makers.

Still, the value to the millions of Florida Medicare and Medicaid beneficiaries of an advocate like her is clear. Just ask Bobby Guin, who can now afford his insulin and other medications.

"We wouldn't have never got that if it hadn't been for Anne and her crew, because they're the ones who went to bat for us for our medicine," Guin said. "They've really come through for us."



RAY STANVARD

‘Especially with mental health problems, it sometimes takes years for the doctors to try different things. It’s very idiosyncratic whether something’s going to work, what combination of medications, so if you start messing around with that, you’re really going to be causing the recipient to be at risk.’

– Anne Swerlick

Florida Legal Services

FLORIDA MEDICARE/MEDICAID PRESCRIPTION DRUG HELPLINE

1-800-436-6001

In 2009, the helpline provided counsel and assistance to 407 callers with Medicaid and/or Medicare prescription drug problems. These callers included Medicaid and Medicare beneficiaries as well as social workers, advocates, physicians and medical office staff. The helpline offered advice on the legal right to appeal a prescription denial, as well as assistance to medical office staff in requesting prior authorizations, coverage determinations, and exceptions to step therapy, in which recipients prescribed a drug not on the Preferred Drug List have to try an alternative drug until it is proven ineffective. Most callers were able to get coverage for their denied medications.

Keeping the developmentally disabled out of prison

by Nancy Kinnally

Growing up in Parsons, Kan., Katy DeBriere was surrounded by people with developmental disabilities, many of them residents at a state hospital and research center where her parents worked.

"I went to school with a lot of kids with developmental disabilities and had a special connection to them because they were often also my parents' clients," said DeBriere, now an Equal Justice Works Fellow at Florida Institutional Legal Services in Newberry, Fla. The nonprofit, Washington, DC-based Equal Justice Works provides public service work experience for law students and lawyers.

A 2008 graduate of the University of Florida Levin College of Law, DeBriere has taken her in-depth knowledge of a population that is particularly vulnerable within the criminal justice system and turned it into a project that is the only one of its kind in Florida.

Through education, outreach, resource development and direct advocacy, DeBriere is working to prevent the unnecessary incarceration and institutionalization of people with intellectual and other developmental disabilities, such as autism.

"Statistics show that although 1.5 percent of the general population have developmental disabilities, they represent 4 to 10 percent of the prison population," DeBriere said. "And I've found that when I go and talk to care providers and families of people with developmental disabilities, this is a concern."

She has developed and is distributing an 82-page handbook for defense attorneys designed to help them identify and communicate with the developmentally disabled, understand state and federal benefits programs that could help them, document their disabilities and seek special sentencing considerations.

Developmental disabilities can include problems like impulse control

that can result in behaviors that people find unacceptable in public, and this can sometimes lead to arrest.

It can begin with something as simple as an outburst at a library, as in the case of one of DeBriere's clients, who was arrested and served with a trespass order.

DeBriere eventually got the trespass order lifted, but meanwhile he faced an even bigger problem – a potential cut in the support services available to him through the Developmentally Disabled Medicaid Waiver. Now, she is working to ensure he'll be able to keep the services of a supportive living coach and companion who can help him avoid situations like the one he got into at the library.

FILS Executive Director Chris Jones said people with intellectual or developmental disabilities also are sometimes manipulated into participating in criminal behavior.

"A lot of times they're used as runners or go-betweens in drug transactions with no criminal intent, no idea what they're being put up to," Jones said. "So, they'll get sucked into a huge drug bust, and then typically they'll be very cooperative with police and agree to whatever they're accused of."

After that, the person might not understand the charges or be able to explain his view of what happened. His defense attorney might not know the legal defenses applicable to the developmentally disabled or even be aware of his disability. Once in the prison system, where he may not understand the rules and is still subject to manipulation and miscommunication, it only gets worse.

"And if you get frustrated and you act out physically, now you're a security risk," said Jones, adding that this can lead to being put in isolation in a lockdown cell. "We're talking about people who are probably not literate or capable of asking for the help they need, and it's a very long, very lonely time for them. We're hoping that with Katy's project we can slow and



Katy DeBriere

divert the flow of people into that system with some education."

DeBriere's work during the two-year fellowship is supported by a \$104,000 grant from The Florida Bar Foundation, but it began when DeBriere first worked at FILS as a law-school intern. The following summer she returned as a Florida Bar Foundation Legal Services Summer Fellow and began to hone her Equal Justice Works proposal with inspiration and help from several FILS attorneys whose career paths had begun the same way.

Her plan for the remainder of her fellowship is to take the handbook statewide and make presentations in various judicial circuits around Florida.

Jones believes those who meet her – even those with years of experience working in Mental Health Court – will leave having learned something new.

