

The Briefs

A Publication of the Orange County Bar Association



75
YEARS
OF EXCELLENCE

April 2008 Vol. 76 No. 4

The Honorable Emerson R. Thompson, Jr.
2007 Honorable James G. Glazebrook
Memorial Bar Service Award Recipient

Elizabeth F. McCausland
2007 Lawrence G. Mathews, Jr.
Young Lawyers Professionalism Award Recipient

Council Wooten, Jr.
2007 William Trickel, Jr.
Professionalism Award Recipient

Inside this issue:
Thoughts on Professionalism
Council Wooten, Jr.

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Mitchell v. Metropolitan at Lake Eola LLC,
947 So. 2d 1263 (Fla. 5th DCA 2007)
Reduced lis pendens bond from
\$600,000 to \$20,000.

McGhee v. Volusia County,
679 So. 2d 729 (Fla. 1996)
Clarified sovereign immunity/scope
of employment rules for deputy
sheriffs.

Acadia Partners, L.P. v. Tompkins,
759 So. 2d 732 (Fla. 5th DCA 2000)
Prevented multi-million dollar
judgment addition in complex
business litigation.

Wenzel v. Boyles Galvanizing Co.,
920 F. 2d 779 (11th Cir. 1991)
Affirmed a \$2.75 million dollar
personal injury award.

Boyles v. Mid-Florida Television Corp.,
467 So. 2d 282 (Fla. 1985)
Reversed the dismissal of a libel action
against an Orlando television station.

Hamlet v. Hamlet,
583 So. 2d 654 (Fla. 1991).
Reinstated permanent alimony award.

Marriott International, Inc. v. Perez-Melendez,
855 So. 2d 624 (Fla. 5th DCA 2003)
Affirmed million dollar personal injury
verdict based on the "two issue rule".

Lieberman v. Dept. of Professional Regulations,
573 So. 2d 349 (Fla. 5th DCA 1990)
Restored a physician's medical license.

Layeni v. Layeni,
843 So. 2d 295 (Fla. 5th DCA 2003)
Reversed denial of wife's interest
in medical accounts receivable.

Thomas v. Fusilier,
966 So. 2d 1001 (Fla. 5th DCA 2007)
Reversed forfeiture of \$250,000
payment required by marital
settlement agreement.

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April Cover

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The Briefs

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DEADLINE INFORMATION

Deadline for June Issue: 05/01/2008

The deadline for each edition is the first day of each month. If that day falls on a weekend or holiday, the deadline is the prior working day.

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To Provide a Forum for Discussion on Issues Pertaining to the Legal System and Education for its Members

C. Gene Shipley

Paying an unannounced visit to the recently retired Supreme Court Justice Oliver Wendell Holmes, Jr., President Franklin Roosevelt found the respected jurist in his library reading Plato's *Symposium* – in original Greek. When President Roosevelt asked him why he was bothering to spend his retirement studying Greek, Justice Holmes simply replied, "Why, to improve my mind." At that time, Justice Holmes was 92 years old.

Not all of us may be singly motivated to study Greek in isolation, though many of us have shut our office doors to absorb the latest case or article relevant to our respective areas of practice. While independent study is often necessary in the practice of law, there's no substitute for the education received by engaging another legal colleague in a healthy discussion on the law.

I still recall going to lunch with other study partners as a 1L in law school and debating, while ordering a Big Mac, the point at which we actually formed a binding contract, and then dreaming up all the legal grounds we could argue for rescission of that contract. Just as "iron sharpened iron" in law school, the same holds true today. Engaging our legal colleagues in healthy, professional discussions on legal theories and issues inevitably serves to promote our ability to practice law more effectively. The OCBA recognizes the value shared by all who participate in such group discussions - not just by debating basic principles of law, but by challenging and encouraging each other in all aspects of our profession. That's why the last, but not least, mission of your Orange County Bar Association is to provide a forum for discussion on issues pertaining to the legal system and education for its members.

One of the most popular forums provided by the OCBA for discussing issues is our monthly luncheon. Similar to breaking bread (or Big Mac's) in law school, there's no time when you are more likely to speak with a group of the finest, most professional legal minds in one place than at one of our monthly luncheons. Where else can you sit at the same table with a trial court judge, an appellate court judge, senior partners of a multi-national law firm and a mid-sized local firm, a brilliant solo practitioner, and the sharpest state prosecutors and public defenders practicing in Central Florida? Even if the conversation at your luncheon table doesn't lead to a discussion of issues you view as relevant to our profession, our luncheon speakers generally will. Whether it's U.S. Marshal Hurlburt speaking on courthouse security, Congressman Lou Frey enlisting us as civic educators, Rocky Rodriguez and Dennis Archer leading the cause in support of diversity, Justice Harry Lee Anstead encouraging our members to embrace a higher standard of

professionalism, or learning more about the needs of our community from others who participated in the 2007-2008 OCBA Speaker Series, the speakers at this year's OCBA luncheons enlightened and challenged us in many ways directly related to the legal profession.

But our monthly luncheons aren't the only OCBA forum for discussing legal issues relevant to the legal system and your practice. In fact, the primary OCBA vehicle for learning more about substantive legal issues is by participating in our many substantive committees. From Appellate Law to Workers' Compensation Law, there are presently twenty-three substantive law committees in which you can get involved. Committee membership ranges from a few to a few hundred attorneys, and most committees sponsor their own monthly luncheons in addition to the OCBA luncheons. As diverse as the committees are, so too are the formats for the committee luncheons, ranging from table service and panels of guest speakers to brown bag lunches over a discussion on the latest hot topic relevant to the committee's area of practice. And perhaps the best-kept secret in our Bar is that many of the committee luncheons include CLE credit.

The members in our twenty-three committees don't limit their discussion of legal issues to lunch meetings. Including this month's issue, OCBA committees have published more than twenty-five substantive legal articles for *The Briefs*, delivered monthly to your office at no charge. That's an average of nearly three legal articles per publication!

Finally, your OCBA committees have already conducted seven continuing legal education seminars since June 2007, and there are four more CLE seminars scheduled before May 31st, for a total of eleven seminars this year! Of course, this doesn't even include the marketing and management seminars conducted by the OCBA's corporate sponsors or the monthly Lunchtime Training Seminars presented by the Legal Aid Society. And if your practice is such that you require a more convenient forum to continue your legal education, you can find more than forty CLE seminars listed on our website that can be purchased in various audio formats at unequalled prices.¹

As the number of OCBA members increase, the number and diversity of our committees similarly increases. Through the energy and initiative of our latest chairperson, Jamie Moses, this year the OCBA added an Appellate Practice Committee. In just its first year of existence, under Jamie's leadership, some very active members of this committee

Continued on page 4

¹Seminars 2.0 or fewer hours are just \$50 for OCBA members; 2.5 - 4.0 hour seminars are \$60; 4.5 - 9.0 hour seminars are only \$80; and members only paid \$125 for a 9.5 hour seminar this year.

President's Message *Continued from page 3*

- Marcia Lippincott and Michael D'Lugo - authored four articles for *The Briefs*; Barbara Egan, David Knapp and Elizabeth Wheeler have written an article for this issue; and Barbara chaired the committee's half-day CLE seminar. Stay tuned, as we've recently been asked to form two new committees: a Tax Law Committee and an In-house Counsel Committee.²

Newton D. Baker, former U.S. Secretary of War during World War I and founder of the firm, Baker & Hostetler, LLC, once said, "The man who graduates today and stops learning tomorrow is uneducated the day after." Justice Holmes certainly agreed, and so does the OCBA. It is

our privilege and our mission at the Orange County Bar Association to provide the most convenient, comprehensive forum and resources available for our members, individually and collectively, to promote discussion and education on issues pertaining to our most noble profession.

² If you are interested in supporting and/or joining the In-house Counsel Committee, please contact Taylor Kessel or Kristyne Kennedy; please contact Vonya Lance to support and/or join the Tax Law Committee.

C. Gene Shipley is a shareholder with Nardella Chong, P.A. He has been a member of the OCBA since 1997.

Judge Kirkwood Named 2007 Jurist of the Year

As a followup to his selection last October as 2007 Jurist of the Year by the Central Florida Chapter of the American Board of Trial Advocates, Circuit Judge Lawrence R. Kirkwood was presented with a plaque at the March 5th Chapter meeting. The award was presented by Council "Butch" Wooten and Gary Rushmer, immediate past President and Vice President of the Chapter. Judge Kirkwood was selected for the award in recognition of his long commitment to professionalism and civility among attorneys, and preserving the right to trial by jury. The American Board of Trial Advocates was formed in 1957 to help preserve the jury system and promote professionalism and civility among attorneys. ABOTA has chapters in all 50 states. Its 6,300 members practice in all areas of trial law, with half the members customarily representing plaintiffs and the other half customarily representing defendants.



Gary H. Rushmer, Judge Lawrence R. Kirkwood, Council Wooten, Jr.

Law Week 2008 Events

The Rule of Law: How Our Laws Ensure Opportunity and Equality in Education

April 17 & 18 – DUI Mock Trial

City Hall

Held for high school students, mock trials will be conducted by members of the judiciary and attorneys from the State Attorney's and Public Defender's offices. This timely program occurs just before prom and graduation ceremonies in an effort to deter high school students from driving under the influence of drugs or alcohol.

April 24, 2008 – A Day in the Life of a Judge

Orange County Courthouse

Judges from the Ninth Judicial Circuit will host teenage girls from the Farmworker's Ministry for a special job shadowing program. Following a morning at the courthouse, each participant will accompany her judge to the OCBA luncheon.

April 24, 2008 – OCBA Law Day Luncheon

The Ballroom at Church Street

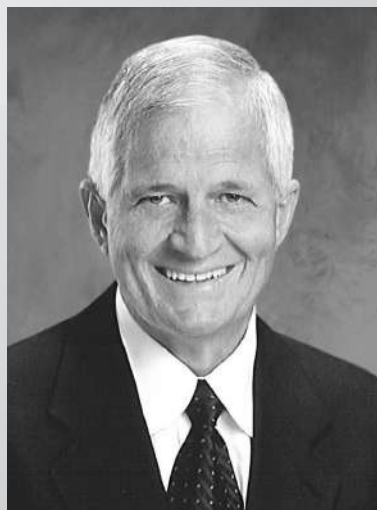
Orlando Mayor Buddy Dyer will read the Law Day Proclamation and present the Liberty Bell Award to an outstanding OCBA member. Children from throughout the county who have submitted winning entries in the Law Week Poster and Essay contest will receive awards and recognition.

May 22, 2008 – Naturalization Ceremony

Orange County Convention Center

A special Naturalization Ceremony will be held in honor of Law Day as 1,000 immigrants pledge their oath of allegiance in a very moving ceremony which will be held at the Orange County Convention Center.

