FORUM 8

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President's Letter

By Margaret Stack

We are fortunate to live in an area that has so many resources for lawyers. The University of Florida Levin College of Law provides us with great opportunities to learn and to teach. I've had an opportunity to do both recently. The Foreclosure Seminar put on by UF law students who are Fellows in the Public Service Fellowship Program at the Center for Government Responsibility was very well attended. They had so many participants that they had to open a second room. The material was voluminous and eye-opening. We hear all the time on radio and TV about "toxic assets" but not too much about what they are and how they became toxic. April Charney presented many of her own cases where she was able to stop foreclosures and told us what to do and how to do it. She has been generous with her time and expertise. It gives us hope and the tools to help people in our area faced with foreclosure.

As most of you know, our very own Federal Judge Stephan Mickle teaches Trial Advocacy at the law school. To give some "real life" input he invites local lawyers to come teach one of the classes. I was recently called to fill in for a lawyer who couldn't make it. It had been awhile since I had taught one of his classes, although over the years I have done so frequently. It's always fun to see how the students attack the various problems. This night it was expert witnesses...a medical examiner and a psychiatrist. Doctors from Shands came over to make the exercise interesting for all the participants. If you've never done this, you might want to give it a try. It really is fun! Also, when I arrived at the law school to prepare for the class I learned that Judge Mickle has been tapped to be the CHIEF JUDGE FOR THE NORTHERN DISTRICT OF FLORIDA! Plans are in the works for a reception on June 19th to celebrate. Watch for details!

On the subject of learning, how many of you know that EJCBA member Professor Bernard A. Raum is an Adjunct Professor of Forensic Evidence at the UF College of Law? His course has now been certified by The Florida Bar for CLE credit under Florida Bar Course Number 2089-8 and offers 30 hours of general CLE credit and 25 hours of Criminal Trial certification credits.

Professor Raum was a former prosecutor and holds a J.D. from the University of Baltimore and has a Master of Forensics Science degree from George Washington University. He taught forensic sciences at George Washington University and the University of Baltimore School of Law where he created the course *Forensic Evidence.*

This course is available on line and you have until November 30, 2009 to take the course and register your credits with The Florida Bar. Go to www.forensicscience.url.edu/law to sign up.

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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

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Any and all opinions expressed by the Editor, the President, other officers and members of the Eighth Judicial Circuit Bar Association, and authors of articles are their own and do not necessarily represent the views of the Association.

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.

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Deadline is the 5th of the preceding month

Federal Bar Association Happenings

By Stephanie Marchman

Reception Honoring Stephan P. Mickle As Incoming Chief Judge Of The Northern District Of Florida

The Federal Bar Association (FBA) 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 on June 19, 2009 at 4:00 p.m. Please save the date on your calendars. Additional details about the event will be released in the next few weeks.

Last Two Brown Bag Lunches Are Planned For The Spring

The FBA will host a Brown Bag Lunch with the Clerk's Office for the United States District Court for the Northern District of Florida. At the lunch, William ("Bill") M. McCool, the Clerk of Court for the United States District Court for the Northern District of Florida, and Traci Abrams, the Resident Deputy in Charge of the Gainesville Divisional Clerk's Office for the Northern District of Florida, will discuss the do's and don'ts in federal court from the perspective of the Clerk's Office, which will include an overview of CM/ECF, the federal court's electronic case filing system. This lunch is open to lawyers, paralegals, and legal assistants, and it is scheduled for May 13, 2009 from 12 p.m. – 1:30 p.m.

The FBA will host a Brown Bag Lunch with the United States Probation Office, Court Security, and the United States Marshals Service for the Gainesville Division of the United States District Court for the Northern District of Florida. At this lunch, Officer Ed Emery and U.S. Marshal John Hallman will discuss such topics as supervision on pretrial release, preparation of the pre-sentence investigation report, post incarceration supervision of clients, courtroom security, pretrial detainment of clients in remote jail facilities, and fugitive apprehension. This lunch is scheduled for May 20, 2009 from 12 p.m. – 1:30 p.m.

As with previous lunches, 1.5 hours of continuing legal education credit is anticipated for each lunch. The cost to attend each lunch is $10, which will cover a box lunch provided to each attendee by the FBA. Please make checks payable to the North Central Florida Chapter of the FBA, c/o Stephanie Marchman, 200 E. University Ave. Ste. 425, Gainesville, FL 32601.

Limited space is available for each lunch, so hurry and send your RSVP to Jamie Shideler at shidelerjl@cityofgainesville.org to reserve your seat. Members of the FBA will have reservation priority. Please note on the RSVP which lunch you plan to attend.

The Brown Bag Lunches will be held in the Jury Assembly Room of the United States Courthouse, 401 SE First Avenue, Gainesville, FL 32601.

Brown Bag Lunches With Judges Paul And Kornblum

In March, the FBA hosted Brown Bag Lunches with Senior United States District Judge Maurice Paul and United States Magistrate Judge Allan Kornblum. Judge Paul shared some of his favorite tunes with local federal practitioners and students (like "Appointed Forever" sang to the tune "Happy Together" by the Bar and Grill Singers) and provided many basic federal practice pointers to attendees. Judge Kornblum shared a case study with the lawyers and students involving an ineffective assistance of counsel claim and discussed how to best protect oneself against such a claim. The FBA sincerely appreciates Judges Paul and Kornblum for their presentations during these lunches!

Federal Law Clerk Roundtable

The FBA hosted a Federal Law Clerk Roundtable at the Levin College of Law on April 1st. Three current federal law clerks spoke to approximately 50 law students about the role of the federal law clerk and the law clerk application process, pizza was provided to the students by the FBA, and a reception for the law clerks before the roundtable was hosted by the Law Review. The law students were very encouraged by the advice provided by the law clerks, which will hopefully lead to more UF law students applying for and being accepted to federal clerkships and externships.

SIEGEL & HUGHES, P.A.
and
JACK M. ROSS, P.A.