"Katy has been an admitted lawyer for about a year, and I think she's probably now an expert in the state on this area of the law," said Jones, who hopes to hire her as a staff attorney after the fellowship.

View the defense attorney handbook, "Developmental Disabilities & The Criminal Justice System," at www.floridabarfoundation.org/handbook.

Florida Justice Summit explores alternatives to new prisons

Juvenile justice and prison reform were the chief topics of discussion in November at the Collins Center for Public Policy's Florida Justice Summit in Tampa.

Co-sponsored by The Florida Bar Foundation, the Summit brought together nearly 300 law enforcement and justice officials, nonprofit organizations, business owners and legislators – all calling for an overhaul of the state's overpopulated and expensive penal system.

Prison reform advocates argue that investing in rehabilitation and job training programs in prison is a small investment compared to the \$100 million to build one state prison and the additional \$25 to \$30 million in annual operations costs. It would cost even less to invest in a diversion

program to prevent at-risk youth from entering the system in the first place, said April Young, Collins Center vice president for justice initiatives.

"This is the question: Are we going to pour Florida's future into corrections, or are we going to invest in measures that improve our state?" Young said.

Florida Department of Children and Families and Juvenile Justice secretaries George Sheldon and Frank Peterman were among the conference speakers, along with state business leaders Barney Bishop, CEO of Associated Industries of Florida, and Tony Carvajal, executive vice president of the Florida Chamber Foundation.

"We're trying to pull together people who are interested in changing



April Young

our justice system so that it costs less, but not just so it costs less, but so it produces people who can come back into our neighborhood and be citizens again," said Collins Center President Rod Petrey. "We're not doing that now."

Foundation welcomes new board members (continued from fall 2009)



As president of Florida Legal Services, Miami attorney **Cristina Alonso** is a designated director on the Foundation board. A shareholder with Carlton Fields in Miami, Alonso is a member of the firm's Appellate Practice and Trial Support Group and serves as the group's continuing legal education training director. She practices in the areas of product liability, complex commercial litigation and personal injury defense. Alonso is a member of The Florida Bar Young Lawyers Division Board of Governors and serves as chair of its Pro Bono and Community Involvement Committee. She also is a member of The Florida Bar Appellate Section's Pro Bono Committee. She earned her bachelor's degree at the University of North Carolina at Asheville and her juris doctorate at the University of Florida College of Law.



Judge **Marva L. Crenshaw** has been appointed by Florida Supreme Court Chief Justice Peggy Quince to replace Judge Thomas S. Wilson Jr., who retired from the bench, and accordingly from the Foundation board, in October. Crenshaw was appointed to the Second District Court of Appeal in January 2009. Her career began as a prosecutor with the State Attorney's Office in Miami-Dade County. She later served as deputy director of Bay Area Legal Services until she was appointed to the Hillsborough County Court in 1989. In 2000, she was appointed to the Thirteenth Judicial Circuit. As a trial judge, she served in the civil, family, criminal and juvenile divisions. An honors graduate of the Tuskegee Institute, she received her juris doctorate from the University of Florida College of Law.



As president-elect of The Florida Bar, **Mayanne Downs** is a designated director on the Foundation board. A shareholder with King, Blackwell, Downs & Zehnder, P.A. in Orlando, Downs practices civil, trial, appellate and domestic relations law. She is also the city attorney for the city of Orlando. Downs has been a member of The Florida Bar Board of Governors since 2002 and has served on the Executive Committee since 2005. She is past president of the Orange County Bar Association and The Legal Aid Society of the Orange County Bar Association and serves as a Guardian ad Litem for neglected and abused children. She earned her bachelor's degree from the University of Florida and her juris doctorate from the University of Florida College of Law.



Leadership and Funding for Justice in Florida

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The Florida Bar Foundation is the only statewide organization that provides funding for Legal Aid and promotes improvements in addressing the civil legal needs of the poor.

FOUNDATION FACTS

Individual donations supporting Children's Legal Services totaled \$220,763 in 2009. More than 5,000 donors contributed to one or more of the following fundraising efforts supporting children's grants: the Lawyers' Challenge for Children on The Florida Bar Annual Fee Statement; the Foundation's 2009 end-of-year campaign for Children's Legal Services; or the purchase or renewal of a Kids Deserve Justice license plate.

These donor contributions are added to regular Foundation funding for Children's Legal Services. In 2008-09, the Foundation awarded 23 grants to local legal aid programs for their Children's Legal Services projects, enabling them to represent the legal needs of children in nearly 3,000 cases.

The Foundation's priorities for its Children's Legal Services grants include representation of foster children and access to special education, as well as medical, developmental and mental health services that are required under law.

SPEAKING OF JUSTICE

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We are The Florida Bar Foundation,

and we believe the system works best when it works for everyone.



Leadership and Funding for Justice in Florida