FORUM 8

Volume 68, No. 5 | Eighth Judicial Circuit Bar Association, Inc. | January 2009

President's Letter

Tis The Season

By Margaret Stack

By the time you get this the Christmas season will be over, a New year will have dawned and the Gators will be playing for a National Championship once again. Will the Big Three Automakers still be in business? What will our economy be doing? Life seems so much more hazardous then it did such a short time ago. Our Courts, State Attorneys and Public Defenders and all facets of the Court system are in grave jeopardy. Everywhere we look things are grim.

I can tell you one thing now… the members of the Eighth Judicial Circuit Bar Association have once again opened their hearts and their pocketbooks to give to the children at Marjorie K. Rawlings School. Santa (a/k/a Carl Schwait) delivered the bags of toys that so many have worked so hard to gather. Elizabeth Collins and Lua Mellman have worked tirelessly on this project so be sure and tell them "Thanks" when you see them. Complete details together with a list of donors' names and hopefully pictures will be in the next issue.

We have much to look forward to in the coming year…a new President who brings a message of hope and the promise of solutions to the many problems our Country faces. We will be hearing from Chief Judge Smith at our January meeting with the latest on what's happening in our corner of the world.

We have some great programs scheduled for this year and look forward to seeing all of you at our monthly luncheons. If you haven't paid your dues yet, please do so. Also, if you know someone who is not a member, bring them with you.

Happy New Year and GO GATORS!!!!!!!!!!!!!!!!

2009 Heart Ball to Honor Jimmy Feiber of Salter, Feiber, Murphy, Hutson and Menet, P.A.

We are proud to announce that the 2009 Heart Ball and Auction is honoring our own Jimmy Feiber, a heart transplant survivor, and long-time supporter of the Gainesville community. Jimmy has been practicing in our legal community for over 39 years. The annual gala premier benefiting the American Heart Association is Saturday, February 14, 2009 at the Hilton University of Florida Hotel and Conference Center.

In support of Jimmy and the American Heart Association, the American Heart Association invites you to support the Gainesville Heart Ball. The American Heart Association can work with your company to find a sponsorship that best meets your marketing or personal objectives. Tickets, table

Continued on page 5

The officers of the Eighth Judicial Circuit Bar Association for the year 2008-2009 are:

Margaret Stack
President
PO Box 1437
Gainesville, FL 32601
352 374-3670
352 491-4488 (fax)
stackm@sao8.org

John D. Whitaker
Past President
224 SW 2 Ave
Gainesville, FL 32601
352 375-6229
352 375-6652 (fax)
jdw@kinsellandassociates.com

Rebecca O'Neill
President-Elect
720 SW 2 Ave., Ste 360A
Gainesville, FL 32601
(352) 733-0030
(352) 733-0052 (fax)
oneilr@shands.ufl.edu

Elizabeth Collins
President-Elect Designate
PO Box 850
Gainesville, FL 32602-0850
(352) 372-4381
(352) 376-7415 (fax)
ecollins@dellgraham.com

Marynelle Hardy
Secretary
201 E. University Avenue
Gainesville, FL 32602
(352) 374-3636
mnh@alachuaclerk.org

Sharon Sperling
Treasurer
2830 NW 41 St., Ste. C
Gainesville, FL 32606-6667
352 371-3117
352 377-6324 (fax)
Sharon@sharonsperling.com

MEMBERS AT LARGE:

Nancy Baldwin
309 NE 1st St
Gainesville, FL 32601
(352) 376-7034
(352) 372-3464 (fax)
baldwinnt@cox.net

Ray Brady
1216 NW 8th Ave.
Gainesville, FL 32601
352 378-6118
352 378-8530 (fax)
rfbrady@bellsouth.net

Pamela Brockway
P O Box 1437
Gainesville, FL 32601
(352) 374-3670
(352) 491-4488 (fax)
brockwayp@sao8.org

Deborah E. Cupples
2841 SW 13 St, G-327
Gainesville 32608
(352) 273-0600
(352) 392-8727 (fax)
Cupples@law.ufl.edu

Denise Ferrero
Past President
2312 NW 14th Place
Gainesville, FL 32605
352 372-9999
352 375-2526 (fax)
drferrero@yahoo.com

Kathleen Fox
PO Box 1930
Alachua, FL 32616-1930
(386) 462-5157
(352) 538-2172 cell phone
(386) 462-1996 (fax)
kathleen@kcfoxlawoffice.com

Evan George
204 W. University Ave., Ste.11
Gainesville, FL 32601
(352) 378-5603
(352) 378-5604 (fax)
edglaw@gmail.com

Leslie Haswell
2233 NW 41st Street, Suite 700-A
Gainesville, FL 32605
(352) 373-3800
(352) 373-8991 (fax)
leshaswell@aol.com

Brian Kramer
1 Southeast First Ave.
Gainesville, Fl. 32602
352-376-5242
352-375-0690 (fax)
Kramer@scruggs-carmichael.com

Mac McCarty
926 NW 13th Street
Gainesville, FL 32601-4140
(352) 336-0800
(352) 336-0505
mmccarty@nflalaw.com

