

# FORUM 8

Volume 69, No.2

Eighth Judicial Circuit Bar Association, Inc.

October 2009

## President's Letter



By Rebecca O'Neill

The Red Flags Rule. Almost two years ago, various federal agencies, including the Federal Trade Commission (FTC), issued a final rule to protect against consumer identity theft. This final rule, called the "Red Flags Rule" (the Rule), amended the Fair and Accurate Credit Transaction Act of 2003. The Rule requires that certain businesses implement security measures to "detect, prevent and mitigate identity theft in connection with the opening of certain accounts or certain existing accounts." (See a copy of the Rule at <http://edocket.access.gpo.gov/2007/pdf/07-5349.pdf>). It is clear that banks, credit unions and various types of financial institutions would be impacted by this rule. However, the Rule so broadly defines "creditor" that hospitals can be captured in the broad definition of creditor, which is how the Rule came to my attention.

The Rule's definition of "creditor" includes "a person who arranges for the extension, renewal, or continuation of credit, which in some cases could include third-party debt collectors." 15 U.S.C. 1691a(e). The Rule's definition of "covered accounts" includes accounts for personal or family purposes where services are rendered on an ongoing basis. 16 C.F.R. 681.2b(3).

The Rule requires creditors to establish a written Identity Theft Prevention Program to include written policies and procedures to help identify and respond when information provided to the creditor may be inaccurate. (Compliance to

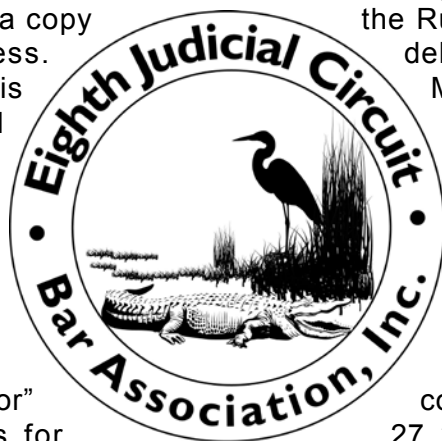
Red Flag Rule due November 1, 2008, McDermott Will & Emery, October 10, 2008 newsletter). These policies must be updated periodically. The most obvious situation is when a client or purchaser of goods or services provides an incorrect social security number to a business. This act (or getting caught in this act) may raise the suspicion that the client or purchaser is a perpetrator of identity theft, which would trigger further action on behalf of the business to respond to such misuse of personal information.

The original deadline for compliance with the Rule was November 2008. The FTC delayed enforcement of the Rule until May 1, 2009, then delayed again until August 1, 2009. Most recently, the FTC once again delayed enforcement until November 1, 2009.

Under the Rule, attorneys can be considered "creditors" and therefore subject to the Rule. The American Bar Association filed a complaint in federal court on August 27, 2009 seeking an expedited judgment enjoining the FTC from enforcing the Rule against lawyers. To review a copy of the claim, please go to: [www.abanet.org/media](http://www.abanet.org/media). I encourage you to keep a watchful eye on the status of this Rule as it may impact your law practice once the dust settles. For more information on this topic, please go to:

[www.ftc.gov/bcp/edu/pubs/business/idtheft/bus23.pdf](http://www.ftc.gov/bcp/edu/pubs/business/idtheft/bus23.pdf)

[www2.ftc.gov/redflagsrule](http://www2.ftc.gov/redflagsrule)



**The officers of the Eighth Judicial Circuit Bar Association for the year 2009-2010 are:**

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

**Margaret Stack**  
*Past President*  
 408 West University Avenue  
 Suite 110-B  
 Gainesville, FL 32601  
 (352) 377-8940  
 (352) 373-4880 (fax)  
 mmstack@att.net

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

**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)  
 rbrady1959@gmail.com

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

**Flint Crump**  
 4703 NW 53rd Avenue, Ste. A-1  
 Gainesville, FL 32653  
 (352) 327-3643  
 flint@flintcrump.com

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

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

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

**Virginia Griffiths**  
 4041 NW 37th Place, Suite B  
 Gainesville, FL 32602  
 (352) 416-3494  
 griffis@scruggs-carmichael.com

**Marynelle Hardy**  
 201 E. University Avenue  
 Gainesville, FL 32602  
 (352) 374-3636  
 mnh@thor.co.alachua.fl.us

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

**Audrie Harris**  
*Secretary*  
 P.O. Box 358595  
 Gainesville, FL 32635-8595  
 (352)327-1170  
 audrie.harris@yahoo.com

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

**Phil Kabler**  
 502 NW 16th Avenue  
 Gainesville, FL 32601  
 (352) 375-4600  
 pnkabler@amjinc.com

**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

**Geoffrey Mason**  
 4545 NW 8th Avenue  
 Gainesville, FL 32605  
 (352) 377-7800  
 grmlaw@bellsouth.net

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

**Michael D. Pierce**  
 18 NW 33rd Court  
 Gainesville, FL 32607  
 (352) 376-4694  
 mpierce@clayton-johnston.com

**Jeanne Singer**  
 120 W. University Avenue  
 Gainesville, FL 32602  
 (352) 374-3670  
 singer@sao8.org

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

**Gloria Walker**  
 901 NW 8th Avenue  
 Gainesville, FL 32601  
 (352) 372-0519  
 gloria.walker@trls.org

## 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 5<sup>th</sup> 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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 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@8jcba.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**

# Alternative Dispute Resolution

## Original Manhattan Mediation

By Chester B. Chance and Charles B. Carter

*(The following is a transcript of the mediation between the Dutch- represented by Peter Minuit<sup>1</sup> as corporate representative of the Dutch East India Company- and the Lenape<sup>2</sup> Indian Tribe arising from a breach of contract action for the purchase of Manhattan Island)*

Mediator: Welcome and thank you for being here. I want to remind you all, everything we say here today is subject to a confidentiality privilege which expires in the year 2009. We will begin the mediation with a joint session.

Lenape Chief: No joints for me. Do you have a peace pipe?

Mediator: You misunderstand, Chief. At this point each side will explain its position in this dispute. Mr. Minuit, since you brought the action, proceed.