Announce the merger of their firms
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Areas of practice include:
Business and Financial Litigation
Real Estate Litigation
Probate Litigation
Personal Injury/Wrongful Death

BRENT G. SIEGEL
Board Certified in Business Litigation
W. CHARLES HUGHES
JACK M. ROSS
Board Certified in Civil Trial Law
NICK B. HARVEY

Probate Section Report

By Larry E. Ciesla

The probate section held its regular monthly meeting on March 11, 2009.

The section wishes to welcome new members Angela Bounds, Ted Nichols and Alan Hawkins. Although probably not technically a new member, the section also welcomes Robert Williams, a long-time Gainesville practitioner.

As previously reported, Angela Bounds is taking over Steve Graves' practice. In this regard, Steve advises me that I was sadly mistaken when I earlier stated he had moved to St. Augustine. Steve reports he is in fact still in Gainesville, busily mentoring Angela during this transition phase in their practice.

Ted Nichols has been in Gainesville for a number of years and recently opened a solo private practice. Alan Hawkins has recently done the same. Best wishes for success for these new probate practitioners.

A brief discussion ensued regarding the relative merits of the "Hot Docs" and "Pro Docs" software for use in probate and other areas. Apparently the former is distributed by Lexis and the latter by West. The main difference appears to be the respective pricing structures; Hot Docs involves a one-time up-front fee, with optional yearly update fees; whereas Pro Docs charges a monthly fee in perpetuity, which includes "free" updates. No consensus was reached as to the preferred product. Anyone having any insight into this issue, or other technology issue, is invited to report at the May meeting.

Steve Graves then initiated a discussion as to whether anyone could identify any downsides to a surviving spouse entitled to a life estate in the deceased spouse's homestead deciding to not hire a lawyer and pay the fees to obtain an appropriate order determining homestead from the probate court.

Two specific downsides were identified by the group: (1) the surviving spouse may not be able to obtain homestead tax exemption from the property appraiser's office; and (2) the spouse may not be able to obtain hazard insurance coverage, given the current climate in Florida's insurance industry, as the property would not be properly titled in the spouse's name.

Peter Ward raised the question of the proper procedure to be followed when it is necessary to have a document such as a deed signed/notarized where the signer is a member of the U.S. Armed Forces serving overseas.

Although none of the members had the procedure memorized, Larry Ciesla gave the standard answer for all real estate questions: check The Fund Title Notes.

Lo and behold, the very first two Title Notes, 1.01 and 1.01.02, discuss this issue. TN 1.01 deals with military personnel in the U.S. and TN 1.01.02 deals with overseas personnel. Two statutes apply in this case: F.S. 695.03(3) and F.S. 695.031. Under the former statute, certain officers authorized by military law may act as notary (generally, judge advocates; adjutants; "commanding officers;" and staff judge advocates). The latter statute authorizes notarization by an officer with the rank of second lieutenant or higher in the Army and Marines, and ensign or higher in the Navy or Coast Guard.

Sam Boone advised the group that Badger Moring is the new guardianship auditor in the Alachua County Clerk's office. Sam pointed out a slight problem with the current audit process. The auditor prepares a worksheet outlining his problems with the guardianship accounting. The court file, with the auditor's worksheet, is then forwarded to the judge for entry of an order to comply. However, at no point is the auditor's worksheet forwarded to the attorney. Neither is it imaged and displayed on LINDA'S. The result is that counsel may be required to make a trip to the courthouse to review or copy the worksheet. Perhaps, at the section's request, the judges could require that the auditor's worksheet be provided to counsel along with the order to comply.

It was announced that a long-term employee of the clerk's office, Jackie Howell, had recently retired. As I understand it, Jackie had primary responsibility for auditing guardianship accountings, so there appears to be a connection between her retirement and the appearance on the scene of Mr. Moring, the new auditor. In addition, Brenda Davis, another long-time employee of the clerk's office, is scheduled to retire at the end of April. Their many years of diligent service have been much appreciated and they will be missed.

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.

Immigration Matters

By Evan George

What, if any, changes to the U.S. immigration system can we expect under the Obama administration? While a comprehensive overhaul of the U.S. immigration laws might still be a long time coming, there is reason to believe that there will be certain immigration related reforms in the not too distant future.

One such area of legislative reform addresses the issue of young people who were brought to the United States by their family as undocumented children. These undocumented youth have grown up in the United States, stayed in school, and kept out of trouble; however, when they turn 18 years old, they find themselves as illegal aliens in the only country that they have ever known. Due to factors beyond the undocumented youths' control, i.e., that their parents brought them illegally or forced them to overstay their visa, they are prevented from adjusting their status to legal permanent residency, they face barriers to higher education, they are not allowed to work or obtain a driver's license, and they have to live in constant fear of detection, detention and deportation by the immigration authorities. These undocumented youth often have little or no ties or experience in their home country, and they are ultimately stuck in a state of limbo in the United States because they bear an inherited title of an illegal immigrant passed on to them by their parents.

The Development, Relief and Education for Alien Minors ("DREAM") Act (S. 729) was first introduced in the Senate in 2001 and has garnered a lot of bipartisan support. It was reintroduced in the Senate on March 26, 2009 by Richard Durbin (D-IL) and Richard Lugar (R-IN), and in the house, where the bill is called the American Dream Act (H.R. 1751), by Howard Berman (D-CA), Lincoln Diaz-Balart (R-FL), and Lucille Roybal-Allard (D-CA). The DREAM Act would enable certain undocumented youth who either attend college or serve in the U.S. military to apply for lawful status and, eventually become eligible for U.S. citizenship. It would also eliminate a federal provision penalizing states that provide in-state tuition without regard to immigration status.

In order to qualify for conditional permanent resident status under the DREAM Act, an applicant who is under the age of thirty must have been brought to the United States before their 16th birthday (at lease five years before the date of the bill's enactment), and must have either graduated from high school, been awarded a GED, or been accepted to college. Undocumented youth who have committed certain crimes would not qualify for the DREAM Act. At the end of a six-year conditional residency, the DREAM Act immigrants can apply for United States citizenship if they demonstrate good moral character and have completed at least two years of college of military service.