OCBA Luncheon Speaker



April 24, 2008



Randall James

***Former Chief of Staff for Orlando Mayors
Langford, Frederick and Hood***

Randall James accepted the appointment as President of the First Orlando Foundation (FOF) in October 1997 and serves as an Assistant Pastor at First Baptist Church of Orlando (FBCO). FOF is a ministry of FBCO and is committed to the generation of resources to support each ministry of First Baptist. During the preceding thirty years, Randall was in public service. He was a Lieutenant with the Orlando Police Department and has served as Chief of Staff to Orlando Mayors Carl Langford, Bill Frederick and Glenda Hood, and retired as Orlando's first Chief of Staff Emeritus. Randall also served as Chief of Staff to Orange County Chairman, Rich Crotty, as an Executive on Loan in 2001.

After years of faithful service to the Lord as a lay minister and on staff at First Orlando, Randall was ordained to the Gospel Ministry in the spring of 2004. In addition to his responsibilities at the Foundation, Randall teaches Spiritual Maturity at FBCO and has served as a deacon, elder, and chairman of the Personnel Committee.

In 2002, Randall was elected to the Executive Committee by the 16.5 million-member Southern Baptist Convention. He is the immediate Past Chairman of FamilyNet Television, a subsidiary of the North American Mission Board, a Trustee for Baptist College of Florida, and a member of the Committee of One Hundred of Orange County. In addition, he serves on Orlando Mayor Buddy Dyer's SAFE Orlando Task Force, on The Florida Bar's 9th Judicial Circuit Grievance Committee, and on the Orange County Ethics and Campaign Finance Reform Task Force.

Randall is a survivor of numerous cancers, including colon and lung cancer, and is a frequent speaker and volunteer for the American Cancer Society. In addition, he has served on numerous community boards, commissions and committees including the boards of Goodwill Industries, Salvation Army, the Christian Endowment Foundation, the Tri-County League of Cities, the Mayors' Prayer Breakfast Committee, the Volunteer Center of Central Florida, as a Trustee for the Orlando Police Pension Fund, Sea World Easter Sunrise Service Committee, and on the Central Florida Board of Reference for Belhaven College.

Randall has received a number of awards and honors including being listed as an Honored Professional in the Nationwide Register's *Who's Who in Executives and Businesses - 2001-2002 Edition*, the 1995 Orlando Community Leader of the Year Award, the Orlando Jaycees Service in Government Award and the Tri-County League of Cities Lifetime Service Award. He is an alumnus of Leadership Orlando, Leadership Central Florida and Leadership Florida.

He has been married to Irma since 1967 and they have a married daughter, Lori; grandson, Chase; and granddaughter, Hayley.

The Ballroom at Church Street • 11:30 a.m. - 1:00 p.m.

225 S. Garland Avenue • Orlando, FL 32801

Hosted by the OCBA Law Week Committee

Please RSVP to reservations@ocbanet.org by Thursday, April 18, 2008.

To ensure a proper luncheon count, **RSVPs** and **CANCELLATIONS** are requested no later than Friday, April 18, 2008. The OCBA is happy to provide 11 luncheons as part of your member benefits, **but no-shows incur additional charges for the Bar and walk-ups can't be guaranteed a spot.** Please keep us up-to-date on your reservation status! Thank you.

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2008 William B. Trickle, Jr. Professionalism Award

Thoughts on Professionalism

Council Wooten, Jr.



for the ideas and positions of the parties to clash; the lawyers don't have to."

I want to thank the Professionalism Committee and the Executive Council of the Orange County Bar Association for this award. On January 2nd of this year, I began my 41st year in the practice of law here in Orange County, so I've had the privilege of knowing not only Bill Trickle, but each of the other 14 recipients of this award. To be included among them is a great honor and I thank you.

Time does not permit, but if it did, an examination of the lives of Bill and each of the prior 14 recipients would provide the answer to the question: "What is professionalism all about?" Instead, let me offer some thoughts.

Professionalism is about understanding that the practice of law is a calling, and not just a business. Professionalism is about understanding and being committed to following the dictates of our Oath of Admission to the Florida Bar. Professionalism is about civility in one's manner of practice, while at the same time ardently representing one's client. Professionalism is about being your client's advocate, and at the same time being counselor and advisor. Professionalism is about saying "no" to your client even when he or she only wants to hear "yes."

In the December 2007 *Florida Bar Journal*, the President's page article by President Frank Angones was entitled "Blessed are the Peacemakers." Frank wrote that "to seek justice, we do not have to destroy our opponents."

Recent reports and articles, both in the mainstream press and in our own professional publications, suggest that The Florida Bar and the Florida Supreme Court are cracking down on what they see as a decline in professionalism and civility among Florida attorneys.

The call for higher standards is not new. It has been a topic of discussion and study for most of the time we have practiced law.

Chief Justice Burger said in 1973:

Without civility no private discussion, no public debate, no legislative process, no political campaign, no trial of any case, can serve its purpose or achieve its objective. When men shout and shriek or call names, we witness the end of rational thought process if not the beginning of blows and combat.

And some of Justice Sandra Day O'Connor's remarks to the American Bar Association included this:

The common objection to civility is that it will somehow disserve the client. I see it differently. In my view, incivility disserves the client because it wastes time and energy. It is not always the case that the least contentious lawyer loses. It is enough

To emphasize how seriously the Florida Supreme Court is viewing issues of professionalism, I had planned to review three disciplinary actions by the Florida Supreme Court that Justice Cantero included in his remarks to the Joint Meeting of the Commission on Professionalism and The Florida Bar Standing Committee last November in Tallahassee. These were reported in the December 15, 2007 issue of *The Florida Bar News*. However, Magistrate Howard Friedman has done that in detail in the February 2008 edition of *The Briefs*. I urge you to closely read his article for our local Professionalism Committee entitled "Three Tales of What Not To Do" and use it as a reminder to sharpen your professional skills and adhere to standards of professionalism in your practice.

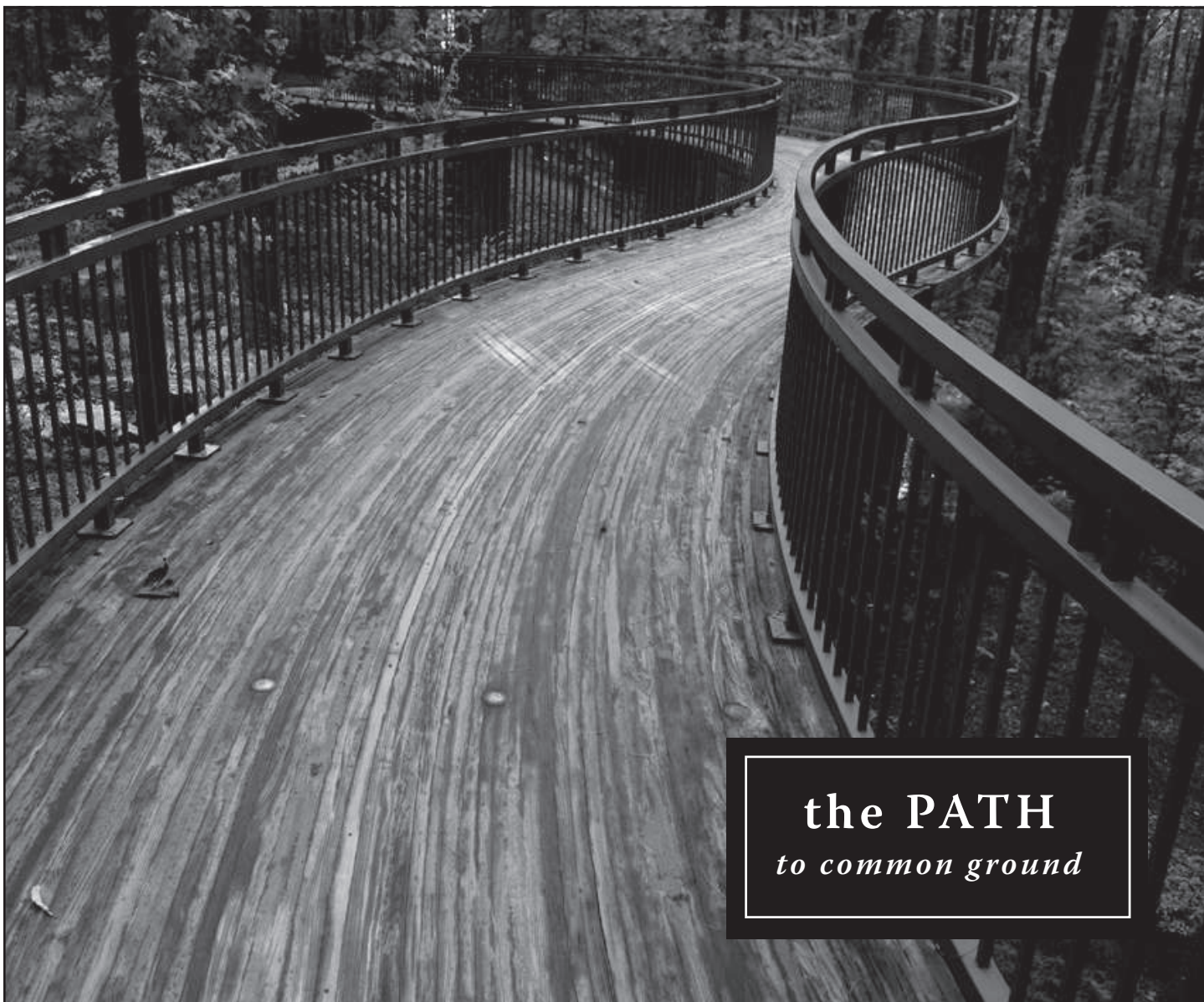
So why does it seem that conditions have worsened? And what can we attorneys do about holding ourselves to higher standards, without being forced to by the threat of suspension or disbarment?

We need to be aware that an increase in disciplinary actions is treating the symptoms, and not the underlying disease. We need to make sure that by reinforcing the public image of lawyers as people who will cut any corner to make their case, the treatment does not kill the patient. Since public expectation of lawyers is increasingly to win at any cost and, as reported by President Angones on his President's page of the *Florida Bar Journal*, March 2008, more and more reprimands are going to be made public, it is imperative that each of us and the Bar as a whole, renew a commitment to professionalism.

It could be argued that, in part, the underlying causes of - and cures for - the problem of lack of professionalism are beyond the scope of our powers as one group of professionals. Is society changing? Are people more contentious? Has incivility grown with the pace of communications? How many of us have received or sent an e-mail message to a colleague or member of the public that on later reflection seems intemperate? Our politicians, our friends in the media and even sometimes our clergy, seem to show less and less civility in their discourse. Are younger lawyers pressured to think of themselves as earning units, not as officers of the court and upholders of a public trust?

Why should lawyers be any different? Each of you may have your own answer to this question, but my answer is simply that a commitment to professionalism requires that we be.

Continued on page 9



the PATH
to common ground



For Upchurch Watson White & Max,
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Navigating a settlement between parties who don't agree can be a rocky road. We can help. For Upchurch Watson White and Max, the road to resolution is paved with thousands of agreeable outcomes.

