

FORUM 8

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Eighth Judicial Bar Association, Inc.

September 2007

President's Letter

by John Whitaker



From the State that brought you *Gideon v. Wainwright* comes Senate Bill 1088.

This may not be the best way to open my first president's letter, but I was told to write about something I know (or at least have some ideas about). What is Senate Bill 1088? In very broad, distilled terms,

Senate Bill 1088 is the Florida legislature's attempt to save money on indigent representation by creating a new bureaucracy and cutting the amount of money allocated for that purpose nearly in half.

First, how did we get here? Well, as of 2004 when Revision 7 of Article V of the Florida Constitution went into effect, the state was put in charge of paying for conflict court appointed counsel in which the public defenders office had withdrawn and private counsel was appointed to represent the accused. (It also affected parents involved in dependency cases, but that is an article or two on its own.) A new bureaucracy, the Justice Administration Commission (JAC) was put in charge of paying court appointed conflict counsel. This worked well enough; even the JAC found that abuse of billing by court appointed counsel occurred in less than one percent of the cases. But the legislators in their wisdom decided that the cost of representing the indigent in criminal and dependency cases was entirely too much. Admittedly, the prospective amount for 2008 was over \$90 million dollars. (No one ever said justice was cheap.) Thus, Senate Bill 1088 was born.

Senate Bill 1088 forms another level of bureaucracy that eliminates most of the private attorneys from the system and creates five new

regional conflict public defender offices. These are based geographically, mirroring the five district courts of appeal. There will be a head of each regional counsel appointed by the governor and paid a salary of \$80,000 per year. The Eighth Judicial Circuit is part of the First District Court of Appeal and consists of 32 counties. This is the largest region by size in the state. The legislator's theory of saving is fewer attorneys doing more work. These regional counsel heads are trying to recruit attorneys at the standard public defender salary rate and ask them to handle a similar number of cases (often too many already). Here is the catch, these new conflict public defenders are not being asked to handle this caseload in front of one judge and division, like most public defenders, they are being asked to do this job in front of multiple judges in multiple divisions and most likely in multiple counties at the same time. From my own experience in working on one of the original seven contracts before the Article V revisions went into effect, this new caseload for the conflict public defenders will be very difficult to manage. I handled cases only in Alachua County (but in all divisions and including dependency), and this took up over 90 percent of my time. At the current funding rate, I have been told that there will be five criminal conflict public defenders for the **entire** Eighth Judicial Circuit under the new system. I don't see how this will work without additional funding. Even if that number is not accurate there is still concern with what kind of candidate will apply for this position knowing there is more work and significant travel at the same pay as a traditional public defender.

This article does not even address the new lower flat fees for those attorneys who wish to take

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Contribute to Your Newsletter!

From The Editor

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

About This Newsletter

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

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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.

Welcome Wagon

by Dawn M. Vallejos-Nichols

California native **ADAM TOWERS** never thought he and his family would end up in Gainesville, Florida, but here they are, and they are loving it! Adam has just opened the new satellite office of Bogin, Munns & Munns, P.A., located on SW 75th Street (Tower Road). When we spoke in August, Adam had not even had the opportunity to hire any staff, but that was in the works. The firm also plans to hire another attorney in the near future.

Adam was born and raised in Sacramento, California, where he also attended law school at University of the Pacific, McGeorge School of Law, serving on both Law Review and the Mock Trial team. For his undergraduate degree, Adam attended the beautiful University of California, Santa Barbara campus, graduating in 1998 with a B.A. in History. While in law school, Adam clerked for Best, Best & Krieger, LLP in Riverside, southeast of Los Angeles. Upon graduating in 2001, he hoped to stay in the Sacramento area, but was recruited by Best, Best & Krieger (obviously happy with his previous work) to their Ontario office to practice primarily in the areas of commercial and real estate litigation. At that time, BB&K was intending to open a Sacramento office, so Adam was hopeful of returning to northern California, but by the time the office was opened, he and his wife Lauren had already bought a home and settled the family in Southern California.

Fast forward to 2006. Adam, Lauren and their 4 children (Landon [9], Molly [7], Maggie [5] and Gordon [3]) live, work and play in a concrete jungle. There were only little signs indicating when one entered a new community as they all just ran together without a break in-between. Although he liked his job, co-workers and clients, as well as the endless entertainment possibilities available in Southern California, Adam bemoaned the non-stop traffic (an 8:30 a.m. court appearance in Los Angeles would require him to leave home at 6:00 a.m. for a trip that should have taken no more than 45 minutes), the ever-present trash and graffiti (virtually every stop sign or freeway overpass had been 'tagged' by gangs) and the fact that the beautiful mountains nearby were

nearly always covered by smog. He was tired of the rat race. In two years, he would be up for partnership. If he was ever going to do it, it was time to make the break.

His sister, a resident of Gainesville, invited him for a visit. What grabs most of us who are transplanted residents when we first come to Gainesville also worked its magic on Adam & Lauren - the greenery and the trees, as well as the fact that when you leave Gainesville, you know it. Adam and Lauren fell in love with the slower pace here, and the great sense of community. Even more important was that his sister's kids were the same ages as his kids, and he and Lauren wanted to raise their children near family. Additionally, his father, a California Highway Patrol officer, is retiring this December and his parents intend to move here, as well. Adam's younger brother, presently at Duke, may choose UF for graduate studies, and the family is trying to convince Adam's younger sister to return to Florida (she used to live in Naples). Adam was convinced that Gainesville was the right place at the right time in his life, and the family gladly made the move.



