

FORUM 8

Volume 68, No. 6

Eighth Judicial Circuit Bar Association, Inc.

February 2009

President's Letter



By Margaret Stack

Christmas and New Year's are over and the year looms before us. As we look back over 2008, it is clear that our Bar Association has had a good year with seminars, good luncheon speakers, Urban Meyer and Cedar Key. Our crowning achievement is the Holiday Project and the distribution of toys, books and other goodies to 423 children at Marjorie K. Rawlings Elementary School. This was our sixth year doing this project and in many ways it was the best.

We had lots of help from many of our members led by Elizabeth Collins and Lua Mellman. These two ladies put in an enormous amount of work. First they had to organize the names and "wish lists"; then pair up members who wanted to buy gifts for the kids and get the bags to the members. They also bought presents and found other members to help with the shopping and keep it all straight. They labored on even while fighting off colds, flu or whatever "bug" was going around. Please be sure to give them a big "Thank You" if you run into them. Deb Cupples was right in there with "the usual suspects" and did a great job in writing a "blog" and getting the Holiday Project in the press. There were many other contributors and you will see their names elsewhere in the newsletter. Many thanks to all.

The Principal and personnel at Marjorie K. Rawlings Elementary School brought a large truck to pick up the goodies at the State Attorney's Office and they were floored when they saw all those bags! It's one thing to say presents for 423 children but it truly is

another to actually see it. They had to use the large truck and every car they had with them to get all the presents moved. Then they had to unload them, get them sorted and make sure every child had a bag. It is a huge operation but when we started the next day with Santa's arrival all was in order.

Santa (Carl Schwait) did a fantastic job as did all of his elves. TV 20 was there as well as the Gainesville Sun who put our project on the front page of the Local Section. Lawyers gained loads of good will from this project.

Thanks to all who participated in this effort.

The coming year will present many challenges to our members and to our Court system. The opportunities for lawyers to step up and help those folks who are facing the prospect of losing their homes to foreclosure or who are losing their benefits or those who need a lawyer's help for a wide variety of reasons but have no money to hire a lawyer will be looking to us for help. Please volunteer your services to those who are so needy. Our Circuit has the reputation of being the best in

the State. Let's make sure we are the best in helping those who need our services so badly.



Save The Date

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

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

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

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

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

MEMBERS AT LARGE:

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

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

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

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

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

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

Evan George
4400 NW 23rd Avenue, Ste. A
Gainesville, FL 32606
(352) 378-5603
(352) 378-5604 (fax)
edglaw@gmail.com

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

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

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

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

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

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

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

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

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

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

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

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

Contribute to Your Newsletter!

From The Editor

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

About This Newsletter

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

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

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.

Judy Padgett
Executive Director

PO Box 127
Gainesville, FL 32602
352 380-0333
866-436-5944 (fax)
execdir@8jcbba.org

Dawn Vallejos-Nichols
Editor

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

Deadline is the 5th of the preceding month

A Hearty Thank You To The Holiday Project Committee!!!

EJCBA would like to thank the members of the Holiday Committee: Margaret Stack, Elizabeth Collins, and Lua Mellman. Margaret, Elizabeth and Lua worked endlessly and tirelessly to organize this project and coordinate the efforts of EJCBA members and members of the community in ensuring that each of the 423 (!!!) students of M.K. Rawlings Elementary had gifts which were specific to them pursuant to their letters to Santa. This project was an enormous undertaking and without the efforts of these committee members, this project would not have been successful. Kudos to Margaret, Elizabeth and Lua! EJCBA appreciates your efforts!

Contributions for the Holiday Project are still being accepted. Please make your checks payable to EJCBA and send to the attention of our Treasurer, Sharon Sperling, at 2830 NW 41st St., Ste. C, Gainesville, FL 32606-6667.

Brown Bag Lunch with U.S. District Judge Mickle—RSVP Now!!

By Stephanie Marchman

FBA is excited to host its second brown bag lunch of 2009. The Honorable Stephan P. Mickle, United States District Judge for the Northern District of Florida, Gainesville Division, will speak with local practitioners about the basics of federal practice. This is a great opportunity to interact with a local federal judge, ask questions pertinent to your practice, and learn about the inner workings of the federal court in Gainesville. The FBA anticipates that this event will be approved for one hour of CLE credit. Lunch is provided, of course.

Limited space is available, so hurry and send your RSVP to Stephanie Marchman at marchmansm@cityofgainesville.org to reserve your seat. Members of the FBA will have reservation priority.

When: Noon, February 12, 2009

Where: Jury Room of the United States Courthouse, 401 SE First Avenue, Gainesville, FL 32601

Cost: \$10 payable to the North Central Florida Chapter of the FBA, c/o Stephanie Marchman, 200 E. University Ave. Ste. 425, Gainesville, FL 32601

YLD Judicial Luncheon

All young lawyers are invited to attend our next judicial luncheon with Judge Davis, February 9th, 11:45am at Harry's. Cost is only \$5.

The YLD Board is expanding...well, sort of...

Alison Walker gave birth to Erik Thomas Walker on December 15, 2008

Karen Yochim gave birth to Allison Starr Yochim on January 3, 2009

Both moms and both babies are doing great. Please join us in extending our congratulations to the new parents!

Clerk's Corner



By J.K. "Buddy" Irby

The Clerk's Office has implemented a new policy regarding issuing summonses for and defaults on unknown persons in civil cases. This will primarily affect foreclosure practitioners.

The Clerk's Office has recently determined that a clerk has no authority to issue a summons on an unknown person or a John/Jane Doe, because a John Doe complaint does not commence an action against the real party. See *Grantham v. Blount, Inc.*, 683 So.2d 538 (2d DCA 1996), ("we choose to treat a John Doe complaint in the same manner we treat a complaint that contains a substantially incorrect identification of the defendant and hold that it does not commence an action against the real party"). A clerk can only issue a summons if there is a complaint against the person named in the summons.

The Clerk's Office can only issue one summons per defendant. See Fla. R. Civ. Proc. 1.070(c) ("If there is more than 1 defendant, the clerk [] shall issue as many writs of process against the several defendants...").