Liz McKillop
P.O. Box 850
Gainesville, FL 32602-0850
(352) 372-4381
(352) 376-7415 (fax)
emckillop@dellgraham.com

Lua J. Mellman
120 W University Ave
Gainesville, FL 32601
(352) 374-3670
(352) 491-4553 (fax)
mellmanl@sao8.org

Sheree Lancaster
PO Box 1000
Trenton, FL 32693
(352) 463-1000
(352) 463-2939 (fax)
shlpa@bellsouth.net

Frank Maloney
Historian
445 E Macclenny Ave Ste 1
Macclenny, FL 32063-2217
(904) 259-3155
(904) 259-9729 (fax)
Frank@FrankMaloney.us

Howard Rosenblatt
2830 NW 41 St Ste H
Gainesville, FL 32606
(352) 373-7100
(352) 376-3760 (fax)
hmr.law@gmail.com

Dawn Vallejos-Nichols
Editor
2814 SW 13 St
Gainesville, FL 32608
(352) 372-9999
(352) 375-2526 (fax)
dvallejos-nichols@avera.com

Contribute to Your Newsletter!

From The Editor

I'd like to encourage all of our members to contribute to the newsletter by sending in an article, a letter to the editor about a topic of interest or current event, an amusing short story, a profile of a favorite judge, attorney or case, a cartoon, or a blurb about the good works that we do in our communities and personal lives. Submissions are due on the 5th of the preceding month and can be made by email to dvallejos-nichols@avera.com.

About This Newsletter

This newsletter is published monthly, except in July and August, by:

Eighth Judicial Circuit Bar Association, Inc.
P.O. Box 127
Gainesville, FL 32602-0127
Phone: 380-0333 Fax: 380-9112

News, articles, announcements, advertisements and Letters to the Editor should be submitted to the **Editor** or **Executive Director** by Email, or on a CD or CD-R labeled with your name. Also, please send or email a photograph with your name written on the back. Diskettes and photographs will be returned. Files should be saved in any version of MS Word, WordPerfect, or ASCII text.

Judy Padgett
Executive Director
PO Box 127
Gainesville, FL 32602
352 380-0333
866-436-5944 (fax)
execdir@8jcba.org

Dawn Vallejos-Nichols
Editor
2814 SW 13 St
Gainesville, FL 32608
(352) 372-9999
(352) 375-2526 (fax)
dvallejos-nichols@avera.com

Deadline is the 5th of the preceding month

Thank You from Three Rivers Legal Services

Three Rivers Legal Services wishes to thank the following attorneys for their donations of pro bono time and/or financial resources to further the availability of legal assistance to the indigent residents of our community. We look forward to greater participation in 2009 as we face significant concerns about the increased need of our clients. Thank you and Happy New Year!

Amy Abernethy
Robert Ackerman
Janet Parker Ailstock
William T. Allen Jr.
Margaret Anderson
Maritza Arroyo
Mitzi C. Austin*
Avera & Smith
N. Albert Bacharach, Jr.*
Thomas Balcerzak
Ann Barnett
C. Valentine Bates
Robert W. Bauer
Harvey E. Baxter
Marilyn C. Belo
Philip C. Beverly Jr.
Marvin W. Bingham Jr.*
Birder & Donsky Law Offices
Sam W. Boone Jr.
Barbara Y. Bourguignon
Raymond F. Brady*
Bruce Brashear
Eric Brill
P. Ause Brown*
Susanne Wilson Bullard
Barbara A. Burkett*
Theodore M. Burt*
Robert Butts
Tracey D. Carlisle
Charles B. Carter Jr.
Jodi Cason
Michael Cavendish
Chester B. Chance
Ramona M. Chance
Thomas G. Christmann
James E. Clayton
C. David Coffey
Kevin Coleman
Julia Cook
John S. Cooper
Tom L. Copeland
Marshall Criser
Kenneth S. Davis*
Richard B. Davis
Robin Davis
Dell Graham, P.A.
Philip A. DeLaney
Thomas DePeter
DeThomasis & Buchanan, P.A.
Randi E. Dincher
Jeffrey R. Dollinger
Donnelly & Gross, P.A.
James M. Donohoe Jr.
Peter C. K. Enwall
Bobbie L. Eubank*
Michelle L. Farkas
Mark Feather
James G. Feiber Jr.
Charles G. Felder
Fine, Farkash & Parlapiano, P.A.
Fisher, Butts, Sechrest, PA
Kathleen C Fox*
J. T. Frankenberger
Carla D. Franklin
Mark J. Fraser
Charles M. Gadd Jr.
William "Bill" Galione
Evan D. George
Honorable David A Glant
Lucy Goddard Teel
Harvey L. Goldstein
Gary D. Grunder
Dudley P. Hardy
Doris D. Hargrave
John H. Haswell
Leslie S. Haswell
Zelda J. Hawk
Alan Hawkins
John F. Hayter
Wm.Carlisle Herbert
Richard H. Hiers
Bruce E. Hoffman*
Charles I. Holden Jr.
A. Bice Hope
Hutson & Brockway, P.L.
Denise Lowry Hutson
Leonard E. Ireland Jr.
Raymond M. Ivey
Carl Johnson
Huntley Johnson
Lee S. Johnson
Stephen K. Johnson
Kelley D. Jones
John D. Jopling
Terence J. Kann
Donna Keim
Dora Kerner
Richard M. Knellinger
Scott David Krueger
Robert Lambert Jr.
Sheree H. Lancaster
David Miller Lang Jr.
F. Parker Lawrence II
Jennifer C. Lester
Susan E. Lindgard
Professor Joseph Little
Jonathan J. Luca
Katherine E. Macdonald
Marjorie Malagodi
Frank E. Maloney Jr.*
Lawrence J. Marraffino
W. Wesley Marston
McGalliard & Brady
Kevin McNeill
John McPherson
Stephen G. Mercadante
Susan L. Mikolaitis
The Law Offices of Moody, Salzman & Lash
Horace Moore
Melissa Jay Murphy
Samuel A. Mutch
Judith Nagan
George Herbert Nelson, III
John R. Nettles
Ted Nichols
Rebecca L. O'Neill
Honorable Ben Overton
Vera Page
Kyle E. Petteway
Thomas Pflaum
James Quincey
Bevin G. Ritch
R Franklin Ritch
David A. Roberts III
Howard M. Rosenblatt
Law Office of Rush & Glassman
Frank P. Saier
Bill Salmon
Salter, Feiber, PA
Anthony Salzman
Gerald Schackow
Pam Schneider
Carl B. Schwait
Scruggs & Carmichael, P.A.
Michael Sechrest
Ernest A. Sellers Jr.
Siegel & Hughes, P.A.
Brande Schwartz Smith
Sharon Sperling
Karen K. Specie
F. Emory Springfield*
Jennifer Springfield
Robert A. Stern
Stripling & Stripling, P.A.
Cynthia S. Swanson*
Alison Talbert
Michelle Thresher Taylor
Diane Tomlinson
A. Scott Toney
Andrew Vloedman, P.A.
Herbert M. Webb
Michael Weiss, P.A.
Jonathon F Wershow
Scott Whitaker
Richard White
Robert L. Williams
Wanda M. Yachnis
Nancy E. Yenser
Karen S. Yochim
E.A.W. "Pan" Zettler*