Minuit: We had a contract with the Lenape tribe to purchase the island we call Manhattan for 20 guilders. The Lenape failed to show-up for the closing. We are suing for specific performance, but, for today our settlement demand is to buy the island for 5 guilders.

Chief: First, the island is called Manahactanienk<sup>3</sup> Island which means "island where we all became intoxicated". And by the way, thanks for the 6 cases of Heineken. And second, Minuit's demand is less money than he said he would pay before mediation! We're leaving. Somebody get our war canoe.

Mediator: Mr. Minuit, that is bad form. It is counter-productive to offer less or demand more at mediation than prior to mediation if nothing has changed in the interim.

Minuit: Well, there has been the garbage strike and the Lacrosse Team – The Mets – is in last place. Still, we are here to attempt to resolve the dispute. But, I have a galleon to catch and the outgoing tide is at 5 p.m., so we can't waste time. Are we at impasse yet?

Chief: Dutch Boy is jousting at windmills. We *never* agreed to sell the whole island. We only agreed to sell the 3-block area where they will film the rumble scene in West Side Story. And the number we agreed on was 200 guilders. By the way, what is a guilder?

Mediator: I am sorry Chief, I cannot give you legal advice, but, we do provide lunch from Papaya King.

Minuit: We are never paying anything close to 200

guilders! Besides, we would be crazy to accept a first offer, no one does. This is a process and we want to remain engaged. We are here to avoid legal costs and legal fees. When we arrived on the island there was one Lenape village and a law office for O'Brien, Ginsburg and Walker located at what they claim will be 5th Avenue. We hired the firm to represent us but they are pretty expensive. We will pay 30 guilders to stop the litigation cost bleed.

Chief: Minuit is negotiating in bad faith. He doesn't have full authority. He has to report to some guy in Amsterdam and it keeps taking 6 months for him to send questions by boat and get a reply. We shouldn't have agreed to excuse the President of the Dutch Company.

Mediator: By the way, I reserved 4 years for this on my calendar and there is a cancellation charge.

Chief: We are making our final offer and drawing a line in the sand-- from Times Square to Battery Park. We will sell that part of the island for 120 guilders.

Mediator: We are making progress, let's stay with this. If you don't settle you will have to go to non-binding arbitration with a panel

of indentured servants and nobody understands what to do then. The glass is half full. Let's not waste the time we've spent so far.

Minuit: Oh, knock-off the mediator platitudes. We will increase our offer to 40 guilders for the whole island if the Lenape throw-in the hut where they keep their fishing equipment and bait.

Chief: O.K., we'll throw-in the Entire Bait Building, but, we want 100 guilders.

Mediator: Have either of you considered a confidentiality agreement. That way both sides avoid the possibility of this working its way into the history books.

Chief: We can't agree to a confidentiality clause because we are subject to the Iroquois Federation Sunshine Law.

Minuit: We will throw-in two tickets to the 1927 World Series.

Chief: Make that tickets to every Yankee-Cleveland series and we will sell for 80 guilders.

Mediator: We are getting very close here. Think of



*Continued on page 12*

# Jimmy Adkins Cedar Key Dinner Set for October 15, 2009



By Elizabeth Collins

Join us for an evening of well-earned relaxation, laughter, and camaraderie at our annual Jimmy Adkins Cedar Key dinner on Thursday, October 15, 2009 at Frog's Landing, located at 490 Dock Street in beautiful Cedar Key. This year, we honor our long-standing traditions, but have

changed both our venue and menu. Dress to impress in your best guayaberas, Panama hats, Hawaiian prints, and other tropical gear.

Cocktails and appetizers begin at 6:00pm and, once again, Attorneys' Title Fund Services, LLC, has generously sponsored two drink tickets for each of our attendees. Of course, a cash bar will remain open for anyone who chooses to have another of Frog's Landing's signature cocktails.

Appetizers will include: Cold Peel and Eat Shrimp with Cocktail Sauce; Blanched Crudités with Dipping Sauce; Hot Wings; Asian Spring Rolls with Shrimp, Crab, and Cellophane Noodles with Sweet and Sour Sauce; Smoked Mahi Mahi Fish Spread with Crackers ; Chips with Homemade Salsa; Cedar Key Clams in a Wine, Herbed Butter Rosetta Sauce; and Crab Bisque.

When the sun sets at 7:00pm, we will be featuring a buffet-style dinner including: Greek Salad (with Potato and Pasta Salad) and Housemade Mediterranean Vinaigrette; Grilled Garlic/Pesto Panini Bread; Spanish Paella (Yellow Rice, Chicken, Sausage, Clams, Shrimp, Mussels, and Calamari); Vegan Rice and Beans; Fried Scallops, Shrimp, and Clam Strips; Wood Roasted Rosemary Chicken with a Honey Dijon Glaze; and Jalapeno Cheddar Jack Corn Muffins.

Following dinner, door prizes will be awarded and CGAWL will be hosting its annual dessert contest. This year's theme is Subpoena Colada. For more information, see article below. Coffee will be also be provided.

Start making your plans now, whether you choose to arrive by car, limo, or sailboat. Remember, sharing a ride with friends and colleagues is great way to save gas, and, more importantly, it can save lives. If you plan on drinking, please choose a designated driver, make arrangements for safe transportation, or visit the Cedar Key Chamber of Commerce at [www.cedarkey.org](http://www.cedarkey.org) to make reservations for overnight accommodations.

Remember, this is a "members only" event, so your dues for 2009-10 must be paid in

full in order to attend. Visit [www.8jcbba.org/join.aspx](http://www.8jcbba.org/join.aspx) for more information on becoming a member.

We hope you enjoy the changes we have in store and look forward to your feedback in this year's members' survey. If you have any questions or need more information about the Cedar Key event, please email me at [ecollins@dellgraham.com](mailto:ecollins@dellgraham.com) or call me at (352) 372-4381.