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I would urge you to visit the Florida Bar's web page and learn about the Henry Latimer Center for Professionalism. There you will discover several resources. One is "Guidelines for Professional Conduct" adopted by the Executive Council of the Trial Lawyers Section in 1994 and approved by the Florida Conference of Circuit Judges in 1995. "Ideals and Goals of Professionalism" was adopted by the Board of Governors in 1990. You will also find a document entitled "Creed of Professionalism." These documents should be required periodic reading. Perhaps if read periodically with an aim towards following the principles they endorse, professionalism would be significantly enhanced.

You will also find there that it has been said that professionalism differs from ethics in the sense that ethics is a minimum standard, while professionalism is a higher standard of conduct that is expected of all lawyers. In 1990, Judge Harold G. Clark, Chief Justice of the Supreme Court of Georgia, stated that "professionalism imposes no official sanctions. It offers no official reward. Yet sanctions and rewards exist unofficially. Who faces a greater sanction than lost respect? Who faces a greater reward than the satisfaction of doing right for right's sake?"

There is more at stake here than simply requiring lawyers to adhere to the "letter of the law" as outlined in our codes of ethics. We all - experienced attorneys as well as those just starting out - bear responsibility for improving the atmosphere of professionalism, civility and, yes, even humility, among our fellow lawyers.

As we each strive to make professionalism a part of our lives, I suggest three areas of efforts in the coming months:

1. Make the matter of ethics and professionalism a most important part of your legal education.
2. Get involved in service to others in your community; find a way to lend your time, as a member of the Bar, to one or more activities that serve others.
3. Become involved in mentoring. A mentoring program is being developed by the Florida Bar. Details are just now being established and defined for the program in Florida. Florida lawyers will be expected to participate as one being mentored or as a mentor. It is anticipated that the program will put students and new lawyers together with mentors to discuss current professional concerns and some of the realities of practicing law that aren't treated in an academic setting. The experienced lawyers serve as mentors beyond law school and well into the young attorneys' careers, in part to help the newcomers understand the vital importance and necessity of and the practical application of ethics and professionalism in the practice of law.

In summary, as you strive to be an example of professionalism, remember the following:

1. Always show respect for the Court and Court officials.

2. Train yourself in professionalism. Seek opportunities for your professionalism to grow through seminars, study and interaction with other lawyers.
3. Never knowingly misstate any fact. Who was it that said "a lawyer's word is his stock in trade"? I like to remember that if you always tell the truth, you don't have to wonder what you last said.
4. When it's called for, don't hesitate to apologize.
5. And finally, follow the golden rule. Always treat others as you would like to be treated and you will have gone a long way towards being the professional that Bill Trickel would have been proud of.

In conclusion, let me leave you with these words from Chesterfield Smith, President of the Florida Bar in 1964: "You can do well by doing good."

Council Wooten, Jr. was admitted to the Florida Bar in June 1968 after obtaining his law degree from the University of Florida in December 1967. Upon graduation, he began the practice of law with the firm that is today known as Wooten, Honeywell, Kimbrough, Gibson, Doherty and Normand, P.A. Since that time he has represented plaintiffs in all types of personal injury litigation. He was first designated as a Board Certified Lawyer in Civil Trial Practice by National Board of Trial Advocacy in 1981, and in 1983 by the Florida Bar. He is a Fellow in the American College of Trial Lawyers and a member of the American Board of Trial Advocates, serving as president of the Central Florida Chapter this past year. He has served as Chairman of the Trial Lawyers Section of the Florida Bar, director of the Florida Association for Justice and as a member of the Board of Governors of the Young Lawyers Section of The Florida Bar. He presently serves as the Chancellor of the Diocese of Central Florida of the Episcopal Church. He is a past Chairman of the Board and President of the Florida Citrus Sports Association, sponsor of the Capital One Bowl. He has served as a member of the Council of the Central Florida Chapter of the American Diabetes Association and is currently a Director of the Florida Citrus Sports Foundation.

Portrait Service Available to OCBA Members!

As a service to OCBA members, RCL Portrait Design will be at the OCBA office for two weeks, from May 13th through 23rd, to take your professional portrait. This is a perfect way to quickly and easily update your photo in the Annual Membership Directory. Portrait sittings take only about 15 minutes and you are under no obligation to purchase anything! However, if you'd like to have some photos for your professional or personal use, RCL's photographer will provide you with a variety of poses - on the spot - for your selection and purchase.



All photo sessions will be held at the OCBA office, 880 N. Orange Avenue, Orlando. To schedule your appointment, please call RCL at 800-580-5562.

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The Evolution of Law Office Technologies in Orange County, Florida

Ralph C. Losey



When the Orange County Bar Association was founded in 1933, the height of technology was the electric typewriter, the Bates stamp, the paper clip and the then brand new invention, cellophane tape. Handwriting was still pervasive and so were legal pads of paper, but fountain pens and pencils were used, not the ballpoint pen. It was not invented until 1935. These items are still found in most law offices in Orange County today, although the typewriters may be a bit dusty and the fountain pens seldom used. For most lawyers in 2008, computers and printers do most of the document- and pleading-generation work at the heart of any law office, no matter what century. In fact, most of what we write today may never be imprinted on dead trees (paper) and may exist only in electronic form.

Before the computer revolution of the 1980s, the biggest change in law office technology probably occurred with the advent of copy machines in the 1950s. Xerography itself was first invented in 1938 by Chester Carlson. He was a patent attorney in New York looking for a way to simplify his legal practice. His invention did not become commercial, however, until the 1950s with the Xerox Corporation. Before that, as some readers may well recall, we relied upon carbon copies. In fact, when I started practice in 1980, the use of carbon copies was still widespread. Yes, we had a copy machine too, but that didn't stop everyone from also using carbon copies.

About that same time, in 1979, another much-revered invention hit the legal office scene in Orange County: liquid paper. It was invented by Betty Graham back in 1951, but did not come into wide use until Gillette took it over in 1979. Many a lawyer and secretary was saved a great deal of re-do effort in the '80s, and well into the '90s, by the use of Liquid Paper, a/k/a, white-out. By the way, Graham was also the mother of Michael Nesmith, one of the original band members of "The Monkeys."

This era was a time for many changes in law office technology. In 1978, the Olivetti Company and the Casio Company each independently developed the world's first electronic typewriter with a memory capable of storing text. They first appeared in the market in 1978. I still remember being in the law office as a young lawyer in 1980 when we received the first of what were called "mag-card" typewriters and the forms that were later developed to be used with them. By the way, the electric typewriter itself goes all the way back to 1872 when it was invented by Thomas Edison. Although invented in 1872, electric typewriters did not come into common use until the '50s.

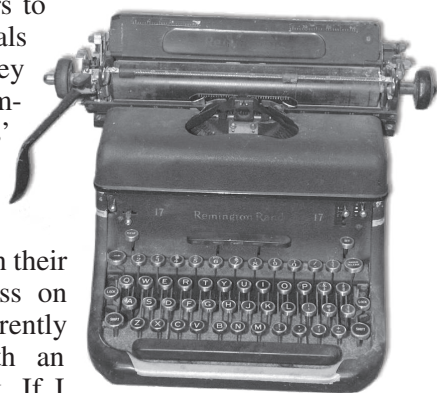
Although the invention of typewriters with memory was a big deal, there's one kind of funny invention that hit law offices in 1980 which was also a big deal, namely Post-

it Notes. Unlike electronic typewriters, these ubiquitous yellow Post-it Notes are still widely used today. I for one am not sure I could practice law without them. Interestingly, Post-it Notes were invented by a fellow named Spencer Silver working for 3M in 1970 trying to devise a strong adhesive. He failed, and instead came up with an adhesive even weaker than what 3M had already been manufacturing. It took 3M 10 years to figure out what to do with this stuff, but ultimately failure was turned into great success.

As transformative and wonderful as all of these law office innovations proved to be, the biggest event was yet to come with the advent of affordable computers. Although Apple, Commodore and Texas Instruments came out with the first consumer model computers in the late '70s, it wasn't until 1981 that IBM rocked the technology world with its development of the IBM PC ("personal computer"). At the same time, Microsoft came out with the MS-DOS computer operating system. I remember loading version 1.0 and the IBM salesman telling me at the time with a smirk how this silly little start-up company, Microsoft, had agreed to license the operating system to IBM for free. Bill Gates was later to perfect that smirk himself.

Even before the advent of the first personal computers, some of the biggest firms in the OCBA had invested in mini-computers, which were large and very expensive. Akerman Senterfitt, for instance, purchased two Digital Equipment Company (DEC) computers in the late 1970s. One was used for accounting and the other for word processing. This technology was, however, too expensive for most OCBA lawyers. That is why the advent of the IBM personal computer was so important. It brought computer power into the reach of the entire Bar.

Although there were a handful of attorneys in Orlando in the early 1980s who were enthralled by computers and worked with them personally, including David Strawn whom I recall used Radio Shack computer systems, most attorneys delegated such matters to technicians, paralegals and secretaries. They were happy to have computers on secretaries' desks, and accounting desks, and in the law firm library. They did not want a computer in their own office, much less on their desk. I was apparently the first lawyer with an IBM PC on my desk. If I recall correctly, that was in



Continued on page 12

1982 and I was an associate at Subin, Shams, Rosenbluth & Moran, P.A. Other lawyers in town would frequently kid me for having a keyboard on my desk and ask me to type something for them. At the time, it was considered beneath the *dignity* of most lawyers to ever touch a keyboard. They considered it typing, and only secretaries did that. In fact, there was a tremendous phobia in the profession concerning anything having to do with computers. We have indeed come a long way since then.

Back in 1982 I talked the partners at Subin Shams into paying for my PC, with the explanation that it would improve my efficiency in WestLaw research. Before that, dumb-terminals were used to connect to the West mainframes at the lightening speed of 300 baud. At that speed you could literally read the sentences as fast as WestLaw could spit them out and still have time to sip your coffee. Later that year, I also talked my firm into letting me buy a color monitor for the PC. Before that, all monitors were monochrome, which meant a kind of ugly green and white. After the sale was consummated, the IBM salesman told me confidentially that mine was the first color monitor they had ever sold in Orlando! I may have forgotten to share this fact with the partners, but anyway they seemed satisfied with my ability to find cases on WestLaw.

WestLaw and Lexis first came into town in 1978 and 1980. I was trained in WestLaw and Lexis at the University of Florida School of Law in 1977. Back then, you were not allowed to use the computers (dumb-terminals connected to mainframes) until after you completed a video course lasting several hours on how to use the equipment. When I got to town in late 1979, I found that Akerman was the only firm in Central Florida with computer-assisted legal research. Akerman had chosen Lexis over WestLaw. My firm decided to become the second firm in town with computer research. For reasons having a lot to do with headnotes, we elected to go with West, and so by 1980 both legal search services were in Orlando.

I well recall the impact computer-assisted legal research had on litigation practice, especially when having to research case law outside of the Southern Reporters or Florida Digest. Suddenly, law from all over the country was much easier to research, and you could pretty much find a case to stand for any proposition you wanted, or so I'm told.