* Recipient of the Florida Bar President's Pro Bono Service Award

Alternative Dispute Resolution

Statistically, Settling Is Better Than Going To Trial

By Chester B. Chance and Charles B. Carter

Many of you have been kind enough to send us an article which was published in the New York Times in August 2008.

The article previewed a study published in the September issue of the Journal of Empirical Legal Studies. The study was done by analysts who have a consulting firm that advise clients on litigation decisions.

According to the co-author of the study, Randall L. Kiser, "The lesson for plaintiffs is, in the vast majority of cases, they are perceiving the defendant's offer to be half a loaf when in fact it is an entire loaf or more". The conclusions from the study of civil lawsuits found most of the plaintiffs who decided to pass up a settlement offer and went to trial ended up getting less money than if they had taken the offer.

The study notes the vast majority of cases settle (somewhere between 80% to 92% by some estimates according to Mr. Kiser). In the cases that did not settle, plaintiffs ended up getting less than the last defense offer in 61% of the cases that went to trial. Defendants made the wrong decision less often, i.e., in 24% of the cases according to the study. In 15% of the cases that went to trial the defendant paid less than the plaintiff had wanted but the plaintiff got more than the defendant had offered. The study notes the mistake of rejecting a settlement proposal was made more often in cases in which the lawyers are paid a share of whatever is won at trial (contingency fee). Other studies (see Lawyer Negotiation by Jay Folberg and Dwight Golann) suggest the tendency to be optimistic and overconfident becomes stronger when the person making the judgment acquires a personal stake in the outcome.

The study suggests 61% of plaintiffs ended up getting an average of $43,000 less than the defendant's last offer prior to trial. Defendants, even though they were less often wrong in proceeding to trial (24% of the time), when a verdict *was* entered for more than what the plaintiff had demanded for settlement, the verdict was on average $1.1 million dollars more than the last demand.

The findings suggest to the authors of the study that lawyers may not be explaining the odds and risk of proceeding to trial to their clients or the clients are not listening to their lawyers. The authors of the study note law schools do not teach how to "handicap" trial nor does law school help develop the skill of telling a client that a case may not be a winner (noting clients do not like to hear such news).

"Most clients think they are completely right . . . . A good lawyer has to be able to tell clients that a judge or jury might see them differently . . . . Part of it is judgment and part of it is diplomacy" according to attorney Michael Shepard of San Francisco.

The study found factors like the years of experience of a lawyer, the rank of a lawyer's law school and the size of the law firm were not helpful in predicting the results of a decision to go to trial. The most significant factor was the type of case, i.e., poor decisions by plaintiffs to go to trial are associated with cases in which contingency fee arrangements are common. Also, the study found on the defense side, errors more often occur in cases where there is no insurance coverage.