*It's those changes in latitudes, changes in attitudes,  
Nothing remains quite the same.  
With all of our running and all of our cunning,  
If we couldn't laugh, we would all go insane.  
--- Jimmy Buffet*

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## Subpoena Colada Dessert Contest at Annual Cedar Key Dinner

### Sponsored by the Clara Gehan Association for Women Lawyers

The Clara Gehan Association for Women Lawyers gratefully accepts the Eighth Judicial Circuit Bar Association's invitation to sponsor the Subpoena Colada Dessert Contest at Frog's Landing immediately following for the Annual Cedar Key Dinner on October 15, 2010. Questions about Subpoena Colada may be directed to Michelle Farkas ([mif22002@yahoo.com](mailto:mif22002@yahoo.com)). We also invite you to join us for 7:45 AM breakfast meetings, the first Thursday of the month at the Flying Biscuit – the next date is October 1<sup>st</sup>. For additional information, e-mail Kathryn Lancaster ([klancaster@rtix.com](mailto:klancaster@rtix.com)).



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## RESERVE NOW FOR THE ANNUAL EJCBA JIMMY ADKINS CEDAR KEY DINNER

**WHEN:** Thursday, October 15, 2009 beginning at 6:00 p.m.

**WHERE:** Frog's Landing: 490 Dock Street, Cedar Key, Florida

**COST:** \$40.00\*

**DEADLINE:** Please register on or before **Friday, October 9, 2009**

**REMIT TO:** EIGHTH JUDICIAL CIRCUIT BAR ASSOCIATION, INC.  
P.O. Box 127  
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**Dress to impress in your best tropical gear! And, to show off your culinary skills, bring a dessert and compete in CGAWL's "Subpoena Colada" dessert contest.**

\*\$45.00 at the door for attendees not having made prior reservations. If you are reserving at the last minute, or need to change your reservation, please contact Judy via fax at **(866) 436-5944**, email [jpadgett@8jcba.org](mailto:jpadgett@8jcba.org), or call **(352) 380-0333**.



Cocktail hour sponsored by Attorneys' Title Fund Services, LLC

*Many thanks for its  
continued generosity*

**NOTE:** Attendance is limited to current members of the EJCBA and attorneys who are members' guests, but only if the guest attorney(s) would not otherwise be eligible for membership in the EJCBA. Visit <http://www.8jcba.org/join.aspx> for dues information and **include your current dues, if not yet paid.**

NAME(s): \_\_\_\_\_

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PAID: Dinner: \_\_\_\_\_ Dues: \_\_\_\_\_ TOTAL: \_\_\_\_\_

## Reception Honoring Stephan P. Mickle

### Chief Judge of the Northern District of Florida

*By Stephanie M. Marchman, Chapter President of the North Central Florida Chapter of the Federal Bar Association*

On June 19, 2009, the North Central Florida Chapter of the Federal Bar Association hosted a reception to honor Stephan P. Mickle's appointment to Chief Judge of the United States District Court for the Northern District of Florida. Approximately 250 judges, attorneys, family members, and friends helped Judge Mickle celebrate this special occasion at the University of Florida's President's House.

The reception included a program where several speakers, including Margaret Stack, 2008-2009 President of the Eighth Judicial Circuit Bar Association, and Robert H. Jerry, II, Dean of the University of Florida Levin College of Law, addressed many of Judge Mickle's accomplishments leading up to his appointment as Chief Judge and his extensive history in Gainesville, Florida. In addition, Senior United States District Judge Wm. Terrell Hodges

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Gainesville, FL 32653

# Immigration Matters



By Evan George

“This country has always served as a lantern in the dark for those who love freedom but are persecuted, in misery, or in need.” John F. Kennedy

“Can we doubt that only a divine Providence placed this land, this land of freedom, here

as a refuge for all those people in the world who yearn to breathe free?” Ronald Reagan

“You don’t have to live like a refugee,” according to the well-known Tom Petty lyric. Well, that depends on what Mr. Petty meant by refugee. The question of who, exactly, is a refugee, is not as simple as it may seem. The terms refugee and asylum seeker are often used interchangeably, and are subject to various interpretations and meanings, all of which can have immense consequences for our clients. In this column, I will clarify the basic components of the U.S. immigration laws relating to refugee and political asylum status.

Typically, “refugee” is used to identify persons fleeing their homeland in search of immediate safety from a variety of real threats to their lives, including, but not limited to war, famine, political unrest, natural disasters, and economic destitution. The countless numbers of people fleeing war in Iraq and Afghanistan, earthquakes in China, tsunamis in S.E. Asia, narco-traffickers in Mexico, guerrillas in Colombia, or the overwhelming violent civil unrest in the Sudan are commonly classified as refugees in the news, movies or other media. Under U.S. immigration law, however, the analysis as to whether such individuals can claim refugee status is much more complicated. Displaced persons, escapees, exiles, victims of natural or economic catastrophes? Yes. Refugees or political asylees? Maybe, maybe not. The short answer is that under U.S. law, not everyone who flees such imminent threats to life are classified as refugees, regardless of how credible the threat to their lives may be.

Under U.S. law, refugee status diverges from the basic flight from danger or other voluntary migration. It is not necessarily a question of how dangerous it is in one’s home country, even if the entire population is in clear peril. Instead, the primary issue turns on whether the person has an individualized risk, distinct from the generalized violence, crime or other life threatening menaces. In 1980, the United States passed the U.S. Refugee

Act, adopting international treaties and protocols, which defined a refugee as a person with a well-founded fear of persecution by a government actor, or a group that the government cannot or will not control, on account of their race, religion, nationality, political opinion, or membership in a particular social group. Under the U.S. immigration laws, those who are seeking protection from persecution are called either a refugee or a political asylee, with the distinction being based upon where the person is located when he or she seeks protection. A refugee is someone who seeks protection from persecution while outside the United States, while a political asylum seeker is someone who has already entered the United States before they seek protection.

To obtain such protection, the applicant must establish that they have suffered persecution, or that they have a well-founded fear of future persecution. Next, they must establish a nexus between their persecution and one of the statutorily enumerated grounds: race, religion, nationality, political opinion, or membership in a particular social group. What constitutes membership in a particular social group is still being resolved in the immigration courts; however, this essentially relates to someone who is targeted on account of an immutable characteristic or something else that is fundamental to one’s identity (examples include sexual orientation, gender, identification as an informant or U.S. collaborator).

