

FORUM 8

President's Letter



By Rebecca O'Neill

Welcome back! Allow me to introduce your new EJCBA Board. The officers for this year are:

Elizabeth Collins, President Elect; Mac McCarty, President Elect Designate; Audrie Harris, Secretary; Sharon Sperling, Treasurer

Your EJCBA Board has new faces this year. In no particular order, they are:

- Flint Crump, who previously served as President of the Young Lawyer's Division and will be our YLD liaison
- Geoff Mason, who will play a significant roll in our website design and updates
- Gloria Walker, who will be instrumental in planning fall events and bringing in luncheon sponsors
- Michael Pierce, chair of the Pro Bono Committee
- Phil Kabler, co-chair of the Membership Committee and who has innovative ideas for how EJCBA can better serve in-house attorneys
- Audrie Harris, who ambitiously volunteered to be the Secretary

Returning to the Board upon the President's request due to their outstanding service in past years are:

Frank Maloney (Historian), Dawn Vallejos-Nichols (Newsletter Editor), Nancy Baldwin, Ray Brady, Pam Brockway, Deb Cupples, Kathleen Fox, Evan George, Virginia Griffis, Marynelle Hardee, Sheree Lancaster, Lua Mellman and Jeanne Singer.

Your Board applauds and appreciates all of you

who attend the luncheons and special events. We would enjoy working more closely with you on our committees and encourage you to actively participate in your voluntary bar association. The following committees have room for non-Board members and the chair of that committee is shown in parentheses:

Cedar Key (Elizabeth Collins), Community Service (Lua Mellman), Golf Tournament (Mac McCarty), Holiday Project (Lua Mellman), Law Week (Nancy Baldwin), Pro Bono (Michael Pierce), and Social Committee (co-chairs Pam Brockway and Jeanne Singer). If you would like to join one of these committees, please contact the EJCBA Executive Director, Judy Padgett, at execdir@8jcba.org.

EJCBA plans to conduct a member survey this year. We want your feedback on what we are doing well, what we could do better and what additional services you may want from us. We want to know whether the Cedar Key event should be moved to a different day of the year and whether the location is agreeable to the majority. We want your opinion on whether the EJCBA Board should

create a local Lawyer Referral Service. We want to know whether there is interest in creating an In-House Counsel Section. We look forward to hearing your feedback and suggestions on these topics and more.

The EJCBA Board summer planning retreat was held on July 18 this year. For those who are not familiar with the retreat, it is at the retreat that the Board members volunteer for various committees, set the budget for the upcoming year, and perform many other administrative tasks in preparation for the

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Calendar The EJCBA Luncheons Now!

Please add to your calendars the dates of the EJCBA monthly luncheons for September 2009 through May, 2010. They will be held at Steve's on University Avenue (new sound sytem) and the cost will be \$14 per person for members and \$16 for non-members. All dates are on Friday:

September 11, 2009
 October 9, 2009
 November 13, 2009
 December 11, 2009
 January 8, 2010
 February 19, 2010
 March 19, 2010
 April 16, 2010
 May 14, 2010

About This Newsletter

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

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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

Alternative Dispute Resolution

Ryan O'Neal As Negotiator



By Chester B. Chance and Charles B. Carter

"Love means never having to say you're sorry", said Oliver (Ryan O'Neal) with a smile to Jennifer (Ali MacGraw) in the movie *Love Story*.

Ryan O'Neal would not do very well as a negotiator. Success in negotiation may very

well depend on saying you're sorry and saying it in the correct fashion.

The front-page headline of the July 21, 2009 Gainesville Sun noted, "U. of Michigan doctors find sorry isn't the hardest word". The Associated Press noted when a treatment goes wrong at a U.S. hospital, fear of a lawsuit usually means never daring to say you're sorry. However, at the University of Michigan Health System, lawyers and doctors say admitting mistakes up-front and offering compensation before being sued have brought about remarkable savings in money, time and feelings. The willingness to admit mistakes goes well beyond decency and has proven a shrewd business strategy according to a 2009 article in the "Journal of Health & Life Sciences Law" authored by a Michigan malpractice defense attorney and Chief Risk Officer for the Michigan Health System, along with four of his colleagues at the University of Michigan. Over a five year period malpractice claims were cut in half while the backlog of open claims fell from 262 in 2001 to 83 in 2007.

The article also quoted Harvard Medical School Dean Dr. Joan Reede, who said patients and families can find great relief and comfort when a doctor promptly admits an error. "When you get what you consider to be a sincere apology, you always feel better" said Dr. Reede's mother, who was a victim of malpractice.

The authors of this article (the CBC's) encourage you to read apologies from movie stars and politicians which appear almost daily in the media. Usually these apologies are variations of the form "I'm sorry if what I did/said offended you/anyone/someone". You may want to consider the effectiveness of such an apology which seemingly transforms fault to the person who found offense in what was said or done. Such a statement can often be counterproductive.

Recently, at a local Inns of Court program, attorney Monica Brasington presented information on

the effectiveness of an apology during a negotiation. Monica discussed an article from the book *Lawyer Negotiation* by Jay Folberg and Dwight Golann. The authors state, "offering something other than money that fills a felt need can be worth more to a recipient than is sacrificed by the side offering the consideration. An apology and its acceptance illustrate this point." The authors suggest the words "I'm sorry" marks the beginning of an apology and go on to state the most effective apologies contain several elements: (1) expressing regret for the wrong suffered; (2) manifesting sympathy for the injury or hurt; (3) admitting responsibility or blame; (4) promising forbearance – not to do it again; (5) offering repair or compensation.