Another area of potential change deals with the issue of what Constitutional rights non-citizens are entitled to in our deportation system. The outgoing Bush administration dealt an eleventh hour blow against the due process protections that non-citizens in the U.S. deportation system have relied upon for decades. On January 7, 2009, Attorney General Michael Mukasey (AG) issued a decision in the *Matter of Compean, 24 I & N Dec. 710 (A.G. 2009)*, an appeal of an Immigration Judge's deportation order before the U.S. Department of Justice, Board of Immigration Appeals, holding that non-citizens in removal proceedings do not have a Constitutional right to counsel.

The AG held that removal proceedings are civil in nature and, as such, non-citizens in this process do not have any rights under the Sixth Amendment of the Constitution, which applies only to criminal proceedings. The AG stated that although the Fifth Amendment's Due Process Clause does apply in removal proceedings, non-citizens only have a statutory privilege to retain private counsel at no expense to the Government, and not a general right to counsel. By extension, the AG held that if a non-citizen does not have a right to counsel, then s/he does not have a specific right to effective assistance of counsel, thereby eliminating the non-citizen's remedy of reopening a case where they were the victim of incompetent or fraudulent action, or complete failure of action.

Under the Obama Administration, the decision in *Matter of Compean* could be reversed. During his Senate confirmation process, Attorney General Holder indicated that he would reexamine *Matter of Compean*. AG Holder stated: "The Constitution guarantees due process of law to those who are the subjects of deportation proceeding. I understand Attorney General Mukasey's desire to expedite immigration court proceedings, but the Constitution requires that those proceedings be fundamentally fair."

If you have an immigration-related issue or question, feel free to contact me at 352-378-5603 or evan@evangeorge-law.com.

Alternative Dispute Resolution

A Rose By Any Other Name . . . .

By Chester B. Chance and Charles B. Carter

The name of a law firm is based on the names of the partners. Unlike other corporations, lawyers cannot pick a catchy corporate name for marketing purposes. Attorneys use slogans to market: “For the People”; “We Fight for You”; “A [sic] Accident Attorney”; “We are not Sleazy”, etc.

The name of the law firm is left to the serendipity of the surnames of partners. Creativity is limited to the order of names. If fate provides a good set of names, there may be some subliminal message to clients, judges, jurors and opposing counsel. “Justice & Farre” would present a better mental image than the infamous “Dewey, Cheatham & Howe”. Who knows whether the subliminal message of a firm name may actually affect jury verdicts or negotiated settlements at mediation. If your firm name is mundane or humorous, avoid embarrassment and list your firm with “Ask Gary” or “Ask Dave”.

Some law firms are adopting a shorter, institutional name. The law firm of Howrey, Simon, Arnold & White in Texas was long known as Howrey and eventually changed its official name to simply “Howrey”. One of the partners suggested, “It’s a short name. It’s a prominent name. It’s a unique name and we’ve been really using it prominently for the last five years”. The lawyer added that he thought a lot of firms would be shortening their names. In fact some firms have slimmed down their name by eliminating the ampersand. Baker & Botts of Texas is now Baker Botts.

Other firms have taken that concept further by replacing the ampersand with a distinctive symbol such as the Texas symbol in the Houston law firm of Williams Bailey, a diamond symbol in the Dallas law firm of Johnston◊Tobey. Some of you may recall Elan Krudman Kadi used a scales of justice with an airplane symbol in a similar fashion. We anticipate someone using a gator logo as a substitute for an ampersand. All these changes are for marketing reasons based on the idea that shortening looks good on a logo or website or on a web domain. It also eliminates in-fighting among partners over who gets to be a “named” partner. Marketing and consultants advise most clients only remember the first name of the law firm and if there are more than three names involved it is too difficult to remember.

Random selection has provided some interesting law firm names.

One of our all time favorites is one which local attorney Bob Costello brought to our attention from one of his trips to Ireland: “Argue & Phibbs”. This name seemingly addresses both courtroom performance and ethics. If you think the name is another Internet rumor, go to the following website: www.sligotown.net/courthouse.shtml. You will learn Mr. W. H. Argue and Mr. Talbot Phibbs were solicitors in Sligo, Ireland who opened up a law office in 1919. After Mr. Argue’s death, the firm continued to trade as Argue & Phibbs until the death of Mr. Talbot Phibbs in 1944. On the website you will even see a photograph of the brass plaque with the firm name.

Random selection has also given us Payne & Fears of San Francisco. During closing argument in a personal injury case it would be difficult to know whether a lawyer from that firm was introducing themselves or commenting on damages. Recht & Greef (Recht is pronounced: wrecked) in Hamilton, MO should consider appearing as co-counsel with Payne & Fears for really high exposure cases.

Bicker & Bicker of Murrysville, PA generates some obvious thoughts about lawyers. This is a husband and wife firm, and despite the firm name they seemingly are able to handle being with each other 24/7.

Low, Ball & Lynch of San Francisco, CA suggests an interesting nomenclature for negotiations. Local plaintiff counsel suggested to us Messrs. Low and Ball probably appear at mediations on behalf of insurance companies.

Allen, Allen, Allen & Allen of Chesterfield, VA sounds as imaginative as George Foreman naming all his children George.

Slez & Slez of Westport, CT illustrates not everyone can market with the above-suggested slogan, “We are not Sleazy”.

Slaughter & Slaughter of San Diego hints at a no-holds-barred approach to litigation. Gunn & Hicks of Hattiesburg, Mississippi combines southern traditions with a position on the Second Amendment.

Continued on page 7

Circuit Civil News

By Hon. Toby S. Monaco, Circuit Judge, Administrative Judge, Civil, Eighth Judicial Circuit

A review of circuit court civil case filings in the Eighth Circuit from the end of 2005 to the end of 2008 was recently completed. It shows that probate and guardianship filings have remained fairly constant, but other civil case filings have substantially increased circuit-wide over this period. Alachua County has seen the most significant increase.

