FORUM 8

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President's Letter

by Margaret Stack

Spring has sprung and summer is almost upon us. UF has had its numerous graduations and Gainesville is once again in the hands of us local folks. Summer vacation plans are being made by many of you so before you jet off, let me remind you of two up-coming events that are being planned for lawyers in our area.

First is the Annual Bar Dinner where I will hand over the gavel to in-coming President, Becky O'Neill. I have mixed emotions about this. It has been my honor and great pleasure to have served as your President for the last year. It has also been a lot of work and responsibility because when the rubber hits the road it is the President who is called on to sort things out. It has been my great good fortune to have had a super Board of Directors who show up and help out. Without their efforts many of the things we have accomplished wouldn't have gotten done.

I have no idea how Dawn Vallejos-Nichols is able to create such a great newsletter every month. She deserves a lot of credit so when you see Dawn, tell her "Thanks". Another hard working, long suffering person is our Treasurer, Sharon Sperling. She keeps a tight rein on our money so when we want to do something special for our members, we have the funds available. Just keeping up with the finances of the Holiday Project is a huge job! She deserves a lot of credit for her tireless efforts.

Another Board Member who deserves special mention is Frank Maloney. Each month he drives to Gainesville from the wilds of Baker County several times to attend Board Meetings, Bar luncheons and other Bar activities. He also reminds us of the history of the Bar Association and has been instrumental in preserving records and pictures of our Association. Frank also takes great pictures for us.

I could go on and on about our Board members and our general membership. Suffice it to say we have the best Bench and the best Bar of anywhere in Florida. Please put our Annual Dinner scheduled for June 18th on your calendar and join us at the Museum of Natural History for another great evening. As a special treat, we will be honoring all of our Past Presidents.

You know sometimes good things come at the same time. That is the case with our Calendar of Events. The next day, June 19, beginning at 4:00 p.m. there will be a reception to honor our very own Judge Stephan Mickle, incoming Chief Judge of the United States District Court for the Northern District of Florida.

Judge Mickle is a man of many firsts. He was in the first group of seven African American undergraduate students to register at the University of Florida in 1962 and the first African American to earn an undergraduate degree from the University in 1965. His wife of 40 plus years, Evelyn, was the first African American graduate of the University of Florida's College of Nursing. Judge Mickle was the second African American to graduate from the University of Florida College of Law, the first African American County Judge and Circuit Judge. He was appointed to the First District Court of Appeal in Tallahassee, Florida, before returning to us in 1998 when he became the first African American Federal Judge in the Northern District. He will be the first African American Chief Judge when he is sworn in.

We hope you all will join us for both of these events.

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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:

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Deadline is the 5th of the preceding month

EJCBA Golf Benefits Holiday Project

By Mac McCarty

On a beautiful Law Day 2009, thirty-four golfers gathered at UF's Mark Bostick Golf Course to participate in the EJCBA Golf Tournament benefiting the EJCBA Holiday Project. The competition was intense (but frequently comical) as the seventeen twosomes vied for gross, net, and hole prizes. When the sun-baked groups finally returned to the clubhouse for the post-round reception, the team of Miles Kinsell and Brian Scarborough won the low gross prize with a blistering round of 61 on the par 70 course. Close behind—but behind nonetheless—was the father-son team of Rod and Jesse Smith with a nifty 63.

With the tournament using a Modified Scheid Scramble Scoring System to allow all teams to fairly compete for the net prizes, the team of Howard Rosenblatt and Leonard Grill won the low net prize with a score of 56 (we won't mention their gross score). Kimberly Kinsell and John Whitaker took the second net prize, also with a 56, losing in a tiebreaker (but we won't mention their "grosser" score either). Hole prizes were won by Frank Saier for closest to the pin and Paul Dobbins, playing as a guest of the Tournament's Signature Sponsor, The Dharma Endowment Foundation, Inc., for the longest putt.

While the golf fun was important, the overriding goal of the tournament was to raise money for the EJCBA Holiday Project. With seventeen organizations and individuals contributing, a little over $3,000 was raised for Christmas gift bags distributed to elementary school children through the Holiday Project. A hearty "Thank You" to all of those who participated or contributed to this event. The EJCBA hopes to see everyone back (plus some) for next year's Tournament!

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Judge Davis points out the line of a chip to Judge Nilon

Rod Smith, Jesse Smith, Dan O'Connell, and Frank Saier relax on the 18th green

Probate Section Report - Part II

By Larry E. Ciesla

The probate section held its regular monthly meeting on March 11, 2009. (article continued from May 2009 issue of Forum 8)