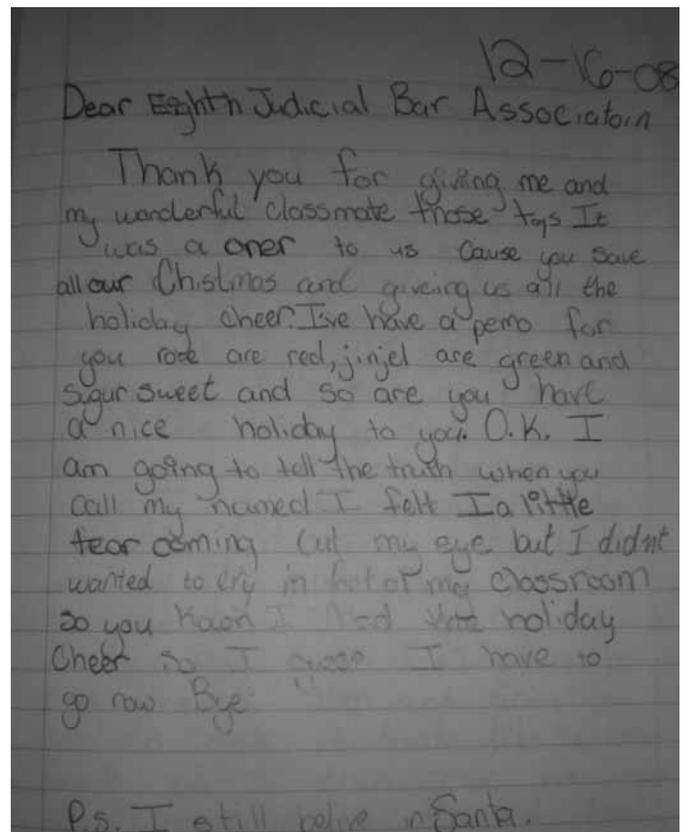
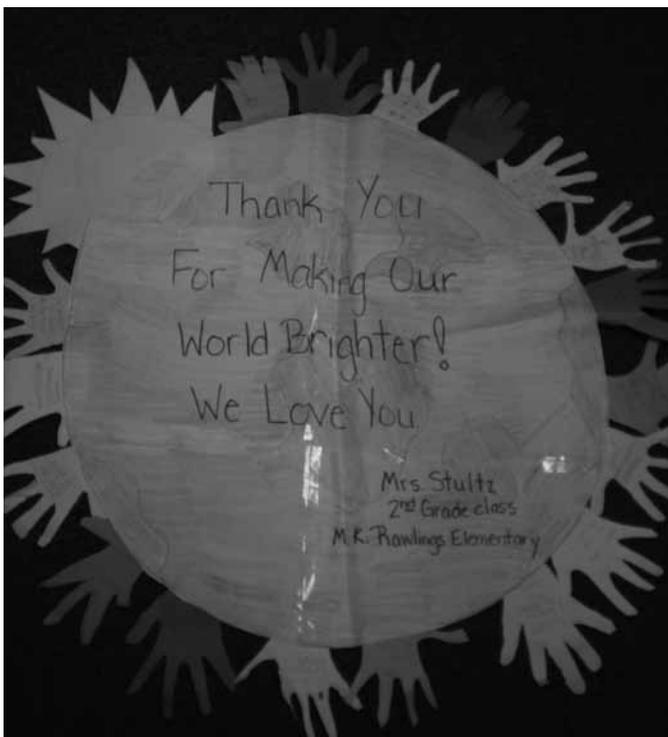
In the event a summons is issued to a John or Jane Doe the Clerk can only default the person named in the complaint—just as it reads in the complaint at the time the summons was issued. Filing an amended complaint, post-service, does not correct the problem as the papers received by the served party do not name the party served.

Thank You to our 2008 Holiday Project Participants

The EJCBA Holiday Committee wishes to extend its sincere thanks and appreciation to all those who contributed this year (and in years past) to making our project a success.

We wish to thank the following judges, attorneys, law firms, staff members, police officers, and members of our community who opened their hearts (and their wallets) to make the 2008 holiday season brighter for all 423 students at M.K. Rawlings Elementary. A special thank you to those who went above and beyond by also donating their valuable time to help us shop for "unadopted" children and to help organize and transport the bags for delivery, including, but not limited to, Ramona Chance, Deb Cupples, Robin Folmer, Ana Gianos, Samantha Gillet, Traci Graves, Marynelle Hardy, Anne Latham, Jennifer Lasseter, Elizabeth McKillop, Jason O'Neal, Rebecca O'Neill, Desi Pfeiffer, Jake Rush, Carl Schwait, Emily Seigle, Susan Seigle, Debbie Synder, Jorge Tormes, Amy Tully, Whitney Untiedt, Mary K. Wimsett, and Jung Yoon. If we have forgotten anyone, please let us know! We appreciate your contribution and want to ensure we give credit where credit is due. In addition, we are still accepting monetary donations towards the holiday project. You may mail your checks to the Eighth Judicial Circuit Bar Association, Inc., Holiday Project, PO Box 127, Gainesville, FL 32602-0127. Look for updates in future issues!

With appreciation and gratitude, The Holiday Committee: Margaret Stack, Elizabeth Collins, and Lua Mellman



Thank you to all those who contributed this year (and in years past) to making our project a success:

Alavi, Bird & Pozzuto
 Alexander, Steffan
 All who attended the Champagne
 and Chocolates Fundraiser
 Archer, Lisa
 Bacharach, Albert
 Baldwin, Nancy
 Baldwin, Suzanne
 Barbarette, Mike
 Barcia, Cindy
 Baros, Marjorie
 Barr, Michele
 Basauri, Victorina
 Bates, Val
 Bendik, Jan
 Bennett, Tammy
 Bernstein, Steve
 Biewend, Jennifer
 Blount-Powell, Barbara
 Brady, Ray
 Brasington, Monica
 Brewer, Sean
 Brockway, Pamela
 Brown, Anne
 Browning, Tim
 Bryant, Kristen
 Burch, Donna
 Carlisle, Tracy
 Carlton, Hollie
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 Carpenter, Ron
 Carter and Drylie, PA and the
 Resolution Center
 Carter, Charles
 Cason, Jodi
 Cauthon, Ray
 Cervone, William
 Chance, Judge Chester B.
 Chance, Ramona
 Chapman, Wanda
 Chisolm, Staci
 Ciesla, Larry
 Cleary, Daintry
 Coates, Laura
 Coker, Judge Mary Day
 Cole, C. Wharton
 Collins, Elizabeth
 Collins, Judy
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 Davis, Kenneth
 Davis, Robin
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 Delaney, Philip
 Dell Graham, PA
 DeThomasis & Buchanan
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 Ferrero, Judge Denise
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 Galigani, Dean & Lea
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 Gristci, Rob
 Gross, Laura
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 Hamilton, Kristin
 Hanson, Linda
 Hardy, Marynelle
 Harris, Mya
 Hastings, Erin
 Haswell, John
 Haswell, Leslie
 Helvosa, Laura
 Hendricks, Jane
 Hertz, Darby
 Holden, Rappenecker & Eubank
 Holy Trinity Episcopal Church
 Moms Night Out Group
 Howell-Wallace, Jessie
 Howell, April & Walter
 Humburg, Joann
 Hutson and Brockway
 Irby, Jesse
 Isenberg, Adrienne
 Jenkins, Dru & Ken
 Jerry, Robert & Lisa
 Johnson & Osteryoung
 Jones, Heather
 Jopling, John
 Kabler, Phil
 Keith, Ken
 Kelley, Nancy
 Kennedy, Lenny
 Kenney, Kelly
 Kidman-Ford Family
 Kinmon, Debbie
 Knellinger, Rick
 Knight, Leslie
 Krause, Amy
 Krueger, Scott
 Lancaster, Sheree
 Larson, Sandy & Charles
 Lasseter, Jennifer
 Latham, Anne
 Lawson, Alena
 Leads Investigations
 (Barr, Matt)
 Leisey, Tamara
 Lester, Jennifer
 Lindgard, Susan
 Lingis, Barb
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 Little, Joe
 Lott, Judge Martha Ann
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 McKeekin, Pam
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 McKittrick, Carolyn
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 Meadors, Mike
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 Morey, Andy and Jessica
 Murad, Majeedah
 Murphy, Lashawndra
 Nagan, Judith
 Neilsen, Aubree
 Nesler, Gerri
 Nilon, Judge James P.
 O'Neal, Jason
 Oasis of Love Ministries
 (Winston & Sandra
 Bradley, Evelyn Anderson,
 Mykayla Williams)
 O'Connell, Dan
 O'Neill, Becky
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 Padgett, Judy
 Padgett, Libby
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 Paulk, Sharon
 Pfeiffer, Desi
 Pierce, Michael
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 Proctor, Sharon
 Quirk, Kevin
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 Remer, Dave
 Robertson, Kevin
 Robinson, Jackie, Melissa &
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 Rudenstein, Sonya
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 Rush, Marian
 Rush, Robert
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 Salmon, Bill
 Sauls, Crystal
 Schaffnit, Gil
 Schaible, John
 Schrieber, Peggy
 Schwait, Carl and Anna
 Scruggs and Carmichael
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 Turner, Hodge
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 Williams, Dana
 Williams, Tom
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MK Rawlings Staff Members:

Clark, Bridgett - CRT Aide
 Curtis, Linda - Lead Custodian
 DeEdra Scott - Guidance Assistant
 Ferria, Barbara - Guidance
 Hughes, Louis - Head Custodian
 Karla Hutchinson - BRT
 Kodim, Mary Lou - Executive
 Assistant
 Langford, Elaine - Reading Coach
 Lopez, Norine - ESE Aide
 Mercado, Patricia - ESE Aide
 Monroe, Sara - Senior Clerical
 Assistant
 Noa, Rita - Medical Assistant
 O'Steen, Galina - Speech/Language
 Patterson, Terrence - Custodian
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 Base Manager
 Phillips, Randy - Custodian
 Smith, Leanna - 4th Grade
 Reading Tutor
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Alternative Dispute Resolution

Negotiation In Good Faith



By Chester B. Chance and Charles B. Carter

At the mediation conference a representative of the defendant's insurance carrier appears at the conference. The representative discusses the underlying facts and circumstances of the case.

In addition, the insurance representative states there has been insufficient time since service of process to take a discovery deposition of the plaintiff or to do an independent medical examination. She offers \$1,000 to settle the case. After several caucus sessions, the mediator reports to you that the defendant steadfastly refuses to increase the offer under the circumstances.

You argue that although the case is a soft tissue injury, a chiropractor gave your client a disability rating of 5% to the whole body. You argue the defendant's policy limits are \$10,000. You assert the defendants and their insurance carrier appeared in mediation with unclean hands and not in good faith and move for sanctions seeking attorney's fees and costs.

Will you prevail?

In Avril v. Civilmar, 605 So.2d 988 (Fla. 4th DCA 1982) the court noted Rule 1.720(b), Florida Rules of Civil Procedures allow sanctions only for failing to appear at a duly noticed mediation conference. The appellate court determined plaintiff's only basis for requesting sanctions ". . . is merely that the defendants were unwilling to make an offer of settlement satisfactory to him. The mediation statutes however, do not require that parties actually settle cases".

The court referenced Chapter 44 of the Florida Statutes including the definition of mediation as an informal and non-adversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement. "It is clearly not the intent to force parties to settle cases they want to submit to trial before a jury. There is no requirement that a party even make an offer at mediation, let alone offer what the opposition wants to settle".

Signing The Mediation Agreement

Elizabeth Collins has forwarded a November

12, 2008 opinion from the Third District Court of Appeal in Mastec, Inc. v. Rolando Cue. The case involved a personal injury lawsuit which was mediated and the defendant alleged the parties agreed to a settlement at mediation. However, it was undisputed the mediation agreement was not reduced to writing and signed by the parties. The trial court denied the Motion to Enforce Settlement. The appellate court determined the lack of a written agreement signed by both parties was more than a mere technical deficiency and the alleged mediation settlement was unenforceable.