In Alachua County, circuit civil filings increased 85%. This has nearly doubled pending case loads in the combined Alachua County circuit court civil divisions from what they were three years ago. This increase is mainly from three major sources; foreclosures, human allograft litigation, and tobacco litigation. Hopefully, these are transient increases in caseloads, but the unknown variable is how long this "bubble" of cases will remain. Increased foreclosures will be with us until the real estate market stabilizes. At the end of March 2009, the number of pending foreclosures was twice what it was one year ago. The number of foreclosures filed in the first quarter of this year was twice what our entire caseload of foreclosures was at the end of 2005, and they continue to increase. Over the past three years, the number of pending foreclosures has increased 335%.

There are so many tobacco and allograft litigation cases, that it will take years to resolve them unless resolutions are reached on a global scale. The tobacco cases are currently set for trials beginning in January 2010 at the rate of two trials per month. At that rate it will take a minimum of three years to conduct these trials assuming no continuances, no appeals and no conflict from the other 7000 tobacco cases pending in the State of Florida which are being handled primarily by the same cadre of plaintiff's and defense lawyers appearing in our cases. There are so many allograft cases that even if a full-time judge was assigned to do nothing but preside over them, it would take over 10 years to try them individually. None of the allograft cases have been set for trial yet, but will be getting trial dates shortly.

Circuit civil filings in the other counties of the Eighth Circuit have also increased. Gilchrist filings have increased 66%, Levy 46%, Bradford 22%, Baker 21%, and Union 17%.

As all of us know, these increases in circuit civil caseloads come at a time when our judicial resources are shrinking. We lost our probate and guardianship staff attorneys, and the prospects for additional circuit judges, staff or increased appropriations for senior judge coverage are not likely.

While we continue to attempt to provide reasonable access for hearing times and trial dates, I ask for the Bar's assistance and understanding as we move into what may prove to be a uniquely challenging chapter in our civil division history.

New Administrative Orders In The Eighth Judicial Circuit

Chief Judge Frederick D. Smith recently executed three 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."

Administrative Order No. 3.400(D) – Forms of Orders – Civil Order Setting Pretrial Conference and Jury Trial; and Pretrial Order

Administrative Order No. 7.900 – Civil Traffic Infraction Hearing Officer

Administrative Order No. 1.470(G) – Registry of Court Appointed and Criminal Conflict Attorneys

Alternative Dispute

Continued from page 6

Bull & Lifshitz of New York City summarizes the thoughts of many when listening to legal arguments.

Boring & Leach of Guiman, OK represent another set of star-crossed lawyers.

Pope & Gentile of Hesperia, CA probably has a branch office in Vatican City.

Butts & Johnson of San Jose, CA hopefully have everything covered.

Given the movement of local attorneys from firm to firm, here are some possibilities should some local lawyers regroup: Mutch & Little; Fine & Fox; Stack & Wood; Stearn, Cross & Lash; Fog & Day; Ritch & Pennypacker; Daly, Day & Knight; Stokes & Cole; Roundtree & Woods; Fisher, Bates & Salmon; Hand & Foote; Truelove & Hayter; Green, Brown & White; Daniel & Boone; Ernest & Moody; and Ash, Cole & Woods.

If any other potential law firm names occur to you that involve local attorneys, send them along to us. We will be glad to share them.

Criminal Law

By William Cervone

I begin with an admonition: the contents of this article may be deemed offensive by some readers, who should therefore not read it. Minor readers, meaning those not of age as opposed to those who are small, should read no further. There, that ought to insure that everyone is paying attention. So on to the point, if there is one.

Recently, a news article about the "Rambo Granny Of Melbourne, Australia" was sent to me. It seems that one Ava Estelle, 81 and therefore not at all minor and allowed to read this article unless it offends her, which I am sure you will determine it would not, was angered by the rape of her 18 year old granddaughter by two individuals described as thugs. Apparently being unsatisfied with law enforcement efforts to right the crime and fearing that the law would "go easy on them," she set out to identify the thugs, which she did with the aid of her granddaughter's description, spotting them at a flophouse hotel near the scene of the crime. To insure the protection of the innocent, Ava surreptitiously snapped some photos, which her granddaughter identified. Now the fun starts.

Not being fearful because "I've got me a gun and I've been shootin' all my life and I wasn't dumb enough to turn it in when the law changed about owning one," [Australia, apparently, passed a law a couple of years ago requiring the surrender of personal firearms] Ava, in her own words, "went back to the hotel and found their room and knocked on the door and the minute the big one opened the door I shot 'em right square between the legs, right where it would really hurt 'em most, you know. Then I went in and shot the other one as he backed up pleading to me to spare him." Ava then went to the police station and, I suspect, proudly turned herself in. Meanwhile at the local hospital, one of the ill fated rapists lost his testicles and penis. The other saved his manhood, but according to one of the doctors "won't be using it the way he used to."

All of this reminded me of the Case of the Limp, Raglike Penis. Those of you who went to law school in my time may know the case, not because of its precedential value but because if you pulled a certain volume of Southern Second from the shelf it automatically opened to the well worn page holding the case. Computer terminals don't do this, and you young lawyers don't know what you've missed because of that flaw. Anyhow, and to summarize, one John Lason was convicted of violating the now long since constitutionally voided Abominable And Detestable Crime Against Nature. Again to summarize by using the words of the Florida Supreme Court, a "76 year old aged Indian War Veteran, feeble physically and mentally, having met two girls of 11 and 13 years who solicited him, allowed them to diddle with his raglike penis, unerectable, lifeless and useless except to connect the bladder to the outside world, utterly incapable of either penetration or emission, and wad it like a rag into their mouths, and then, in his feeble and aged condition impelled by irresistable impulse, in turn he would kiss and put his tongue in their little though potentially influential and powerful vaginas," the result of which he testified was "pleasurable." The Court went on to sustain Lason's conviction while noting that further discussion of the "loathsome, revolting crime would be of no edification to the people nor interest to the Bar," something that the well worn pages of that volume of Southern Second belies. The court also noted that "creatures who are guilty are entitled to consideration of their case because they are called human beings," a comment that would surely earn a reversal if uttered now by a prosecutor in addressing a jury.