Adam was lucky in that his former firm permitted him to continue working on an hourly basis until he passed the Florida Bar. Soon thereafter, he found that Bogin, Munns & Munns was interested in placing a satellite office in Gainesville. Now that the office is up and running, Adam can concentrate on his areas of specialty: business and real estate litigation (including eminent domain and inverse condemnation), contract and title disputes, commercial and residential landlord/tenant disputes, code enforcement and substandard building matters, personal injury and property damage claims.

For fun and exercise, Adam was involved in "adventure races" out West - 3 man teams that would compete in running, mountain biking and kayak racing. Since moving to Gainesville, he and Lauren have focused more seriously on running, and Adam intends to participate in his first marathon in December in Jacksonville. He also keeps busy helping to coach

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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 the amount of \$75.00, along with your completed application to:

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Interested in prepaying for your luncheons (non-refundable)? Please include an additional \$90.00 (for luncheons from September through May).

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.

Save The Date

The EJCBA monthly luncheons resume in September and will continue through May, 2008. The cost is \$12 for members, \$14 for non-members. The luncheons will be held at Steve's Courtyard Café on University Avenue from 11:45 a.m. – 1:00 p.m. Please mark your calendars now, and we'll see you then:

September 14, 2007
October 12, 2007
November 9, 2007
December 14, 2007
January 11, 2008
February 8, 2008
March 14, 2008
April 18, 2008
May 9, 2008

P.S. The Annual Cedar Key dinner will be held on **Thursday, November 1, 2007.**

Renewal/Application for Membership

Membership Year: 2007-2008

Check one: Renewal New Membership

First Name: _____ MI: _____

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List two (2) Areas of Practice: _____

Number of years in practice: _____

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

Make a Note of It

The EJCBA office has a new fax number. If you need to fax us something, the new number is (866) 436-5944. For newsletter submissions, email them directly to the editor at dvallejos-nichols@avera.com. Deadlines for submissions are listed in the Forum 8 calendar each month.

Board of Florida Bar Governors Report



by Carl Schwait

Dear Colleague:

It has been my pleasure serving you as your Board of Governors representative this past year. I thank you for reelecting me to another term.

Each Board of Governors member is assigned to two working committees. I have been assigned based on my request to serve a third year on the Disciplinary Review Committee and to also serve on the Board Review Committee on Professional Ethics. During this past year I served on the selection committee for the Judicial Nominating Committees and as a Board of Governors representative on the selection of a member of the Board of Bar Examiners. I recently was asked to be a member of the Joint Committee on Physician-Attorney Relations.

Below please find a summary of some of the major actions of the Board of Governors this past year.

- Established a "bright line" rule on using doctor of laws in lawyer advertising, allowing lawyers to use only the terms actually on their diplomas and not allowing translation of that wording into another language.
- Adopted a position in support of Amendment 3 requiring broader support for amending the Florida Constitution.
- Approved the creation of a Florida Registered Paralegal Program Committee for Supreme Court adoption.
- Endorsed amendments offered by the Criminal Procedure Rules Committee to amend Rules 3.131 and 3.132, which concern pretrial release of defendants charged with violent crimes.
- Approved a recommendation to join the Supreme Court's Commission on Professionalism in asking the court to withdraw the commission's request for a Bar rule change that would allow judges to impose up to a \$500 fine and order attendance at a professionalism course for lawyers who show unprofessional conduct in court.
- Approved a proposal from the Communications Committee to provide an easier way for Bar members to get a password to access secure areas of the Bar's Web site and for the listing of Bar members' 10-year disciplinary history.

- Approved that all future public reprimands be administered in front of the Board of Governors, unless waived by a two-thirds vote of the board.
- Approved a proposed advertising rule amendment on attorney and law firm Web sites, pending Supreme Court approval. The rule requires the opening, or homepage, of a Web site comply with all advertising rules except that it be submitted for Bar review. Inside pages could also, within guidelines, use testimonials, references to past results, and statements characterizing the quality of the lawyer or law firm's work.
- Discussed reservations about the state's new regional conflict counsel plan, including concerns of whether the program, which begins October 1, is adequately funded and will provide effective representation.
- Approved a rule change to clarify that lawyers cannot belong to a private lawyer referral service unless that service follows all Bar rules. Also passed was a new standing board policy to keep judges informed when they make a complaint about a lawyer's conduct to the disciplinary system.

I hope the articles on the Board actions and articles by Bar staff in our local newsletter as well as my reports at Bar lunches and Inn of Court meetings have been valuable. Please feel free to call me or write to me with any questions or comments.

Again, I am honored and humbled by your confidence in my work as your Board of Governors representative.



EJCBA Board for 2007-2008

How to Make Sure Your Contempt Order is Upheld on Appeal



by Cynthia Stump Swanson

I hope you all had a great summer! I imagine you're already into the swing of back to school, back to Gator football, and back to bar activities. The Family Law Section's last meeting was May 30, 2007. Judge Stan Griffis taught a seminar on contempt proceedings. He helped us to distinguish between civil and criminal contempt, and between indirect and direct contempt, as well as to consider the burdens of proof, range of possible punishments, ability to request the State Attorney's office to prosecute contempt matters, and so on.

Here is some of the information Judge Griffis provided at the meeting:

- Over 85% of contempt orders are overturned on appeal;
- "Direct" contempt means the action occurred in front of the judge;
- "Indirect" means it did not;
- Whether it is civil or criminal contempt depends upon the sanctions sought.
- Actions for civil contempt are intended to coerce a person to do something, not to punish him or her for not doing the thing; civil contempt actions can also be used to compensate a person for losses sustained.
- The contempt motions we most often file in family law matters have to do with a failure to pay support or perhaps failure to return a child from visitation. These will be indirect civil contempt motions – the action or inaction occurred outside the presence of the judge, and you are asking the court to coerce the party to take an action (pay support, return the child). In such actions, as we know, we must demonstrate that the party has the ability to comply (to pay the support, to return the child) or has intentionally divested himself of the ability to comply. This is summed up in the shorthand phrase, "The contemnor must hold the keys to his own jail cell." See, e.g., *Alves v. Barnett Mortgage Co.*, 688 So.2d 459 (Fla. 4DCA 1997).