A separate study done 30 years ago by Gerald R. Williams interviewed attorneys in cases that went to trial. The attorneys were asked their opinion of why the case proceeded to trial. Fifty-three percent (53%) of those asked said the reason was the failure by one party to agree to the terms recommended by their own attorney. Williams comments that the usual emphasis in legal negotiation is upon the process by which attorneys reach agreement with one another. However, Williams suggests the more important focus should be upon the process by which the disputing parties themselves move from conflict to agreement.

The authors of this column conjecture most of the cases going to trial in the study are cases which involve strong liability issues. The study notes in the 61% of the cases where plaintiffs did worse by going to trial the defendant had offered an average of $48,700 and the plaintiff had demanded $565,800. The average final award to the plaintiff was $5,700. That suggests a lot of "defense verdicts".

In the 24% of cases where the plaintiff did better by going to trial, the average plaintiff demand was $770,900, the average defendant offered $222,400 and the final average award was $1.9 million. This again suggests cases in which the defendant was gambling

Continued on page 5

Alternative Dispute

Continued from page 4

on the liability issue. Perhaps the motivating factor for plaintiffs in these situations is the old adage, "if you ain't got nothing, you got nothing to lose".

In only 15% of the cases which proceeded to trial, the jury award was somewhere between the plaintiff's last demand and the defendant's last offer.

Clearly this study suggests going to trial is risky for both parties. The majority of the time the plaintiff will do worse than the last offer. The defendant will do worse less often than the plaintiff, however, the monetary risk is much higher for the defendants in those situations.

It appears that when defendants feel there is no liability, more often than not the jury agrees with the defendants. Only 24% of the time will the plaintiff "ring the bell". Over 60% of the time the case will proceed to trial and result in a defense verdict or a low verdict.

The study has enough information to give pause to both sides and to give comfort to those who have resolved and settled a case at mediation, i.e., take comfort in the fact that statistically, they made the right decision by settling.

2009 Heart Ball

Continued from page 1

sponsorship, and donation packages are available.

The American Heart Association works every minute of every day to advance groundbreaking medical research, spread lifesaving knowledge, and reach out to people of all ages. The American Heart Association is building healthier lives, free of cardiovascular diseases and stroke, to ensure stronger, longer lives for you and your loved ones. If you have any questions about this event, sponsorship, and donations, please contact Kristine Van Vorst, Salter, Feiber, Murphy, Hutson, and Menet, P.A., (352) 376-8201.

Clerk's Corner

Indigency Determinations In Appeals

By J. K. "Buddy" Irby

The Clerk picked up a new responsibility recently that may affect some of your clients. The Florida Supreme Court amended Florida Rule of Appellate Procedure 9.430, Proceedings by Indigents, on November 13, 2008 (In Re: Amendments to the Florida Rules of Appellate Procedure 2008 WL 4876766 (Fla.), 46 Fla. L. Weekly S908). The 2008 Amendment comment provides: Subdivision (b) was created to differentiate the treatment of original proceedings from appeals under this rule. Each subdivision was further amended to comply with statutory amendments to section 27.52, Florida Statutes, the legislature's enactment of section 57.082, Florida Statutes, and the Florida Supreme Court's opinion in In re: Approval of Application for Determination of Indigent Status Forms for Use by Clerks, 910 So. 2d 194 (Fla. 2005).

The rule now requires the filing of a signed application for determination of indigent status with the clerk using an application form approved by the Supreme Court for use by circuit court clerks. The rule previously required a filing of a motion.

Case law interpreting the former version of the rule required that indigency requests could only be filed by motion and such motions must be ruled on by the court, not the clerk. With this change, the clerk is now required to make indigency determinations. In appeals of civil cases, parties applying for indigency must use a civil indigency application. In appeals of criminal cases, parties applying for indigency must use a criminal indigency application. The Clerk's indigency determination can be reviewed by the lower tribunal.

As in trial court proceedings, an indigency determination allows a party to proceed without prepayment of costs. Parties determined indigent are required to enter into a payment plan for payment of court costs and fees incurred in the appeal.

FBA Judicial Reception in Ocala

By Peg O'Connor

On Thursday, December 4, 2008, the North Central Florida Chapter of the Federal Bar Association held a judicial reception at Golden Ocala Golf and Equestrian Club. A number of attorneys from Gainesville and Ocala met for hors d'oeuvres and a chance to socialize with both state and federal judges. Ocala attorney John Fuller, of Ayres, Cluster, Curry, McCall, Collins, and Fuller, PA., put a tremendous amount of time and effort into coordinating this event. In addition, Magistrate Judge Gary Jones, who spoke briefly at the reception, has been an important source of support from the judiciary. The FBA would like to recognize those who sponsored this gathering:

- Ayres, Cluster, Curry, McCall, Collins, and Fuller, PA
- Turner & Hodge, LLP
- Law Firm of Robert S. Griscti
- Law Offices of Gilbert A. Schaffnit
- John M. Green, Jr., PA
- James H. Sullivan III
- J. Arthur Hawkesworth, Jr.
- John Fuller

The FBA is hard at work organizing more events for both members and non-members alike; for example, in January, we will be hosting a brown bag lunch with Judge Jones. Please see the article in this newsletter for more details.

FBA Launches its Brown Bag Series—RSVP Now!!