Saying you are sorry and showing sympathy without admitting fault, note the authors, is a partial apology that may help, but, it can also make matters worse because it may be perceived as insincere or a brush off.

Articles referenced in the book by Folberg and Golann indicate survey research suggests claimants desire apologies and that some would not have filed a lawsuit had an apology been offered. Studies also compared settlement results when a partial apology was offered, a full apology was offered, and when no apology was offered. When no apology was offered 52% of claimants indicated they would definitely or probably accept a settlement offer while 43% would definitely or probably reject an offer and 5% were unsure. When a partial apology was offered only 35% of claimants were inclined to accept the offer, 25% were inclined to reject it and 40% indicated they were unsure. However, when a full apology was offered, 73% of respondents were inclined to accept the offer with only 13% – 14% each inclined to reject it or remaining unsure. The study was done with control groups who were role-playing an accident scenario and all involved identical liability and damage factors.

Recognizing the importance of an apology, several states, including Florida, have enacted legislation protecting and thus encouraging statements expressing sympathy. Section 90.4026, Florida Statutes states the portion of statements, writings

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Francis Tyrone McCoy - Secretary and Archivist

By Frank Maloney

The Eighth Judicial Circuit Bar Association lost its longest serving Secretary, archivist, and one of its strongest supporters with the passing of Francis T. McCoy on May 22, 2009.

Upon graduating from the University of Florida College of Law in the mid 1950s, Frank joined the staff of the law library. At that time there was a close relationship between the College of Law faculty and the Eighth Judicial Circuit Bar Association. By tradition the Law School supplied the Secretary for our Bar Association. In 1941 Librarian Ila Adele Pridgen began that tradition, and her first minutes reflected that a new member, Jimmy Adkins (later Chief Justice of the Florida Supreme Court) and a new student member, Frank Maloney, were inducted. Ila Pridgen and attorney (President) Clara Gehan nee: Floyd ran the association throughout the War. After World War II, Mrs. Pridgen passed the Secretary position to new faculty member Frank Maloney (later Dean of the Law School). Frank Maloney was replaced by P.K. Yonge III (grandson of the namesake for P.K. Yonge School). Professor Yonge then tapped Prof. Mendel Glicksberg to serve as our Secretary.

In the 1950s Professor Glicksberg offered the Secretary position to a new member of the Law Library staff, Francis Tyrone McCoy. Frank accepted the offer, and thus became the longest serving Secretary of our Bar Association. In addition to becoming Secretary, he also became the custodian of the complete history of the bar association dating back to Mrs. Pridgen. Frank and our Bar Association hit it off from the very start, and he continuously served until June, 1990, faithfully keeping our minutes and maintaining our records. Throughout his tenure as Secretary Frank maintained a close liaison with the Law College faculty and our Bar. Frank was also our contact person to the Florida Bar at a time when the big Bar coordinated many of its programs through our association and the Law School. He never seemed to miss a meeting and always began our luncheons with an invocation. "Keep us ever mindful of the needs of others."

By 1990, the Law School and the Eighth Judicial Circuit Bar Association had both grown greatly in numbers and sadly apart in their missions. The position of Secretary was becoming entirely too much for either an active faculty member or practicing lawyer. We now have a paid Executive Director and our archives are maintained at the

Matheson Museum, Alachua County Historic Trust.

Although of southern ancestry, Frank McCoy was born in New York City on October 15, 1922. His father died an untimely death and Frank and his mother returned to Florida which was his permanent residence for the remainder of his life.

Frank McCoy entered the University of Florida in 1940 and received his BA degree in 1944. His undergraduate education was followed by service in the United States Army and the OSS during World War II. Trained as a paratrooper, McCoy was posted to China where he worked with Chinese forces in the war against Japan. McCoy remained in the reserve forces after the war and retired from the military with the rank of Lieutenant Colonel

After the war, McCoy completed the first Masters degree awarded by the geography department at the University of Florida. As part of his degree work, McCoy wrote a thesis on the Miami International Airport. To gain first hand background, he spent 6 months as a flight attendant on Pan American Airways.

Thereafter, McCoy entered the United States Foreign Service and served missions in Shanghai, Tokyo and Madagascar. He was at his post in Shanghai when the Nationalist troops sailed away to Taiwan and the Chinese Communist troops marched in to take over.

McCoy then returned to the University of Florida and earned his law degree in the mid 1950s. Upon graduation, he joined the law library staff and soon joined the law faculty. For over 40 years he taught a panoply of courses, including admiralty, family law and legal history. McCoy's teaching was eclectic in scope and enriched by his deep study of ancient history. Although widely traveled, including through Iraq and Iran when camel trains still plodded across deserts, Frank's life was centered on thought and contemplation. He officially retired in the middle 1990s but until the last few months continued to come to his law school office every day and participate in college activities.

Late in life Frank McCoy married Mary Watson McCoy, who was a long time University of Florida librarian. Mary McCoy predeceased Frank and he continued to live alone in their Gainesville home where he died. Frank McCoy died leaving no children, but is survived by a number of distant relatives in Florida and elsewhere. He will be remembered for his dedicated service to the UF College of Law and EJCBA.