A family law example given to illustrate the requirement for the contemnor to "hold his own jail cell keys" is as follows. Where a former husband

refuses to obey a direct order in court to sign a form naming his former wife as a beneficiary of his pension, he can be incarcerated until he does sign the form. An indefinite period of incarceration is valid where all the former husband has to do is sign the form to be released. However, if, while he is in jail, he actually retires from his job and according to his pension plan, he cannot now change the beneficiary designation, he must be released from jail. He no longer "holds the keys."

- The court is not required to appoint an attorney for a party who is the subject of a civil contempt action even where incarceration is sought as a sanction (*Andrews v. Walton*, 428 So.2d 663 (Fla. 1983)).
- In direct criminal contempt actions (you probably see this most often on TV where a lawyer lands in jail for smarting off to a judge), there is not a full due process procedure; this is where the judge has seen and heard the action and is adjudging a person guilty of the behavior right then and there; there is no interruption of the main proceeding and the judge just sentences the person at the time the behavior occurs;
- Criminal contempt can be punished by incarceration and/or the imposition of monetary fines;
- The standard of proof in a criminal contempt proceeding is the same as other criminal matters: beyond a reasonable doubt.

In regard to *criminal contempt* motions, the maximum sentence for imprisonment cannot exceed one year (Fla. Stat. §775.02); however, a sentence of more than six months cannot be imposed without a trial by jury (*Thomas A. Edison College, Inc. v. State Board*, 411 So.2d 257, 258 (Fla. 4DCA 1982), citing *Bloom v. Illinois*, 391 U.S. 194 (1968); *Aaron v. State*, 345 So.2d 641 (Fla. 1977)).

A written order adjudging a party to be in *indirect civil* contempt must contain the following:

- (1) A statement that the respondent has been adjudicated guilty of indirect civil contempt;
- (2) The date and contents of the original order with which the contemnor was ordered to comply (attach a copy if possible);
- (3) An affirmative finding that this was a willful

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violation of the original order, with a recitation of the specific facts showing the violation and a finding of the contemnor's present ability to comply with the original order;

- (4) A separate finding of the present ability to comply with the purge provisions;
- (5) The specific sentence imposed (which may be fixed or indefinite);
- (6) The specific purge provision and an identification of the source of purge satisfaction..

A written order adjudging a party to be in *indirect criminal* contempt must contain the following:

- (1) The date the order to show cause was issued;
- (2) Recitation of the specific order with which the contemnor was ordered to comply (if a written order, better to also attach a copy of the order);
- (3) Recitation of the specific facts of what the contemnor did or did not do which was a violation of the original order;
- (4) Announcement of the adjudication or withholding of adjudication of guilt for contempt;
- (5) Sentence imposed;
- (6) Advice that contemnor has the right to appeal and right to appointed attorney on appeal.

A written order adjudging a party to be in *direct criminal* contempt must contain the following:

- (1) Recitation of the specific facts upon which the contempt is based;
- (2) Adjudication of guilt for contempt;
- (3) Sentence imposed;
- (4) Advice that contemnor has right to appeal and right to appointed counsel for appeal.

Be sure to consult the following law in preparing any motion for contempt: Fla. Stat. §38.23, 1741.31; Fla.R.Civ.P. 1.380, 1.410, 1.510, 1.570, Form 1.982; Fla.R.Crim.P. 3.830, 3.840; Fla.Fam.L.R.P. 12.610. Both civil and criminal contempt actions are available in both civil and criminal cases.

Yet another important adoption case has been decided by the Florida Supreme Court. If you are involved in representing child placing agencies or handling private intermediary adoptions, you must read *Heart of Adoptions, Inc. v. J.A.*, No. SC07-738, Supreme Court of Florida, 2007 Fla. LEXIS 1236; 32 Fla. L. Weekly S 455, July 12, 2007. In this case, the Court has held that "may" means "shall." This holding was in regard to the provision in the adoption statute that an adoption entity "may" notify

an unmarried father of the intended adoption plan and that his failure thereafter to take certain actions will allow the adoption proceeding to continue without his consent. The Court held that the parental rights of an unmarried biological father, known or identified by mother as possible father and who was locatable by diligent search, could be terminated for failing to file a claim with Florida Putative Father Registry only if he was served with a notice of intended adoption plan as provided in Fla. Stat. §63.062(3)(a) and he failed to comply with its requirements within the 30-day period. This effectively transformed that one word "may" in the statute into "shall" for those situations where an adoption entity looks to terminate the rights of a locatable, un-cooperating unmarried father. Thus, the failure to register with the putative father registry, where the unmarried father did not receive notice that he must register in order to protect his rights, cannot be used in and of itself as a basis to terminate his rights.

Please come to our meetings – All family law sections meetings take place the last (not the fourth) Wednesday of the month at 4:00 p.m in the Chief Judge's Conference Room (former Grand Jury Room) of the Family and Civil courthouse. Hope to see you all there!

If you would like to receive email reminders of the meetings, and you're not already receiving them, please send me an email at cynthia.swanson@acceleration.net. If you have suggestions for topics or speakers for the meetings or for a newsletter article, please let me know.