I wanted to point out an area of concern to those of us who participate in real estate closings. Just in case handling the nightmare known as a short sale is not challenging enough, here is something else to be on the lookout for. Buyers who can't qualify for an institutional loan under today's tightened lending standards (What, you mean I have to prove that I in fact have the ability to repay this loan?) are turning to mortgage brokers for help. The brokers in turn find private individuals to make mortgages to these buyers, who could be referred to as "sub-prime". In any event, such loans can bring up issues that many times are not examined in the absence of knowledgeable counsel, which in many cases is absent, partially due to the fact that such loans tend to be on the small side. Having recently encountered one such loan (representing the private lender) in a case where the buyer did not have a lawyer and the seller was using a south Florida title agency as the closer, and having been involved in another such case several years ago (representing the private lender in a foreclosure action), here are a few words to the wise. First, you need to figure out what laws apply. The main ones that you need to be familiar with are the Federal Truth in Lending Act (TILA)(15 USC Sections 1601-1693r); Regulation Z (12 CFR pt 226); the Federal Homeowner's Equity Protection Act (HOEPA)(Section 32 of Reg Z); and various provisions of Chapter 494, Florida Statutes, governing mortgage brokers, particularly Section 494.0042 which specifies the maximum fee a broker may charge. The federal rules are of particular import, as violations tend to result in the borrower having a right to rescind the entire transaction up to three years after closing, which would result in the note and the mortgage being totally invalidated. The federal rules generally apply in cases involving the borrower's primary residence; however, note that Section 494.0042 applies to commercial loans where the borrower is an individual. Note that under HOEPA if a mortgage broker is involved in the transaction, all of the federal rules under TILA, Reg Z, and HOEPA apply even if this is the only loan the individual lender has ever made and if the loan is secured by a mortgage on the borrower's primary residence. We are all familiar with the 3-day right of rescission/cancellation under TILA and Reg Z; however, in this context we are concerned with a totally separate right to rescind if all required disclosures are not accurately made in connection with the closing. This right extends for three years.

You may be wondering what is the relevance of all this? Well, here is how it can come up, as it did in a case I handled several years ago. I filed a foreclosure on behalf of the individual who made and held the mortgage. The borrower went to Three Rivers Legal Services for assistance. The borrower's attorney proceeded to raise violation of all these laws as a defense to the foreclosure. Needless to say, I was at a loss. I started checking into the matter and quickly concluded this was a tad complicated. I ended up getting a reference book dedicated solely to the statutes, rules and cases on these issues. I determined it was going to be my burden to prove that my client had fully complied with all of the applicable rules (of which there are many). Regardless of whether the rules had been followed at the time of the closing, the only thing that had any import at the time of the foreclosure was whether my client could prove he had followed all the rules. Fortunately, we were able to quickly locate the mortgage broker, who had indeed scrupulously followed all of the rules and, amazingly, retained a copy of everything we needed to prove our case. What are the chances of that happening in this day and age where most people in the mortgage industry don't even have paper files?

A loan is subject to HOEPA if the interest rate is more than 8% over the T-bill rate for a comparable duration. I understand that 12% is a standard rate on these loans. With most T-bills yielding under 4%, HOEPA will apply in most such cases. Alternatively, if the broker charges more than 8 points, HOEPA applies. I further understand that 10 points is typically charged on such loans. The one in which I was very recently involved had an interest rate of 12% and the broker charged 10 points. Note that 10% is the maximum allowable fee under FS 494.0042, and in this case the proposed fee exceeded the maximum allowed due to the fact that the statute states the maximum is 10% of the amount of actual loan funding, after deducting the points. In that case, everyone came to my office for the closing (lender; buyers; mortgage broker; real estate broker; no representative of south

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Immigration Matters

By Evan George

Assessing the potential immigration consequences of criminal convictions is often a difficult and complex task. If you represent a non-citizen in a criminal matter, the answers to the following six questions will be pivotal in negotiating a plea agreement sensitive to your client's immigration status or their eligibility for relief from deportation:

1. At the time of entry into the United States, was your client lawfully admitted on an immigrant visa (green card), a nonimmigrant visa (visitor, student, temporary worker, etc.), or did they enter without inspection?
2. Does your client have any prior criminal convictions? (Findings of juvenile delinquency proceedings are not convictions for immigration purposes)
3. Is the potential sentence of the criminal offense at issue greater than one-year imprisonment?
4. What was the date of your client's last entry into the United States?
5. Does your client have a spouse, child or parent who is a U.S. citizen or lawful permanent resident?
6. Does your client have a fear of persecution on account of their race, religion, political opinion, nationality, or membership in a particular social group (including sexual orientation) in their homeland?

The answer to the first question above will determine whether your client faces potential removal proceedings as a non-citizen who is "inadmissible" (entry without inspection) or "deportable" (lawful admission in any status). Under the U.S. immigration laws, the statutory grounds for removal vary significantly depending on whether the non-citizen was lawfully admitted upon entry. The commission of a single crime involving moral turpitude (CIMT), with a potential sentence of at least one-year imprisonment, would render a non-citizen inadmissible, yet not deportable, unless the crime was committed more than five years after admission. Similarly, under the grounds of inadmissibility, a non-citizen can be removable from the United States simply for admitting to the essential elements of a CIMT, while under the grounds of deportability, a conviction is required. Multiple criminal convictions (question #2) can constitute grounds for removal; however, here too, the distinction between inadmissibility and deportability can be crucial.

Both the potential sentence and actual sentence of a criminal offense (question #3) are critical to the assessment. Regardless of the underlying conduct, the potential sentence of an offense, if greater than a year, can be the difference in whether your client will be placed in removal proceedings. Similarly, the actual sentence, whether or not the non-citizen is required to serve time, can be determinative of whether the offense will be classified as an aggravated felony. Several offenses, including crimes of violence or theft offenses, only constitute aggravated felonies if the actual sentence is greater than one-year imprisonment. As a notable example, the law firm of Kinsell, Zadel & Whitaker handled a recent case where a long-term lawful permanent resident was charged with aggravated battery. Criminal defense attorney John Whitaker negotiated a plea agreement resulting in a 364-day sentence, enabling his client to avoid classification as an aggravated felon, and thereby averted deportation.