Alternative Dispute

Continued from page 3

or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering or death of a person involved in an accident and made to that person or to the family of that person shall be inadmissible as evidence in a civil action. However, the statute goes on to say "a statement of fault . . . which is part of, or in addition to, any of the above shall be admissible pursuant to this section". Monica's program noted the potential protection given to statements at mediation (confidentiality privilege) as encouraging and protecting full apologies including a fault admission. Thus, the mediation scenario may be the most effective forum for implementing an apology into a negotiation. Given the studies, newspaper articles, legislation and text articles noting the proven beneficial results of saying "I am sorry," attorneys and their clients would be wise to consider editing Ryan O'Neal's script to read "Love and power negotiation means having to say you're sorry".



Dancing partners Judge Lott and Judge Jaworski

President's Letter

Continued from page 1

year ahead. I will take this opportunity to thank all members of the Board for their willingness to spend an entire Saturday getting organized for the new year.

At the retreat, the Board decided to implement a tiered fee payment schedule this year. You will see the selections on the dues notices. The idea is to provide a discount for new attorneys (those who have been in practice less than 5 years) and government employed and legal aid attorneys who have less than 10 years of experience practicing law. This is our way of welcoming new and government or legal aid employed attorneys. In addition, EJCBA is offering free membership to attorneys who are in their first year of practice (the luncheons are not free). We hope to see all of you at our events!

EJCBA is moving into the 21st century by updating our website so you can pay your dues online through PayPal. While we believe it would be an additional benefit if members could pay for luncheons online also, at this time it is cost prohibitive.

Lastly, in keeping with the trend, EJCBA is looking for more ways to "Go Green." Throughout the Fall, you will receive the EJCBA newsletter (Forum 8) in the mail as usual. However, as of January 2010, the Forum 8 will be circulated electronically. Those members who want to continue to receive it in the mail will have to notify EJCBA as the default will be electronic circulation.

On behalf of the Board, we look forward to seeing you at events, working with you on committees and enjoying a fun and exciting year together.

New Administrative Orders

- 1.991(B) Media Coverage of Judicial Proceedings (6/19/09)
- 6.0200(B) Baker Act and Marchman Act Procedures (6/19/09)
- 4.1300(A) Jessica Lunsford Act and Anti-Murder Act Cases (5/26/09)

Chief Judge Smith signed these Administrative Orders on the dates in parentheses above. Copies of these orders are available at www.circuit8.org/ao/index.html.

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Nancy Baldwin (right) paid special tribute to attorney Jill White (left) at the EJCBA Annual Dinner in June.



Judge Smith, Margaret Stack, and Professionalism Award Recipient Rod McGalliard

Eighth Judicial Circuit Bar Association, Inc.

Mission Statement:

The mission of the Eighth Judicial Circuit Bar Association is to assist attorneys in the practice of law and in their service to the judicial system and to their clients and the community.

Please send a check payable to EJCBA in one of the following amounts:

- \$55 For lawyers with less than 5 years experience; lawyers with the State Attorney's Office, Public Defender's Office and Legal Aid with 10 years of experience or less.
- \$75 For all other lawyers and members of the Judiciary
- 1 year free membership for members in their first year of practice (in any jurisdiction). Free membership does NOT include cost of lunches.

Please send your check, along with your completed application to:

Eighth Judicial Circuit Bar Association, Inc.
P. O. Box 127
Gainesville, FL 32602-0127
Email: execdir@8jcba.com; padgej@shands.ufl.edu

Interested in prepaying for your luncheons (non-refundable)? Please include an additional \$126.00 (for luncheons September through May). The cost of luncheons will be \$14 per person for members and \$16 for non-members.

Voting Members: This category is open to any active member in good standing of the Florida Bar who resides or regularly practices law within the Eighth Judicial Circuit of Florida.

Non Voting members: This category of membership is open to any active or inactive member in good standing of the Bar of any state or country who resides within the Eighth Judicial Circuit of Florida, or to any member of the faculty of the University of Florida College of Law.

Renewal/Application for Membership

Membership Year: 2009-2010

Check one: Renewal New Membership

First Name: _____ MI: _____

Last: _____

Firm Name: _____

Title: _____

Mailing Address: _____

Street Address: _____

City, State, Zip: _____

Eighth Judicial Circuit Bar Association, Inc.

Telephone No: (____)____-____

Fax No: (____)____-____


Email Address: _____

Bar Number: _____

List two (2) Areas of Practice: _____

Number of years in practice: _____

Are you interested in working on an EJCBA Committee? Yes / No



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Age Discrimination in Florida is on the Rise

By Commissioner Mario Valle (Naples), Florida Commission on Human Relations

Unfortunately, older Americans often face discrimination and stereotyping in the workplace. In addition to being viewed as senile, seniors are often thought of as generally incompetent, suffering from physical disabilities, lacking in technological skills, and unable (or unwilling) to learn new things.