Chief Judge Smith and Denise Ferrero at the Annual Dinner on June 20, 2007

Irish Law Symposium in Dublin with a Touch of the 8JCBA and UF



by Frank Maloney

Florida lawyers and judges gathered in Dublin, Ireland on May 29 & 30, 2007 for a two day comparative law seminar with the Irish Bar Council/ The Law Library (Barristers) and the Law Society (Solicitors).

Frank Maloney, Historian of the 8JCBA, handled the logistics of presenters, locations and refreshments with Harry McQuaid, Event Coordinator of the Irish Bar Counsel. Prof. Michael Olexa, Distinguished Teaching Scholar/Director of Agricultural Law Center UF, Chair of the General Practice, Solo, and Small Firm Section of the Florida Bar, and Assoc. Dean Linda Calvert Hanson, Career Services, Levin Law Center at the University of Florida, with Dean Sarah Macdonald, Dean of the Law School at the Honorable King's Inn, Dublin, presented comparisons in legal educations with the two systems.

The event occurred to a courtroom full of barristers, solicitors, and Florida lawyers and judges. The lively discussion was moderated by Senior Counsel David Nolan, Irish Chairman of the Criminal & State Bar Committee, with Justice (ret) Major Harding, Florida Supreme Court, and Criminal Trial Lawyer Kirk Kirkconnell of the Florida Bar. Areas compared and contrasted included legal education, criminal trial procedure, effects of European Union Law, constitutional law, mediation and the roles of barristers and solicitors in the Irish legal system.

When David Nolan asked about pregnant chads, Justice Harding had the Irish mesmerized explaining Gore v. Bush, as well as with the success of the American Judicial system ("no tanks in the streets"). The discussion continued through lunch at Hanley's at the Bar Restaurant, a favorite of the barristers.

After lunch the Floridians were given an informative tour of the Kings Inn and law school by Dean Sarah Macdonald. This was followed by a side trip to Louis Copeland & Sons, haberdashers, to try on Barristers robes and wigs. There were no takers from the Florida Bar for the wigs.

The day ended with an evening reception and banquet at the Hotel Alexander in Dublin. Limerick Senator Pat Kennedy's wife, Lorette, entertained all with song for the Florida visitors. Everyone enjoyed a good and interesting social exchange that evening.

The next morning Harry McQuaid, of the Irish

Bar Council led the Florida lawyers and their families on a tour of the Four Courts and the Law Library, the very heart of the Irish legal system.

The Florida Bar members, and the Irish members came away with a good understanding of each others' legal system and new friends were made across the Pond.

To complete the CLE requirements, all present had the opportunity to kiss the Blarney Stone to hone their speaking skills.

After leaving Ireland, Frank Maloney, Kirk Kirkconnell, and Hearing Officer Dorothy Hauge continued to Scotland for a meeting with the Faculty of Advocates (Barristers) in Edinburgh. They were able to discuss the two system of laws with Dr. Kirsty Hood, Advocate of Advocates' Library, and Mr. Pino DiEmidio, Advocate and Director of Training & Education Faculty of Advocates, and tour the Parliament Building, which has served as the Scottish courts since 1707, when the Scottish parliament left to join Whitehall in London. The advocates have an interesting custom of pacing to and fro in the large Parliament chamber while discussing on-going cases. They do this so they will not be overheard, which they could be if they were standing still. The Florida lawyers learned that unlike the English Common Law system, the Scottish law is based on the Roman law. Their system is closer to Louisiana law than Florida law. The Florida Bar, through the General Practice Solo and Small Firm Section, has made new and good friends in both Ireland and Scotland.



Frank Maloney fitted for robe and wig by Louis Copeland Dublin

Probate Section Report



by *Larry E. Ciesla*

The probate section has continued its monthly meetings throughout the summer months. Several new members have recently been in attendance. Michelle Farkas is an associate with Cynthia Stump Swanson's office who, in addition to family law and adoptions, is working in the areas of wills and estates. Zana Dupee and Tracy Geon have become associated with Bill Allen's office. Both will be working in the probate arena, with Zana, who has a background as a realtor, concentrating more in the area of real estate and closings. The probate section welcomes these new members and encourages them, as well as all other practitioners, to bring questions and issues of interest to the meetings for discussion.

Randy Childs, the staff attorney handling all probate cases in Alachua County, has left us to pursue an L.L.M. tax degree in St. Louis. We thank Randy for the good work he did while he was with us and we wish him much success in his future endeavors. Randy will be replaced by Judy Paul, who has been handling guardianship cases in Alachua County. In addition to Alachua County probates, Judy will be handling both probate and guardianships in Gilchrist and Levy counties. Judy's former position has been filled by Ryan Hulslander. In addition to guardianships in Alachua County, Ryan will be in charge of both probate and guardianships in Baker, Bradford and Union Counties. We welcome Ryan and look forward to meeting him at an upcoming probate section meeting.

Richard White has been serving on the Executive Committee of the RPPTL Section of the Florida Bar and reported on several legislative initiatives of the RPPTL Section. One involves an amendment to Chapter 733, Florida Statutes, so that, in addition to the Inventory, other probate documents containing financial data will be filed under seal. These would include accountings and documents related to elective share computations. Another involves changing the definition of "Insolvent", as set forth in Section 739.102(8), Florida Statutes, which limits who may file a disclaimer. As it currently stands, the definition of "Insolvent" focuses on the amount of debt exceeding the value of assets, which apparently prohibits disclaimers by some people who timely pay all of their obligations. The new definition would

include a provision that would permit a disclaimer so long as one's obligations are being regularly paid. A new Section, 736.014117, has been passed, effective July 1, 2007. This provision allows a trustee who has been given "...absolute power under the terms of a trust to invade the principal of the trust...", to appoint and transfer principal to a separate second trust, for the benefit of the beneficiary of the first trust (as opposed to invading principal and distributing it directly to the beneficiary). Finally, Richard's group is working on creating a new fiduciary "health care representative", which will be a combination of power of attorney and health care surrogate. Stay tuned for further details in future months.