The remaining questions above relate to a non-citizen's eligibility for humanitarian relief from removal. These forms of relief include political asylum (domestic refugee status), withholding of removal under the Convention against Torture, cancellation of removal, etc., and will be discussed in future columns. The next column will address recent developments in legal relief for unaccompanied and undocumented children whose parents or guardians have abandoned, abused or neglected them. If you have an immigration-related issue or question, feel free to contact me at 352-378-5603 or evan@evangeorge-law.com.

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

Alternative Dispute Resolution

Mediation Solutions

By Chester B. Chance and Charles B. Carter

Recently we wrote some tongue and cheek articles about the history of ADR. The idea stemmed from a recent mediation where the two sides had seemingly reached an impasse. One side was demanding $60,000 and the other was willing to pay $50,000. Typically these resolve at the midpoint, but, in this mediation each party was firmly entrenched. Both attorneys frequented Las Vegas and enjoyed gambling. So did their clients. Each side agreed to literally "roll the dice". A pair of dice was obtained from the glove box of somebody's car. A high roll would determine whether $50,000 was paid or $60,000 was paid. When the parties and their counsel came into the conference room to roll the dice, both attorneys smiled at each other and said, "I suppose we should compromise at $55,000". And that is exactly what happened.

Sometime rolling the dice may be necessary. Gary Weiner is an attorney and mediator in Sonoma County, California. He authored an article which involved a story about a purchase of land. To make a long story shorter, the buyers' idea to subdivide the land fell through when the County prevented the buyers from putting in the road they desired. Regrettably the potential buyers had waived any contingencies on the purchase. But the circumstances included some equitable issue which favored the buyers. The buyers were requesting return of their $20,000 deposit. The seller refused. The matter was mediated.

The buyers and seller and their respective lawyers mediated to the point of near impasse. The only thing they agreed upon was the similar names they were calling each other. The buyers said they wouldn't take less than $15,000 being returned to them from the original deposit. The seller dug his heals in at returning only $10,000. It was a matter of principle to everyone.

The buyers had done some homework and learned the seller had won the property playing poker and was a big time gambler. They proposed cutting a deck of cards. If the buyers win the seller would return $15,000; if they lose they will take the $10,000. The buyers' high profile corporate lawyer was all for the idea. Interestingly, so was the seller and his attorney.

A deck of cards was obtained. The buyers drew the Jack of Clubs. The seller drew the 6 of Diamonds. All had a good laugh. The seller immediately wrote a check for $15,000. Interestingly, they were laughing and getting along so well they agreed to explore some other possibilities for developing some land together.

What lessons are learned here? First, the seller was given a respectable "out". Dignity and self-esteem weren't involved. The cards allowed him to externalize the decision-making and reach a compromise. Second, there was a relationship change. The buyers acknowledged the seller's poker playing background and that was appreciated. The seller felt "seen" according to Gary Weiner. Third, the mediator played almost no role in the ultimate resolution. Although the mediator clarified the terms of the deal before the actual drawing of cards, according to Mr. Weiner, the mediator basically just got out of the way and made room for the parties to do what they wanted to do.

We suppose the parties could have used rock, paper and scissors or flipped a coin instead of drawing from a deck of cards. The point is: Never discount the need to "think outside the box" to resolve a matter efficiently, fairly and with allowance for all of the psychological factors to come into play.

The "A" in ADR may just as well stand for "Appropriate" or "Acceptable".

(**Thank You:** As a final thought: thanks to Dawn Vallejos-Nichols for all her hard work putting together the articles for the newsletter. She puts in a lot of time and effort in a thankless job and deserves a "well done". *Thanks guys. -Ed.*)

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Recovery Of Attorneys' Fees Under The Wrongful Act Doctrine

By Siegel, Hughes & Ross

A contract or statute is not the only way to recover attorneys' fees in Florida. For several decades Florida courts have recognized the "wrongful act doctrine" which allows a party to recover attorneys' fees against a third party. The doctrine has been described as follows:

Where the wrongful act of the defendant has involved the claimant in litigation with others or placed the claimant in such a relation with others as makes it necessary to incur expenses to protect his or her interest, such costs and expenses, including attorney's fees, should be treated as the legal consequences of the original wrongful act and may be recovered as damages. *Canadian Universal Insurance Co. V. Employers Surplus Lines Co.*, 325 So.2d 29, 31 (Fla. 3rd DCA 1976).

There are four elements necessary to establish a right under the doctrine:

1. A wrongful act on the part of the defendant;
2. Which places the plaintiff in a position that requires him to litigate with others;
3. To protect his interest;
4. Causing him to incur costs and expenses, including attorneys' fees.

Auto-Owners Ins. Co. V. Hooks, 463 So.2d 468 (Fla. 1st DCA 1985).