An applicant must also demonstrate that their fear is country-wide, that they could not seek the protection of some governmental authority, and that they were not previously resettled in a different country prior to arriving seeking refugee or asylum status. Persons seeking political asylum in the United States must also apply within one-year of their entry, a procedural hurdle that is often troublesome for those genuine asylum seekers who are often destitute, fearful of deportation, unable to speak English or understand the U.S. immigration system. Finally, once meeting the many eligibility requirements for asylum status, an applicant may still be denied, as the decision is ultimately discretionary and remains in the hands of the individual immigration judge or DHS asylum officer. Approval of an application provides permanent lawful status, the ability to apply for a green card after one year, and then naturalization to U.S. citizen after five years.

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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 one of the following amounts:

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

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

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

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

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

## Renewal/Application for Membership

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Check one: Renewal  New Membership

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Eighth Judicial Circuit Bar Association, Inc.

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



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# One Attorney ♦ One Client ♦ One Promise

By Marcia Green

With the help of a grant from the Florida Bar Foundation, Three Rivers Legal Services is set to launch a new initiative to bridge the divide between the low income community of rural North Central Florida and access to legal assistance.

Coinciding with the start of the Florida Bar's *One Attorney ♦ One Client ♦ One Promise* campaign and the America Bar Association's Pro Bono Celebration in October, Three Rivers hopes to revitalize pro bono legal assistance to the poor.

A recently published study by the Florida Bar Foundation about pro bono in the state (see Pro Bono Report at [www.flabarfdn.org](http://www.flabarfdn.org)) indicated that many lawyers (particularly young lawyers and solo practitioners) want to be involved but have not been asked, do not have the time, have family obligations, worry about the costs or lack of malpractice coverage, and do not have the training. Alternately, with the current economy, many lawyers are struggling to keep their offices open and/or maintain or find employment.


At the same time, Three Rivers hopes to increase the number of individuals and families helped with family law and estate planning or probate by expanding the availability of these services, with an emphasis on pro bono referrals. In addition to providing training to volunteers to handle simple family law, guardian advocacy, wills, and simple probate to save a family home and/or farm, Three Rivers will provide technological assistance which will be helpful in their non-pro bono practice as well. Three Rivers will provide on-going training

and mentors on issues that continue to come up in the practice of poverty law, e.g., tax issues or pension funds which can often affect the working poor. CLE credit will be available with training and Three Rivers will provide reimbursement for costs (especially associated with rural practice) and malpractice coverage.

Three Rivers Legal Services, Inc. is the sole provider of free civil legal services in the rural Eighth and Third Judicial Circuits and these areas are populated by primarily small firms and solo practitioners. We are fortunate to have the support of the Eighth Judicial Circuit's YLD as well as the significant experience and expertise of the Virgil Hawkins Civil Clinics at the University of Florida Levin College of Law. We hope that with technology, organization and support from all aspects of the legal community, we can increase our ability to meet the needs of our clients as well as to help our legal community increase the opportunities to help meet these needs.

Watch for more information about *One Attorney ♦ One Client ♦ One Promise* and check out Three Rivers Legal Services' new website at [www.trls.org](http://www.trls.org) where you can sign up to volunteer, be informed about upcoming training, find important links helpful in the practice of poverty law and to our clients, and make contributions on-line.





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## Watch This Space!

by Peg O'Connor, FBA Secretary

By the time you read this, the North Central Florida Chapter of the Federal Bar Association will have held its fabulous "View From the Bench" seminar, jam-packed full of information on appellate practice, complete with a panel of distinguished federal circuit, district, and magistrate judges. The FBA will also have held its annual meeting and elected a new slate of officers and board members. We'll have a full story on the event in the next newsletter, so stay tuned.



U.S. immigration policy receives persistent criticism for what some say are arbitrary and inconsistent applications of the regulations, and it is inevitable that there are cases where genuine refugees are deported back to their persecutors, while fraudulent or weak applications get approved. Everyday, however, immigration judges and DHS asylum officers across the country grant protection to individuals who have been badly beaten and tortured simply because of their political opinion, religion, race, or sexual orientation. The U.S. immigration system is not perfect; however, the protection our country provides for many victims of persecution is a source of pride for many who deal with these issues on a daily basis.

The next column will address recent developments in legal relief for unaccompanied and undocumented children whose parents or guardians have abandoned, abused or neglected them. If you have an immigration-related issue or question, feel free to contact me at 352-378-5603 or at [evan@evangeorge-law.com](mailto:evan@evangeorge-law.com).

## Circuit Judge Frederick Smith to Retire

In a letter to Governor Charlie Crist dated September 4, 2009, the Honorable Frederick D. Smith announced his retirement as Circuit Judge for the Eighth Judicial Circuit, effective at 12:00 p.m. on January 31, 2010. Judge Smith has served the citizens of Alachua, Baker, Bradford, Levy, Union and Gilchrist counties since 1986. He was appointed to his post by former Governor Bob Graham; he was subsequently elected by the citizens of this circuit four times. Judge Smith recently served as Chief Judge of the Eighth Judicial Circuit, a position he passed to Chief Judge Martha Ann Lott on July 1, 2009.

### Sponsorship Opportunities Available!

If you would like to sponsor an EJCBA event and get some great perks, please contact the EJCBA Sponsorship Committee at [execdir@ejcba.org](mailto:execdir@ejcba.org) to find out more.

## The Goosey - Gander Rule



By Stephen N. Bernstein

I have argued this rule of fair treatment for both sides on many occasions, saying what is good for the goose is also good for the gander. However, a recent case in Fairfax, Virginia held that what is good for the goose might not be good for drivers. Reactions of one “do gooder” driver ruffled some feathers. When Jozsef Vamosi stopped to help a gaggle of geese cross the Fairfax County Parkway, he found himself ticketed for jaywalking. Mr. Vamosi sighted three large geese and eight smaller ones attempting to cross four lanes of fast moving traffic. He made a move straight out of a Walt Disney movie; he pulled over, got out of his car and waived the geese across, standing in the path of traffic and shouting “Move, move, move”. The geese made it unscathed but Mr. Vamosi attracted the attention of a police officer who wrote him the ticket.