As the state agency which enforces the state's civil rights laws, we are all too aware of the discriminatory actions which continue to plague our seniors. In fact, the number of age discrimination cases closed by the Commission has increased every year since 2004. During the 2007-2008 fiscal year, 20% of employment complaints closed by the Commission were based on age discrimination. The Equal Employment Opportunity Commission (EEOC) has reported that age-discrimination allegations by employees are at a record high, jumping 29% to 24,600 filed in the year ended Sept. 30, up from 19,103 in 2007.

It is important for businesses to realize that a workforce of individuals from a variety of age groups can be very beneficial. Older workers have years of experience that can be used to teach and mentor younger, less experienced workers.

Managers and business owners should find ways to work with their employees by learning how to communicate across generations, allowing for collaborative decision making, creating a support system that will allow employees to openly talk about issues they may be facing, and utilizing team building exercises to create unity among staff members. Most importantly, business owners and managers must stay abreast of Florida's anti-discrimination laws and implement sound workplace policies to ensure fair treatment for all.

Lets work together to ensure that Florida's businesses, and seniors, thrive! For more information on age discrimination, please visit the Florida Commission on Human Relations' web site at <http://fchr.state.fl.us>.

Claims of Homestead After Final Judgment

By Siegel, Hughes & Ross

Florida has always been known as a debtor's state. In fact, Florida seems to go out of its way to protect debtors, and the most notable protection, as we all know, is the homestead protection. Article X, Section 4 of the Florida Constitution provides the framework for a person's constitutional right to homestead protection. It states:

"There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty."

In other words, no creditor other than a creditor who holds a mortgage, the government trying to collect taxes, or a laborer who performed work on a homestead can execute a judgment against a homestead. There are a number of procedures a client can use to exercise his or her constitutional protection against enforcement of a final judgment against a homestead.

The first is to declare homestead before a sheriff's levy on the property. In order to declare homestead prior to a sheriff's levy, the procedures set forth in § 222.01 *Fla.Stat.* must be followed. Section 222.01(1) *Fla.Stat.* states:

"Whenever any natural person residing in this state desires to avail himself or herself of the benefit of the provisions of the constitution and laws exempting property as a homestead from forced sale under any process of law, he or she may make a statement, in writing, containing a description of the real property, mobile home, or modular home claimed to be exempt and declaring that the real property, mobile home, or modular home is the homestead of the party in whose behalf such claim is being made. Such statement shall be signed by the person making it and shall be recorded in the circuit court."

The statement provided by the property owner must then be recorded in the county records. §222.01(2). While there is no specific form or requirements for the contents of the notice of homestead that must be recorded, the statute goes on to provide a general form that may be

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Local Federal Bar Association Starting Off Strong with “A View From the Bench” Seminar

By Peg O'Connor

The North Central Florida Chapter of the Federal Bar Association is gearing up for another productive and interesting year, beginning with a half-day seminar in October packed full of CLE credits. “A View From the Bench” will be held on Thursday, October 1, 2009 from 1-5 p.m. at the federal courthouse in Gainesville. The first session will be presented by Steven Brannock, a board-certified appellate attorney at Brannock & Humphries (formerly with Holland & Knight) who teaches Appellate Practice and Procedure courses at Stetson University College of Law. Mr. Brannock will share tips and tricks on basic appellate practice for new (or infrequent) appellate practitioners. Then, there will be updates on recent developments in both the Northern District and the Eleventh Circuit presented by our own Chief Judge Stephan P. Mickle and the Northern District Clerk’s Office.

Finally, we will hear from three distinguished judges: Eleventh Circuit Judge Charles R. Wilson;

Senior United States District Judge William H. Stafford; and United States Magistrate Judge Gary R. Jones. Together, they will discuss best practices in writing and oral argument at both the trial and appellate level.

All this education makes you hungry, you say? Not to worry. The seminar closes with a reception including wine and hors d’oeuvres in the jury assembly room of the federal courthouse. During the reception, FBA will conduct its annual meeting at which officers and board members will be elected. (Board and other leadership positions are available; if you are interested, see contact information below.)

So don’t delay—sign up today and spend an afternoon with the FBA and a number of wonderful presenters. Fill out the registration form in this newsletter and return it with your payment (early birds get a discount), or e-mail Elizabeth Waratuke at waratukeea@cityofgainesville.org with any questions you have.

A View from the Bench Registration Form				
Thursday, October 1, 2009, 1:00 – 5:00 p.m.				
Name:		Employer:		
Mailing Address:				
Phone Number:		Email Address:		
Are you a member of the FBA? ___ Yes ___ No		Are you a judge? ___ Yes ___ No		
Are you a law student? ___ Yes ___ No		Are you judicial staff? ___ Yes ___ No		
Please send a completed registration form and remit payment according to the fee schedule below to: NORTH CENTRAL FLORIDA CHAPTER OF THE FEDERAL BAR ASSOCIATION c/o Elizabeth Waratuke, City Attorney’s Office 200 E. University Ave., Ste. 425 Gainesville, FL 32601				
A View from the Bench Fee Schedule:		Early-Bird Discount! BEFORE 09-28-09		ON OR AFTER 09-28-09
		Public Sector	Private Sector	Public Sector
Federal Bar Association Members		\$50	\$75	\$60
Non-Members		\$75	\$100	\$85
Law Students		\$20	\$20	\$25
Judges and Judicial Staff		no fee	no fee	no fee

Criminal Law



By William Cervone

As we start the new publishing year I have a “Eureka!” moment to report. Not only that, but this news answers a question that I posed long ago as we inevitably marched through the ranks of the 900s in So 2d: would we continue apace into the 1000s or would we have So 3d? I am happy to inform all concerned (which I suspect would be about three of you) that the answer is So 3d!