One major distinction between this doctrine and more traditional methods of recovering attorneys' fees is that the fees must have been incurred in litigation with a third party, not the defendant against whom the fees are sought. *Auto-Owners, supra,* provides a good example of this requirement. In that case Auto-Owners' insured, Loflin, sold his car to Arnold. When he discovered Arnold had paid for the car with a forged cashier's check, Loflin submitted a claim to Auto-Owners for theft. Auto-Owners traced the car through a number of dealers and found it had been sold to Hooks by Var Heyl Lincoln Mercury, Inc. Auto-Owners sought and received a prejudgment writ of replevin and took possession of the vehicle. Hooks counterclaimed against Auto-Owners and included in the counterclaim a claim against Var Heyl for breach of warranty of title. Var Heyl then brought a multi-count complaint against Auto-Owners. The trial court found on summary judgment that Auto-Owners had wrongfully obtained the prejudgment replevin and awarded the car to Hooks. It also awarded Var Heyl all of its attorneys' fees. The First District affirmed in part and reversed in part. It held that Var Heyl was entitled to recover from Auto-Owners its attorneys fees incurred in defending Hooks' claim under the wrongful act doctrine. However, it noted that the doctrine allowed recovery of fees "only to the extent that they are incurred in litigation with a third party in connection with the dispute between the party seeking fees and the third party." *Id*. at 477. It limited Var Heyl's recovery to those fees incurred prior to the time the court granted summary judgment against Auto-Owners on its replevin case and denied fees for Var Heyl's pursuit of its remaining claims against Auto-Owners. *See also, Robbins v. McGrath*, 955 So.2d 633, 634, n. 2 (Fla. 1st DCA 2007).

The doctrine is not an independent cause of action giving rise to attorneys' fees. *Horowitz v. Laske*, 855 So.2d 169 (Fla. 5th DCA 2003). Instead, it is a recognition that recovery of attorneys' fees may be an element of damages recoverable for violation of an existing duty. In this situation attorneys' fees are an item of special damages and must be specifically plead. *Robbins v. McGrath*, 955 So.2d 633 (Fla. 1st DCA 2007); Rule 1.120(g), Fla. R.Civ.P.

Given that limitation, the factual situations in which the doctrine can be invoked seem to be quite broad. In *Tibbetts v. Nichols*, 578 So.2d 17 (Fla. 1st DCA 1991) the purchaser of real property was awarded fees incurred in litigating the validity of a lease which was undisclosed by the seller. It has been applied to a claim against an excess insurer against a primary insurer for fees incurred defending a bad faith case brought by the mutual insured. *Canadian Universal Insurance Company v. Employers Surplus Lines Insurance Co.*, 325 So.2d 29 (Fla. 3rd DCA 1976). Another interesting application of the doctrine is its use by a successful bidder to recover attorneys' fees incurred in a bid challenge by an unsuccessful bidder. The litigation resulted from the county's negligent failure to provide the plaintiff the complete bid package. Under those circumstances the First District held the successful bidder was entitled to recover its attorneys' fees from the county. *Baxter's Asphalt & Concrete, Inc. v. Liberty County,* 406 So.2d 461 (Fla. 1st DCA 1981). It seems the doctrine, also, would be applicable in

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Criminal Law

by William Cervone

As we reach the end of the publishing year, I have a few things to wrap up.

One is a preliminary word on 2009 criminal legislation that may be of interest: nada. As in none, zero, zip. The legislature has been so consumed with money issues that little of substance has been passed. If I can't have my wish for a biennial session granted I'll settle for this. Symptomatic of the near paralysis that has gripped Tallahassee for nearly two years now is the fact that last year's creation of the Sentencing Policy Advisory Council has resulted in absolutely nothing. The Council has not been appointed, much less met or done anything towards its role of reviewing sentencing in Florida. This is amazing to me since the real role of the Council was to find ways to do things cheaper, meaning to incarcerate fewer people, which is what the legislature is all about now. It has all turned out to be, as they say, sound and fury signifying nothing. To balance things, I suppose I should add that on yet another of my frequent and interminable trips to Tallahassee during the session I spoke with the Governor, and he smiled warmly (and tan-ly) and assured me that everything would be OK. I was comforted.

Related to this, I'd like to report to you on FDLE's most recent statewide crime stats, which were released a few weeks ago. For calendar year 2008, the statewide crime rate for major crimes increased from 2007 by an insignificant .1% despite the economic troubles that we face. Most people assume that a sinking economy will mean increased crime. Apparently it hasn't happened yet, or at least it hadn't in 2008. Most of the counties in the 8th Circuit beat even this number. Alachua County's crime rate was down 5.1%, Baker County's was down 18.5%, Bradford County's was down 4.4%, and Union County's was down 19.2%. Only Gilchrist County (+47.1%) and Levy County (+21.8%) bucked the trend. In small counties it doesn't take all that much to change the numbers so I'm not necessarily dismayed by that. For perspective, in calendar year 2007 Gilchrist County's crime rate was down 23.1% from 2006 and Levy County's was down 16.6% from 2006. Including and since 2000, the crime rate in Alachua and Levy Counties has been down in seven of the last nine years. Over that same period, it has been down six of nine years in the other four counties of our circuit.