Steve Graves led a discussion regarding the technicalities involved when an account has been established in another state under that state's version of the Uniform Gift to Minors Act, and the custodian and/or beneficiary subsequently moves to Florida and moves the account to a different bank or brokerage firm. In such cases, it was the general consensus of the group that the law of the foreign state would govern distribution of funds to the beneficiary (usually at either age 18 or 21), even if the account has mistakenly been re-registered under Florida's UGMA law. Another issue presented for discussion by Steve is whether to serve formal notice in an estate to persons who have been disinherited by will and who would otherwise have standing to bring a will contest. Despite a lively discussion, no consensus could be reached. The upside to providing notice is that once the 90 days runs, if nothing is filed, you know you are good to go. Of course, if a will contest is filed, you are stuck in litigation. If you elect not to give formal notice, a challenger has until the estate is closed to file a contest. If the estate is not complicated, you may be able to quickly administer it and get it closed and thereby foreclose any potential challengers.

Judy Paul would like everyone to be aware that the court's website, www.circuit8.org, has been updated and contains current versions of various checklists used by the staff attorneys in reviewing various aspects of probate and guardianship filings.

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

Conservatives Five, Liberals Four



by Stephen N. Bernstein

As George W. Bush staggers toward the conclusion of his second term, he can point to one project that has gone according to plan: the transformation of the Supreme Court. The first full term in which Chief Justice John G. Roberts, Jr., and Justice Samuel A. Alito, Jr., have served together changed the Court, and the implications for the nation have been profound. There was little doubt that Justice Alito's replacing Sandra Day O'Connor would shift the Court measurably to the right. I wrote last year that we didn't know how good we had it and how much we would miss Justice O'Connor.

The careers of Roberts and Alito have demonstrated the conservative ascendancy in American law. Both men joined the Reagan administration after graduating from law school and worked for Edwin Meese, III and have pursued the conservative agenda in the decades since. These two new Justices have agreed more than any other pair, and there was no case on which they reached unanticipated conclusions. For all of Chief Justice Roberts' description of a judge as an impartial umpire merely calling balls and strikes, this term made clear that one set of four conservative umpires see one strike zone; one set of four more-liberal Justices see another; and Justice Anthony M. Kennedy mostly, but not invariably, calls pitches the same way as the conservatives. In areas from abortion rights to campaign finance to school desegregation, the Roberts' Court has already changed the law.

This Court has also been more fractured than ever. A high percentage of its rulings, about one-third of the cases, were decided by five to four votes, mostly split along familiar ideological lines. Tempers can be expected to fray at the end of a court term when the hard cases are decided. In this Court, dissenting opinions are now being read from the bench. For example, Justice Stephen Bryer, in announcing his dissent on a school desegregation case, said, "It is not often in the law that so few have so quickly changed so much."

It is surprising to me that the new Justices have acted with what seems to be an inconsistency with the respect for precedent and a modest

conception of their judicial roles. In the partial birth abortion case, the new conservative majority essentially overruled the decision of seven years earlier and for the first time allowed an abortion restriction with no exceptions for maternal health. In the school desegregation case (so much for judicial modesty), the Court reached out to take a pair of cases and then limited how local school systems could try to maintain integrated schools. Additionally, this Court dumped a ninety-six year old anti-trust precedent and dramatically curtailed a three-year-old campaign finance ruling. These do not seem to be the decisions of a restrained court committed to cautious, incremental change. For example, this Court rejected an appeal by a prisoner who had filed his case before a deadline set by a Federal District Judge. Because the Judge (not the prisoner) had misread the law and given the prisoner too much time (three extra days), the Court threw the case out. The dissenting opinion by the usually mild mannered Souter reflected true anguish: "It is intolerable for the Judicial system to treat people this way, and there is not even a technical justification for condoning this bait and switch."

At the end of the day it seems that what matters is not the quality of the arguments but the identity of the Justices. Presidents pick Justices to extend legacies. By this standard, President Bush chose wisely.

At this point in time the liberals face not only jurisprudential but actual peril. Justice Stephens is eighty-seven and Bader-Ginsberg is seventy-four; Roberts, Thomas and Alito are in their fifties. The Court, no less than the Presidency will be on the ballot next November.

Judicial Poll

The results of the judicial poll (too large to reprinted here) have been tallied and sent to our membership via email. If you did not receive it, please contact us at execdir@8JCBA.org and we'll get it to you. **If your email address has changed, please let us know immediately at execdir@8JCBA.org.**

Alternative Dispute Resolution

Florida Courts Favor Mediation And Arbitration Provisions In Contracts



by Chester B. Chance and Charles B. Carter

Often cases are filed in Circuit Court when relevant contractual language allows the option of mediating and/or arbitrating the dispute.

Florida courts have routinely favored contractual provisions requiring either mediation or arbitration. Such provisions are becoming more prevalent in all types of contracts.

In *Auchter Company v. Zagloul*, 949 So.2d 1189 (Fla. 1st DCA 2007) the appellate court reviewed the trial court's order denying a party's Motion to Compel Mediation or Arbitration in a breach of contract action arising from the construction of a residence. The court held Rule 9.130(a)(3)(C)(iv), Florida Rules of Civil Procedure authorizes review of an order denying a motion to stay and compel mediation, and if mediation fails, arbitration (See: *Tropical Ford, Inc. v. Major*, 882 So.2d 476 (Fla. 5th DCA 2004).