I don’t know exactly when the happy event actually occurred but Alabama ex rel. Riley v Lorillard Tobacco Company, Inc. was actually decided in March of 2008 and has now been assigned the fascinating citation of 1 So 3d 1 by West or whoever does that. I have no idea why it took so long for the case to go from being released by the Alabama Supreme Court to being published but I suspect that someone in Alabama manipulated things to achieve this. If Alabama can’t beat Florida for the SEC football championship, I suspect, Alabama has decided to at least win this race to history. Suspiciously, 1 So 2d 1 is also an Alabama case but 1 So 1 comes from Mississippi. I for one say, enough of this foolish gamesmanship. Let us secede from West and restore Florida Reporter.

Some more follow-up type news: you may recall that last year I also wrote about the so-called Brandeis brief, a vehicle used by some to present totally inadmissible and non-record information to an appellate court. To me, that practice is wholly inappropriate if not blatantly unethical. A fairly recent United States Supreme Court case, Crawford v Marion County Election Board, may be suggesting the same thing. Crawford and several other cases that the Court has recently dealt with posed a very broad challenge to an Indiana law requiring voters to have a valid government ID card and show it at the poll. The problem was that there was not one single named plaintiff who had been disadvantaged involved in the case. Noting this, the Court said something to the effect of such facial (as opposed to as applied) challenges being speculative and failing to offer sufficient proof of any harm. That, I suspect, was despite all sorts of non-evidence supporting a claim that massive social ills and injustices were behind the suit. So there may yet be hope for our profession and its ability to properly comport itself under the rules we’ve adopted.

A final follow-up or two from Great Britain and other topics I’ve written on before. First, some official body or other that represents local governments in Britain has told its members to stop using “management buzzwords” because all they do is confuse people and prevent the ordinary guy from really knowing or understanding what government is doing. As the article I saw put it, there are to be no more government sanctioned synergies, stakeholders or sustainable communities. In the interest of plain speaking, that can’t be a bad thing.

Second and finally, and in line with how courts and lawyers can fritter away time, Britain’s High Court, whatever level that might be, has ruled that Pringles (you know, the potato chip in a can) is not a potato snack. This is important because Pringles is thus not subject to Britain’s VAT (Value Added Tax - get used to this because it’s being debated in Washington by some as a potential new national revenue source here). The manufacturer is reported to be delighted because this will result in them saving millions of dollars. Or pounds. Or euros. Whatever. What I want to know is what happened to the potatoes in Pringles. And if they’re not made of potatoes, what are they made of?

Obviously, it was a slow summer around here.

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An Independent Review by The Federal Judiciary on the Guantanamo Detainee Cases



By Stephen N. Bernstein

It has been more than a year since the Supreme Court ruling giving detainees the right to challenge in federal court their captivity at the United States Naval Base in Guantanamo Bay, Cuba. The process has moved slowly, but results have

shown indisputable value of how the independent judges review the Government's detention decision.

In the thirty-three cases adjudicated, judges have ruled in favor of detainees twenty eight times. In many of these matters the judges noted that the Government failed to provide substantial evidence to justify detention, let alone continued detention. Had these judges not been empowered to scrutinize the facts, the Government would be free to continue to hold these detainees despite having little or no proof that they are dangerous or affiliated with terrorist organizations.

Several cases illustrate this, including that of the Uigur detainees the government is still trying to relocate to other countries. Last week the District Court ordered the release of Mohammed Jawad, who may have been as young as 12 when he was captured in Afghanistan in 2002 for allegedly throwing a grenade that seriously wounded two U.S. forces soldiers and their interpreter. After seven years of detention, the Government agreed not to rely on a confession given by Mr. Jawad because it had been obtained through coercion, and also conceded that it did not have enough evidence to hold Mr. Jawad. The Justice Department now claims that it has recently obtained new information untainted by torture that may allow a federal criminal prosecution of Mr. Jawad. It will probably announce its decision soon on whether or not to press those charges.

Roughly two hundred more Guantanamo cases remain in the judicial pipe line, and it is highly likely the judges will find the government has sufficient justification to hold at least some of these men. Before the Supreme Court's 2008 decision, the Government had virtual carte blanche to detain whom it wished, and even lawyers for detainees often were not able to review the evidence against their clients. Even though this evidence remains classified and not subject to public scrutiny, judicial

review provides the country and the world some confidence that if someone is kept behind bars it is based on more than a government whim.

Many years were wasted as the Bush Administration tried to channel detainee cases through flawed military proceedings. The *Habeas Corpus* proceedings themselves have been slowed by procedural uncertainties and complications in sorting through evidence. These delays can be greatly reduced through the creation of a National Security Court. Such a court would be staffed by federal judges and governed by a clear set of rules to handle cases against detainees believed too dangerous for release but where there is not enough conventional evidence to prosecute in a traditional court of law.