Melded into a circuit-wide picture, the numbers are pretty much the same. The crime rate declined from 2007 to 2008 for the 8th Circuit by 2.6%, and between 2000 and 2008 it went down in seven of nine years. What does it all mean? I don't know - maybe several things. Acknowledging that statistics can be both used and abused it still says something about how the criminal justice system is functioning to have decreasing crime rates at a time when population is increasing and economic hard times are upon us. Maybe we don't understand what causes crime as well as we thought, although the one category where the numbers were up for the circuit in 2008 was theft. Maybe it's a simple function of getting rid of the repeat offenders who commit disproportionate numbers of crimes - identifying and incapacitating the repeaters through incarceration is one of our goals. Maybe all "the sky is falling" predictions about law enforcement and even court funding is a little too strident.

In any event, it's food for thought. Enjoy the summer.

Word of Appreciation from the Editor

By Dawn Vallejos-Nichols

The Forum 8 is published from September to June of each year (10 issues) and would not be possible without the very hard work of all of our regular contributors, as well as those who contribute informative articles on an occasional basis. I am in awe of those who continue to regularly produce articles that both educate and entertain us and thank them for the commitment they have made to unselfishly assist the rest of us in our practices. Additionally, I want to thank every contributor for trying their best to meet the monthly deadline, which is important so that we can provide you with a timely newsletter at the beginning of each of the publication months.

Finally, a huge thank you to Darren Burgess, who takes the articles after editing and performs the incredible task of making everything fit so well into our page and space restrictions. Without his monumental contribution, the Forum 8 would not be nearly as polished and professional as it appears, and I truly appreciate his monthly assistance.

See you all back in September!! Have a great (and safe) summer!

Justice in the Wild, Wild West

Post 911 Thinking of the Bush Legal Team

By Stephen N. Bernstein

Imagine a place where soldiers are entitled to burst through doors without warrants and citizens can be locked away without trial. Imagine that the leader of this place has the power to silence dissenters and the press, and also has the right to keep duly elected legislators from having a voice in these matters. Imagine further that this leader can unilaterally rip up and disregard any treaty he doesn't like and that he has been told that he is on solid legal ground by a circle of advisors. No, this is not some lawless third world country, nor the dusty, fictional outback from the old westerns, but rather, the United States of America, as described in a series of newly released Justice Department memos from the early years of the Bush Administration.

Some of the ideas in these memos, authored by lawyers in the Justice Department's elite Office of Legal Counsel, have been known for sometime, and later excursions of the Bush Justice Department denied many of the principles these memos now reveal. But their public disclosure now makes clear how intellectually dishonest Bush-era lawyers were in coming to these amazing conclusions.

Many of these memos distort existing statutes or case law to give the President the answers he wanted. For example, a September 25, 2001, memo concludes that law enforcement officers need not obtain search warrants to conduct intelligence operations inside the country. The legal reasoning: Foreign Intelligence constitutes "nation self-defense". In other contexts, courts have ruled that the use of deadly force and self defense is justifiable under the Fourth Amendment. Therefore, the memo concludes "if the government's heightened interest in self defense justifies the use of deadly force, it also certainly justifies warrantless searches". Never mind that Congress specifically passed the Foreign Intelligence Surveillance Act in the 1970's to forbid exactly these very warrantless searches.

Steven G. Bradbury, the last Bush Administration lawyer to head this group, spelled out in a mid-January memo the ultimate rejection of the conclusion outlined in the eight opinions that were released in March 2009. He also explained that the original decisions were made in the wake of the atrocities of 911, when policymakers, feeling that additional catastrophic terrorist attacks were imminent, "stride to employ all lawful means to protect the nation."

Fair enough. But those are precisely the kinds of circumstances that can lead even competent officials to embrace deeply flawed positions that lead to disgraceful results. And that is precisely why such opinions must be made public when possible or at least be shared with lawmakers with oversight authority and appropriate clearances.

Our new Attorney General, Eric H. Holder, Jr., took a step in the right direction by releasing these memos and by preparing to release more. He must be on guard now to ensure that his own Office of Legal Counsel does not fall into the same pattern of mistakes.

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Family Law Section

By Cynthia Stump Swanson

Last month, I reported on several tips from Judge Smith and Judge Davis for family law practitioners. This month, I'd like to pass on some additional items from Judge Moseley and Judge Glant, as well as some additional information from Judge Smith and Judge Davis. Before getting into the substance, I wanted to thank these judges, once again, on behalf of all family lawyers, for their generous and helpful comments. The family law judges have been making a special effort to attend FLAG meetings and Family Law Section meetings, and their attendance is really appreciated. Their willingness to provide guidance and insight to lawyers is something each of us should take advantage of. Also, it's possible that we can provide some information to them that will be helpful to them (see my comments below regarding child support guideline calculations).

So, on to specifics. These notes are from discussions held at the April Family Law Section meeting and the April FLAG meeting.

Judge Moseley asks us to please re-read the 8th Circuit Administrative Order 5.1120(E). This specifically provides that a parent must attend the Parent Education and Family Stabilization Course in person, unless the parent resides out of state, or in a Florida county in which such course is not offered in person, or if the parent receives permission from the Judge. We are being put on notice that the judges will review the parents' certificates to see that they have attended in person. If not, be prepared to show that the parent meets the criteria to attend a course online.

Beverly Graper mentioned that many parties for whom she has mediated have provided positive comments about attending the course before they attend mediation. This provides parents with information on things they should be thinking about regarding parenting issues that come up in mediation. She urges us to get our clients to attend the parenting course before mediation.