By Peg O'Connor

FBA is excited to host its first brown bag lunch of 2009. The Honorable Gary R. Jones, Magistrate Judge for the United States Middle District of Florida, Ocala Division, will speak with local practitioners about the basics of federal practice as well as the different roles served by magistrate and district judges. This is a great opportunity to interact with a federal judge, ask questions pertinent to your practice, and learn about the inner workings of federal court. The lunch even includes a tour of Judge Jones's chambers. We anticipate that this event will be approved for one hour of CLE credit. Lunch is provided, of course.

The lunch is limited to ten people, so hurry and send your RSVP to Elizabeth McKillop at emckillop@dellgraham.com to reserve your seat.

When: January 28, 2009

Where: Golden-Collum Memorial Federal Building and United States Courthouse, 207 NW 2d Street, Ocala, FL 34475

Cost: $10 for members, $20 for non-members. $10 if you sign up as a new FBA member!

Larry Turner, Betsy Hodge, Brenda Schaffnit, Peg O'Connor, and Gil Schaffnit pause for a photo at the FBA Judicial Reception.

Harlan McGuire, Peg O'Connor, and Alexis Cooper. Harlan and Alexis are two law students serving on the FBA board and are very involved in planning events.

Criminal Law

by William Cervone

Hard as it is to believe, you will be reading this in 2009. It doesn't seem that long ago that the world was going to end because of some millennial disaster or other. Somehow we have survived to start another new year, this one the last of a decade since then. To all of you I wish the best for 2009 and I hope you return to work refreshed in mind and soul by the holiday season.

Among the catching up that January seems to involve each year there is certainly enough reading to do just in keeping up with Florida cases and decisions. I can't claim that I'm always as current as I should be with that, so I rarely look at anything from outside of Florida other than the most pertinent of US Supreme Court decisions. This is especially true of things that come out of California, the land of the bizarre. Recently, however, I was given and did read a 9th Circuit case that provokes this article.

The case, Kenna v US District Court, Central District Of California, deals with victim rights under federal law. Briefly, a father and son operation swindled dozens of people out of more millions of dollars than I can conceive of. The father was convicted and sentenced first, and Kenna, one of the victims, spoke about the effects of the crime – "retirement savings lost, businesses bankrupted, and lives ruined," as the 9th Circuit summarized it. When the son's day in court rolled around some months later, however, the sentencing judge refused to hear from Kenna again, saying that he had heard it once and, in an uncommonly dumb thing to say from the bench, that "I don't think there's anything that any victim could say that would have any impact whatsoever." (I recognize that that quote is undoubtedly out of context.)

Kenna sought mandamus to compel a re-sentencing hearing at which he would be allowed to speak. He conceded that the court could put reasonable constraints on his exercise of his right to be heard but argued that being heard meant in person and orally, not just by written submission or reference to prior statements. The opinion discusses at fair length whether to be heard compels an oral exchange and the intent of the federal victims rights statute in making crime victims "full partners" in the criminal justice system. Ultimately, the 9th Circuit agreed with Kenna, held that it was error not to allow a victim to speak orally, granted mandamus, and in a great piece of legal dodgeball left it for the District Court to grapple with the fact that the defendant was not a party to the mandamus action and most assuredly would take exception to the re-opening of his sentencing proceeding based on various pesky little constitutional concerns.

Florida has dealt with this same issue although not in the same way. In 2002, the 2nd DCA refused to allow vacation of change of plea and sentencing proceedings when a victim complained that she did not have adequate notice to attend and speak. (Bryant v State, 829 So2d 969, if you care.) The reason? Double jeopardy, of course.

I say all of that to say this. When I started prosecuting, victims were given no consideration about the impact to them of whatever had happened or how we in the court system were all going to inconvenience them to suit our own schedule and purpose without a second thought. Locally, we realized that we had to do better for victims in the early 1980s, and now we have state statutes making us do so even if we didn't recognize that we should on our own. Make no mistake about this: there is a downside in that complying with yet another procedural requirement complicates what we are trying to accomplish. I'm not the only one who must have noticed that what once took a few minutes and a few pages to accomplish now takes hours and volumes. But we have to and should accommodate victims, not just because it's the law but because it's the right thing to do. Our cases are real and they have real impacts on real people. Some forbearance on our part in hearing them out even when it's not convenient or maybe even helpful is the least we can do.

Welcome Wagon

Meet Vikram J. Saini

By Dawn M. Vallejos-Nichols

Vikram J. Saini and Kelly R. McNeal have announced the formation of their new "general service law firm," McNeal and Saini, P.L. Kelly, who was featured in a prior edition of the Forum 8 Welcome Wagon, contacted me and suggested that we introduce her new partner in a like manner.

Vik is a Florida boy through and through. Although he was born in Tampa, he was raised on the opposite coast in the harbor city of Melbourne. He came to Gainesville in 1998 to attend the University of Florida, where he obtained his undergraduate degree in Political Science and Religion. Vik stayed in Gainesville to attend the Levin College of Law, graduating in December 2005. He began his legal career as an assistant state attorney under Bill Cervone's direction following graduation.