Anyhow, is there a point? Maybe several. Australian police are stymied as to what to do with Ava because not only is she 81 but also three million people want to elect her mayor. The Internet is a wonderful thing for without it we in America might never know of these goings on down under. Likewise, I would never have been able to locate poor John Lason's case, having long ago lost the citation, something the internet allowed me to do in less than five minutes [12 So2d 305 if you must]. And where are the literary greats of opinion writing these days? My weekly FLW is dry, boring and tedious as I plod through it. Not so in 1943 if Lason v State is any example. The Abominable And Detestable Crime Against Nature, perhaps vague but certainly understandable and perfectly functional for many years, has been replaced by more statutes addressing Lason's proclivities than I can count, which causes me to renew my cry for biennial legislative sessions in order to give the legislature less time to do things. And finally, watch out for those old folks.

Reversal Of Fortunes: Ted Stevens Goes Home Again

By Stephen Bernstein

Ted Stevens should be jumping for joy. The Justice Department announced on April Fools Day that it would ask a judge to dismiss the conviction of the former Alaska Republican Senator, who was tried last year for failing to report hundreds of thousands of dollars worth of gifts from an Alaska Oil Services Firm and its former Chief Executor, among others. The government also announced that it would not seek to try Mr. Stevens, 85, who lost a re-election bid last November.

Yet this shocking reversal says more about the Justice Department than it does about the former senator. The government's misconduct cannot erase or forgive the ugly behavior that gave rise to the indictment in the first place. Trial records and testimony painted a picture of a man so consumed with his own sense of entitlement that he did not think twice about accepting expensive freebies of a Viking Gas Grill, a vibrating Shiatsu Massage Lounger, and a five foot sculpture of migrating salmon, not to mention extensive plumbing, electrical, and carpentry work on his Chalet. Altogether he took gifts worth in excess of $250,000.00.

Gross breaches of law and fairness by prosecutors are the reason that Mr. Stevens will walk free. The Justice Department admitted that the lawyers from the Public Integrity Section, who put Mr. Stevens on trial, failed to turn over to defense lawyers information about contradictory statements by a key prosecution witness. An agent of the FBI who worked on the case and was the whistle blower also alleged that prosecutors have been willfully withholding pertinent evidence from the defense team.

Judge Emmet G. Sullivan of the U.S. District Court for the District of Columbia who presided over the trial had several times castigated the prosecutors for similar failures. He held four prosecutors in contempt of court this year and was considering further action when the Justice Department declared its intention to drop the case against Mr. Stevens.

This decision could not have been easy for Attorney General Eric H. Holder, Jr. who cut his teeth as a prosecutor at the very same Public Integrity Section. But it was the right call. After doing criminal defense work for over 35 years in Alachua County, I want to go and shake the hand of Bill Cervone and his many litigation attorneys who have never done anything like these shenanigans. While I know that the cases that we work on here in Alachua County are not "that rarefied air, super important" stuff, nevertheless, it is really something that we regular, day in day out people manage to cross these same bridges without falling down that slippery slope of gaming the system to guarantee a particular result.

Annual Dinner: Save the Date!!

The EJCBA's Annual Dinner is scheduled for Thursday, June 18, 2009 at the Museum of Natural History. The Eighth Judicial Circuit Bar Association is honored to have Asst. Head Coach and Defensive Coordinator Charlie Strong as our guest speaker. Please watch for your invitation in the mail.

Space Florida's Percy Luney is the Speaker for the May 2009 EJCBA Luncheon

Percy Luney, Vice President of Education, Research and Development and Workforce for Space Florida, will be the speaker for EJCBA's May luncheon. Prior to joining Space Florida, Mr. Luney served as Dean and Professor of Law at Florida A&M University College of Law as well as North Carolina Central University School of Law. He previously taught at Duke University School of Law and Cornell University College of Engineering. Add to his credentials that he was President of the National Judicial College in Reno, Nevada.

Prior to embarking on an academic career, Percy was in private practice with the law firm of Birch, Horton, Bittner, Monroe, Pestinger & Anderson. Before that, he was with the United States Department of Interior Office of the Solicitor in Washington, D.C.

Percy obtained his Juris Doctor degree from Harvard Law School. He has traveled, conducted research, and taught in Europe, Africa, and Asia as a Thomas J. Watson Fellow, Fulbright Lecturer, Fulbright Scholar, and Senior Fulbright Specialist. Bring your questions about Space Florida to May's luncheon!

Family Law

Tips from the Bench

By Cynthia Swanson

Judge Frederick Smith and Judge William Davis came to the recent Family Law Section meeting, and shared some thoughts they had for members of the bar. We sincerely appreciate the willingness of both Judges to educate lawyers on some of their personal preferences, as well as to remind us of some "best practices."

Judge Smith pointed out that if the parties have agreed to continue a hearing, generally he would go along with that. Further, if the parties can agree to a continuance, he would encourage them to also agree to a new hearing date and time, and to include the new date and time in a proposed order continuing the first hearing. This is efficient, and helpful to have the information all in one order. Judge Davis agreed with this.

The Judges also pointed out a few "etiquette" or "form" items: First, where you type the Judge's name below a signature line for the Judge to sign an order, don't type "Honorable" before the name. Judge Davis pointed out that we should not use the phrase "Ordered and Adjudged . . " where the document is an order, but not a judgment. The judges also requested that we not fax courtesy copies of motions unless they are emergency motions. They consider that items which are faxed are a request for expedited or emergency treatment. If that is not the case, please don't fax courtesy copies of motions to their chambers. On the other hand, if you are requesting emergency consideration, please fax a cover letter with your motion, explaining exactly what you are asking for – not the remedy so much as the length of time needed for a hearing, or requesting a hearing within X days, and so on.

Also, when you send a proposed order resulting from a hearing, please include a cover sheet, saying that the opposing attorney has reviewed and approved the order, or that you and the opposing attorney cannot agree upon an order and this is your version. Judge Smith also will be happy to accept and review proposed orders via email. Judge Davis will also accept proposed orders via email, and pointed out that you still need to send your postage paid envelopes, too.