Based upon a question posed at the Family Law Section meeting, the judges responded to concerns about judges rotating in and out of divisions and how that can be difficult for parties whose cases are started with one judge and completed with another. Judge Glant pointed out that for every party who was upset because their first judge transferred out, there is another one who is really happy. The main piece of advice is for lawyers to "protect the record." This means to get substantial findings of fact into every order. When a second judge can read a temporary support order and see the facts upon which the order is based, it is less likely that the second judge would change the first judge's order, unless the facts have actually changed. Good recitations of facts result in more consistent orders, no matter who the judge is at the second (or third or fourth) hearing on that issue.

This point prompts me to remind you of one of Judge Smith's comments which I passed on last month: GIGO. Garbage in, garbage out. If we lawyers don't get in the evidence that a judge needs in order to make findings of fact, then it's pretty hard for the judge to do much to make findings. Similarly, if we don't put some work into proposed orders (writing them and reviewing them), then we have only ourselves to blame for orders which skimp on findings of fact.

Next, we discussed parenting plans and child support guideline calculations. Lawyers are urged to prepare a detailed parenting plan to be provided with their pretrial compliance statements. Specifically, to provide as detailed a plan as you want the court to adopt. Note that the Florida Supreme Court has adopted Form 12.995, a proposed parenting plan form which is not mandatory. The Court is still accepting comments on this form, so if you have some bright ideas, let them know. The American Academy of Matrimonial Lawyers also has a proposed plan, which you can get on a CD and then fill in on your own computer. The Supreme Court form can be downloaded from the Court's website.

The judges are very happy to accept a parenting plan with more or less detail, depending upon the parties' needs. If the parties are in agreement, not as much detail may be needed. Where there is a lot of conflict, however, a very detailed plan would probably be best.

Dr. Myrna Neims said that she had worked with some parties to help them fill out a parenting plan, and was surprised by how strongly some parties fought over only a day or two of time, and wondered why this would be. I brought up my personal pet peeve that the child support guidelines create this problem, and pointed out that one day can make a

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Family Law

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huge difference in the amount of child support paid. At some income levels, 40% instead of 39% contact can mean a couple hundred dollars difference in support paid and received. At other levels, it can make a $1,000 difference. Most rational people would not argue tooth and nail over one night per year. Over the course of a childhood, this still only adds up to 10 or 15 nights.

But $1,000 per month over ten years adds up to $120,000. Over 15 years, it's $180,000. THAT'S why the big fight, in my humble opinion. Judge Moseley mentioned later that he had not realized the monetary difference could be so significant. That is what I mean by the lawyers providing information that might be useful to judges in these give-and-take meetings.

The question of children and teenagers testifying in court was also considered. Generally, the judges do not like to talk to kids, but they all have done it at various times. Remember that Rule 12.407 governs this and no minor may be deposed or may testify or even be brought to a deposition or to court without prior order of the court based on good cause shown. The judges generally agreed that it is almost always a bad idea to talk with a minor, for several reasons. The usual concern about the child's maturity level is not just a concern about the ability to distinguish between the truth and a lie, but also for the child to understand the possible consequences to the child (emotionally) of such testimony. There are also concerns about whether a child may be more aligned with one parent than the other, and whether the child perceives that he or she has inappropriate "power" in giving testimony; as well as whether the judge is the best trained person to even be able to discern this.

On the other hand, the judges pointed out that a vast majority of the time, the child or teenager simply says something along the lines of, 'I just want to be with both my parents." And often something like, "I don't want to be in the middle of this." Judge Moseley pointed out that if you haven't been able to convince him that it's best for the child to be with a particular parent with the other evidence you have presented, what the child says will not tip the scales to that parent. Judge Moseley said he would rather hear from friends, neighbors, teachers, and so on than from children.

All the judges said that if they were going to talk with children or teenagers, it would be just that - talking with them. Not having the minor testify in open court. When judges have talked with children, they do it in their chambers, with just a judicial assistant or a bailiff or both present. No attorneys; no parents. Both parents would have to have agreed to this in camera procedure; otherwise, the child would have to testify in open court. My feeling was that it would be an exceedingly rare case in which a judge would grant a motion to have a child testify in open court.

Finally we had a discussion about evidence. We are reminded that the first rule of evidence is that it must be relevant. No need to even consider if it's an authentic record, hearsay, or an excited utterance . . . if it's not relevant, it should not come in. If it is relevant, then it should come in unless it is clearly excluded by some other rule. The judges recognized that the cost of doing the "perfect" dissolution of marriage trial has become very high and is simply overwhelming to most people. Thus, there is a perceived need for the rules of evidence to be somewhat relaxed in family law matters. Not abandoned, but somewhat relaxed sometimes in some situations. The probative value of any particular piece of evidence (its "weight") is always up to the judge in a family law matter. Thus, if a piece of evidence is on the cusp of being objectionable, the trial judge may let it in, but still not consider it to be particularly probative.

The Family Law Section meets the third Tuesday of each month at 4:00 p.m. in the Chief Judge's Conference Room in the Alachua County Civil and Family Justice Center. If you would like to be added to or removed from the email reminder list, please send me an email at cynthia.swanson@acceleration.net.