Following his stint with the State, Vik accepted a position with a private investment group with projects in Central America. He worked in and out of The Republic of Panama and the United States with various start-up projects and businesses, ranging from medical tourism to reforestation projects as a broker and promoter. As his business trended toward healthcare, Vik decided to formalize his background by enrolling in the Masters Degree program in Healthcare Administration. As you can probably tell by now, Vik is anything but your average guy!

In his spare time (?), Vik enjoys spending time with friends and family, as well as cooking, traveling and engaging in non-profit work. He is a huge fan of motorsports, and logs in many an hour in his garage working on various car projects!

Even though Vik has enjoyed a variety of interesting jobs over the years – including being a radio disc jockey, a computer consultant

Continued on page 9

Driving Mr. Bin Laden

By Stephen N. Bernstein

The first military commission since World War II rendered a stunning verdict and sentence last August against Salim Ahmed Hamdan, Osama bin Laden's former driver. The commission's decision was remarkable not because it was the first of its era but because it appeared to be measured, thoughtful and fair – or as fair as a hopelessly flawed system could hope to produce.

A jury of six military officers acquitted Mr. Hamdan of the most serious charge of conspiracy and convicted him of providing material support to al-Qaeda. Mr. Hamdan was then sentenced to 66 months in detention, with credit for the 61 months he had already served. The bottom line; Mr. Hamdan could be - and should be - released before President Bush leaves office.

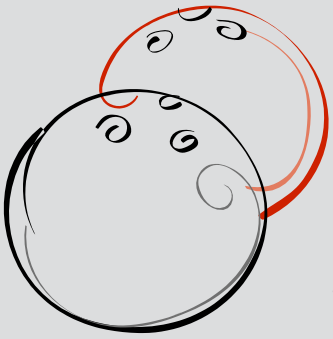
The matter emerged as both vindication and defeat for the administration; vindication in the sense that the commission in this case proved not to be the kangaroo court many critics once feared and predicted; defeat, in that even military jurors and a military judge in no way bought the administration's assertion that Mr. Hamdan was a hardened al-Qaeda operative deserving life imprisonment. After all was said and done, the jury was convinced that Mr. Hamdan was simply a low-level, uneducated father of two, who was stuck with a job chauffeuring Osama bin Laden because it paid well enough for him to support his family. It is one thing for a defense lawyer to assert such a benign explanation, another for a military jury sitting in judgment to endorse it. Apparently nothing contained in evidence introduced in secret sessions persuaded the jurors to believe otherwise.

The President may yet try to extend Mr. Hamdan's detention. The Supreme Court has determined that the executive may hold without charge those such as Mr. Hamdan, designated as enemy combatants. While I acknowledge the executive's prerogative to do so, I suggest that it would be unnecessary and unwise to exercise that power in Mr. Hamdan's case.

To hold a man who has been judged to be of minimal risk to the country would make a mockery of legal proceedings just completed. This result, mind you, was reached under a system that allows the introduction of hearsay evidence and statements gleaned using coercive tactics. It is a system that

Continued on page 9

Eighth Judicial Circuit Bar Association Young Lawyers Division Presents:



Bowling Brawl 2009

WHAT: The Young Lawyers Division invites all lawyers and judges to compete for the title of Best Bowler in the Eighth Judicial Circuit!

WHEN: **Saturday, February 28, 2009 at 1:00 pm** (registration begins at 12:30pm)

WHERE: Alley Katz Bowling Alley

WHY: All proceeds benefit Three Rivers Legal Services

COST: $20 (includes two hours of bowling, shoe rental, and refreshments)

DEADLINE: Register on or before February 9, 2009

REMIT REGISTRATION FEE TO: Eighth Judicial Circuit Bar Association Young Lawyers Division
Post Office Box 1775
Gainesville, Florida 32602
(please provide names of all bowlers at the time of registration)

You can register as individuals or in teams of up to 4 people!
For more information or if you have questions, contact
Justin Jacobson @ 352-373-3334 or justinrmk@bellsouth.net.

Driving Mr. Bin Laden

Continued from page 8

restricts the ability of the defense lawyer to rebut government allegations - the right of defendants even to be aware of certain evidence. It is a system, in short, that should be shut down and replaced by one with more due process for defendants, even while protecting national security prerogatives.

That Mr. Hamdan obtained such a measured and appropriate result is a testament to the integrity of the participants in this matter, particularly the jurors and the judge. It would seem that Mr. Hamdan has been punished enough for his small part in what was and continues to be a vicious and violent global enterprise masterminded and operated by others.

Welcome Wagon

Continued from page 8

and a caterer – he has always maintained his interest in the law and kept the law as part of his professional life. He is very excited about the opening of his and Kelly's law firm, and hopes to practice more commercial and health law related matters. Their firm will also engage in family law, criminal defense, civil litigation, and civil and family appeals. We wish him and Kelly all the best.

If you or anyone you know is new to the Gainesville legal community, please contact Dawn at dvallejos-nichols@avera.com to be featured in the Welcome Wagon.

Save The Date!

On May 1, 2009, the Annual EJCBA Golf Tournament (associated with Law Week) will be held at the UF Golf Course. Lunch will be from 11:30 a.m. – 1 p.m.; tee off at 1:00 p.m., with a reception to follow. Put this on your calendar NOW!