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New Medicaid Contractor for Florida Medicaid Liens



By Cheri H. McDermott

*Personal Injury Litigation Paralegal -
Moody, Salzman & Lash*

The Agency for Health Care Administration (AHCA) has contracted with Affiliated Computer Services, Inc., a private company in Tallahassee, to manage the Medicaid subrogation process in Florida. ACS is taking over the services previously provided by Health Management Systems (HMS). Their services include identifying and recovering funds paid for medical care in tort and casualty claims by Medicaid recipients.

I recently spoke with ACS's lead attorney, James Bruner, who outlined the process ACS will be using. Essentially nothing has changed and the process remains very similar to the process used by HMS in the past.

ACS will require an initial notice of the tort claim/lien letter, certified mail, accompanied by an executed HIPAA form. After ACS is put on notice they will assign a case manager, who will prepare and forward to the attorney's office a payment log outlining services provided since the date of the incident. ACS will attempt to calculate which services are relative to the injury for which the client received treatment and for which Medicaid provided payment. I have always found it helpful to identify those injuries and the medical providers who treated the client when I send in our initial notification letter.

After the payment log is received by the attorney's office, charges that are not related to the claim can be disputed, in writing, by notifying the case manager assigned to the file. It is beneficial to have the client review the payment log for errors and non-related charges, as well, and to indicate those in writing on the log. Keep that document in the file for future reference. The attorney's office should review each charge, comparing the treatment ICD codes to the injury for accuracy. Prepare a letter to ACS confirming which charges are applicable and follow up with them to get a final accurate and agreed-to lien amount.

Once your case is settled you will need to contact ACS for settlement of the subrogation lien, the amount of which has been agreed to by ACS, you and the client. There are three ways to satisfy the Medicaid lien:

1) Pay the lien amount in full if the lien is less than the net recovery to the client;

- 2) Use F.S. 409.910(11)(f) to calculate the lien amount if the lien is greater than the net recovery to the client. The 25% attorney fee amount in the Statute is not the fee the attorney gets paid if the attorney/client contract specifies a different amount. The 25% figure is only to be used to calculate the lien;
- 3) Dispute the lien amount by scheduling an evidentiary hearing after filing a Motion for Equitable Distribution. If you are going to file a Motion for Equitable Distribution you will need to prove the value of your client's claim if you are seeking a reduction of the lien based on not receiving the full value. A good reference case for this issue is the Supreme Court case Arkansas v Ahlborn 547 U.S. 268. You will need to put ACS in your certificate of service on your pleadings and coordinate the hearing date/time with Mr. Bruner's office.

Any case that was previously managed by HMS is being transferred to ACS, and ACS is able to identify a file by the previous TPL number. Mr. Bruner indicated to me that there were approximately 25,000 files "in transition." When we spoke he was able to pull up information on a particular file my firm is handling using my old TPL number.

During our conversation I found Mr. Bruner to be very informative and helpful. He asked that any communications to him be faxed and mailed in order to expedite the process as all mail to ACS is scanned "somewhere else" prior to being delivered to the addressee, which sometimes creates a time lag.

Here are the important names and numbers for ACS:

James Bruner, Esquire

(850) 201-1111; fax (850) 201-1411

Martha Taylor Avilos – Mr. Bruner's paralegal

(850) 201-1149

Also handles subpoenas for records

ACS

Florida TPL Recovery Unit

2308 Killearn Center Blvd

Tallahassee FL 32309

(877) 357-3268 Main number

(866) 443-5559 Fax

Email: FLMedicaidTPLRecovery@acs-inc.com

Website: www.flmedicaidtplrecovery.com

used. Once a notice for homestead is recorded, the judgment creditor must then challenge the declaration of homestead prior to being able to get a sheriff's levy or executing on the property.

If the homeowner files a notice of homestead claiming protection for the property and the judgment creditor wants to challenge the validity of the debtor's claim, he or she must do so by filing a declaratory action within forty-five (45) days of receipt of the notice. §222.01(4) *Fla. Stat.* Otherwise, the judgment creditor's lien automatically will not attach to the property described in the claim of homestead.

If the judgment creditor has already obtained a sheriff's levy on the debtor's property, there is also a procedure for asserting the homestead protection after levy. Section 222.02 *Fla.Stat.* provides protection for homestead property even after a sheriff's levy has been issued and the sale has been set. Section 222.02 states:

"Whenever a levy is made upon the lands, tenements, mobile home, or modular home of such person whose homestead has not been set apart and selected, such person, or the person's agent or attorney, may in writing notify the officer making such levy, by notice under oath made before any officer of this state duly authorized to administer oaths, at any time before the day appointed for the sale thereof, of what such person regards as his or her homestead, with a description thereof; and the remainder only shall be subject to sale under such levy."

If the procedure set forth in § 222.02 is followed and the sheriff is provided a notice of homestead prior to the time for the sheriff's sale, the sheriff is obligated to cancel the sale without further inquiry. In fact, the courts have held that once faced with a notice of homestead, the sheriff's office has no discretion and must cancel the sale, leaving the challenge of the claim of homestead to be litigated by the judgment creditor and judgment debtor.