Lexis and WestLaw were later supplemented by other dial-up research services, such as CompuServe, where specialized articles and academic abstracts could be searched and downloaded. You would join CompuServe for a fee and then pay for access to certain libraries. In the mid-'80s other services became available, such as The Source, and they began to have more of a consumer orientation. They became known as "online" services and were similar to computer

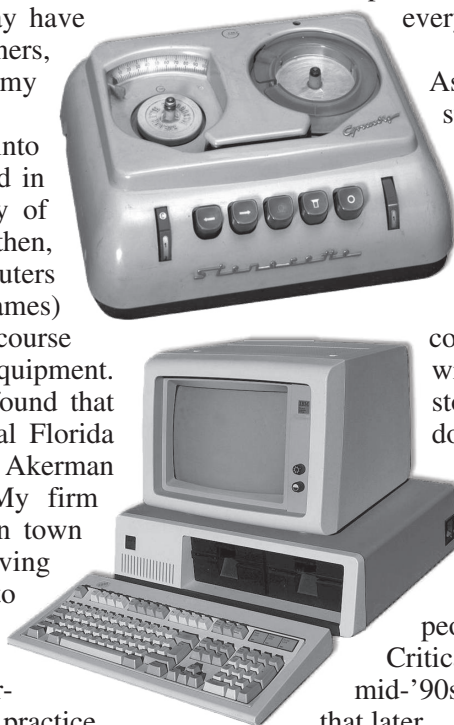
hobbyists' Bulletin Board Systems (BBS). The first BBS were computers set up so that multiple people could log on at a time (at first they were just one person at a time, and then they slowly expanded in capacity) using a modem and telephone connection. You could read stuff, and later look at pictures, and you could interact and leave your own messages. They were the first discussion and chat groups, and BBS and online communities began to develop. This method of using computers to communicate with complete strangers over great distances - for free - was at first only used by the small world of "computer nuts" as we were then called, or as I prefer to remember, "computer gurus." The beloved "geek" term had not yet caught on. There were a couple of us BBS in the OCBA at the time, but not many.

By the late 1980s and early 1990s, CompuServe and The Source were becoming popular not only for their online libraries, but for technical and social discussions. The line between expensive business and IT-oriented online services, and free BBS services, began to blur. In the early '90s AOL was started as a consumer-friendly competition to CompuServe. At first AOL was not very popular, but as everyone knows, by the late 1990s, it dominated.

In the early 1990s the American Bar Association set up its first online BBS-type system called ABA Net. I remember going online when it first opened to see whether there were any other lawyers using the BBS to communicate. I never ran into anyone else online from Florida, much less the OCBA. In fact, on a busy night, there might be five or six of us in the whole country. We quickly grew tired of chatting with each other, and most of us early adopters stopped using ABA Net. I think it later closed down entirely, only to be resurrected when the Internet became popular. The problem was not that lawyers did not like to talk (we all know that's not true), but that there was not what we used to call at the time "critical mass." That meant there were not enough people using the system to make it interesting. Critical mass was never really achieved until the mid-'90s with the advent of the Internet, but more on that later.

First, another important piece of law office technology should be mentioned: the dictation machine. The first dictation machines were utilized in offices in the 1950s, but did not come into widespread use until the '60s. These began as very large machines. Ed Foster tells me that when he began work at Akerman as a summer clerk in 1978, the firm had a large, centralized tape dictation system. There was a microphone on every attorney's desk that looked like a small black phone and had two buttons: record and rewind. You would speak your dictation into the phone, which was connected to a large tape recorder in another office deep in the bowels of the CNA Building. The tape recorder was

Continued on page 14



Supreme Court Honors Local *Pro Bono* Attorneys

Attorneys providing *pro bono* legal services during 2007 were recognized by the Florida Supreme Court, the Florida Bar's Young Lawyers Division and the Florida *Pro Bono* Coordinators Association. The project is funded by YLD and was established to encourage participation with local organized *pro bono* programs. Each year attorneys who contribute time at three levels, 20 to 49 hours, 50 to 99 hours, 100 or more hours receive a letter from the Chief Justice and a bronze, silver or gold pin designating their contribution. The donation of time is based on the hours on cases closed during 2007 and project work in 2007. This year the letter from Chief Justice R. Fred Lewis and the pin is being mailed by the Legal Aid Society to 293 attorneys who participated through Legal Aid. The letter for the winners of the gold pin is personally signed by the Chief Justice. *The attorneys recognized are listed below:*



Legal Aid Society of the OCBA 2007 Pro Bono Service Pins

GOLD LEVEL - 100 + HOURS

Herbert L. Allen	Charles J. Cacciabeve	W. Scott Gabrielson	James M. Magee	Heather Pinder Rodriguez
Joseph L. Amos, Jr.	S. Lynn Cummings	Brian R. Gilchrist	Elizabeth Y. McCausland	Nicholas A. Shannin
Karel L. Averill	William A. Davis Jr.	Ralph V. Hadley, III	Nancy McClintic	C. Eugene Shipley
Michael J. Beaudine	Donald Andrew DeBevoise	C. Christopher Killer	Francis M. McDonald	Susan V. Stucker
Christopher G. Betscher	Terence Delahunty Jr	David B. King	John R. McDonough	Michael S. Waranch
Neal J. Blaher	Robert H. Dellecker	Juliette Koves	Pauline McIntyre	Frank C. Wesighan
Matthew G. Brenner	Gary L. Dirlam	John Stanley Lord Jr.	Daniel Thomas O'Keefe	Donald N. Williams
Robin Uricchio Byrd	Allan C. Draves	R. Gavin Mackinnon	William L. Pence	Hallie L. Zobel

SILVER LEVEL - 50-99 HOURS

Bruce B. Blackwell	Michael Thomas Haire	Kimberly E. Lorenz	Michael E. Nebel	Mary M. Stewart
Jeffrey J. Branham	John R. Hamilton	James R. Lussier	Leslie O'Neal-Coble	Robert J. Stovash
Teri Ann Bussey	Barry W. Hepner	John D. Mahaffey Jr.	Marie R. O'Neill	William E. Sublette
Leann R. Canter	John Horan	Winston A. McClean	Sonica J. Rhodes-Cinami	Robert L. Taylor
Tania M. Colon	Terri S. Johnson	Katherine McKinley	Rafael R. Ribeiro	Mark S. Troum
Anthony Conti	Joseph G. Kern	Dulcy Ann Miller	Abigail Marie Schroeder	Richard B. Webber II
R. David De Armas	John Leklem	Mark V. Morsch	Christopher L. Smith	Lynne R. Wilson
Ann Marie Giordiano-Gilden	Steven Lengauer	Mary A. Nardi	Charles L. Steinberg	Marwa Zeini

BRONZE LEVEL - 20-49 HOURS

Charles W. Abbott	Jules S. Cohen	Robert Finkbeiner, Jr	Peter W. Kenny	D. John Morgeson, Jr.	Kavita Sookrajh
Mark F. Ahlers	Albert R. Cook	Daniel W. Ford	Robin N. Khanal	Wayne A. Morris	Grey Squires-Binford
William C. Airth, Jr.	Kevin J. Cook	Robert J. Fox	Susan Khoury	Jamie B. Moses	Sharon Lee Stedman
Edward R. Alexander	Mark O. Cooper	Barbara Fancher Jones	Frank H. Killgore Jr.	Deborah L. Moskowitz	Charles R. Stepter
Michael J. Appleton	Mark A. Cornelius	Scott R. Fransen	Orman L. Kimbrough, Jr.	Carmen Muñiz-Sierra	Stephanie K. Stewart
Christine E. Arendas	Christopher M. Costello	Judith B. Friedland	Samuel P. King	Ernest J. Myers	Gregory D. Swartwood
Ellen Avery-Smith	Amanda Aubry Cowan	Deborah Frimmel	T. Christopher King	Lynn F. Nelson	James M. Talley
Grady G. Ayers	Barbara M. Cowherd	Michael R. Gibbons	Stephanie Klein	Jon M. Oden	Joseph Tamborello, Jr.
M. Merrell Bailey	Peter Cushing	Jon M. Gibbs	Lawrence H. Kolin	Joan Okun	Ana Tangel-Rodriguez
D. Scott Baker	Catherine E. Davey	Michael Gibson	T. Kevin Knight	Marc Ossinsky	Cory Taylor
Elizabeth Balaguer	William H. Davis	Charles E. Gordon	Mitchel Krause	Gayle A. Owens	David F. Tegeler
Steven L. Barcus	John D. Daw	Maria DiBlasio Hale	Lisa A. Krueger-Khan	Rhonda E. Parnell	Larri T. Thatcher
Carole J. Barice	Scharome Rayanne Deaton	Tenesia C. Hall	Jon L. Lambe	Irene Pearce	Leslie Thomas
Krista M. Bartholomew	Jeffrey D. Deen	Ronald A. Harbert	Daniel W. Langley	Lawrence J. Phalin	Robert H. Thornburg
Matthew P. Bartolomei	Richard Dellinger	Ryan James Hayes	Terese M. Latham	Steven P. Pyle	Patricia A. Toro-Savitz
Theodore R. Baumgardner	Mary Anne De Petrillo	Kimberly Healy	Dougald B. Leitch	Burke Randa	Phillip D. Townes
Edmund T. Baxa	Tami L. Diebel	Donald R. Henderson	Sunny A. Lim	Marc John Randazza	Catherine A. Tucker
Angel M. Bello-Billini	John Dierking	Mary J. Hoftiezer	Kaci A. Line	Robert Rasch	W. Rogers Turner, Jr
Jose L. Benson	William Dietz	Anna Adams Holbrook	Scott A. Livingston	Michael L. Resnick	William David Umansky
Deborah Jane Bergin	Eve D'Lugo	Norman L. Hull	Katherine Lockett	R. Spencer Rhodes	Kenneth R. Uncapher
Russell F. Bergin, Jr	Cara M. Dobrev	Rebecca K. Hull	Atheseus Lockhart	Eric D. Robinson	Michael R. Walsh
Jeanette Bigney	Mayanne Downs	Lisa Jones Hurley	Juan C. Lopez-Campillo	Matthew H. Roby	Charlotte L. Warren
Andrea Black	Kathryn Evelyn Durnell	Rex A. Hurley	Ryan A. Lopez	William Rogner	Kenneth R. Washburn
Sally A. Blackmun	Cindy Duque	Clement L. Hyland	Patricia Lynch Franklin	Nicholas J. Rubino	Robert J. Welch, Jr.
Terry L. Bledsoe	Zoila E. Easterling	J. Charles Ingram	E. Juan Lynum	William E. Ruffier	Glen D. Wieland
Gene S. Boger	Andrea Edwards-Martin	Alyson M. Innes	C. Lee Mangas, Jr.	Gerald Rutberg	Lori Wheeler
Richard B. Bogle	Thomas F. Egan	Jonathan L. Innes	Michael Manglardi	Lyzette SanGermain	Keith F. White
Nicola A. Boothe-Perry	Enrique Estevez	Blair T. Jackson	Frederick R. Mann, Jr.	Beth S. Schick	Stacy L. Wilde
Philip F. Bonus	Elise Ezze	Wade F. Johnson, Jr.	Robert E. Mansbach Jr.	Kenneth L. Schlitt	Brian Thomas Wilson
John D. Boulden	David B. Falstad	E'Carl Jourdean	T'anjuiming A. Marx	J. Timothy Schulte	Simon L. Wiseman
Craig L. Brams	Angela G. Ferguson	John M. Joyce	Kevin C. Maxwell	Dorothy C. Sedgwick	Stephanie Woods
Deaina M. Brown	Kaidan Ferguson	James W. Keeter	Willie May	Ronald L. Sims	David A. Yergey, Jr.
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Stephen Chong	Samuel R. Filler, II	Jill E. Kelso	Thomas Moore	Mary A. Doty Solik	

not in your office; in fact, you never saw it. Secretaries in the Akerman word processing department would then listen to the tapes and, using dumb-terminals, enter the dictation into the DEC computers. Then the text would be printed out on very large printing paper with sprocket holes on the side. These printers were in common use throughout the 1980s and were terribly loud. The large folded print-outs would then be presented to the lawyers for hand editing. Dictation technology eventually went to smaller tapes, then even smaller micro-tapes, which are still in widespread use today. The technology has also morphed into pure digital recordings.