On to "best practices:" Judge Smith wanted to remind us of the "PEACE" acronym for presenting evidence and for proposing rulings in dissolution of marriage matters. That is, that courts are to rule on dissolution topics in a certain order because the resolution of each issue depends, in part, on the resolution of the earlier decided issue. "P" stands for parenting. Decisions about parenting plans and timesharing should be made first. Then, the court should consider issues regarding the "E"quitable distribution of assets and debts. This is because the distribution of assets, particularly income producing assets, will affect a party's need for or ability to pay "A"limony. The amount of alimony which may be paid will then affect the calculations of "C"hild support. The final "E" stands for "everything else," which most often includes attorney's fees, but may include other matters.

The final acronym Judge Smith wanted to mention was "GIGO," which stands for "Garbage In, Garbage Out." If we attorneys do not provide good evidence on which Judges can base their decisions, then their decisions cannot be the best. If we don't provide evidence of the present market value of the marital home or the parties' vehicles, for example, then how can the Judge make an appropriate equitable distribution award?

Both judges urged us to utilize the opportunity to present an opening statement. This really does allow the Judge to know what our motion is about, and to focus on the information the Judge needs to make a decision on the issue that everybody is there for. It goes without saying, of course, that you cannot make claims in an opening statement that you cannot prove. So, be careful, be concise, and stay on point.

It is so helpful to the bar when judges will come to section meetings to talk about procedures they prefer, and to discuss substantive law issues. Of course, we all realize that judges cannot and do not pre-judge an issue. But to be able to understand how judges view certain types of evidence, or how they understand a certain appellate case ruling to be applied – all these things help raise the level of practice in this area.

In March, another judge came to share his expertise with FLAG (the Family Law Advisory Group). Ray McNeal, retired Circuit Judge from Ocala, talked about a recent conference on domestic violence. At this very well attended meeting, Judge McNeal presented information on different theories regarding

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Family Law

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domestic violence. He pointed out that there are now several different models, which differentiate among types of perpetrators and victims. He mentioned "Situational Couples Violence," which may be initiated equally by men and women and is a violent reaction to a specific disagreement. Usually, the partners have poor conflict resolution skills and they are not fearful of each other. With this type of violence, there are fewer incidents, and fewer and less severe injuries. The violence is very likely to stop after the parties separate.

This situational violence was contrasted with "coercive controlling violence," which includes the following general characteristics: Primarily committed by men against women; for the purpose of power and control; violence is more severe and injuries more serious; separation increases the risk to the victim; victims often suffer Post Traumatic Stress Disorder and depression. A newly identified subset of high risk populations for this type of violence include aggressive, delinquent, anti-social teenagers and young adults. In these groups, women initiate violence at higher rates than men.

Another type of domestic violence is a result of psychopathology, where one or both parties may have a diagnosed mental illness. When the violence is examined, it is often found that the batterer has a history of mental illness, of childhood exposure to violence, attachment deficits, extreme fluctuations in mood, suicidal ideations, alcohol abuse, low self-esteem, chronic hostility or anger, extreme anger or need for control, unassertiveness, physical abuse toward children, cognitive distortions of social cues, distortion in information processing and social skills deficits, strong sex stereotypes, and lack of verbal skills.

Judge McNeal went on to point out that, while it may be helpful in treating the perpetrator to identify which type of violence was involved, there is a danger in differentiating the types of violence. The danger is that this ignores the reality of the violence against women. Despite reports about females committing violence, women are more likely than men to be killed or physically harmed by an intimate male partner. 30% of female murder victims were killed by an intimate partner, while only 5% of male murder victims were killed by an intimate partner. (FBI statistics 1976-2005). Women are seriously injured at rates roughly seven times the rate of men.

He also discussed the "power and control" wheel, which is familiar to those who work with domestic violence. He reported that this is an accepted method used by scholars and researchers around the world. He also mentioned that research now points out great concerns about male socialization today with the prevalence of violence and pornography in video games such as Grand Theft Auto IV. Are your kids playing that game?

Judge McNeal went on to discuss the implications of domestic violence in designing parenting plans. He pointed out that while accusations of violence may seem unbelievably high during custody disputes, in one California study, 74% of the accusations by mothers against fathers were substantiated, and 50% of father's accusations against mothers were substantiated. Courts must consider when contact between the child and a parent should be supervised, suspended, or terminated. Judge McNeal stated that in doing this, courts must ask what is the impact of intimate partner violence on children in cases where neither partner is violent toward the children? And what is the likelihood that a parent who is violent toward his or her partner will also be violent toward the children? Should a parent who has been violent have custody or unsupervised access to the children? And, when is a victim parent so ineffective that he or she cannot parent the children?

He suggested five guiding principles for a safety focused parenting plan:

- Protect children directly from violent, abusive, and neglectful environments;
- Provide for the safety and support the well-being of parents who are victims of abuse, with the assumption that they will then be better able to protect their children;
- Respect and empower victim parents to make their own decisions and direct their own lives (thereby recognizing the limitations of the state in the role of loco parentis);
- Hold perpetrators accountable for their past and future actions; have them acknowledge the problem and take action to correct their abusive behavior;
- Allow and promote the least restrictive plan for parent-child access that benefits the child.

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.

It's that time again!

The Eighth Judicial Circuit Bar Association Nominations Committee is soliciting members for EJCBA Board positions for the 2009 – 2010 year. Please consider giving a little time back to your bar association. Please complete the application and mail it back by June 5, 2009.

EIGHTH JUDICIAL CIRCUIT BAR ASSOCIATION, INC.