The Mastec decision references Jordan v. Korden Adventist Health System, 656 So.2d 200 (Fla. 5th DCA 1995) which determined the absence of a writing containing an attorney's signature is a technical detail which the court may ignore. In Jordan, the parties reached a settlement after extensive negotiations and a preliminary agreement was reduced to writing and signed by the parties but the agreement was not signed by counsel. Because Rule 1.730(b) FRCP requires that a mediation agreement be signed by the parties' counsel, one of the parties argued the preliminary agreement was unenforceable. The Fifth District Court held a party could not avoid the agreement by relying on this "technical detail".

The appellate court also referenced Gordon v. Royal Caribbean Cruise, Ltd., 641 So.2d 515 (Fla. 3rd DCA 1994). In Gordon the defendant sought to enforce a mediation agreement against a client/party who did not sign the agreement although the party's counsel did sign it. The Third District Court held the signatures of the parties are necessary and an attorney's signature alone, even in the presence of his client, is wholly insufficient. In Gordon, the court distinguished cases involving settlement agreements which were not reached during court ordered mediation.

In summary, a mediation agreement appears to be enforceable if signed by the parties but not by their counsel and a mediation agreement signed by counsel but not by the parties is not enforceable.

Thanks to Elizabeth Collins for providing this updated case law.

Three Gainesville Lawyers Celebrate 25 Years Of Board Certification

When Florida's legal board certification program began in 1983, it consisted of just two specialty areas. Today there are an impressive twenty-two specialty areas. Certification is the highest level of evaluation by The Florida Bar of the competency and experience of attorneys in areas of law approved for certification by the Florida Supreme Court. Certified attorneys are the only Florida lawyers permitted to identify or advertise themselves as specialists or experts. Three local Gainesville attorneys are among the 226 Florida Bar board certified lawyers statewide who originally earned that designation in 1983 and have maintained their status for 25 years! They are:

Neil Chonin
Southern Legal Counsel

Ellsworth William Hoppe, Jr.
The Hoppe Law Firm

Leonard E. Ireland, Jr.
Clayton-Johnston, P.A.

Congratulations to each of you for maintaining the highest standards of excellence.



Margaret Stack with Circuit Court Judge William Davis

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8th Circuit Young Lawyers gathered much needed toys and games for the Family Visitation Center at their Holiday Party.

Florida Bar Board Of Governors Report



By Carl B. Schwait

At its December 12, 2008, meeting in Orlando, The Florida Bar Board of Governors:

- Approved 13 legislative positions for the 2008-10 biennium which were all renewals of positions the board had approved for the 2006-08 legislative sessions. The positions include maintaining the Supreme Court's authority over the court system and the legal profession, supporting adequate funding for the court system including public defenders and state attorneys, supporting the Supreme Court's certification of the need for new judges, supporting a substantial pay raise for federal judges, getting adequate funding for the Civil Legal Assistance Act, and opposing the indiscriminate shackling of juveniles in court proceedings.

- Heard a report on the Bar's coordinating its efforts with the Supreme Court to get better funding for the court system in the state's current economic crisis. It was noted that the court and others are looking at the more than \$300 million in fees and fines currently collected by court clerks and returned to the state's general revenue fund, of which less than \$14 million is earmarked for the courts. More of the effort will be detailed and worked out at the summit on state court funding January 16 at the Midyear Meeting in Miami.

- Heard a report that while the stock market is down 35 to 45 percent, the Bar's investment portfolio is down only about 15 percent. The Investment Committee is continuing to monitor the funds. President-elect Jesse Diner added that the difficult economy and investments mean the Bar will be facing a tough time with its 2009-10 budget, but that he does not foresee an increase in Bar annual membership fees.

- Heard a report on the recent planning retreat. It reaffirmed the Bar's existing priorities, but that economic considerations were being given a special urgency. The four top goals remain protecting the courts including getting adequate funding, protecting the legal profession, protect access to the courts, and improving communications with Bar members and the public.

- Passed on final reading several rules, including one which allows for the emergency placing on the inactive list an attorney who has an incapacity not

related to misconduct which affects that member's ability to competently practice law. The board also gave final approval to a new Standing Board Policy which provides guidelines for exempting some recipients of public reprimands from having to appear before the board under certain circumstances with the approval of the designated reviewer after discussion with staff counsel.

- Heard a report that the Board Review Committee on Professional Ethics postponed action on a revision to Ethics Opinion 90-6, which addresses an attorney's duties when he or she discovers a criminal defense client is proceeding under a false name. The committee heard extensive debate on the matter at its December 11 meeting, and requested that staff draft alternatives for the BRC to consider on the revised opinion. The issue will come to the board at its January 30 meeting.

- Approved revisions of Supreme Court-approved residential eviction forms. The revisions reflect statutory changes and the revised forms will be filed with the Supreme Court.

I wish to thank each of you for allowing me to continue my service as your Board of Governors representative. Please feel free to contact me with any concerns, questions or comments about issues involving the Bar.

You are cordially invited to attend
the investiture of the
Honorable

Denise R. Ferrero

Alachua County Court Judge

Friday, February 20, 2009, 4:00 p.m.
Courtroom 1B

Alachua County Courthouse
Criminal Justice Center
220 S. Main Street
Gainesville, Florida

Reception immediately following in the
Jury Assembly Room

Criminal Law



By William Cervone

Conceding that my office does little appellate work and that I do even less than that, I had never heard of a “Brandeis Brief.” Perhaps some of you who practice in that arena have. I do read Florida Law Weekly each and every week and my office does occasionally assist the Attorney General’s office with an appeal from one of our cases. We also do handle a few county to circuit court appeals on a local basis, but other than that I’m not very knowledgeable on appellate procedure or processes. Still, if this was something legitimate I’d have thought that somewhere over the last 35 years of practicing I’d have run across it. Imagine my surprise, then, to see an article on this.

The article was actually sent to me by someone, which is how a lot of arcane stuff gets to me. It was printed in something called *The Practical Lawyer*, which is a joint publication of the American Law Institute and the American Bar Association, neither of which I pay much attention to. It was written by Michael G. Walsh, who is an Associate Professor of Business Law at Villanova University’s School of Business. All decent if not great credentials, one would think.