The use of dictation to communicate from attorney to assistant is still prevalent today, although its popularity is now on the decline. This communication system seems little changed from when it first began in the 1950s. As lawyers, most of us have learned the fine art of dictation and the strange practice of saying commas out loud and periods at the end of a sentence. Period. I have noticed, however, that many new lawyers are doing all of their typing themselves directly on desktop computers and ever-present laptops, and never dictate. The days of dictation may well be numbered.

Speaking of laptops, I recall when the first so-called portable computers came to town in the mid-'80s. They were built by Osborne and were frequently used by people in the construction industry. No one else seemed strong enough to lift them. They were the size of a large suitcase, and I mean large. They weighed at least 25 pounds, not including printer, and were extremely difficult to lug around. I don't recall any lawyers actually being strong enough to use one of these machines, but I did see many a client with them at construction job sites. Today, of course, my new MacAir is as thin as a dime, light enough for any lawyer and has computing power a thousand times greater than the biggest mainframe computers of the '80s. So too does the Blackberry phone that many of us carry around in our pockets, which keeps us in constant voice and e-mail contact with anyone, anywhere in the world, and allows for constant Internet access.

This global computer-to-computer communication system known as the Internet puts virtually unlimited information at our finger tips (note I say information, not knowledge, much less wisdom). The Internet has opened up new fields of legal research and fact investigation to all lawyers. The precursors to the Internet were the mentioned private online services, CompuServe, The Source, AOL,

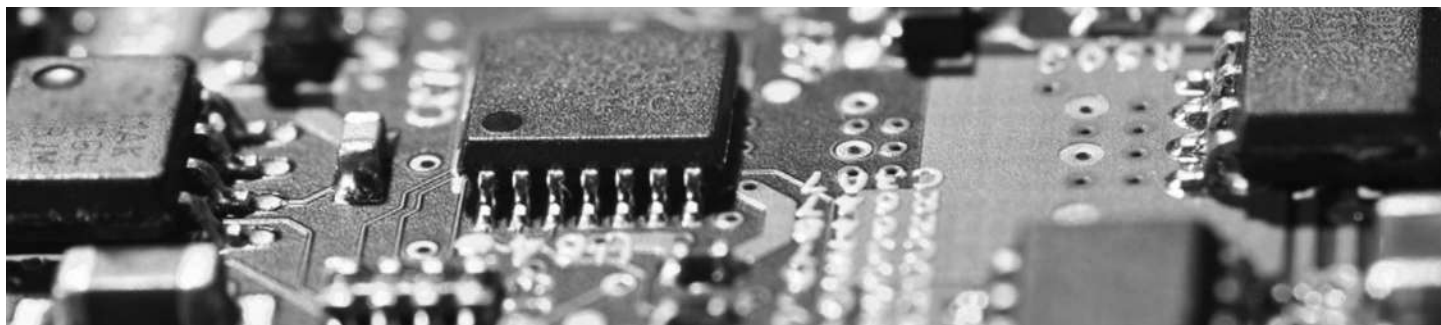
and the private BBS systems. These were all almost entirely text based at first, although certain very cool graphics can and were created as far back as the mid-'80s using text-based ASCII symbols, especially on the BBS systems.

When a programmer friend of mine told me about this new thing called the Internet in the early '90s, it was very boring and only had academic articles and scores of FTP sites where you could download free software. Then, in 1993, the World Wide Web (WWW) portion of the Internet became available for free to anyone with a computer and phone line who downloaded and installed a free program called Mosaic. It was the world's first web-browser. Now you could visit other computers all over the world that had what were called "websites" on them that included not only text, but graphics. Even more remarkable, the text could be hyperlinked to other computer websites around the world. Even better, the WWW made electronic mail affordable (nearly free) to anyone with an Internet connection. At first the critical mass problem remained, even on the Internet. It was not so easy to get onto. There were many technical difficulties and, at first, it was inhabited only by academics, techs and hobbyists like myself. But these access difficulties were quickly overcome. With the advent of Mosaic, and later NetScape, AOL and numerous Internet service providers, the Internet quickly caught on, even among lawyers.

By around 1994, I noticed that a couple of attorneys in California had put up websites about their legal services. They were using the Internet not only as a way to convey information, but also as a type of marketing tool. Marketing on the Internet was a brand new idea, and no one had yet thought of click-on ads. By this time, the use of graphics and color images on the Internet had become common, as had e-mail. A few more attorneys started doing this in New York, and then one in Atlanta. At that point, I figured I had better get in on the act, and so I purchased the domain name "FloridaLawFirm.com," taught myself HTML programming and set up the first legal website in Florida. Today just about every law firm in town has a website. In the mid-'90s, it was quite a novelty.

Being the first has its drawbacks. A year after www.FloridaLawFirm.com went up, the Florida Bar noticed it. They thought it was a television ad. I am not kidding. At the time, the senior members of the advertising committee thought that the Internet was a kind of television network. They assumed that I had broadcast a TV ad without

Continued on page 15



advance permission as required. It had to be a TV ad because they saw it on the TV sets on their secretaries' desks (their computer screens). It seems funny now, but at the time I was quite nervous. I ended up printing the whole website (the website included hundreds of pages of federal statutes) and submitting it for approval as a TV ad. It was indeed approved with just a few requested modifications, and soon thereafter I joined the Florida Bar's advertising committee and changed things.

Along with the development of the Internet came the widespread use of e-mail. I remember using e-mail only for personal purposes back in the early and mid-'90s. Since I always had a computer on my desk, however, I also looked for ways to use e-mail at work. The problem with e-mail, much like the facsimile machine which I remember being introduced into the law office in the late '80s, is that it does you no good whatsoever unless there is someone else you need to communicate with who also has e-mail or a fax machine. The fax machine is another great technological tool that had a huge impact upon the practice of law in the '90s.

Its impact, today, however, seems to be diminished as more and more people are moving away from the fax machine to total online transactions. Most people don't realize that the first fax machines were manufactured right here in Orlando by a company called Qwip, which was a subsidiary of Exxon. Unfortunately, Qwip was a failure and closed down simply because of the critical mass problem. In the mid-1980s, shortly before they gave up, Qwip even considered giving away fax machines to every court in the country to give lawyers some reason to buy them. Ultimately, by the late '80s and the early '90s, critical mass was achieved in fax usage, even in law offices.

But back to the Internet and the story of e-mail. At first in the early and mid-1990s, there was not much occasion to send e-mail to other lawyers because there were so few lawyers in town who used e-mail. Still, some of our larger clients in big corporations around the country started to use this new technology. I even had a few high-tech companies in Florida that used e-mail. I really enjoyed communicating with them. It felt like an adventure at first. In fact, it was not uncommon to call the person and make sure they got the e-mail. On some days I would end up sending and receiving as many as five e-mails a day! That seems really ridiculous in today's world, where I probably received five e-mails in the last five minutes, but that's the way it was.

Over the last 30 years all facets of legal practice has speeded up, primarily because of changes in office technology. I clearly recall when I began practice in 1980 that it was perfectly acceptable to wait a week, or sometimes longer, before replying to a letter. You would, after all, need time to think, talk to the client, think some more and then compose the letter. That would usually be by handwriting on

a legal pad or by tape dictation. Then later - perhaps several days later - your secretary would hand the first draft of the letter to you for review. You would then revise it, at least once, perhaps multiple times. Finally you would carefully read the letter one last time and sign it with a flourish. After that the letter was mailed, whereupon it would in turn take several days, if not a week, to reach its destination. Later that delivery time was speeded up by express services, such as Fed-Ex, and later still by facsimiles. (The first faxes, however, were often hard to read, and so everyone would also mail the letter or document.) Now a delay of an hour in responding to an electronic letter can annoy some people.

The growth of e-mail was a slow and gradual one until the late '90s, at which point a critical mass seemed to develop. By then most lawyers in town had e-mail accounts and so did most clients. But, truth be known, many lawyers at first did not actually open and read their own e-mail. They had their secretaries read them. The practice used to be (I remember seeing my partners do this) that a secretary

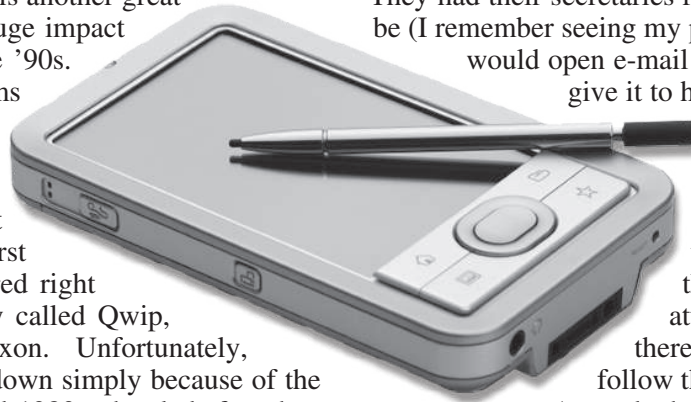
would open e-mail for an attorney, print it out and give it to him or her to read. The attorney

would dictate a response, or hand write one on a legal pad.

The secretary would decipher the scribbles or listen to the tape and then write an e-mail that would be sent out under the attorney's name. I know for a fact there are still attorneys today who follow this practice.

Around the turn of the century, more and more attorneys actually began working with e-mail themselves. This was driven in large part by our clients. More and more clients wanted to do business via e-mail and the OCBA lawyers responded and learned these new technologies. Today we all depend upon computer-generated documents, and we all use e-mail to communicate with each other. No doubt in another 75 years, our use of such computer and Internet technology will seem quaint. Maybe by then, for our children's sake, there will be Star Trek-like teleportation, and they can avoid I-4 and beam directly to the courthouse to get to hearings on time.