In *Zagloul*, the parties entered into a standard AIA contract for construction of a home. The purchaser subsequently notified the contractor that he was terminating the contract because of alleged breach of contract by the contractor. The buyer filed a complaint for breach of contract and the contractor filed a Motion to Compel Mediation and/or Arbitration. Arbitration provisions are routinely made a part of such contracts.

The contract required any claims arising out of or related to the contract ". . . to be submitted to mediation and if mediation failed, to binding arbitration." The court agreed with the contractor requesting enforcement of the provision. The court noted alternative dispute resolution agreements are favored by the courts and any doubts concerning their scope should be generally resolved in favor of alternative dispute resolution.

Such alternative dispute contractual provisions have been upheld in a variety of factual scenarios, including litigation involving allegations of nursing home/assisted facility negligence,

claims by architects and general contractors, disputes between attorneys and clients over the amount of fees, claims relating to the purchase of motor vehicles, causes of action arising from securities transactions, etc. Such provisions are found in everything from residential construction contracts to realtor contracts to car muffler warranties.



When reviewing contracts, counsel should carefully review any arbitration provision and determine matters such as: does the provision specify the arbitrator to be utilized, and if so, is the arbitrator affiliated with the other party in some way? In a local case, *Gainesville Health Care Center v. Weston*, 857 So.2d 278 (Fla. 1st DCA 2003) the appellate court refrained from setting aside an arbitration provision in a nursing home admissions contract. The provision required arbitration to be administered by the National Health Lawyers Association which is made up of attorneys who counsel hospitals, long-term care facilities, physicians, etc. as well as physicians and healthcare executives. The court rejected a mere assertion that such a provision was biased and unconscionable.

Counsel should ask whether the arbitration provision requires the use of an arbitrator or association that charges large or significant fees. If you are drafting an arbitration provision, consider and determine alternatives and available arbitrator services.

An attorney faced with the defense of an action filed in Circuit Court arising from a contract or a purchase and sales agreement should examine the contract/agreement and determine if mediation and/or arbitration can be compelled as an alternative to the Circuit Court proceeding. Such an alternative dispute resolution mechanism may be a faster and/or less expensive alternative to the Circuit Court action. Implementation of such a contractual provision may remove the threat of prolonged litigation as a concern when your client is attempting to resolve a given dispute.

Pat Perry Recognized as Recipient of 2007 Judge James L. Tomlinson Professionalism Award

Attorney Pat Perry was awarded the 2007 James L. Tomlinson Professionalism Award at the Annual Dinner of the Eighth Judicial Circuit Bar, held on June 20, 2007. The Honorable Toby S. Monaco gave those in attendance a memorable introduction to the award recipient; with his permission, his comments are reprinted below:

It's a real pleasure for me to introduce to you the recipient of this year's professionalism award, and it is even more so with the fond memories and admiration that I carry for Judge James L. Tomlinson, in whose honor this award is given.

I had the privilege as a young lawyer to participate in a trial against then attorney Jim Tomlinson in Bradford County – my first jury trial, under the watchful eye of my mentor, Joe Willcox. I saw then not only how good lawyers try cases, but how good lawyers can be real professionals in their interaction with the Court, with non-lawyer participants in the judicial process, and with each other, while at the same time being effective advocates for their clients.

In fact, many of us can look back on those early years of practice and recall those older members of the Bar who were our mentors and role models of the day – and it stands out quite vividly in our minds that those who showed us how to practice law were honored, privileged, proud and grateful to be lawyers, and acted accordingly.

To them, professionalism wasn't merely a set of guiding ideals and standards from the Florida Bar's Center for Professionalism, but a natural expression of their internal sense of the significance of what they were doing as lawyers and of the importance of their role in the broader social context within which they practiced their profession. Professionalism was ingrained in their concept of being a lawyer.

They conducted themselves in a manner which brought respect to the practice of law and to the legal system. And among the members of the Bar today we see their legacy in those who carry that same sense of true professionalism.

- We see it in those who make the effort to be adequately prepared in whatever they do
- We see it in those who are honest, fair and respectful in their dealings with the Court, and with other counsel, and with others whom they encounter in their role as lawyers

- We see it in those who are reasonable and collaborative in scheduling closings, meetings, hearings and depositions, and diligent in the preparation of documents needed for transactions and in the conduct of paper discovery during litigation
- We see it in those who are determined to prevail in achieving the legitimate objectives of their clients, but realistically willing to accept less than the desired result
- And we see it in those whose word is their bond.

The recipient of this year's Professionalism Award has these traits and more.

He maintains a high level of education and proficiency in his area of practice and is a Board certified civil trial lawyer.

He is always well-prepared and conversant with the authorities both for and against his position.

Since first meeting him as he began his legal career in 1981, I have known him to always conduct himself with proper decorum appropriate to the occasion, to be well-mannered and courteous to all, and, in his behavior, to accord dignity to proceedings even when others don't.

This lawyer, who also maintains an AV rating from his peers, doesn't try to achieve advantages through sharp practice, harassing tactics, or trickery, and is willing to let the "cards play out" to whatever the conclusion might be, while at all times being an able and effective advocate for his clients - within the rules - and in keeping with the highest ethical and professional standards of conduct.

He is always reasonable in his dealings with opposing counsel, whether it pertains to scheduling matters or waivers of procedural formalities or stipulations on matters not in genuine dispute. And when the occasion arises that concessions cannot be made to someone's request, it is always with good reason and not arbitrary.

When this lawyer's professional behavior is viewed by others, it is unmistakable that he values and takes pride in the legal system and in what he does as a lawyer.