The District Court Judge acknowledged that it was difficult to figure out the right thing to do in such a situation. I can’t help cheering for someone who takes the initiative of saving a family of geese from a terrible fate, not to mention that Canadian geese are protected by federal law and killing them is illegal. Ironically, had he struck the geese with his car, Mr. Vamosi might have brought traffic to a screeching halt and even caused an accident but not gotten a ticket. Nevertheless, the officer cited him for “careless or maliciously” interfering with the passage of vehicles, an action that carries with it a fine of up to \$250.00.

The judge decided to dismiss the case as long as Mr. Vamosi remained on good behavior for the next six months. I am not quite sure what good behavior means but I assume it means not wading out into traffic attempting to help stray birds cross the road. The judge wisely noted that “I think we have to be careful when we do a thing that is for the greater good that the consequence isn’t more dangerous.” So the next time you are traveling down 441 south of Gainesville and you recklessly seek to intervene on behalf of some wildlife trying to cross 441, beware the traffic Goosey - Gander Rule.

# Criminal Law



By William Cervone

Abraham Lincoln is generally considered to be one of our greatest Presidents, if not the greatest. He saw the country through the perils of civil war and by force of right ended the plague of institutionalized slavery. The Civil War itself is generally considered to have been a noble undertaking, even in the person of men like Robert E. Lee, who, though a Rebel soldier, is thought well of in history. But consider this.

By 1863, the South had secured a string of victories, most under Lee, and the outcome of the war was very much in doubt. Chancellorsville had been the latest, a Union defeat in which some 13,000 casualties had been suffered by the North at the hands of the South. That's a staggering number, even today, for a single battle, and was virtually inconceivable then.

The North was growing weary. After only two years of fighting, there was a growing Peace Party movement aimed squarely against Lincoln and his 1864 re-election bid. There was even the specter of an underground movement called the Knights of the Golden Circle, which was thought to be plotting a coup d'état against Lincoln's government - an overthrow by force associated today with banana republics of the developing world.

In Illinois, one Clement Vallandigham was on the stump, decrying both the war and Lincoln. He had credibility of sorts in that he was a former Congressman. And he was getting lots of popular attention, including by the media. In response, Union General Ambrose Burnside was so outraged that he had Vallandigham arrested in the middle of the night and jailed for treason. So much for free speech. When Vallandigham sought habeas corpus it was Burnside who summarily denied it. How a General did that rather than a court I have no idea, but he did. To make matters worse, when the Chicago Tribune had the temerity to protest all of this, Burnside simply had the paper shut down.

The resulting furor among the nation's press and civil liberties advocates eventually forced Lincoln to act. He did not merely release Vallandigham, however; he had him released to the South, where his railing against the war and Lincoln had a more receptive audience but far

less meaningful impact. Lincoln also and perhaps more importantly ordered that the Tribune be reopened and that his generals not mess with the press again.

The point? That there is seldom anything new in the world. Dire predictions that a war, any war, is immoral and unjust - not new. Cries that our civil liberties are doomed if not already lost (interestingly on one side of the political fence by actions of former President Bush and now on the other side by those of President Obama) - not new. And yet the nation survived the Civil War and will quite likely survive the threats of today, both perceived and real. I'm simply suggesting that hysteria and over-reaction are usually just that, leaving for another day my own concerns about the apparent willingness of the country to mortgage its future with such a colossal debt through subsidies and spending beyond imagination that future generations may never get out from under it. Someone who practices in this area tell me, please, if the federal government can declare bankruptcy.

My source for this historical anecdote, by the way and for those who are interested, is a new book, *Vicksburg 1863*, by Winston Groom, who is no doubt better known for the less than intellectually challenging *Forrest Gump* but whose recounting of the siege of Vicksburg and the related policies of both sides in the Civil War is something I'd recommend to anyone who has an interest in either topic or in the simple vagaries of life, now and then.

Finally, a postscript from last month's comments regarding Pringles. With thanks to Alert Reader Charles B. Carter, who is as many of you know a traditionalist's traditionalist and an aficionado of the arcane and at whose feet I learned civil practice once upon a time, I can report that Britain's Court of Appeal has overturned the British High Court's ruling that Pringles is not a potato snack. Despite Pringles arguing, among other things, that its "un-natural shape" took it out of the realm of potato-dom, the Court of Appeal has held that a 42% potato content is more than enough potato to declare Pringles a potato product. This will reportedly mean that "tens of millions of pounds" in VAT, not to mention FAT, are generated. Truly, when they say it's not about the money you can be sure it's all about the money.

# No Need To Ask, You've Got To Tell

By Siegel, Hughes & Ross

How many of us have clients who, if asked, would authorize us to call an attorney who we thought was going to be representing the other side (but who persisted in not filing responsive pleadings) BEFORE asking the Clerk to enter a default? I don't see many hands in the air. Most litigants that I've had the pleasure of knowing - having gotten sufficiently "perturbed" with the opposition to hire a lawyer, paid plenty of good money and then waited for what seemed like an eternity for investigation and research to be completed, a Complaint prepared, filed and served and then ANOTHER twenty days after that - feel that there is no need to extend any courtesy whatsoever to that sorry blankety-blank, also known as the Defendant. As it turns out there is no need to ask your client what you should or should not do because you've got to tell your putative opposing counsel that you're doing so before you can properly obtain a default.

In *Gulf Maintenance & Supply, Inc. v. Barnett Bank of Tallahassee*, 543 So.2d 813 (Fla. 1<sup>st</sup> DCA 1989), the First DCA was presented with just such a situation. Barnett Bank had filed suit against Gulf Maintenance and its principals on a promissory note and personal guarantees. Upon receipt of service of process, Gulf Maintenance's registered agent, an attorney, contacted the bank's attorney to advise that the defendants had defenses and a counterclaim, and that they wanted to talk about settlement first. Some settlement negotiations followed, but no settlement was reached and the bank's attorneys ultimately told the defendants to file their responsive pleadings. When no responsive pleadings were filed, the Bank sought and obtained the entry of clerical defaults under Rule 1.500(a), *Fla.R.Civ.P.*, without notice to defense counsel who had still not appeared of record. The bank went on to have an *ex parte* final hearing and obtained a final judgment totaling \$92,920.33.