Ralph C. Losey is a shareholder with Akerman Senterfitt. He has been a member of the OCBA since 1980.



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Appellate Practice Committee

Preserving Error - Remember to Move for a Mistrial

Barbara Eagan, David Knapp and Elizabeth Wheeler¹

Once, a relatively small business owner (“David”) engaged in a dispute with a large, national conglomerate (“Goliath, Inc.”). In a legal proceeding, the parties contested the meaning, intent and legal effect of a few pages of correspondence. In the first round, David won a jury’s verdict to the tune of tens of millions of dollars. The dispute then developed into a battle of words ultimately decided by three (and then seven) black-robed individuals.

Goliath, Inc. assembled an appellate army possessing significant weaponry: prestige, expertise, abundant resources and stellar credentials. Goliath, Inc.’s army correctly identified grave error that occurred in the dispute below – *David’s expert used an improper measure of damages*. On reviewing the record, however, David’s team discovered a deadly rock which ultimately slew Goliath, Inc. – *Goliath, Inc.’s trial counsel failed to contemporaneously object to the testimony or to offer evidence at trial on what it asserted was the correct measure of damages*. Because the issue was not presented to the trial court in a timely manner, the appellate court held it was not properly preserved for appellate review. David’s multi-million dollar judgment was affirmed.

As the above story illustrates, trial counsel face many potential pitfalls in the heat of battle. A kingdom can be lost on technical error - it happens regularly. This article is intended to assist trial counsel in avoiding Goliath, Inc.’s fate. We will focus on the role of a motion for mistrial in preserving error with respect to motions *in limine* and improper argument of counsel.

§ 90.104(1), Fla. Stat. (2003) Says That If I Win A Motion In Limine I Don’t Have To Object During Trial, Right? – Not So Fast, My Friend.

It has long been the general rule that when a court sustains a party’s objection during trial, that party must seek a curative instruction and/or move for a mistrial to preserve the issue for appeal.² If the party does not seek a curative instruction or move for mistrial, the appellate issue is waived.

This rule is known as the “contemporaneous objection” requirement, and has its origins in the English legal system.³ As the Florida Supreme Court has explained:

[T]he reasons for the contemporaneous objection requirement [] go to the heart of the common law

tradition and the adversary system. It affords an opportunity for correction and avoidance in the trial court in various ways: it gives the adversary the opportunity either to avoid the challenged action or to present a reasoned defense of the trial court’s action; and it provides the trial court with the alternative of altering or modifying a decision or of ordering a more fully developed record for review.⁴

More simply, as the Fifth District Court of Appeal recently stated: “The rationale of the contemporaneous objection rule is to offer the trial court the opportunity to correct any mistake and to prevent a litigant from allowing an error to go unchallenged so it may later be used for a tactical advantage.”⁵

Unfortunately, although the contemporaneous objection rule has its value, it also has its downsides - such as being applicable even if a party has prevailed on a pretrial motion *in limine* and obtained a ruling that certain information cannot be discussed or admitted during trial. Traditionally, even after winning a motion *in limine*, trial counsel was still required, if the order in limine was violated, to quickly make the Hobson’s choice of objecting in front of the jury and thereby emphasizing the potentially prejudicial nature of the evidence, or remaining silent and thereby waiving the issue for appellate purposes.

In 2003, the Florida legislature appeared to resolve this dilemma by amending § 90.104(1), Florida Statutes. Specifically, the legislature added the following new language:

If the court has made a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.⁶

The amended language took effect July 1, 2003.⁷

Although this new language appeared clear, and seemed to resolve the motion *in limine* issue, at least one commentator warned that the statute posed a “trap for the unwary.”⁸ This warning was based upon two appellate decisions – one from the Fourth District Court of Appeal, and one from the Fifth District Court of Appeal – which suggested that, because the amendment appeared to be an improper attempt by the legislature to encroach upon the Florida Supreme Court’s procedural rule-making authority,

Continued on page 18

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² *Grau v. Branham*, 761 So. 2d 375, 378 (Fla. 4th DCA 2000); *Williams v. Lowe’s Home Centers, Inc.*, 33 Fla. L. Weekly D143, 2008 WL 45522, *6 (Fla. 5th DCA Jan. 4, 2008) and *Weise v. Repa Film Int’l, Inc.*, 683 So. 2d 1128, 1129

(Fla. 4th DCA 1996).

³ *Murphy v. Int’l Robotics Sys., Inc.*, 766 So. 2d 1010, 1016 (Fla. 2000).

⁴ *Id.* at 1017.

⁵ *Williams* at *4.

⁶ Chapter 2003-259, § 1, Laws of Fla.

⁷ Chapter 2003-259, Senate Bill No. 524.

⁸ Jack R. Reiter, *Principles and Pitfalls of Preservation of Error*, 78 Fla. Bar. J. No. 10 at 33 (November 2004).

litigants should not rely upon the amendment until and unless it was approved by the Florida Supreme Court.⁹

On October 25, 2005, the Florida Supreme Court *did* approve the amendment to § 90.104(1), and indicated that the new rule would “eliminate the need for a trial objection in order to preserve an evidentiary issue for appeal when the trial judge has made a definitive ruling on the admissibility of the evidence.”¹⁰ The Florida Supreme Court’s adoption of the amendment was effective as of the date it became law – July 1, 2003.¹¹ In *Tolbert v. State*,¹² the Fifth District acknowledged the Supreme Court’s adoption of § 90.104(1), and agreed that one of its intended consequences was to “alleviate the often harsh results that followed from application of decisions which held that although a litigant secured a prior evidentiary ruling from the trial court, waiver of the objection occurred, albeit unintended, if the litigant failed to lodge a timely renewal of the objection in the proceedings when the evidence was subsequently introduced.”¹³

It appeared the amended rule could now be relied upon. In fact, another commentator made the following statements in a February 2007 *Florida Bar Journal* article:

The amendment eliminates the need for a trial objection to preserve an evidentiary issue for appeal when the trial judge has made a definitive ruling on the admissibility of the evidence, thus, giving counsel more flexibility in strategizing how to try their case.

Indeed, trial counsel may now routinely use §90.104, as amended, as a component of their trial strategy by filing motions in limine to exclude evidence at the outset of trial where they otherwise would not have. For example, prior to the amendment to §90.104, counsel may have decided that it was more beneficial to the case to introduce potentially prejudicial evidence during their case in chief because renewing their objection to the evidence during the trial in front of the jury would run the risk of emphasizing the potentially prejudicial nature of the evidence to the jury. Now, counsel can file a motion to exclude the evidence even with the knowledge that the motion will likely be denied. The issue will be preserved for appeal without having to renew the objection before the jury. At least in this respect, the court has made the balance of preserving the record and winning the trial a little easier.¹⁴

As Lee Corso might say on College Game Day (with or without a mascot mask perched on his head) – “Not so fast, my friend.”

On February 21, 2007, the Fourth District held in *Ocwen Financial Corporation v. Kidder*¹⁵ that, even though the defendant had obtained an order granting a motion *in limine* to preclude the introduction of certain information, the defendant had waived the issue for appellate purposes by failing to move for a mistrial when the motion was violated.¹⁶ In reaching its ruling, the Fourth District rejected the defendant’s argument that § 90.104 made it unnecessary to move for a mistrial in order to preserve the issue for appeal. The court reasoned that the amendment only said no objection was needed – “[i]f the legislature had meant to relieve a party from having to move for a mistrial it would have said so.”¹⁷

What does this mean? Does it mean that if counsel obtains a favorable ruling on a motion *in limine* and the ruling is subsequently violated, it is not necessary to make a contemporaneous objection but it is necessary to contemporaneously move for a mistrial? If so, how does requiring a motion for mistrial effect § 90.104’s intent to eliminate the problem of an “inadvertent waiver”?¹⁸

In all fairness, the result in *Ocwen* does make sense in light of the facts in that case. In *Ocwen* the improper issue was blurted out or raised on several different occasions.¹⁹ Each time this occurred, the defendant objected. On more than one occasion the defendant also asked for a curative instruction. When requested, the trial court gave a curative instruction. As noted previously, the defendant never requested a mistrial.²⁰ Under these facts, it does appear that the defendant may have been trying to have the best of both worlds – to obtain a curative instruction and hopefully receive a favorable verdict from the jury, while leaving open its option to appeal in the event of an unfavorable verdict. This is what courts have worked to avoid, and one of the reasons for the existence of the contemporaneous objection requirement in the first place.

Where does this ruling leave § 90.104, and where does it leave the practitioner? Does § 90.104 provide protection and preserve issues for appeal, *except* when a party decides to make a contemporaneous objection during trial? Does it still apply if a party makes a contemporaneous objection during trial, but *not* if that party also requests a curative instruction? Would it be best if counsel just relied on § 90.104 and did not object at all during trial? Based upon the ruling in *Ocwen*, the best practice appears to be to assume that § 90.104 was never amended, and continue to make contemporaneous objections and requests for curative instructions and/or mistrial as required by the contemporaneous objection rule.

At least one other potential trap also deserves mention when discussing the applicability of § 90.104. The statute

Continued on page 21

⁹ *Id.* at 33-34, referring to *Mallory v. State*, 866 So. 2d 127 (Fla. 4th DCA 2004); *Crumbley v. State*, 876 So. 2d 599 (Fla. 5th DCA 2004).

¹⁰ *In re Amendments to the Florida Evidence Code-Section 90.104*, 914 So. 2d 940, 941 (Fla. 2005).

¹¹ *Id.*

¹² 922 So. 2d 1013 (Fla. 5th DCA 2006).

¹³ *Id.* at 1017.

¹⁴ Christine R. Davis, *Striking a Balance to Win: Balancing the Need to Win the Trial with the Need to Preserve the Record on Appeal*, 81 Fla. Bar. J. No. 2 at

20 (February 2007).

¹⁵ 950 So. 2d 480 (Fla. 4th DCA 2007).

¹⁶ *Id.* at 482.

¹⁷ *Id.* at 482-483.

¹⁸ *In re Amendments to the Florida Evidence Code-Section 90.104*, 914 So. 2d 940, 941 (Fla. 2005).

¹⁹ *Ocwen* at 482.

²⁰ *Id.*



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requires “a definitive ruling on the record.” Remember that a reserved ruling, or a tentative ruling leaving open the opportunity to revisit the issue during trial, is not enough to trigger the protection of the statute.²¹ The trial court’s ruling must be definitive. Further, even if definitive, the ruling must also be reflected on the record, whether pursuant to a signed order or as part of a recorded transcript.