Members:
Please make sure you add execdir@8jcba.org to your email address book so important messages from EJCBA don't get blocked

Family Law

The Hague Convention

By Cynthia Stump Swanson

For those of us involved in family law, there are a lot of state and federal statutes with which we need to be familiar. There is a lot more out there than just Florida Statutes Chapter 61, which is entitled "Dissolution of Marriage; Support; Custody." For example, Florida Statutes Chapter 63 governs all types of adoptions. Section 743.07(2) provides for the payment of child support for a dependent person beyond the age of 18 in certain circumstances. Chapter 751 provides for the temporary custody of minor child by extended family members. In addition, most family law practitioners are familiar with the alphabet soup of laws such as the UCCJEA, UIFSA, and the PKPA. One of the pieces of legislation which most of us have not had as much to do with is CARA, the International Child Abduction Remedies Act, 42 USC §11601. This is the legislation passed by Congress in 1988 as the United States became a contracting member of the Convention of the Civil Aspects of International Child Abduction, which is otherwise known as The Hague Convention.

The Hague Convention is essentially a uniform law (much like the UCCJEA), which contracting countries may adopt to compel the return of a child who is wrongly removed from his or her habitual residence. The explanation by the official Convention Reporter is that the Convention is intended to prevent one parent from gaining an unfair advantage in a custody dispute by taking a child to another country in order to invoke that other country's jurisdiction.

A court hearing a petition brought under the Hague Convention is solely to determine which country will have jurisdiction to enter an order in any subsequent custody dispute. The court hearing the Hague petition is not supposed to determine the relative merits of the parties as parents, or the best interest of the child, in order to make a custody order. Instead, the court is supposed to determine whether the country from which the child was removed was the child's "habitual residence;" and whether the "abducting parent" took the child away from his or her habitual residence without the consent of the "left behind parent." If that is the case, then the court hearing the Hague petition should order the child to be returned to his or her country of habitual residence. The court should also make orders about who will pay for travel expenses, and any provisions that may be necessary for the child's safety and welfare after the child returns to the country of habitual residence. In addition, the court is to consider an award of fees to the left behind parent if he or she prevails on the petition.

At first blush, it would seem that the two main factors required to be proven in order to prevail in a Hague petition would be fairly straightforward, and either true or not true. The left behind country either is or is not the child's habitual residence, and the left behind parent either did or did not give his or her permission for the child to leave. But, as with much of the law, things are not always straightforward. The presence of domestic violence in the home from which the child has been taken has been considered by many courts as a very important factor in both the initial showing of habitual residence, and in the "grave risk" defense.

Habitual Residence

A 2006 case from the 7th Circuit recognized that the existence of domestic violence may affect the determination of whether the left behind country was the habitual residence of the child. The 7th Circuit rejected the argument that the trial court should not consider abuse by one parent of the other in determining habitual residence, citing the *Tsarbopoulos* case, *infra*, "At least one other court has found that the physical abuse of one spouse by another is a relevant factor in the court's determination of the existence of shared intent to make a place a family's habitual residence." *Koch v. Koch*, 450 F3d 703, 719 (7th Cir. 2006). The reason for this analysis seems to be two-fold. The *Koch* court held that the husband's physical attacks against the wife gave him an incentive to seek a friendlier forum for custody, which is in direct contravention of the goals of the Hague Convention. But, in addition, the *Koch* and the *Tsarbopoulos* courts recognized that a determination of habitual residence should not be based purely on an observation of behavior, but must include an assessment of intent and settled purpose. The *Tsarbopoulos* court specifically stated "Where the

Continued on page 11

Court finds verbal and physical abuse of a spouse to the degree present in this case, the conduct of the victimized spouse asserted to have manifested 'consent' [to move to another country] must be carefully scrutinized." *Tsarbopoulos*, *infra*, at 1056.

Grave Risk of Physical or Psychological Harm Related to Domestic Violence

There are several exceptions to the "rule of return," even if the two main factors (habitual residence and wrongful removal) are proven. Article 13(b) provides that, notwithstanding the finding that a child has been abducted within the meaning of the Convention, a contracting country should not require the return of the child if there is a grave risk that the return would expose the child to physical or psychological harm or would otherwise place the child in an intolerable situation.

In the last seven or eight years, courts have expanded on the meaning of this "grave risk" exception where there has been domestic violence in a child's home. These cases appear to coincide with the general acceptance of sociological and psychological studies which show that, even where a parent has not abused a child, but has abused the other parent, the child is likely to suffer harm. See, for example, the following cases:

a. *Walsh v. Walsh*, 231 F.3d 204, 220 (1st Cir. 2000): "Credible social science literature establishes that serial spousal abusers are also likely to be child abusers. Both state and federal law have recognized that children are at an increased risk of physical and psychological injury themselves when they are in contact with a spousal abuser."
b. *Tsarbopoulos v. Tsarbopoulos*, 176 F.Supp.2d 1045, 1057 (E.D. Washington 2001): "Spousal abuse, found by the Court in this case, is a factor to be considered in the determination of whether or not the Article 13(b) exception applies because of the potential that the abuser will also abuse the child."
c. *Van De Sande v. Van De Sande*, 431 F.3d 567, 568 (7th Circuit 2005): "While the remedy of return works well if the abductor is a non-custodial parent, it is inappropriate when the abductor is a primary caretaker who is seeking to protect herself and the children from the other parent's violence. . . . In such a case, the remedy of return puts the victim's most precious possession, her child, in close proximity to her batterer either without her protection (assuming she does not return with the child) or with her protection, thereby exposing her to further violence."