Probate Section

Continued from page 4

Florida title company); the deal involved the lender taking a mortgage on a commercial parcel and also on the buyers' residence; with not a single disclosure form in sight. When questioned, the mortgage broker was heard to say that none of those laws applied. He further stated that there could not possibly be a problem, as his "Compliance Department" in another city had approved the deal. In any event, you may now consider yourself on notice of these consumer protection laws, of which I have a feeling we may be forced to deal with a lot more going forward.

The probate section continues to meet on the second Wednesday of each month at 4:30 pm in the 4th floor meeting room of the civil courthouse. All interested practitioners are welcome to attend.

Recovery of Fees

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a suit for tortious interference with a contractual or business relationship.

There are circumstances in which the doctrine will not apply. A deeper understanding of the doctrine may come from knowing its limitations. One may not recover under the doctrine if one's own wrong has contributed to the litigation. Exemplary of this principle is *State Farm Fire & Casualty Co. v. Pritcher*, 546 So.2d 1060 (Fla. 3rd DCA 1989). In that case Pritcher purchased real property and received an assignment of the State Farm policy from the seller. Pritcher's attorney, Spatz, sent the assignment to State Farm but never followed up to obtain a written acknowledgment of the assignment, a condition of the policy. When Pritcher suffered a loss, State Farm denied coverage and Pritcher sued both State Farm and Spatz. Spatz cross-claimed against State Farm for his fees under the wrongful act doctrine. The court found State Farm liable under the policy but denied Spatz recovery against State Farm holding that it was Spatz' failure to obtain the acknowledgment that caused the litigation.

There is also some question, especially in the First District, whether the claim can be made in the same litigation as that in which the fees are incurred. While the majority of the decisions allow recovery in the same case, at least one case denies such recovery. In *Skipper v. McMillan*, 349 So.2d 808 (Fla. 1st DCA 1977) the First District denied recovery stating, "We have been unable to find any cases which allow the assessment of costs and attorney's fees in a primary action brought by the covenantee against the covenantor for breach of the covenants." *Id.* at 809. However, that case was decided over 30 years ago and the First District reached a different result more recently in *Tibbets v. Nichols, supra*, at 19. "Although this rule is typically applied to permit recovery when an attorney's services are rendered in a separate action, it appears from our review of the pertinent authorities that the circumstances justifying such an award is the necessity of entering into litigation against a third party, and not whether the action is *separate* or part of the lawsuit against the covenantor."

The cost of litigation continues to increase. As trial lawyers, particularly in a commercial or business setting, we can better serve our clients by looking to third parties, in addition to contracts and statutes, for recovery of those costs.

June 2009 Calendar

4 CGAWL meeting, Albert's Restaurant, UF Hilton, noon

10 Probate Section Meeting, 4:30 p.m., 4th Floor, Family & Civil Courthouse

11 North Florida Association of Real Estate Attorneys meeting, 5:30 p.m.

16 Family Law Section Meeting, 4:00 p.m., Chief Judge's Conference Room, Alachua County Family & Civil Justice Center

18 EJCBA Annual Dinner – Museum of Natural History, 6-9 p.m.

19 Reception Honoring Judge Stephan Mickle, UF President's House, 4-7 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.

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Dues Statements are Coming! Donate your Time or your Money!

By Marcia Green

Yet another year has passed and Three Rivers Legal Services continues to celebrate our commitment to providing free, civil legal services to the low income residents of North Central Florida. But while we are fortunate to pass our 30th anniversary milestone, our community is seeing the indigent population grow as layoffs increase and employment opportunities diminish. At the same time, our funding sources and other resources are struggling. Although we recognize that as attorneys you are not immune to the downturn of the economy, we ask that you take the time to reflect on your activities of the past year and consider that this might be a good time to invest in the legal needs of the poor of our circuit.

In the past year, more than twice the number of new clients have come to Three Rivers seeking assistance with foreclosures and with an even greater number of individuals or families facing eviction. The numbers of families in turmoil continues to increase along with the numbers of individuals just trying to survive.

As attorneys, you have the unique opportunity to offer legal help to those in our community who are facing the new challenges of our economic times as well as those who have endured a lifetime of poverty or disability. The needs of these individuals, families and the elderly or disabled can range from simple advice to preparation of legal documents, to contested litigation to save a home, escape an abusive marriage or secure financial independence. As attorneys, you alone have the ability to provide the legal help that can answer a simple question, provide for a child's future or settle a dispute. As attorneys, you can ensure that those who would otherwise be unable to afford legal help can get it.

Three Rivers Legal Services is the only provider of free civil legal assistance in the Eighth Judicial Circuit. Our general civil practice office provides services that span the gamut from routine hearings to complex federal litigation along with self-help clinics, and community education and outreach. Our consumer unit focuses on foreclosure and debt collection, including unfair and predatory debt collection practices. We continue to work in the fields of landlord-tenant law, family law, public benefits, employment and general civil legal services.

In the same way, our volunteer attorneys represent those facing divorce or custody in more-than-simple family law cases. They help the elderly or disabled with wills and advance directives or those who need a probate action to obtain clear title to the family homestead. The work of pro bono attorneys expands the services we can offer by working with non-profit groups who serve the needs of the low income community or providing services with expanded expertise and resources. In the past year, 11 new attorneys stepped forward and volunteered their services to the poor, we raised close to $27,000 from the private bar and another $1500 was donated by YLD from their Bowling Tournament this past spring. We are ever so grateful to those of you who provide services and donate to Three Rivers; however, as the needs of our community grow, so does the need for volunteers, donations and resources.