Preserving Error as to Improper Argument – If You Take the Third Strike, You’re (Usually) Out

Most trial practitioners are familiar with the case of *Murphy v. International Robotic Systems, Inc.*,²² in which the Florida Supreme Court attempted to clarify the circumstances under which improper argument by counsel could provide a basis for a new trial when the opposing party failed to contemporaneously object. Noting that several policy concerns²³ weighed against an exception to the contemporaneous objection requirement, the Court nevertheless recognized the “overarching concern” that a litigant receive a fair trial and that our system operate so as to deserve public trust and confidence. In attempting to strike a balance between the right to a fair trial and the competing policy concerns, the Court rejected a bright-line rule and concluded that an “escape valve” with a very narrowly defined parameter and extremely limited application was essential to maintain public trust in our jury trial system.²⁴

The *Murphy* Court held that a civil litigant may not seek relief in an appellate court based on improper but unobjected-to closing argument unless the litigant has at least challenged the argument in the trial court by way of a motion for new trial.²⁵ In order to receive a new trial, the complaining party must establish that the argument was improper, harmful, incurable, and so damaged the fairness of the trial that the public’s interest in our system of justice requires a new trial.²⁶ When granting a new trial based on unobjected-to closing argument, the trial court must specifically identify the improper arguments and the actions of the jury resulting from those arguments.²⁷ On appeal, the appellate court must apply an abuse of discretion standard in reviewing the trial court’s grant or denial of a new trial.²⁸

As with many multi-pronged tests developed by the courts in attempting to provide guidance to practitioners, the *Murphy* standard is much easier to recite than it is to apply.²⁹ It is an understatement to say that the “escape valve” has had its intended effect of providing relief only in a very narrow category of cases. Cases decided under the *Murphy* standard make it clear that, in the vast majority of cases, a motion for new trial based on unobjected-to arguments of counsel is highly unlikely to succeed. Rather than rely on this last resort, trial counsel should make contemporaneous objections to improper comments and follow up with appropriate requests for curative instructions and/or motions for mistrial. Although it is by no means clear, post-*Murphy* decisions from the Second and Third Districts suggest that a motion for mistrial made prior to submission of the case to the jury may be sufficient to avoid the need to resort to the *Murphy* escape valve.

Shortly after *Murphy* was decided, the Florida Supreme Court reviewed *Garbutt v. LaFarnara*³⁰ (*Garbutt I*), in which the Second District certified a question as to whether a contemporaneous objection is required for each instance of improper argument, or if the issue can be preserved by a motion for mistrial before the case is submitted to the jury. The Second District had affirmed an order denying Garbutt a new trial, but certified the question because it concluded there was merit to the position set forth in a concurring opinion by Judge Blue.³¹ Judge Blue described as follows the circumstances which he felt warranted a new trial.

In his motion for new trial, Garbutt listed thirty-four alleged instances of improper argument by LaFarnara’s counsel during the two-month trial.³² In its order on the motion for new trial, the trial court set forth fourteen instances of improper argument which it tested on the basis of fundamental error because there were no contemporaneous objections. Judge Blue concluded that at least some of the remaining twenty were either improper or borderline. After the improper comments were made, but before the final argument concluded, Garbutt’s counsel moved for mistrial based on the improper argument. Judge Blue suggested that the motion for mistrial should have preserved the error as to the cumulative effect of the improper remarks.³³

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²¹ *Tolbert* at 1016-1017 and *James v. State*, 33 Fla. L. Weekly D266, 2008 WL 140805 (Fla. 2d DCA Jan. 16, 2008) at n.3.

²² 766 So. 2d 1010 (Fla. 2000).

²³ These concerns included deterring further improper argument, preventing counsel from engaging in “sandbagging” tactics, precluding the possibility that counsel may refrain from objecting based on a belief that the improper argument actually hurt opposing counsel’s rapport with the jury, providing the trial judge with the optimal opportunity to stop such argument when it is made, and preventing confusion that can stem from appellate courts making “cold record” decisions regarding improper closing argument. *Id.* at 1026.

²⁴ *Id.*

²⁵ *Id.* at 1027.

²⁶ *Id.* at 1028-30.

²⁷ *Id.* at 1030.

²⁸ *Id.* at 1030-31.

²⁹ For examples of cases applying the *Murphy* standard, see *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1271-74 (Fla. 2006) (noting that “context is crucial” and reviewing the improper remarks against the totality of the circumstances, including the length of the trial); *Mercury Insurance Co. v. Moreta*, 957 So. 2d 1242, 1251-54 (Fla. 2d DCA 2007) (finding the challenged comments were

highly improper, repetitive and extensive, but neither harmful nor incurable); *USAA Casualty Insurance Co. v. Howell*, 901 So. 2d 876, 878-80 (Fla. 4th DCA 2005) (limiting review to comments identified in the motion for new trial; finding some of the comments to be clearly improper and others arguably so, but neither harmful, incurable nor damaging to the fairness of the trial); *Thompson v. Hodson*, 825 So. 2d 941, 946-47 (Fla. 1st DCA 2002) (assuming, without deciding, that the comments were improper, but concluding that the remaining requirements could not be met as cumulative harm and could have been cured if the party had objected to the first comment and thereby prevented further error); *Platz v. Auto Recycling and Repair, Inc.*, 795 So. 2d 1025, 1026-28 (Fla. 2d DCA 2001) (concluding that three of the six incidents of misconduct occurred outside the presence of the jury and thus could not have influenced the jury’s consideration of the case; noting that one comment drew an objection which was sustained; finding the remaining two incidents consisting of a loud voice at sidebar and a sardonic tone were not reflected in the record on appeal and thus could not have been so extensive or pervasive as to warrant a new trial).

³⁰ 754 So. 2d 727 (Fla. 2d DCA 1999).

³¹ *Id.* at 727.

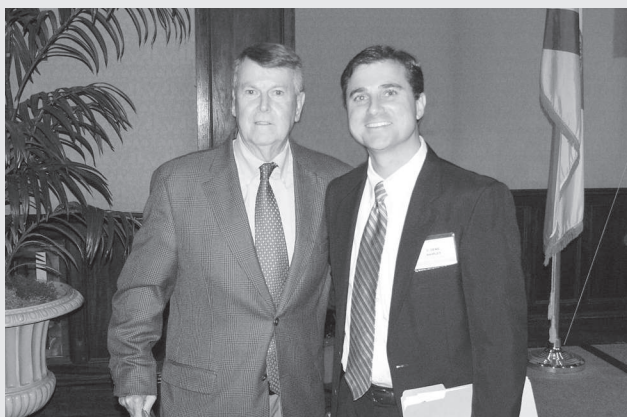
³² *Id.* at 728.

³³ *Id.*

HEARSAY



Dennis W. Archer, former President of the ABA and former Mayor of Detroit, spoke about diversity within the legal profession at the OCBA's February luncheon. His insights, gathered from more than thirty-five years in the legal field and public service, were of particular interest to members and guests.



Florida Supreme Court Justice Harry Lee Anstead presented the OCBA's professionalism awards to Judge Emerson R. Thompson, Jr., Council Wooten and Elizabeth McCausland at the March 27 luncheon. OCBA President Gene Shipley had an opportunity to speak with the Justice following the ceremony. Look for additional award photos in the next issue of *The Briefs*!



Judge Bob LeBlanc and teens from the Parramore Kidz Zone participated in the Pathways in Law event at the Orange County Courthouse in March. Judge LeBlanc, along with Judge Allen and the OCBA Law Week Committee, developed and are presenting various programs as part of a year-long series of events targeted at crime prevention and education about the legal system.

*Three it's a magic number
Yes it is, it's a magic number
Because two times three is six
And three times six is eighteen
And the eighteenth letter in the alphabet is R
We've got three R's we're going to talk about today
We've got to learn to
Reduce, Reuse, Recycle ...*

- Jack Johnson, *The 3 R's*

Happy Earth Day to all my Hearsay readers out there. Let's go ahead and launch right into this month's trivia question: In which year did the tradition start of designating April 22nd as a date for celebrating our planet? First person to e-mail the correct answer to me at nshannin@floridalawonline.com wins his or her name in print and the glory of having prevailed on a question of global proportions. Actually, the last question asked was of otherworldly proportions. Congratulations to **April** (how timely a name is that?) **Springer**, the sharp paralegal to GrayRobinson's **Trevor Arnold**, who pinged back the name of the born-mortal wife of Cupid on the first day the February *Briefs* came out. The answer fits a different April tradition that would occur on the first of the month: Psyche. Congrats, April!

Okay, but back to our main topic: Mother Earth. Regarding the first Earth Day, *Time* magazine quoted a Daughter of the American Revolution as saying, "Subversive elements plan to make American children live in an environment that is good for them." Gotta love a quote that says as much about the speaker as it does the subject. Unfortunately, the "subversive elements" plan has not yet succeeded, since our children can not yet be accused of living in an environment that is good for them. Still, the changes made, both large and small, have proven to be steps in the right direction. But how about us? Other than taking on Exxon in a lawsuit, what can we do to "give a hoot" and "pitch in"?

REDUCE: Kudos to **Dave "Learned Hand Rocks" Cannella** and his partners at **Carlton Fields**. Why? While they are unlikely to be the first firm to "Go Green," they are the first one to specifically brag to me about it. And I think that's great. Most of my entreaties for self-reporting of notable notes nets me blurbs on lawyer *this* making list *that*. This was quite different, since it was announcing a multi-point plan to, essentially, make the world a better place. The reduction in energy use, which was the primary point, includes joining the EPA Green Power Partnership and the Energy Star program, the latter designed to reduce power usage, the former to require purchase of Renewable Energy Credits. Many acronyms followed, but it all equaled a good start for Mother Earth.

Other firms are encouraged to tell me of their green derring-do. While I may not print another Earthday Everyday Hearsay column, at least until next year, I may compile the good ideas for a separate article or at least share the best ones for firms to copycat at their earliest possibility. But back to the three R's...

—**Nicholas A. Shannin**

REUSE: Boone High School's Law Magnet rocks! Led by the fearless **Cindy** "no relation to Mike" **Schmidt**, current lay trustee for the Legal Aid Society, it has one organized crew of mock-trialing legal beagles in training. To aid that quest, the program is seeking fiction work on legal themes (i.e., authors such as John Grisham, Barry Scheck, etc.) and gently owned sets of law books to assist these future OCBA members. If you have such items that you don't need anymore, don't pitch them - help the kids and the environment at the same time. E-mail Cindy at cynthia.schmidt@ocps.net, let her know what you have and she'll see whether your books are ones they can reuse.

Another example of reuse, you request. For that I turn to the Social Committee, which has quite an event planned for May 15th in conjunction with the OCBA Entertainment Law Committee - "Lawyers Rock!" The Grammy's may have been held in February (winner Amy Winehouse: Billie Holliday's voice, Dean Martin's liver), but we can reuse the theme again to celebrate good music and raise funds equally for the Legal Aid Society and the GRAMMY charity for struggling artists. Whether Kanye shows or not, this promises to be one cool party. (Don't act like I never told ya'.) Obtain details from event chair **Nick** "I've got great first name" **Nanton** at NDNanton@DicksNanton.com.

RECYCLE: My firm has started to use a new program that allows us to recycle our aluminum, plastic and glass, much like we all (should) do at home. Considering the number of cans my six-lawyer firm alone goes through in a week, if every firm took the small amount of time to take advantage of this service, the collective results would be impressive.