In their eventual motion for relief from that judgment, which was denied by the trial court, the defendants and their attorney asserted that the first time that they became aware of the existence of the final judgment (and with it, the clerical default) was some six (6) months later, when they were served with interrogatories in aid of execution. In reversing the order denying the defendant's motion for relief from judgment, and vacating both the final judgment and the defaults, the First DCA noted

that, "[t]he true purpose of the entry of a default is to speed the cause thereby preventing a dilatory or procrastinating defendant from impeding the plaintiff in the establishment of his claim. It is not [a] procedure intended to furnish an advantage to the plaintiff so that a defense may be defeated or a judgment reached without the difficulty that arises from a contest by the defendant." *Id.* at 816.

The *Gulf Maintenance* Court then proceeded to discuss the differences between situations supporting a clerical default under Rule 1.500(a), and those requiring a judicial default under Rule 1.500(b). As explained by the First DCA, once the Plaintiff/Bank's counsel became aware that the defendants had retained counsel and intended to defend, the Rule 1.500(a) clerical default without notice procedure was no longer available, and the only way that the bank could properly seek and obtain the entry of a default was through a Rule 1.500(b) motion for judicial default, with notice. As pointed out by the Court, while the standard for overturning a clerical default under Rule 1.500(a) may be inadvertence or excusable neglect, the judicial default procedure under Rule 1.500 (b), "[i]s intended to require notice of such application [for default] to afford a defendant's counsel opportunity to file responsive pleadings before the application for default comes on for hearing and the default is entered, as permitted by rule 1.500(c)." *Gulf Maintenance*, 543 So. 2d at 817.

Citing with approval to the *Gulf Maintenance* decision, the Second DCA has recently reached the same result in *U.S. Bank National Association v. Lloyd*, 981 So.2d 633 (Fla. 2d DCA 2008), stating at page 640:

A trial court should vacate an *ex parte* default when 'the plaintiff seeking default had actual knowledge that the defendant was represented by counsel and intended to defend the lawsuit, but failed to contact the defendant's counsel prior to seeking default' (citations omitted). When the plaintiff is aware that the defendant is represented by counsel and intends to defend on the merits, *Florida Rule of Civil Procedure* 1.500(b) requires the plaintiff to serve the defendant with notice of the application for default and to present it to the court for entry. *See Gulf Maint. & Supply, Inc. v. Barnett Bank*

Continued on page 15

## Alternative Dispute

*Continued from page 3*

the time you will save. The trial date is 400 years in the future. Think of the costs you will avoid: blowing up those exhibits on buffalo hides at Kinko's is expensive. And, you avoid the uncertainty of a jury whose only qualification is they have hunting licenses. Besides, Mr. Minit, the jury pool could be bad for you as the only people in the venire are Native Americans. Who is the Judge?

Minit: Judge Roundtree.

Mediator: That sounds like a Native American name. I think I know his brother: Sneaky Square Oak. And the Clerk of Court is a former medicine man, Wampum Irby. The venue does not look good for the Dutch East India Company.

Minit: Why don't we agree to split the difference: 60 guilders.<sup>4</sup>

Chief: We can do that, but, only if the Dutch agree to pay the entire cost of mediation.

Minit: We have a firm policy against that. We both agreed to mediate. Let's go Dutch treat on the mediator fees.

Chief: What, you accuse me of going back on my word? If you call me an Indian-giver we are filing a Section 1983 action and selling the story to Larry David for a future Seinfeld episode.

Mediator: Minit, try and consider your BATNA, your best alternative to a negotiated agreement. The Dutch could end up having to purchase New Jersey from the Mohicans. Do you really want to live in Jersey?

Minit: Alright. We agree to pay the mediator costs. Will the mediator reduce her fee?

Mediator: No. Just sign here and then I will have my scrivener make copies of the agreement. Does anyone have an extra subway token?

Chief: Could we interest the Dutch in buying the Brooklyn Bridge?<sup>5</sup>

<sup>1</sup> According to tradition, purchased Manhattan on May 24, 1626.

<sup>2</sup> Also known as "Delaware".

<sup>3</sup> Lenape account given to Moravian Missionary John Heckewelder. Yes, that is the translation. (Wikipedia).

<sup>4</sup> Actual value, at the time, about \$1,000. (Wikipedia)

<sup>5</sup> Minit purchased the island from the wrong tribe. He bought Manhattan from the Canarsee who lived in Long Island and were passing through on a hunting trip – The Wappingers, an Algonquin tribe, were the owners of record. Also, 'purchase' was not understood by the Native Americans since alienable real estate was not an Indian concept. This leads to a future article on further disputes and ultimately the Marketable Record Title Act. (Wikipedia)

## Judge Mickle

*Continued from page 5*

(formerly Chief Judge for the Middle District of Florida) spoke about the role of the Chief Judge. Judge Mickle was also presented with an engraved rocking chair in order to provide him with comfort and support when he is required to make tough decisions as Chief Judge. To close the program, Judge Mickle remarked that he was thankful to all of his supporters, especially United States District Judge Robert L. Hinkle, who made his appointment to Chief Judge possible, and that he was looking forward to carrying out all of the duties of Chief Judge.

His appointment to Chief Judge is the culmination of Judge Mickle's many years of hard work and dedication in the field of law. To name of few of his accomplishments, Judge Mickle was the first African American to graduate from the undergraduate program at the University of Florida in 1965, the first African American to establish a private law practice in Gainesville in 1972, the first African American to become a county judge in Alachua County in 1979, and the first African American to become a circuit judge in the Eighth Judicial Circuit in 1984. Additionally, he was the first African American (and only lawyer) from the Eighth Judicial Circuit to be appointed to the Florida First District Court of Appeals in 1993, and he was the first African American to become a federal judge in the Northern District of Florida in 1999.

The Chapter would like to thank the national Federal Bar Association, the Eighth Judicial Circuit Bar Association, and the University of Florida Levin College of Law for their support in hosting this reception.