To you younger lawyers here tonight, speaking on behalf of those of us who had the privilege of learning from the role models of our day, I encourage you to model yourselves after the recipient of tonight's award and practice like a true professional. If you do, not only

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Tomlinson Award

Continued from page 12

will your own career be more valuable and fulfilling, but society's respect for the legal profession and the legal system will grow.

And so, it is with great pleasure that I introduce to you and ask you to recognize the recipient of the 2007 Judge James L. Tomlinson Professionalism Award – Mr. Pat Perry.

Congratulations, Pat – from all of us at 8JCBA!



Pat Perry, Tomlinson Award Recipient
and Judge Monaco

EJCBA September Luncheon Topic

Everything You Wanted to Know About Collaborative Divorce but Were Afraid to Ask.

Please join us at Steve's Courtyard Café on September 14, 2007 for our first luncheon of the 2007-2008 season when Pam Schneider of Wershow, Schneider & Arroyo, P.A. speaks on "collaborative divorce." Collaborative divorce returns control of their personal and financial lives to the divorcing parties, enabling them to determine the timing of their dissolution of marriage, as well. The divorce process occurs prior to any filing with the court and thus is much more confidential, with only the final agreement filed with the court. It helps the parties to work together in the best interest of their entire family assists them in maximizing the benefits each receives from their financial resources. It also generally costs less and is less painful than traditional divorce.

News from Three Rivers Legal Services

*by Marcia Green**

Three Rivers Legal Services welcomes Whitney Untiedt as our new Equal Justice Works AmeriCorps attorney. Formerly with the public defenders office in Alachua and Levy Counties, Whitney is a 2005 graduate of the University of Florida, Levin College of Law. She received her undergraduate degree from William and Mary. Whitney joins Debra Rosenbluth in engaging and inspiring law students to pursue public interest work with the ultimate goal of expanding legal services in the community.

Three Rivers Legal Services has participated in this successful project for the past seven years and has incorporated clinics, addressing such issues as housing and pro se family law, into our regularly offered services. The projects are so successful that available volunteer positions are quickly filled by the law students. Efforts are being made to increase outreach to the rural counties in both English and Spanish.

Nancy Wright, who spent the past year as an Equal Justice Works AmeriCorps attorney, is now entering into a contract position within Three Rivers for general services with an emphasis on the homeless and their disability issues.

Three Rivers commends the Alachua County Commission for their continuing support with grants through the Community Agency Partnership Program (CAPP).

Finally, if you discover that you have not met the Florida Bar's aspirational goal of providing 20 hours of pro bono service, please consider signing up and becoming a volunteer with Three Rivers. Alternatively, you may donate \$350 per year to Three Rivers Legal Services in lieu of providing services. Your contribution will not only help to support the efforts of Three Rivers, but it will also provide matching funds needed to obtain grants from other funding sources. We are very grateful to those of you who have made donations in the past few months.

** Marcia, f/k/a Marcie Lockhart, has married her long-time partner, Alan Hill, and changed her last name back to the one she was born with. Congratulations Marcie & Alan!*

President's Letter

Continued from page 1

the remaining cases that the second public defender office conflicts out of, such as a \$2,000 cap on death penalty appeals.

Though I cannot speak for the legislators that supported and voted for this bill, which the governor signed into law, I can point out the obvious. I cannot think of anything less important to 160 legislators (none of whom are full time criminal defense attorneys), than paying for attorneys for the indigent accused. Seriously, pregnant pigs are way more important, there in the constitution supported by the people's vote. I wonder if any legislators rationalized this bill because they know a convicted felon can't vote anyway. Although no one professed to like the bill, the sentiment was that something had to be done, so Senate Bill 1088 became that something. Early on the Public Defenders considered supporting the bill; however, once it was clear that the funding was not going to be sufficient they withdrew any potential support. This did not deter the legislators and the bill was easily passed. Though Governor Crist did sign the bill into law, he issued a letter indicating his concern about the adequacy of the funding.

I don't know how this will all play out and what the end result will be. The only thing I am sure of is that until the system is changed or additional funding is provided, the representation of indigent accused will take a big step backward, closer to the days before *Gideon v Wainwright*.

Welcome Wagon

Continued from page 3

Landon's baseball team and is Cubmaster for Cub Scout Pack 316 in which Landon is a member.

Adam is a very down to earth guy. When others in his old firm were buying BMWs, Mercedes or sports cars, Adam bought a Ford F-150. Although it may have seemed out of place in So. California, it fits in just right here in Gainesville. Many years ago, Adam adopted a principle that he continues to apply to every aspect of his life, whether it be a job, an organization he belongs to, or a neighborhood he lives in: always leave the campsite better than you found it! He also believes that everyone is smarter than you in some way... identify what it is and don't be afraid to ask about it. One of the great benefits of being a lawyer is that you get paid to learn!

When asked what he likes about the legal community in Gainesville, Adam was appreciative of how open and friendly everyone has been here, and impressed at how accessible our Judges are at bar luncheons and dinners. Judge Sieg, who swore Adam in as a member of the Florida Bar, made a very favorable impression with the family by allowing the children to sit at counsel's tables in the courtroom and be a part of the occasion. Adam is excited to be practicing here, and very happy with his decision to make Gainesville his family's home. *Welcome to the Eighth Judicial Circuit Bar, Adam!*

If you are new to this circuit, or know someone who is, contact Dawn Vallejos-Nichols at dvallejos-nichols@avera.com for an 8JCBA welcome.

NFAREA Dinner & Program

The North Florida Area of Real Estate Attorneys is co-hosting an evening with Henry Fishkind, Ph.D., a premier economist in the state of Florida. He will deliver real estate market projections for 2007-2009 and share an overview of the current local "landscape".