Now is the time of year when Florida attorneys will be receiving Florida Bar dues statement in the mail. If you discover that you have not met the Florida Bar's aspirational goal of providing at least 20 hours of *pro bono* service, please consider signing up and becoming a volunteer with Three Rivers. Alternately, we ask that you donate at least the suggested $350 per year to Three Rivers Legal Services in lieu of providing services. Your contribution will not only help to support the efforts of Three Rivers, but it will also provide matching funds necessary to obtain grants from other funding sources.

Three Rivers is extremely grateful to the attorneys in the Eighth Judicial Circuit who support our efforts. If you would like to volunteer and want to know of the many ways in which you can assist, or if you need assistance in calculating the hours you donated through Three Rivers Legal Services, please contact Marcia Green at 352-372-0519 or e-mail marcia.green@trls.org. If you have been a volunteer in the past and have not been contacted recently, please call or e-mail. Your contributions can be mailed to Three Rivers Legal Services, attn: M. Green, 901 N. W. 8th Avenue, Suite D-5, Gainesville, FL 32601.

Young Lawyers Division Update

By Kelly R. McNeal

As most of you are aware, our circuit is home to numerous young lawyers. The EJCBA Young Lawyers Division (YLD) is working hard to bring those young lawyers together. The YLD has been fairly busy the past few months, and we hope our upcoming projects will foster more interest from young lawyers who are not currently members of the YLD.

Some of the recent events of the YLD include:

- A social event at BJ's on April 2nd. Our social director, Evan George, organized this event.
- A 3 hour CLE involving the specifics of starting your own law firm (April 23rd). Our CLE director, Robert Folsom, organized this event. Robert also invited Judith D. Equels, Director of the Florida Bar's LOMAS, to attend.

Upcoming events from the YLD:

- The YLD is hoping to partner with Three Rivers Legal Services on several projects, including a legal education for the public project, where young lawyers would hold seminars throughout the circuit on issues related to Landlord/Tenant Law, Family Law, Foreclosures, etc.
- The YLD is also starting a project titled "Aging Out of the System – What Now?" This project will be headed by YLD director Rhonda Stroman. The event would present information to teens aging out of Foster Care. Topics presented would include Landlord/ Tenant Law, Driving Rules and Regulations, Alcohol and Drug Abuse, Relationship issues, Education, and Employment.
- The YLD continues to invite one judge from our circuit to attend a monthly luncheon with YLD members. We are extremely appreciative of this time with our judges. In the past 3 months, we've been fortunate to have Judges Davis, Moseley and Ferrero join us.

As you can tell, we are working quite diligently to make the YLD an organization the 8th Circuit can be proud of!

Reception Honoring Stephan P. Mickle as Incoming Chief Judge of the Northern District of Florida

By Stephanie Marchman

The North Central Florida Chapter of the Federal Bar Association is hosting a reception to honor Stephan P. Mickle as incoming Chief Judge of the United States District Court for the Northern District of Florida. All members of the Federal Bar Association and the Eighth Judicial Circuit Bar Association are invited to attend.

June 19, 2009
4:00 p.m. to 7:00 p.m.

University of Florida President's House
2151 West University Avenue
Gainesville, Florida 32603

To attend the reception, please RSVP to Jamie Shideler at shidelerjl@cityofgainesville.org or 352-393-8331 by June 8, 2009.

April luncheon speaker Jay White

EJCBA's Annual Dinner – 2009

By Rebecca O'Neill

The annual dinner this year is shaping up to be a fun-filled event. It will be held at 6:00 on June 18, 2009 at the Florida Museum of Natural History, University of Florida Cultural Plaza on Hull Road. Our guest speaker is Charles Strong, Assistant Head Coach and Defensive Coordinator. Coach Strong has been defensive coordinator since before the 2002 season and his defensive strategies held both Ohio and Oklahoma to a combined 21 offensive points during the BCS National Championship games, easing the way for the Gators' win over these two teams. Coach Strong continues to bring focus, commitment and a winning attitude to the Florida defense.

In addition to our dynamic speaker, I hear rumblings that our judges are organizing an entertaining surprise for us. My source won't give away any further details, so we will have to show up to personally see what our judiciary has in store.

As for the venue, the Florida Museum of Natural History will open the Butterfly Rainforest for a minimal fee during the dinner. In addition, they have generously agreed to do a butterfly release at some point during the evening. Be sure to calendar June 18 and consume this evening's entree of fun topped with laughter, served up with a side of sports and culture.

New Administrative Orders in the Eighth Judicial Circuit

Chief Judge Frederick D. Smith recently executed two new administrative orders that all practitioners in the 8th Judicial Circuit should be aware of. The orders are published on the Eighth Judicial Circuit's website, www.circuit8.org under Circuit Information "Administrative Orders."

General Assignment of Judges Administrative Order July 1, 2009 through December 31, 2009 (judicial assignments for the Eighth Judicial Circuit)

Administrative Order No. 8.100 (L) – General Assignment of Alachua County Circuit and County Court Cases to Divisions.

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Robert Jerry, Rachel Inman, Judge Smith, Rebecca O'Neill,Jay White, Margaret Stack, Carl Schwait, and Elizabeth Collins at the April 2009 EJCBA Luncheon