Application to Nominations Committee

Name: ____ Bar No. ___________

Address: (Home) ______________________________

____

(Office) ______________________________

____

Telephone Numbers: (Home) ______________ (Office) ______________

(Fax ______________ (Cellular) ______________

(E-Mail) ____

Years in practice: ______ Type of practice: ____________________

Office of Interest: (Check all that apply)

President Elect Designate _______ Secretary _______ Treasurer _______

Board member _______ Committee Member _______

Areas of Interest: (Check all that apply)

Judicial Poll	_____	Membership	_____	Membership Benefits	_____
Community Services	_____	Publicity	_____	By-Laws	_____
Membership Survey	_____	Director	_____	CLE	_____
Law Week	_____	Newsletter	_____	Mentoring	_____
Sponsored Programs	_____	Programs	_____	Long Range Planning	_____
Professionalism	_____	Historian	_____	Pro Bono	_____
Computer Technology	_____	Meeting Activities	_____	Other (Describe below)	
Bag Luncheons with Judiciary	_____	Judicial Robes and Receptions	_____		

Briefly describe your contributions to date to EJCBA.

What new goals would you like to explore for our association?

How many hours per week can you devote to your EJCBA goals? ______________

Return to: EJCBA – Nominations Committee
P O Box 127
Gainesville, FL 32602-0127

Return by June 5, 2009

The Florida Bar Board of Governors Report

By Carl Schwait

At its April 3 meeting in Coral Gables, The Florida Bar Board of Governors:

Heard Bar President Jay White announce that he has appointed a special task force to study the Clients' Security Fund program, which is facing both more claims and a higher amount of claims. The program will have to dip into its reserves for the first time in several years, or it won't be able to pay the maximum guaranteed reimbursement of $25,000 to all claimants this year. The task force would have recommendations for the board's May meeting.

Approved in concept having a Bar-sponsored voluntary self-disclosure form for candidates running for election for the trial courts, upon the recommendation of the Program Evaluation Committee. The PEC is still studying a specific candidate questionnaire recommended by the Judicial Evaluation and Administration Committee. The self-disclosure questionnaire is aimed at helping educate voters about candidates in judicial elections.

Approved a new legislation position proposed by the Attorney-Client Task Force to back expanded protection for the attorney work product for government lawyers advising public bodies. But the board stopped short of agreeing to a proposal to keep confidential details of meetings between public agencies and their attorneys, unless a court ordered a transcript of those meetings released. However, the new position calls for allowing more parties to participate in those closed sessions. The Legislation Committee split over that task force proposal and is continuing to study it. City Attorney for Gainesville, Marion Radson, spoke to the Board of Governors in support of the legislation.

Deferred action on a rewriting of Ethics Opinion 90-6, which governs an attorney's duty when he or she discovers a criminal defendant client is proceeding under a false name. The issue will be discussed at the next Board of Governors meeting. I am a member of this committee. I want to thank Judge Morris, Judge Lott, Larry Turner, Craig DeThomasis and Johnny Kearns for recently attending a conference in which they gave me their thoughts on this issue.

The board voted to approve guidelines recommended by the Professional Ethics Committee for "offshoring" legal work to another country. Those guidelines will now be posted on the Bar's website and otherwise disseminated. The ethics panel is continuing to work on possible rules for offshoring legal services.

Approved a recommendation from the Program Evaluation Committee to end the annual Midyear Meeting beginning in the 2010-11 Bar year, a move that reflects falling attendance at the Bar's three main annual gatherings (General Meeting, Midyear Meeting, and the Annual Convention), increasing use of tele- and video conferencing, and which will save the Bar around $50,000. The action has the approval of more than 80 percent of the Bar's committee chairs.

Approved the Bar's 2009-10 budget. Budget Committee said the $38 million budget is projected to have a $290,000 deficit, for which the Bar has more than adequate reserves. The budget does not have an annual membership fee increase, raises the amount of annual fees allocated to the Clients' Security Fund from $20 to $25, and allocates funding to overhauling and improving the Bar's website. The board will consider member comments on the budget at its May meeting.

Heard a report that the Bar is monitoring a petition filed at the Supreme Court asking the court to order Gov. Charlie Crist to fill a vacancy on the Fifth District Court of appeal from a list of six candidates submitted by the Fifth DCA Judicial Nominating Commission. Crist has declined to make the appointment, saying he wants a more diverse list of candidates, but the JNC has refused to change its nominations. The Bar is unlikely to take any action unless and until the Supreme Court decides whether it will accept jurisdiction on the case.

Margaret M. Stack

Announces The Opening

Of Her Office in

The Seagle Building

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Truth May No Longer Be an Absolute Defense to Defamation

By Siegel, Hughes & Ross

We all learned in first year torts that truth is an absolute defense to a claim for defamation, right? Maybe not now. On October 23, 2008, the Florida Supreme Court may have changed that with its decision in *Jews for Jesus, Inc. v. Rapp*, 997 So.2d 1098 (Fla. 2008). In that decision, the Supreme Court rejected the tort of "false light" as a cause of action in Florida but recognized the tort of defamation by implication. Defamation by implication is essentially the same cause of action as defamation with one major exception, the specific factual statements need not be false. A plaintiff in a defamation by implication action can recover for defamatory statements that are literally true if "they create a false impression." *Id.* at 106.

Prior to *Rapp* several district courts had recognized defamation by implication, but it was far from clear whether the Supreme Court would uphold those decisions. In one such district case, *Brown v. Tallahassee Democrat, Inc.*, 440 So.2d 588 (Fla. 1st DCA 1983), the First District Court of Appeal allowed a suit against the Tallahassee newspaper for publication of true but misleading material. Plaintiff's photograph was published next to a story about a murder that had nothing to do with the plaintiff. There was nothing factually untrue about the murder story, and there was nothing factually untrue in the photograph. However, the Court recognized that the placement of the photo next to the story about the murder created the false impression that the man in the photo committed the murder. Truth was no defense to the implication created by the placement of the photo.

In *Boyles v. Mid-Fla. Television Corp.*, 431 So.2d 627 (Fla. 5th DCA 1983) the Fifth District reversed the dismissal of a libel per se claim against the T.V. station. No specific statement had been untrue, but, taken as a whole the broadcast implied that plaintiff was a suspect in the death of a child, was a habitual tormentor of retarded patients, and had raped a patient in his care.