According to Professor Walsh, a “Brandeis Brief” is traced to and named after Louis Brandeis. Now, as I’ve always admitted, I’m also no great scholar of things like who authors what appellate opinion or how appellate judges come to think as they do but I am pretty sure that Justice Brandeis was a quite distinguished Supreme Court member in his day. Apparently, before reaching that pinnacle of our profession, he practiced extensively in appellate law and developed a style of brief writing that has now earned the distinction of being a genre of its own.

Here’s the rub. According to the article, Brandeis used his briefs to place empirical evidence before the courts, including the Supreme Court, even though it was nowhere in the record through testimony, exhibits, or otherwise. He would supposedly use his briefs to incorporate social facts and commentary as corroborative material for the judicial decision making process. To quote from Professor Walsh, a “Brandeis Brief is a well-known technique for asking the court to take judicial notice of social facts...It does not solve the

problem of how to bring valid scientific material to the attention of the court...Brandeis did not argue that the data were valid, only that they existed... The main contribution...was to make extra-legal data readily available to the court.”

Some of you may see where I’m headed. If not, let me finish quoting Professor Walsh. “In short, consider the appropriateness of the Brandeis Brief if you find yourself needing to get evidence, statistical or otherwise, before an appellate court, or in some jurisdictions, a trial court. If you are successful, you will have managed to get opinion evidence before the court without employing an expert.”

In other words, Rules of Evidence don’t matter. Ignore them. Planning your case and presenting it at the trial court level so that you have record evidence to rely on doesn’t matter. Ethics don’t matter. What the heck, don’t worry about what the evidence really was when you get to the appellate level, just say it was what you want it to be. And while you’re at it, don’t worry about your closing argument being based on the evidence. What’s the judge going to do about it, tell the jury to disregard those facts that are not in evidence after sustaining a Facts Not In Evidence objection? So what.

Maybe I shouldn’t be, but I’m bothered by a law school professor who basically encourages practitioners to think about breaking the rules. For quite some time I’ve watched a diminution of the value of planning, preparing and presenting a good case, often under the guise of wanting to reach a “just” result. The real result is that good lawyering goes by the boards because bad lawyering might lead us closer to achieving “perfect justice.” There is, in short, neither a reward for being a good lawyer nor a sanction for being a bad one. Why, then, require law school or a Bar exam? Let pride and shame control the matter.

I offer this as food for thought about where our profession is and may be headed. We like to say that a case is a search for the truth. We also like to hold ourselves out as being guided by rules and precedent. How, then, do we reconcile the two when on the one hand the evidence upon which a case is to be determined is to be guided by the rules (read here the Evidence Code) and yet on the other hand we invite ignoring those rules in order to present other possibly quite improper material to the fact finder or decision maker?

The Rest Of The 2006 Story Behind Firing U.S. Attorneys



By Stephen N. Bernstein

Some were fired because they irritated Justice Department higher-ups. Others were just dismissed after Republican politicians groused about their failure to move quickly against political enemies. One was removed to make room for Karl Rove's hand-picked candidate.

For some, there seemed to be no explanation of why they were asked to leave; remarkably, only two were actually let go because of poor performance evaluations.

These were some of the conclusions contained in a scathing report released about the Bush Administrations firing of nine United States Attorneys in 2006. In that 392 page document the Justice Department Office of the Inspector General and Office of Professional Responsibility detailed incompetent, unethical, and possible criminal conduct that surrounded the dismissals. Attorney General Michael B. Mukasey was right when he said in a written statement after the report's release, "it is true, as the report acknowledges, that an administration is entitled to remove presidential appointees, including United States Attorneys, for virtually any reason or no reason at all. But the leaders of the Department devoted to those who serve the country in those capacities, should treat their careers and reputation with appropriate care and dignity. The leaders of the Department owed it to the American people that they served to conduct the public business and deliver in a professional manner. The Department failed on both scores."

The report appropriately places the primary blame for the breakdown of professionalism on the former Attorney General Alberto R. Gonzales, who showed a breathtaking disengagement from the process of disposing of nine presidential appointees. Mr. Gonzales told investigators that he delegated the tasks of terminating underperforming U.S. Attorneys to his Chief of Staff, D. Kyle Sampson. Mr. Gonzales never inquired about or laid out the standards Mr. Sampson would use to evaluate these prosecutors. Mr. Sampson acknowledged in his report that he did not recommend the dismissal of some "mediocre" prosecutors because they enjoyed home state political support. Thus, Mr. Sampson placed

more importance on the U.S. Attorney's political connection and actual qualifications didn't register with or did not bother the Attorney General. Mr. Gonzales did not so much delegate as abdicate responsibility for ensuring that the Department was being run in a professional and ethical manner.

Attorney General Mukasey took the appropriate step of naming a veteran Justice Department Prosecutor, and currently acting U.S. Attorney in Connecticut, to determine whether criminal laws against false statements or obstruction of justice were violated. Stay tuned.

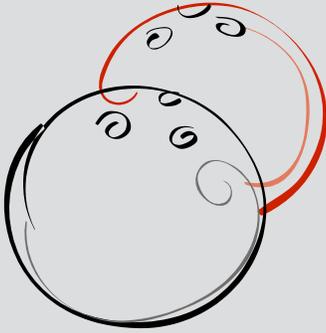
2009 Heart Ball to Honor Jimmy Feiber of Salter, Feiber, Murphy, Hutson and Menet, P.A.

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

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

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

Eighth Judicial Circuit Bar Association Young Lawyers Division Presents:



Bowling Brawl 2009

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

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

WHERE: Alley Katz Bowling Alley

WHY: All proceeds benefit Three Rivers Legal Services

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

DEADLINE: Register on or before February 9, 2009

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

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

Nominees Sought for 2009 James L. Tomlinson Professionalism Award

Nominees are being sought for the recipient of the 2009 James L. Tomlinson Professionalism Award. The award will be given to the Eighth Judicial Circuit lawyer who has demonstrated consistent dedication to the pursuit and practice of the highest ideals and tenets of the legal profession. The nominee must be a member in good standing of The Florida Bar who resides or regularly practices law within this circuit. If you wish to nominate someone, please complete a nomination form describing the nominee's qualifications and achievements and submit it to Raymond F. Brady, Esquire, 1216 NW 8th Avenue, Gainesville, FL 32601. Nominations must be received in Mr. Brady's office by April 30, 2009, in order to be considered. The award recipient will be selected by a committee comprised of leaders in the local voluntary bar associations and practice sections.