In *Grant v. Credithrift of America, Inc.*, 402 So. 2d 486 (Fla. 1st DCA 1981), the First District Court of Appeal addressed the issue of what authority the sheriff has once provided with a Notice of Homestead pursuant to § 222.02 *Fla.Stat.* The District Court stated that the sheriff may "sell only the land that is not designated by properly drawn affidavit as homestead. The statutes give him no authority to presume that the homestead claim

is unfounded or to force the parties into court to sort things out after the sale." *Id.* In *Grant* it had been the practice of the sheriff's office to sell the property but refuse to issue a sheriff's deed. *Id.* at 487. According to the Court, this had the net effect of requiring the property owner to actually prove the validity of a claim of homestead prior to the sheriff canceling the sale. *Id.* The Court acknowledged that the sheriff has a ministerial duty to levy on property described in writs of execution, but the Court also acknowledged that § 222.02 clearly limits that duty. *Id.* at 488. The *Grant* court specifically held that "The sheriff's practice of selling claimed homestead interests along with nonexempt interests, and leaving homesteaders to unravel their entangled affairs in post-sale litigation, with all accompanying expense and anxiety, is irreconcilable with the constitutionally favored status of the Florida homestead." This holding is consistent with the well-established law in Florida that a party seeking to pierce the homestead protection once it is asserted by the property owner has the burden of proof to establish that the property is not protected. *Dania Bank v. Wilson & Toomer Fertilizer Co.*, 172 So. 476 (Fla. 1937).

Unlike the forty-five day window a judgment creditor has to file a declaratory action under §222.01, if a judgment debtor claims homestead protection under §222.02, there is no clearly defined procedure or time limitations for a creditor to challenge the claim of homestead. However, if the judgment creditor has a reasonable basis to believe that the property is not the homestead of the debtor, it only seems prudent for a judgment creditor to file a declaratory action in this instance as well. Otherwise, the judgment debtor will have precluded execution of a final judgment against the property.

The ability to protect one's home from forced sale is guaranteed by the Florida Constitution, and no person, organization, or arm of the government can infringe upon that protection without following the proper procedure. The Florida legislature and the Courts have ensured that homeowners have every reasonable opportunity to protect their homestead. As the *Grant* Court pointed out, the sheriff's office has no right to make a substantive determination on its own initiative whether or not a claim of homestead is valid or genuine.

Congratulations to our 2009 Florida Super Lawyers

Congratulations to the following lawyers from the Eighth Judicial Circuit who have been named as Florida Super Lawyers for 2009. Super Lawyers names Florida's top lawyers as chosen by their peers and through the independent research of Law & Politics. The goal is to select the top 5 percent of Florida attorneys in more than 60 practice areas. Attorneys are asked to nominate the best lawyers they have personally observed in action — whether as opposing counsel or co-counsel, or through other first-hand observation in the courtroom. If we have forgotten anyone, please let us know and we will recognize them in an upcoming issue.

Lance F. Avera

Workers' Compensation, Personal Injury Plaintiff:
General
Avera & Smith LLP, Gainesville

Mark A. Avera

Personal Injury Plaintiff: General
Avera & Smith LLP, Gainesville

Neil Chonin

Employment Litigation: Plaintiff, Civil Rights/First
Amendment, General Litigation
Southern Legal Counsel, Gainesville

Paul A. Donnelly

Employment & Labor, Real Estate, Estate
Planning & Probate
Donnelly & Gross, P.A., Gainesville

James G. Feiber, Jr.

Business Litigation
Salter, Feiber, Yenser, Murphy & Menet, PA,
Gainesville

Robert S. Griscti

Criminal Defense: White Collar, Criminal
Defense, Appellate
Law Firm of Robert S. Griscti, Gainesville

Leonard E. Ireland, Jr.

Personal Injury Plaintiff: General, Business
Litigation, Appellate
Clayton - Johnston, PA, Gainesville

John D. Jopling

Personal Injury Defense: Medical Malpractice,
Civil Litigation Defense
Dell Graham, P.A., Gainesville

Robert A. Keeter

Workers' Compensation
Robert A. Keeter, Attorney at Law, Gainesville

Alan E. McMichael

Personal Injury Plaintiff: General, Personal Injury
Plaintiff: Medical Malpractice, Personal Injury
Plaintiff: Products
The McMichael Law Firm PL, Gainesville

C. Gary Moody

Personal Injury Plaintiff: General, Family Law
Moody Salzman & Lash, Gainesville

Melissa Jay Murphy

Real Estate, Alternative Dispute Resolution
Salter, Feiber, Yenser, Murphy & Menet, PA,
Gainesville

Robert A. Rush

Criminal Defense
Law Office of Rush & Glassman, Gainesville

Anthony J. Salzman

Workers' Compensation, Personal Injury Plaintiff:
General, Construction Litigation
Moody Salzman & Lash, Gainesville

Carl B. Schwait

Personal Injury Defense: General, Civil Litigation
Defense
Dell Graham, P.A., Gainesville

Robert O. Stripling, Jr.

Personal Injury Plaintiff: General, Personal Injury
Plaintiff: Medical Malpractice, Personal Injury
Plaintiff: Products
Stripling & Stripling, PA, Gainesville

Stuart F. Suskin

Workers' Compensation
State of Florida Department of Administrative
Hearings, Gainesville

Larry G. Turner

Criminal Defense, Criminal Defense: White
Collar, General Litigation
Law Offices of Turner & Hodge LLP, Gainesville

Three Rivers Legal Services Looks Forward to Training Volunteer Attorneys

By Marcia Green

Three Rivers Legal Services is pleased and encouraged by the response to our summer fundraising efforts and even more excited about the new volunteers who have been contacting us to become involved. We applaud the support of the attorneys in the Eighth Judicial Circuit and their dedication to the legal profession and the needs of the poor.