Chief Judge Stephan P. Mickle at his reception on June 19, 2009



# The Florida Bar Board of Governors Update



By Carl B. Schwait

At its July 17 meeting in Naples, The Florida Bar Board of Governors:

- Approved the “judicial candidate voluntary self-disclosure statement” as proposed by the Judicial Administration and Evaluation Committee and slightly modified by the Program

Evaluation Committee. The statement will be given to all trial court candidates in future elections and their answers posted on the Bar’s website. The approval included providing copies of the self-disclosure statement to candidates in Creole and Spanish, but it will be up to candidates to provide translations of their answers.

- Approved, on the recommendation of the Member Benefits Committee, an agreement with Affiniscap Merchant Solutions, which provides credit card services for law firms. Affiniscap, when attorneys accept credit card payments for retainers, will automatically deposit the retainer in the attorney’s trust account but take the expenses related to the transaction from the law office operating account, as required by Bar rules. Under the agreement, Affiniscap, which has similar arrangements with 40 other state and local bars, will offer discounted rates for Bar members.

- Endorsed, on the recommendation of the Legislation Committee, the ABA position opposing the Federal Trade Commission’s efforts to include lawyers and law firms in its Red Flag regulations requiring extra efforts by creditors to protect debtors from identity theft. The ABA argues that existing ethical rules protect client information and that providing legal services to clients does not make lawyers creditors.

- Heard a report from Florida Bar Foundation President Adele Stone that Foundation IOTA revenues have been declining, from \$44 million three years ago, \$24 million two years ago, and \$11 million last year to an anticipated \$5.7 million in the coming year. The Foundation is pushing to increase lawyer pro bono efforts and also to get more private donations, she said.

- Received on first reading proposed rule amendments that would impose additional requirements on lawyers who are suspended and have not been reinstated for a period of three years or longer. The proposed rule amendments will come back to the board for final reading at its September meeting. Among the proposed new requirements, lawyers would have to

show that they have taken 10 hours of CLE for each year or part of a year during which they are ineligible to practice, show familiarity with the law, and if they waited more than 5 years to seek reinstatement retake the MPRE and Florida portions of the bar exam.

- Heard President Jesse Diner announce what he sees as the major issues confronting the Bar this year. Those include: Working to implement electronic filing for the courts; continuing to advocate for adequate funding for the courts; defending SB 2108 which passed this year and put the funding of court-related functions of elected clerks of the court under legislative overview; pushing to address the legal needs of children, especially carrying out recommendations from the Commission on the Legal Needs of Children; and helping lawyers address the current difficult economic conditions.

I am pleased to have been appointed by President Diner as the co-chair of the Disciplinary Review Committee. This largest committee of the Board of Governors reviews the grievance agenda and makes recommendations on disciplinary actions that require the review of the Board. We receive the agenda items and back up information. We then meet the day before the Board of Governors meeting in order to determine which items should be discussed by the entire Board of Governors. I will also serve as one of seven members of the Board Review Committee on Professional Ethics which performs a preliminary review of advisory ethics opinions appealed to the Board of Governors from the Professional Ethics Committee and advisory advertising opinions appealed to the Board from the Standing Committee on Advertising. This committee then votes to affirm, modify or withdraw the advisory opinion and then reports to the Board of Governors for its approval or modification.

Thank you for allowing me to continue to serve as the representative of the Eighth Judicial Circuit.

## Announcement

Law Offices of Gloria W. Fletcher, P.A. is pleased to announce that Erica Bloomberg-Johnson has joined the firm located at 4510 N. W. 6<sup>th</sup> Place, Gainesville, 352-374-4007 or Fax 352-337-8340 or email [ebloombergj@bellsouth.net](mailto:ebloombergj@bellsouth.net).

# Probate Section Report



By Larry E. Ciesla

The probate section continued to meet during the summer months. In no particular order, here are some of the topics discussed at recent meetings.

Richard White (always thinking outside the box) raised the issue of the legality of holding an attorney's ownership of stock in the attorney's P.A. in the attorney's personal revocable trust, or naming the successor trustee of the attorney's revocable trust as pay-on-death beneficiary pursuant to the provisions of Ch. 711, Florida Statutes. Unfortunately, the Rules of Professional Conduct appear to prohibit such an arrangement, as is pointed out in a written Florida Bar Staff Opinion (No. 28879) addressed to Richard dated July 14, 2009, in which Bar counsel cites to opinions issued in Ohio and Illinois reaching the same conclusion.

Richard also led a discussion regarding a conflict between F.S. 733.212(2) and Florida Rule of Probate Procedure 5.240(b), regarding the required content of Notice of Administration. Richard pointed out that the statute provides that the Notice must contain the time limits within which certain proceedings must be filed: 3 months to challenge the will or personal representative; 4 months to claim exempt property; and 6 months to claim elective share, while the Rule (and, importantly, the form promulgated by FLSSI, which most practitioners follow) simply uses the term, "within the time provided by law". Accordingly, while the RPPTL folks and the FLSSI folks work on amending the current version of the FLSSI form for Notice of Administration, practitioners may wish to consider the advisability of reviewing and, if necessary, revising whichever Notice of Administration form they are currently using.

Richard next led a discussion regarding the current status of the requirement of serving a copy of a probate Inventory on the Florida Department of Revenue. F.S. 733.604 contains no such requirement. Former F.S. 199.062 contained such a requirement, however, it was repealed as of 2006 when the intangible tax was repealed. Current Rule 5.340 contains such a requirement, with a citation following the Rule in the "Statutory References" section, to F.S. 199.062.

Since that statute has been repealed, the continued viability of the Rule is doubtful. The Florida Probate Rules Committee has recommended to the Supreme Court that the requirement of serving the Department of Revenue be deleted from the Rule. According to Richard, if you ask the Department of Revenue, they will tell you they no longer require the Inventory,

however, most people in the probate would, including judges and staff attorneys, still require proof of service of same. It should be pointed out that Florida Statue 733.2121 requires the personal representative to serve the Department of Revenue with a copy of Notice to Creditors, and that the service of a copy of the Inventory shall be sufficient to satisfy the foregoing requirement. In summary, even though the statutory requirement to serve a copy of the Inventory on the Department of Revenue has been repealed, good reasons still exist to continue to do so and to file proof of same with the court.