James L. Tomlinson Professionalism Award Nomination Form

Name of Nominee: _____

Nominee's Business Address: _____

County in which Nominee Resides: _____

The above named nominee exemplifies the ideals and goals of professionalism in the practice of law, reverence for the law, and adherence to honor, integrity, and fairness, as follows (attach additional pages as necessary):

Name of Nominator: _____

Signature: _____

Business Valuation: Evidence Of Post Valuation Date Events

By Jack M. Ross

The need to prove the value of a business can arise in many different situations: in a domestic relations case to establish equitable distribution, in a corporate dissolution to establish the price of the shares of stock, in a breach of a partnership agreement to determine damages, in an estate to determine the value of the estate on the date of death, and in a condemnation case to establish business damages, among others. All of these situations have one thing in common. The trial of the case will be held months, if not years, after the date on which the business is to be valued. Appraisal professionals call this a “retrospective appraisal.” Such cases present a problem when events, sometimes dramatic events that affect the value of the business occur after the valuation date but before the date of the trial. Can the finder of fact consider the intervening events in reaching a decision on the value? The answer is sometimes.

The starting point for the analysis is recognition that the fact for the court to determine is the fair market value of the business on the date of the valuation. The definition of fair market value is well known: the amount a buyer, willing but not obligated to buy, would pay to a seller, willing but not obligated to sell. *Savers Fed. S & L Ass'n v. Sandcastle Beach Joint Venture*, 498 So.2d 519 (Fla. 1st DCA 1986). Implementing this definition, courts have ruled that evidence of facts which the buyer and seller could not have known on the valuation date is inadmissible. As stated by one court in a case involving the valuation of an estate, “Because property is valued as of the date of death, the only relevant facts are those that this hypothetical buyer and seller could reasonably have been expected to know at that time....Information that the hypothetical willing buyer could not have known is obviously irrelevant to this calculation.” *First National Bank of Kenosha v. United States*, 763 F.2d 891, 893-94 (7th Cir. 1985).

However, events occurring after the valuation date may be relevant if they are used to establish the reasonableness of trends or expectations that were knowable on the valuation date. Subsequent events are admissible only “to the extent that they were reasonably foreseeable at the date of the valuation....” *First National Bank of Kenosha v. United States*, *supra*, at 894. Subsequent events which were foreseeable are admissible because

those events can be expected by the buyer and seller and can be included in their consideration at the time of the valuation.

An excellent discussion of these principles can be found in *Okerlund v. United States*, 365 F.3d 1044 (Fed. Cir. 2004). In that case the court had to determine the evidence admissible to prove the market value of stock representing a minority interest in a nonpublic company as of December 31, 1992. The Plaintiff sought to introduce evidence of a decline in the earnings of the company in 1993 and 1994 caused by the occurrence of two unexpected risks. The court affirmed exclusion of the evidence holding that “In general, property is valued as of the valuation date on the basis of market conditions and facts available on that date without regard to hindsight. However, we have held that postmortem events can be considered by the Court for the ‘limited purpose’ of establishing what the willing buyer and seller’s expectations were on the valuation date and whether these expectations were ‘reasonable and intelligent.’” *Id.* at 1053. The court continued, “Valuation must always be made as of the donative date relying primarily on *ex ante* information; *ex post* data should be used sparingly.” *Id.* at 1053.

The case law on this issue is consistent with the professional literature as well. The Appraisal Standards Board addresses this issue in its Uniform Standards of Professional Appraisal Practice (2008-2009), Statement on Appraisal Standards, No. 3, p. U-82:

Data subsequent to the effective date may be considered in developing a retrospective value as a confirmation of trends that would reasonably be considered by a buyer or seller as of that date.... In the absence of evidence in the market that data subsequent to the effective date were consistent with and confirmed market expectations as of the effective date, the effective date should be used as the cut-off date for data considered by the appraiser.

In conclusion, the principles discussed in this article are not a special rule of law, but a specialized application of the law of relevance as stated in FLA. STAT., § 90.401. “Relevant evidence is evidence tending to prove or disprove a material fact.” The material fact is the state of mind of the buyer and the seller on the valuation date. If subsequent events can be used to support that fact they are admissible; if they cannot they are not admissible.

Immigration Matters



By *Evan D. George*

Editor's Note: Immigration Matters is a new feature in the Forum 8 written by Evan D. George. Evan is a Gainesville native and UF Law graduate who practiced with a prominent Manhattan immigration law firm for three years before returning

home to Gainesville. In addition to his expertise in immigration law, including political, religious and sexual orientation based asylum, Evan shares space with and is "Of Counsel" to the Law Office of Larry E. Ciesla, where he is working in the areas of guardianship and probate.

Immigration matters directly affect a wide cross-section of societal issues, including economics, labor, politics, religion, race, family unity, and criminal justice. In Florida, changing demographics increasingly translate into immigration-related legal questions for area attorneys representing noncitizens in the United States. There are myriad issues where a client's lack of lawful resident status can affect their potential legal position, liability or availability of relief. While Lou Dobbs and others might vehemently wish this issue away, immigration, and the complicated patchwork of federal statutes and regulations governing it, will undoubtedly remain a national issue of great import with serious consequences for Florida residents, families and businesses.

Possibly more than any other area, criminal defense intersects with immigration law, with potentially grave consequences for a noncitizen facing criminal charges. Over the past decade, and especially in the aftermath of the 9-11 terrorist attacks, the funding, resources and vigilance of U.S. immigration enforcement agencies has spiked dramatically. In this climate, criminal defense attorneys play a vital role in ensuring that a plea agreement or underlying conviction does not, inadvertently, have serious collateral consequences for their client's immigration status.