When: Thursday, September 27, 2007
Reception and mixer: 5:30 p.m. – 6:15 p.m.
Dinner: 6:15 p.m. – 7:00 p.m.
Program: 7:00 p.m. - 8:00 p.m.
Where: Gainesville Golf and Country Club
Cost: \$35 Includes Hors D'Ouerves, dinner and two drink tickets. Cash bar available

Please R.S.V.P. with your meal selection (Sliced Beef Tenderloin, Pasta Primavera, or Grouper) by calling Liz Shade at 352-375-1822 or eshade@thefund.com, and forward advance payment (checks payable to NFAREA) to: Liz Shade, Attorneys' Title Insurance Fund, Inc., 4923 NW 43rd Street, Suite A, Gainesville, FL 32606. There will be no refunds for cancellations less than 72 hours prior to the event.

The next meeting of NFAREA is September 13, 2007 - presentation by Nancy Huber with SFCC on hiring a legal assistant and what to expect. The last meeting of 2007 is October 11th. Meetings begin at 5:30 p.m. with a Happy Half Hour. E-mail John F. Roscow at Roscow@raclaw.net for locations.

Criminal Law



by William Cervone

As we start a new publishing year, I can think of no topic more appropriate for discussion than the events that have transpired over the last year in Durham, North Carolina, involving the prosecution of four Duke University lacrosse players for a variety of sexual assault offenses. These events have drawn considerable public attention and, rightfully so, condemnation of the actions of the prosecutor involved in that case. The case and the way it was handled are an embarrassment to me, both personally and professionally, as I am sure it is to many others both inside and outside of my profession and the law enforcement community. Issues about the credibility and professionalism of prosecutors that are being raised on a national level as a result are troublesome and compel me to offer these thoughts.

As I tell every new lawyer who joins my staff as a prosecutor, integrity and character are our stock in trade. I preach to them that character is defined as how a person acts when he thinks no one is paying attention, and integrity is simply whether or not someone can be trusted. Reputation, the sum of these two, is hard won but easily damaged. No case under any circumstance will ever be worth sacrificing a reputation.

What apparently happened in North Carolina is that an overly zealous prosecutor allowed political motivation and ambition to dictate the direction a case took. I place no blame on the victim, who may well be an individual who suffers from many mental health issues, or on the law enforcement officers who investigated the case and, I assume from all I've seen, presented their findings to the prosecutor in good faith. Certainly there is no blame to be placed on the accused men, regardless of the morality of their behavior. A criminal prosecution must be based on the law and the facts, not on emotion or moral disapproval. Most certainly, prosecution in order to pander to any group for political or elective gain is contrary to every rule that guides prosecutors.

One of the things I've heard said about this case is that such prosecutorial abuse "happens all the time." Let me most emphatically assure you that it does not. I would also like to assure you that not only are there a great many legal and ethical

rules governing the conduct of prosecutors but also we collectively and individually take our obligations under those rules seriously. Beyond ethics, there are pragmatic reasons for this: do it wrong and you'll be doing the case over. Do it wrong deliberately and you'll face the kind of consequences the former North Carolina prosecutor has suffered. As you should.

Prosecutors know that there is in a sense a double standard in our criminal courts, but it's not the one you might think. A great many of our laws and rules are deliberately designed to give the benefit of the doubt to the accused. That sometimes frustrates the law enforcement community but as a society we decided long ago that justice and liberty required us to take that stance. Rather than try to find ways around the rules that govern us, any decent prosecutor will embrace those rules. Certainly, that is the way my office and my Assistants will comport themselves. There may be disagreements as to what we do and we may make mistakes - all of us do - but we will not act in the fashion that occurred in North Carolina.

If there is a silver lining to the sordid events at Duke and in Durham, it is that ultimately justice won out. In that sense, everyone won, although I recognize the price paid by the accused men in getting to that point. My pledge to you and to each of our citizens is that you will not be embarrassed by the conduct of your prosecutors. Not on my watch.



Sheriff Sadie Darnell was the featured speaker at the Annual Dinner on June 20, 2007

September 2007 Calendar

- 1 Florida Gators v. Western Kentucky, 12:30 p.m.
- 3 Labor Day – County and Federal courthouses closed; schools closed
- 4 Deadline for submissions to October newsletter
- 4 EJCBA Board of Directors Meeting; Ayers Medical Plaza, 720 SW 2d Avenue, North Building, Third Floor conference room – 5:30 p.m.
- 8 Florida Gators v. Troy, 6:00 p.m.
- 12 Probate Section Meeting, 4:30 p.m., 4th floor, Family & Civil Courthouse
- 15 Florida Gators v. Tennessee, 3:30 p.m.
- 22 Florida Gators at Ole Miss, TBA
- 26 Family Law Section meeting, 4:00 p.m in the Chief Judge's Conference Room (former Grand Jury Room) of the Family and Civil Courthouse
- 29 Florida Gators v. Auburn, TBA

October 2007 Calendar

- 1 EJCBA Board of Directors Meeting; Ayers Medical Plaza, 720 SW 2d Ave., North Building, Third Floor conference room – 5:30 p.m.
- 4 Deadline for submissions to November newsletter
- 6 Florida Gators at LSU, TBA
- 10 Probate Section Meeting, 4:30 p.m., 4th Floor, Family & Civil Courthouse
- 20 Florida Gators at Kentucky, TBA
- 26 Pupil Holiday/Teacher Workday, Alachua County Public Schools
- 27 Florida Gators v. Georgia, Jacksonville, FL, TBA
- 31 Family Law Section meeting, 4:00 p.m in the Chief Judge's Conference Room (former Grand Jury Room) of the Family and Civil Courthouse

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 Sue Black at dvallejos-nichols@avera.com.



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