Several training events are on the horizon, with the first "Lunch and Learn" session to focus on **Filing Fee Waivers**. Although at the time of printing this newsletter, the date has not been set, notification of the date, time and place will be available shortly. This session will be of particular interest to family law attorneys (and their assistants) to help navigate the filing fee waiver provisions for indigent petitioners.

Other "Lunch and Learn" seminars planned for the fall and in 2010 include **Advance Directives**, **Summary Administration** and **Simple Wills**. Three Rivers will provide expertise, materials and lunch to volunteer attorneys!

In addition, Three Rivers Legal Services will hold a CLE event after the first of the year on handling **Simple Dissolution of Marriage** cases. Although no dissolution is simple, it is our hope that attorneys with little or no experience in family law will feel comfortable representing individuals referred from the Volunteer Attorney Program. Many of our clients have few issues to resolve in court but are challenged by the pro se forms, even with the assistance provided through our pro se clinics and through the Family Courts office. Three Rivers' family law attorneys and other experts in the legal community will be the trainers. Follow-up "Lunch and Learn" events will provide refresher sessions and family law experts will serve as mentors or advisers to new attorneys handling pro bono cases. Training will be free to volunteer attorneys.

We want to thank the private attorneys, judges, clerk's office and the College of Law for making themselves available to lend their expertise to these trainings and we look forward to making your pro bono commitment that much easier.

If you want to become involved and volunteer your services or make a donation to our program, please join in with those who already have!

Contact Marcia Green at Three Rivers Legal Services, marcia.green@trls.org or 352-372-0519, to stop by for a visit. Donations can be sent to Three Rivers Legal Services, Inc., 901 N. W. 8th Avenue, Suite D-5, Gainesville, FL 32601.

The Young Lawyers Division Helps Local Children Aging Out of Foster Care

By Kelly R. McNeal

The YLD has had a busy summer!!! On August 7, the YLD held a Foster Care Workshop, to educate teens aging out of Foster Care of their rights and responsibilities. Presenters at the Workshop included Sam Stafford, Meshon Rawls, Pam Burns, Rhonda Stroman, Bill Falik, Robert Folsom, Christina Straile, and Kelly McNeal. The Foster Care program was used in the statewide partnership proposal and included topics such as entering leases, buying a car, credit and debt, issues related to driving, getting a job, budgeting, education, and family matters. The YLD would like to thank all of the presenters who made this wonderful event a special experience for all involved, and would like to especially thank Director Rhonda Stroman for all of her hard work in putting together a successful program.

On August 15, the YLD hosted a Poker for a Purpose poker tournament to benefit local Foster Care children. The event was attended by lawyers, non-lawyers, family and friends, and was a total success. All funds from Poker for a Purpose will be used to offset the costs of the Foster Care Workshop. Any additional proceeds will be used by the YLD to fund a scholarship for a child aging out of Foster Care.

As usual, if you are a young lawyer (age 36 or under) OR a member of the Florida Bar for 5 years or less, please consider joining the EJCBA Young Lawyers Division. You can find us here: <http://8jcba.org/yld.aspx> and download a membership form, or e-mail us at 8thyld@gmail.com.



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September 2009 Calendar

- 2 EJCBA Board of Directors Meeting; Ayers Medical Plaza, 720 SW 2d Avenue, North Tower, Third Floor – 5:30 p.m.
- 3 CGAWL meeting, Albert's Restaurant, UF Hilton, noon
- 4 Deadline for submission to October Forum 8
- 5 UF Football v. Charleston Southern, Gainesville, 7:00 p.m.
- 7 Labor Day – County and Federal courthouses closed
- 9 Probate Section Meeting, 4:30 p.m., 4th Floor, Family & Civil Courthouse
- 10 North Florida Association of Real Estate Attorneys meeting, 5:30 p.m.
- 12 UF Football v. Troy, Gainesville, 12:21 p.m.
- 15 Family Law Section Meeting, 4:00 p.m., Chief Judge's Conference Room, Alachua County Family & Civil Justice Center
- 19 UF Football v. Tennessee, Gainesville, 3:30 p.m.
- 26 UF Football at Kentucky, TBA
- 28 Yom Kippur – County courthouses closed

October 2009 Calendar

- 1 CGAWL meeting, Albert's Restaurant, UF Hilton, noon
- 5 Deadline for submission to November Forum 8
- 7 EJCBA Board of Directors Meeting; Ayers Medical Plaza, 720 SW 2d Avenue, North Tower, Third Floor – 5:30 p.m.
- 8 North Florida Association of Real Estate Attorneys meeting, 5:30 p.m.
- 10 UF Football at LSU, TBA
- 12 Columbus Day – Federal courthouse closed
- 14 Probate Section Meeting, 4:30 p.m., 4th Floor, Family & Civil Courthouse
- 17 UF Football v. Arkansas, Gainesville, TBA
- 20 Family Law Section Meeting, 4:00 p.m., Chief Judge's Conference Room, Alachua County Family & Civil Justice Center
- 24 UF Football at Mississippi State, TBA
- 31 UF Football v. Georgia, Jacksonville, 3:30 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.