The removal of noncitizens from the United States, including legal permanent residents (green card holders), is separated into charges of inadmissibility and deportability. Inadmissibility deals with noncitizens who are seeking admission into the United States, or who are physically present without ever being inspected or admitted. Deportability, rather, deals with noncitizens who, after being admitted into the United States, have violated the terms of their visa, for example, by overstaying their lawful period of stay, accepting

unauthorized employment, or committing certain criminal offenses. The Immigration and Nationality Act (INA) lays out a long list of grounds for removal that varies significantly based upon whether the noncitizen is subject to inadmissibility or deportability, especially in the criminal context.

The question of whether a certain crime triggers a noncitizen's removal varies tremendously, based upon the nature of the offense, the state exercising jurisdiction, the potential sentence, the actual sentence, and the noncitizen's criminal record. In the immigration context, there are various types of convictions that render a noncitizen removable, however the primary grounds of criminal removal are categorized as crimes involving moral turpitude, aggravated felonies, violations of controlled substance laws, and multiple convictions. A crime involving moral turpitude is an undefined concept in immigration law and requires a case-by-case analysis; burglary has been found to be a crime involving moral turpitude, while breaking and entering has not. Aggravated felonies are defined under the INA and carry severe consequences; however, they are not necessarily always felonies under state law. The determination of whether an offense is properly classified as a crime involving moral turpitude or an aggravated felony is based upon an analysis of the state criminal statute, and not on the underlying conduct involved in the offense.

Based upon the particular conviction, a noncitizen might be subject to removal, mandatory detention pending removal, and in some cases a permanent bar from returning to the United States. In other cases, a conviction might not trigger removal, but will preclude a finding of good moral character, which is essential for various forms of immigration relief, as well as for eligibility for naturalization. Importantly, in the immigration context, a noncitizen can face removal based upon an offense where there is no underlying conviction according to state law, provided that there is some form of sentence ordered by a judge.

This column will cover strategies for minimizing the immigration consequences of criminal activity, and will deal with other areas where immigration law intersects with Florida law, including but not limited to family law with divorce, unaccompanied juveniles and victims of domestic violence, and business and labor law related issues, such as employment authorization and I-9 compliance. In the interim, if you have an immigration-related issue or question, feel free to contact me at 352-378-5603 or evan@evangeorge-law.com.

Family Law: New Year's Technology Resolutions

By Cynthia Swanson



OK, this is not only for family lawyers. We all are using technology in our offices, and we can all do a better job of it. It's a good time for some technology New Year's Resolutions. Here are the main resolutions I'm touting:

1. I will use all (or at least more) of the features available

to me in my hardware, software and portable devices (smart phones, etc.)

2. I will take security seriously.

3. I will at least know what software and hardware I have, what I don't need, and what I want.

4. I will capture all my billable time.

In my firm, we use software for lots of things – we use Amicus Attorney for our practice management, which handles all our client matters, contact data base, phone messages, email (attaching to client matters), and even automatically merges some data fields to create some documents. We could use that feature a lot more. We use WordPerfect for all our word processing, and even for some spreadsheet and table making. We are so good at WordPerfect that we don't use the documents merge feature in Amicus Attorney very much. But it would really make for more uniform, streamlined documents in many cases.

Another Amicus feature we can do better at utilizing is its Library function. You can create "libraries" of legal research, firm generated documents, etc. For example, I have a section in my library called "Family Law." Then, there is a book case called "Divorce." Then, there are shelves, some of which are called "Alimony," "Child Support," "Equitable Distribution," "Attorneys Fees," and so on. On the Alimony shelf, there are books called, "Imputation of Income," "Vocational Rehabilitation," "Length of marriage," and so on. Then, each of those books has lots of pages. Each page points to a case, a memorandum of law I created, or something similar. There is a brief abstract of each page which shows on the "Table of Contents," so we can scan to see if there is something we can use in a present matter. This allows me to utilize memos I have done for past cases in a present case, without my feeble brain having to remember which client it was and going to search in a closed file. There is a link to where the memo is saved on my computer on the page in the library. I'm in love with this feature and we need to use it more.

And how about your smart phone? Do you use it for

anything more than phone calls? I have a Palm Centro, because Amicus Attorney syncs with Palm software. My entire firm data base is synced to my phone. So, when I'm in court, I have access to my entire calendar, and contact information for every client, lawyer, judge, and pizza place in Gainesville (and beyond). I also got the phone plan that includes unlimited data access, and so I can read the news on any news website or check the weather or read a tutorial on how to use my phone while I'm sitting outside the judge's chambers waiting to be called to a hearing. Or, let's face it, I can also play any number of solitaire and tetris type games while waiting.

I have made a personal rule that I am not going to check email outside my office, though I could do that, too. My no checking email outside the office rule is because if I check it, I will probably want to respond to it. If I respond to it outside the office, there are three problems. One is the Centro keyboard just plain stinks. Solution - download and install a handwriting program. These work great and allow you to enter information into your data base or to text or to email much quicker. I use a program called Graffiti and love it. I have also used one called MobileWrite - also very good and they are quite similar.

But the other two problems are not so easily solved. One is that if I do my email at the office, I can attach both the email I received and my responses to my client file via Amicus Attorney. The other is that if I do it outside the office, 99.9% of the time I will forget to bill for it.

Amicus Attorney also has a timer function attached to each feature. If you make a phone call to somebody, you should open their client file or their contact card, and click on the little phone icon and a timer starts running. Same for email, creating documents, etc. There is just no excuse for not capturing all our time. And yet - we don't. How many times have you found yourself, sitting at your desk at 5:00 p.m. on Friday, thinking about going home, and wondering what the heck you did all week . . . because you only have about 10 hours accounted for in your billed time? Resolve to not let this happen to you in 2009.

What about the ability of your email client to automatically move emails to certain folders? Do you use that? I get a couple dozen emails each day from the American Academy of Adoption Attorneys listserv. I set up a rule in Outlook that dumps them all into a separate folder, so I can read them when I have time. This way, other, more time sensitive, emails don't get

Continued on page 15

lost in the daily explosion of emails in my inbox. And if you're receiving spam - shame on you. Get with an internet service provider that weeds out spam; set up rules and filters in your email client to do it yourself. And whatever you do, do NOT respond to a pop up ad that says you just won a free \$2,000 laptop computer if you will only answer 30 minutes of questions about your shopping preferences.