Burden of Proof

ICARA also establishes various burdens of proof which the parties must meet. §11603(e)(1) provides that the petitioner must establish by a preponderance of the evidence that the child has been wrongfully removed from his or her habitual residence. The respondent who opposes the return of the child and who alleges the return would result in a grave risk of physical or psychological harm must prove that defense by clear and convincing evidence.

However, in regard to the burden of proof which the respondent must meet in asserting the "grave risk defense," at least one court has held that while the defense must be established by clear and convincing evidence, subsidiary facts need only be proven by a preponderance of the evidence. "There may be twenty facts, each proved by a preponderance of the evidence, that in the aggregate create clear and convincing evidence." *Elyashiv v. Elyashiv*, 353 F.Supp.2d 394 (E.D. New York 2005).

Hague Convention cases are few and far between, but the body of law interpreting this treaty is growing

New Day for Section Meetings

The family law section meeting dates are going to change. Beginning in December, we will meet on the third Tuesday of each month, still at 4:00 p.m., and still in the Chief Judge's conference room in the Alachua County Civil and Family Justice Center. We are hopeful that there will be more parking available on Tuesdays, if we're not coinciding with the Wednesday Farmer's Market. The next meeting will be Tuesday, January 20, 2009 at 4:00 p.m., and so on, on the third Tuesday of each month.

At our meeting in December, we enjoyed a presentation from Kim Hardy, C.P.A., from James Moore & Co., who spoke to us about the valuation of small and closely held businesses. If you want to be added to or removed from an e-mail list which reminds us about meetings, please contact me at cynthia.swanson@acceleration.net. I look forward to seeing you at our meetings.

January 2009 Calendar

1 New Year's Day – County and Federal Courthouses closed
5 Deadline for submissions to February newsletter
7 EJCBA Board of Directors Meeting; Ayers Medical Plaza, 720 SW 2d Avenue, North Tower, Third Floor – 5:30 p.m.
8 CGAWL meeting, Ayers Medical Plaza, 720 SW 2d Avenue, North Tower, Third Floor – 5:30 p.m.
8 North Florida Association of Real Estate Attorneys meeting, Scruggs & Carmichael, 4041 NW 37th Place – 5:30 p.m.
8 Fed Ex BCS National Championship, Oklahoma Sooners v. Florida Gators, 8:00p.m., Miami, FL
9 EJCBA Monthly luncheon meeting; Savannah Grande, 11:45-1p.m.; Chief Judge, Speaker
9 Honorable William E. Davis' Investiture to Circuit Bench, Courtroom 1B, Criminal Justice Center – 4:00 p.m.
14 Probate Section Meeting, 4:30 p.m., 4th Floor, Family & Civil Courthouse
19 Martin Luther King, Jr.'s Birthday – County and Federal Courthouses closed
20 Family Law Section Meeting, 4:00 p.m., Chief Judge's Conference Room, Alachua County Family & Civil Justice Center

February 2009 Calendar

4 Deadline for submissions to March newsletter
4 EJCBA Board of Directors Meeting; Ayers Medical Plaza, 720 SW 2d Avenue, North Tower, Third Floor – 5:30 p.m.
5 CGAWL meeting, Ayers Medical Plaza, 720 SW 2d Avenue, North Tower, Third Floor – 5:30 p.m.
11 Probate Section Meeting, 4:30 p.m., 4th Floor, Family & Civil Courthouse
12 North Florida Association of Real Estate Attorneys meeting, Scruggs & Carmichael, 4041 NW 37th Place – 5:30 p.m.
16 President's Day – Federal Courthouse closed
17 Family Law Section Meeting, 4:00 p.m., Chief Judge's Conference Room, Alachua County Family & Civil Justice Center
20 Honorable Denise Ferrero's Investiture to County Court Bench, Criminal Justice Center, 4:00 p.m.
28 YLD's Bowling Brawl 2009 (to benefit Three Rivers Legal Services), Alley Katz Bowling Alley, 1:00 p.m.

Have an event coming up? Does your section or association hold monthly meetings? If so, please fax or email your meeting schedule let us know the particulars, so we can include it in the monthly calendar. Please let us know (quickly) the name of your group, the date and day (i.e. last Wednesday of the month), time and location of the meeting. Email to Dawn Vallejos-Nichols at dvallejos-nichols@avera.com.

FORUM 8

Eighth Judicial Circuit Bar Association, Inc.
Post Office Box 127
Gainesville, FL 32602-0127

Non-Profit
Organization
U.S. Postage
Paid
Gainesville, FL
Permit No. 179