In *Rapp,* Jews for Jesus, Inc. reported in its internet newsletter that plaintiff, Edith Rapp, had prayed with one of its members and asked for God's forgiveness. *Id.* at 1100. According to Ms. Rapp, who was Jewish, this true fact created the false impression that she had joined Jews for Jesus and essentially converted to Christianity. It hardly seems that conversion to Christianity would be considered as defamatory by the community at large, and the Supreme Court withheld judgment on whether those implications could be considered defamatory. The case was remanded to the district court to address that issue. However, the Supreme Court did make clear that the standard was narrower than whether the false impression would be considered defamatory in the entire community. The Court cited with approval Section 559 of the Restatement (Second) of Torts, that a statement can be defamatory if it would tend to prejudice a plaintiff "in the eyes of a substantial and respectable minority...." The Court also implied the "community" at issue was the community in which the plaintiff interacts, "his or her personal, social, official or business relations." Though not specifically held by the Court, it seems the fact that conversion to Christianity would prejudice Ms. Rapp within her circle of Jewish friends and associates would be sufficient to establish defamation by implication.

As with many decisions that break new ground, the *Rapp* decision seems to create as many questions for the practitioner as it answers. First, how will the issue of "false implication" be determined? It seems that whether a fact is true can be determined by an objective standard. Therefore, it seems that in some, if not many, cases the defense of truth can be determined on summary judgment. While the facts in some cases may remain in dispute, there will be some cases in which they are clear. However, whether a true statement creates a false implication must be a subjective determination to be determined not on the basis of the statement itself, but on the basis of the way it is perceived by the audience. Even if the facts are undisputed, a "false implication" case, like a negligence case, may not be susceptible to summary judgment.

This seems particularly troubling for the media. An editor can do a fact check to confirm the facts are accurate. It is much more demanding to ask an editor to determine and evaluate the way the audience will respond to those facts. It is even more demanding to require that editor to determine the effect the facts will have on various "sub-audiences" that may make up a particular plaintiff's "personal, social, official or business relations." This becomes even more difficult when the false implication can be created not only by statements within a particular story, but also by the way material addressing different issues is juxtaposed on the page, as was the case in *Brown v. Tallahassee Democrat, Inc., supra.*

Combining the difficulty of objectively determining the impact of true material on an audience with the possible increased difficulty of resolving the case short of a jury verdict, the *Rapp* case seems to present a difficult time for the media. Many of those about whom

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Defense to Defamation *Continued from page 15*

the media reports are people of means who can afford to bring suits for unflattering reports even if, ultimately, they may not be successful. A legal scheme in which they can involve the media in litigation over truthful reports all the way through jury trial will greatly increase the expense of critical journalism and may have a chilling effect on unflattering reporting about people of wealth.

Finally, how does the "actual malice" standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), apply to truthful statements. How can a truthful statement be made with knowledge of its falsity or reckless disregard for the truth? In *Rapp* the Supreme Court was explicit that one of the reasons it adopted the defamation by implication tort and rejected the "false light" tort was to bring the tort under the constitutional restrictions of the First Amendment. Therefore, it is anticipated that, ultimately, the Court will articulate a very high standard for such claims, at least, for public figures and public issues. Perhaps the Court, eventually, will adopt a standard of intentionally creating a false impression or recklessly creating a substantial risk of such an impression. However, that will have to come in future decisions, and in the interim, there is a great deal of uncertainty, particularly for the media.

Karen Yochim with her daughter, Allison

Medical Power of Attorney for Minor Children

By Karen Yochim

Do you know who would be authorized to make medical decisions for your minor child in the event you were unable to do so? What if your family was in an automobile accident and you were unable to communicate with physicians to make decisions about medical care being provided to your child?

While I have practiced family law, estate planning, probate and guardianship for the past five years, when my daughter, Allison, was born in January, I realized that I did not know who would be authorized to provide informed consent for her medical treatment in the event both my husband and I were incapacitated or otherwise unavailable. The answer lies in Florida Statute 743.0645 - Other persons who may consent to medical care or treatment of a minor. The statute provides a prioritized list of persons who may provide medical consent for a minor child when the parents cannot be contacted by the treatment provider (excluding those minors who are in the care of the Department of Children and Family Services or the Department of Juvenile Justice). The first person authorized to provide such consent is any person who possesses a power of attorney to provide medical consent for the minor. The next person authorized is the stepparent, followed by the grandparent, an adult sibling, and finally an adult aunt or uncle. No other person is listed in the statute as having the authority to consent to a minor's medical treatment.

My firm plans to immediately start recommending to our clients with minor children that they execute a separate limited power of attorney specifically for the purpose of nominating someone to authorize medical care for their minor children. If you read in the April edition of Forum 8 that I had left the practice of law for a few years to have children, such rumors of my sabbatical have been greatly exaggerated! For any of you who may not practice in this area, your referrals for any clients needing such services are greatly appreciated, as I now have returned from maternity leave and have a college education to save for!

May 2009 Calendar

1 JA Luncheon, Gainesville Golf & Country Club
5 Deadline for submissions to June newsletter
6 EJCBA Board of Directors Meeting; Ayers Medical Plaza, 720 SW 2d Avenue, North Tower, Third Floor – 5:30 p.m.
7 CGAWL meeting, Albert's Restaurant, UF Hilton, noon
8 EJCBA Monthly Luncheon Meeting, 11:45-1:00 p.m., Savannah Grande
13 FBA Brown Bag Lunch with the Clerk's Office, Jury Assembly Room, US Courthouse, 12-1:30 p.m.
13 Probate Section Meeting, 4:30 p.m., 4th Floor, Family & Civil Courthouse
14 North Florida Association of Real Estate Attorneys meeting, 5:30 p.m.
19 Family Law Section Meeting, 4:00 p.m., Chief Judge's Conference Room, Alachua County Family & Civil Justice Center
20 FBA Brown Bag Lunch with the United States Probation Offie, Court Security, and the United States Marshals Service, Jury Assembly Room, US Courthouse, 12-1:30 p.m.
25 Memorial Day – County and Federal Courthouses closed

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, TBA
19 FBA Reception to honor Stephan P. Mickle, incoming Chief Judge of the United States District Court for the Northern District of Florida, 4:00 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.

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