Have you downloaded any CLE seminars to listen to on your iPod or other mp3 player? You can get audio books to keep up on your fiction reading list, too. Or, hey - does anybody besides Sharon McCloud have a Kindle (Amazon's wireless reading device - no, it's not just a book)? That was such a popular Christmas gift, they're back ordered for three months.

If you learned word processing on WordPerfect 5.1 or earlier, raise your hand. If so, you probably already make good use of keyboard shortcuts. If you don't - resolve to learn the keyboard shortcuts available in your office suite software, especially your word processing program, to reduce lost time using the mouse to access your most used commands and features.

Let's talk security for a minute. Don't you just hate this topic? I mean, we're lawyers, not computer geeks, right? But how stupid will you feel if something bad actually happens and you were too complacent and didn't have any kind of security in place? Start with strong passwords. I have a couple passwords I use for all sorts of things. One of them, I'm ashamed to admit, is a password that was randomly and automatically assigned to me when I opened my first AOL email account what -- like 15 years ago? It is six characters and 15 years old. How pathetic is that? Some tips for creating stronger passwords: Use upper and lower case letters; use numbers; use punctuation marks where allowed; use at least eight characters and more where allowed; Use the first letter of each word from a line in a book, song, or poem. For example: "Who ya gonna call? Ghost Busters!" would produce "Wycg?GB!" That's cool, huh? Or how about, "I had a farm in Africa at the foot of the Ngong Hills?" Can't you just hear Meryl Streep saying that in her Danish accent? That would help you remember a password like "lhafiAatfotNH." You'd probably want to throw in some numbers, too.

And what about backups of your computer hard drives? Tape backups are old hat - now you need external hard drives! We have two which we rotate to back up our network server every day. What a pain. You just have to make it somebody's job, and they just have to do it. If you're really good, somebody will take one home every day. So, you have one back up at the

office and one somewhere else. But then whoever took it home has to remember to bring it back the next day. Another pain.

So, you could try backing up to the Internet. With these services, you download and configure a piece of software and the backup is handled automatically in the background. Of course, you better do a lot of due diligence type research before you choose a service provider. What happens when their computers crash? If you want tips on how to backup the whole internet, go here: <http://www.bluedamage.com/2004/11/17/backing-up-the-internet/> . And get ready to laugh!

You should also resolve to make sure all computers in your firm have antivirus and antispyware protection that updates automatically and runs regularly scheduled scans to find and remove dangerous files and programs. Same for your home computers if you transfer files back and forth. Enough said.

Another good tip: resolve to inventory all of your firm's software and hardware, and replace those items that are obsolete and inefficient. If you're really good, you'll also resolve to create an orderly upgrade and replacement plan for your firm's technology and -- get this! -- to budget accordingly.

My final resolution is to create a better software program than DPA to prepare financial affidavits, equitable distribution charts, etc. This is my nomination for the family lawyer's most hated, most counter-intuitive, most difficult, and yet most essential piece of software. If only I had the time, I know I could create a better program and then sell it for a million bucks! Then I won't need to worry about capturing my billable time any more.

Next Family Law Section Meeting: The Family Law Section meets each month on the third Tuesday at 4:00 p.m. in the Chief Judge's Conference Room in the Alachua County Family and Civil Justice Center. Our January meeting on January 20th featured Kim Hayfield of Crown Reverse Mortgage, who spoke about how reverse mortgages might be helpful to our clients going through divorces. Our February meeting is on February 17th.

As always, if you want to be added to or removed from an email list with reminders of meetings - send me an email at cynthia.swanson@acceleration.net .

One last thing...

Here's a divorce joke I heard on late night TV: There is a report out that with the economy so bad, the divorce rate is going down. People can't even afford to get divorced. That's really bad, huh? You lose half your money and you're still stuck with your lousy spouse.

February 2009 Calendar

- 4 Deadline for submissions to March newsletter
- 4 EJCBA Board of Directors Meeting; Ayers Medical Plaza, 720 SW 2d Avenue, North Tower, Third Floor – 5:30 p.m.
- 5 CGAWL meeting, Ayers Medical Plaza, 720 SW 2d Avenue, North Tower, Third Floor – 5:30 p.m.
- 9 YLD Lunch with Judge Davis – 11:45 a.m. at Harry's
- 11 Probate Section Meeting, 4:30 p.m., 4th Floor, Family & Civil Courthouse
- 12 North Florida Association of Real Estate Attorneys meeting, Scruggs & Carmichael, 4041 NW 37th Place – 5:30 p.m.
- 14 2009 Heart Ball & Auction Honoring Jimmy Feiber, Hilton UF Hotel & Conference Center; call Kristine Van Horst at 376-8201 for more info
- 16 President's Day – Federal Courthouse closed
- 17 Family Law Section Meeting, 4:00 p.m., Chief Judge's Conference Room, Alachua County Family & Civil Justice Center
- 20 Honorable Denise Ferrero's Investiture to County Court Bench, Criminal Justice Center, 4:00 p.m.
- 28 YLD's Bowling Brawl 2009 (to benefit Three Rivers Legal Services), Alley Katz Bowling Alley, 1:00 p.m.

March 2009 Calendar

- 4 EJCBA Board of Directors Meeting; Ayers Medical Plaza, 720 SW 2d Avenue, North Tower, Third Floor – 5:30 p.m.
- 5 Deadline for submissions to April newsletter
- 5 CGAWL meeting, Ayers Medical Plaza, 720 SW 2d Avenue, North Tower, Third Floor – 5:30 p.m.
- 11 Probate Section Meeting, 4:30 p.m., 4th Floor, Family & Civil Courthouse
- 12 North Florida Association of Real Estate Attorneys meeting, Scruggs & Carmichael, 4041 NW 37th Place – 5:30 p.m.
- 17 Family Law Section Meeting, 4:00 p.m., Chief Judge's Conference Room, Alachua County Family & Civil Justice Center

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



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