On the subject of service to the Department of Revenue, Monica Brasington advises that the Department of Revenue is requesting mail to be addressed as follows:

Florida Department of Revenue  
ATTN: Paul Brunarski/Compliance Support  
5050 W. Tennessee Street  
Tallahassee, Florida 32399-0100

In yet another issue of interest to probate practitioners and personal representatives, Richard White raised the question of the extent of the duty of a personal representative to take steps to attempt to recover funds contained in a so-called "joint" bank account where the funds have passed to the surviving joint owner, outside of probate, upon the death of the person who established the account (using his or her own funds). Most practitioners assume the personal representative is under no duty to chase after such non-probate funds, however, there are many Florida decisions wherein such funds have been returned to a personal representative under theories including undue influence; lack of capacity; and lack of intent to create a survivorship account. Accordingly, the extent of the personal representative's duty in such cases is less than clear. Personally, your author examines such matters on a case-by-case basis, by closely examining the account documentation in order to determine whether there exists a clear intention to create a survivorship account. Your author has been successful in at least one trial where funds were found to not have passed to the alleged joint owner due to a lack of intent to create a survivorship account. In any event, Richard advises that the RPPTL folks are working on a draft of a new statute which, if passed, would hopefully clarify the extent of the duties of a personal representative in such cases.

*Continued on page 15*

## Probate Section

Continued from page 14

The probate section continues to meet on the second Wednesday of each month at 4:30p.m. in the fourth floor meeting room in the civil courthouse. All interested practitioners are welcome to attend. If you would like to join the mailing list for notices of the monthly meetings, you may do so by sending an email to [lciesla@larryciesla-law.com](mailto:lciesla@larryciesla-law.com).

## General Magistrate Position Opening

### Eighth Judicial Circuit

This position may address: Baker Act/Marchman Act hearings, Adult Protection Cases, Medical/Psychiatric Treatment Permission Cases, Active Dependency Arraignments, Judicial Review hearings; Family Court hearings and Compliance Court; Review routine case plans, performance/compliance contracts, Case Management of all assigned cases; and other quasi-judicial functions as directed by the Court. This is a full-time position with work throughout the circuit. A State of Florida job application and verification of required education (i.e. copy of college degree/transcripts) is required. Please send to Ms. Jan Phillips, Human Resources Manager, Alachua County Family & Civil Justice Center, 201 E. University Avenue, Room 410, Gainesville, FL 32601. Starting salary is \$73,795.08/annually (hiring at base only). For additional information, please visit our website at [www.circuit8.org](http://www.circuit8.org). **This position is available November 1, 2009 and is open until filled.**

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## No Need to Ask

Continued from page 11

of Tallahassee, 543 So.2d 813,817 (Fla. 1<sup>st</sup> DCA 1989). A clerk's default entered in accordance with *Florida Rule of Civil Procedure* 1.500(a) under these circumstances is invalid and renders a resulting judgment void.

So the next time that you're faced with a defendant who you know has counsel and who you have reason to believe intends to defend, save "Don't Ask, Don't Tell" for the military and save yourself the stress and indigestion of asking your client, and being told to get a clerical default entered first, and let the opposition find out afterwards. Proceed directly to Rule 1.500(b), file a motion for judicial default, and set it for hearing with notice to the defense. You probably won't get your default. But you will eventually get your responsive pleadings, and you'll save yourself and your client the substantial delay and expense of an almost certain appellate reversal.



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## October 2009 Calendar

- 1 CGAWL meeting, Flying Biscuit Café, NW 43rd Street & 16th Ave., 7:45 a.m.
- 2 High Tea for Chief Judge Martha Ann Lott, Jury Assembly Room, Criminal Courthouse, 3-5 p.m.
- 5 Deadline for submission to November Forum 8
- 7 EJCBA Board of Directors Meeting; Ayers Medical Plaza, 720 SW 2d Avenue, North Tower, Third Floor – 5:30 p.m.
- 8 North Florida Association of Real Estate Attorneys meeting, 5:30 p.m.
- 9 EJCBA Luncheon, Kenny Marvin and James A.G. Davey, “Florida Bar Discipline and Lawyer Regulation,” 11:45 a.m., Steve’s Café
- 10 UF Football at LSU, TBA
- 12 Columbus Day – Federal courthouse closed
- 14 Probate Section Meeting, 4:30 p.m., 4th Floor, Family & Civil Courthouse
- 15 Jimmy Adkins Cedar Key Dinner at Frog’s Landing, Cedar Key, 6:00 p.m.
- 17 UF Football v. Arkansas, Gainesville, TBA
- 20 Family Law Section Meeting, 4:00 p.m., Chief Judge’s Conference Room, Alachua County Family & Civil Justice Center
- 24 UF Football at Mississippi State, TBA
- 31 UF Football v. Georgia, Jacksonville, 3:30 p.m.

## November 2009 Calendar

- 4 EJCBA Board of Directors Meeting; Ayers Medical Plaza, 720 SW 2d Avenue, North Tower, Third Floor – 5:30 p.m.
- 5 CGAWL meeting, Flying Biscuit Café, NW 43rd Street & 16th Ave., 7:45 a.m.
- 5 Deadline for submission to November Forum 8
- 7 UF Football v. Vanderbilt, Gainesville, TBA
- 11 Veterans Day – County & Federal Courthouses closed
- 11 Probate Section Meeting, 4:30 p.m., 4th Floor, Family & Civil Courthouse
- 12 North Florida Association of Real Estate Attorneys meeting, 5:30 p.m.
- 13 EJCBA Luncheon, Hon. Larry Cretul, Florida House Speaker and District 22 Representative speaking on issues to be addressed in the 2010 pre-session.
- 14 UF Football at South Carolina, TBA
- 17 Family Law Section Meeting, 4:00 p.m., Chief Judge’s Conference Room, Alachua County Family & Civil Justice Center
- 21 UF Football v. Florida International, Gainesville, TBA
- 26 Thanksgiving Holiday – County & Federal Courthouses closed
- 27 Day After Thanksgiving Holiday – County Courthouses closed
- 28 UF Football v. Florida State, Gainesville, TBA

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](mailto:dvallejos-nichols@avera.com).