For an altogether different version of recycling, let's bring back my twice-used theme from Hearsay column number one - everyone's favorite pre-school singing trio, the Doodlebops! Why? Because they're complete, that's why! We started off with OCBA Prez-elect **Tad** "Keats and" **Yates** getting the dubious honor of getting tabbed as straight-laced Blue, while current OCBA Foundation Prez **Tom** "Bill Sublette uses a kickstand" **Wert** got saddled with the pseudo-anarchistic Yellow. Who, then, would be the free-spirited, high-energy Purple? By triple-nominated unanimous consent, congratulations go to our own *The Briefs* editor **Kristyne** "K-Square" **Kennedy**, who is perhaps the most perfect of the three for her role. Augustus and company move over, we've got a new triumvirate in town, and they are ready to rock until recess is over! Hmmm, Gala 2009, anyone?

Alright, that's it for April. Please remember to send your information, ideas, gossip or trivia answers to me at nshannin@floridalawonline.com. Celebrate Earthday Everyday, Reduce, Reuse and Recycle, and I'll see you in May.

Nicholas A. Shannin is a Board Certified Appellate Attorney and a partner with Page, Eichenblatt, Bernbaum & Bennett. He has been a member of the OCBA since 1995.



The YLS and the Chartered Financial Analysts (CFA) Society of Orlando rounded up a great group of "cowboys" for their night out at the Cheyenne Saloon on March 28th. Members of the YLS and CFA enjoyed a great time at the celebrated Church Street watering hole!



Jack Keller, Elizabeth McCausland, Meghan Kane, Cory Taylor and Brett Renton.



Judge Mike Murphy and Lawrence Kolin.



Judge Mike Murphy, Kristen Cox and Woody Rodriguez.



Wild horses couldn't drag these folks away from the saloon!

In its opinion, the Supreme Court noted that it had recently addressed in *Murphy* issues similar to those posed in the certified question in *Garbutt I*.³⁴ The Supreme Court remanded *Garbutt I* to the district court for reconsideration in light of *Murphy*.³⁵ In a concurring opinion authored by Justice Pariente, three of the justices expressed their belief that the certified question had not been answered by *Murphy*.³⁶

The concurring justices suggested that the Supreme Court should clarify that the failure of the adverse party to contemporaneously object to each improper argument is not fatal to appellate review.³⁷ The concurring opinion shed a little more light on what occurred during the trial, indicating that Garbutt objected to six comments contemporaneously and to ten comments during a recess before moving for a mistrial based on cumulative error.³⁸ The concurring justices felt that the fact that a motion for mistrial was made prior to conclusion of the closing argument was a “significant difference” from those cases where no objection was made until an adverse verdict was returned.³⁹ The opinion concluded with a reference to Justice Pariente’s concurring opinion in *Murphy*, in which she stated that if objections were made to some of the closing argument remarks and those objections were overruled, an appellate court would not be precluded from reviewing the cumulative effect of the objected-to and unobjected-to remarks.⁴⁰

On remand to the Second District, Judge Blue authored the majority’s decision in *Garbutt II*.⁴¹ Judge Blue noted that *Murphy* provided guidelines for granting a new trial based on unobjected-to closing argument, referring to failure to object during closing argument “or request a mistrial during or at the close of such argument.”⁴² Based on this language, the *Garbutt II* majority concluded the error was preserved by the motion for mistrial in that case and that the *Murphy* analysis for unpreserved error was unnecessary.⁴³ LaFarnara sought review in the Supreme Court, but the Court declined to accept jurisdiction.⁴⁴

Interestingly, only one appellate decision has cited *Garbutt II* in the several years since it was decided. In *Wyatt v. Marcus*,⁴⁵ decided in 2007, the Third District cited both *Murphy* and *Garbutt II* in holding that the *Murphy* factors were only to be considered when there is a failure to object during the argument or a failure to request a mistrial based

on such statements during or at the close of the argument.⁴⁶ Because all of the improper comments cited by the trial court in its order granting a new trial were addressed through the court’s consideration of motions for mistrial both during and at the end of opposing counsel’s closing argument, the Third District concluded in *Wyatt* that the *Murphy* standard did not apply.⁴⁷

In light of *Garbutt II* and *Wyatt*, it is difficult to imagine any justification for failing to at least move for a mistrial when there are multiple instances of improper conduct. The standard for granting a mistrial is high,⁴⁸ but it is not as high as the stringent *Murphy* test. The motion for mistrial must itself be timely – made during or immediately after the improper argument – in order to preserve the issue for appellate review.⁴⁹

It remains clear that preservation of an issue for appeal will almost always be tied to contemporaneous objection.⁵⁰ If the objection is sustained, it should be followed with a request for a curative instruction and/or a motion for a mistrial. If no contemporaneous objection is made to improper argument of counsel, at the very least a motion for mistrial should be made before the case is submitted to the jury. While there is no guarantee, *Garbutt II* holds open the slim possibility that a timely motion for mistrial may salvage a right to appeal and avoid the ultimate pitfall of having to rely on the *Murphy* “escape valve” as the basis for a new trial.

³⁴ 795 So. 2d at 957.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 959.

³⁸ *Id.* at 957.

³⁹ *Id.* at 958.

⁴⁰ *Id.* at 959, citing *Murphy*, 766 So. 2d at 1036 n.32.

⁴¹ 807 So. 2d 83 (Fla. 2d DCA 2001).

⁴² *Id.* citing *Murphy*, 766 So. 2d at 1010.

⁴³ 807 So. 2d at 83.

⁴⁴ *LaFarnara v. Garbutt*, 829 So. 2d 918 (Fla. 2002).

⁴⁵ 949 So. 2d 1204 (Fla. 3d DCA 2007).

⁴⁶ *Id.* at 1205.

⁴⁷ *Id.*

⁴⁸ Although the trial court has broad discretion in deciding whether to grant a mistrial, it should not do so “unless an absolute legal necessity to do so exists.” *Dorsey v. Reddy*, 931 So. 2d 259, 265 (Fla. 5th DCA 2006).

⁴⁹ *Id.* (holding the trial court did not err in denying a motion for mistrial made one day after improper testimony was offered and no objection was made).

⁵⁰ *Bocher v. Glass*, 874 So. 2d 701, 704 (Fla. 1st DCA 2004).

Gary L. Formet, Sr. Eleventh Annual Memorial Golf Tournament Arnold Palmer's Bay Hill Club & Lodge

The eleventh annual golf tournament in memory of Judge Gary L. Formet, Sr. will be played May 19, 2008, again at the fabulous Bay Hill Club. A celebration dinner with entertainment will be held at the club the night before the tournament. Tournament proceeds and other donations received enable the Formet Foundation to give thousands of dollars annually to Central Florida families suffering the emotional and financial burdens of the care of their seriously ill children. In 2007, greater than 50 such families received funds from the Formet Foundation, with requests for assistance normally processed in one to two days.

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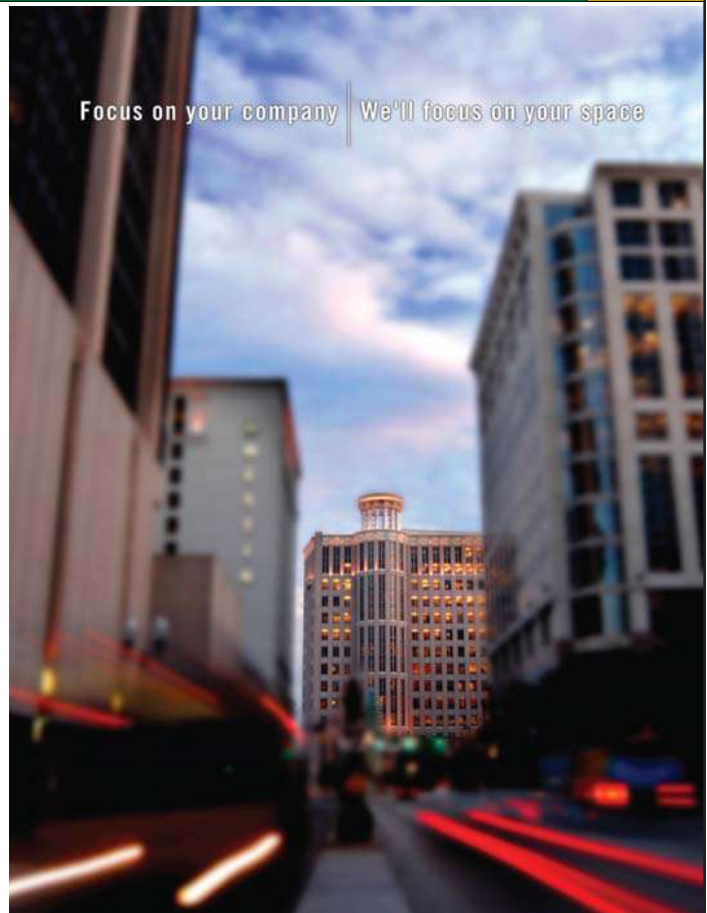
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YLS on the Move!

Spring Cleaning



Taylor C. Kessel

The warmth of the spring season is almost here and we can finally put the cold weather clothes in the back of the closet and break out the swimsuits and the summer clothes! I don't know about you, but I have had enough of the cold weather and I can't wait to get back to the beach. And before you know it, the fresh-faced law clerks will be in town to help with all those "research projects" you have been meaning to get to . . . so stock up on that sunscreen and splurge on a new set of sandals, summer is right around the corner and that means vacation time! But before we get too sidetracked with taking time off from work, let's wrap up the first few months of 2008 and give you an idea of what's coming up with YLS.

Thanks to your help at our February and March YLS luncheons, we received numerous donations for the Helping the Homeless project and we will continue to take donations by collecting new travel-sized toiletries.

Don't forget to save the date for Thursday, April 17, and the April YLS Luncheon. Former Attorney General Bob Butterworth will be the special guest speaker. Butterworth is now the head of DCF and is in the process of revitalizing the department. He has had one of the most successful legal careers of any Florida lawyer. He was a sheriff, a judge, the attorney general for 16 years and the dean of St. Thomas law school. If you are interested in attending the April YLS luncheon, please RSVP to ocbayls@gmail.com by Tuesday, April 15. The cost is \$18 if you RSVP on or before April 15, \$20 at the door, or \$10 for sole practitioners, law students and government attorneys and judges.

Whether it's a friend, a family member or the neighbor down the street, we all know someone who has been touched by cancer. Many of us are concerned about this disease and want to do something to make a difference. That's why YLS takes part in the American Cancer Society Relay For Life®. It's an event that brings together the whole community and helps raise funds for the fight against this disease. We would love for you to join us as part of the YLS Relay team. On Friday, April 18, 2008, we'll have a fundraising party at a downtown establishment TBD, with live entertainment and refreshments. On Saturday, April 19, 2008, we will represent YLS at the Relay for Life in Winter Park – we'll walk around the track, bond with our fellow team members and meet lots of new people. There is an incredible tribute to cancer survivors and caregivers that starts off the afternoon and a moving ceremony at sunset honoring those who have fought the disease. It's a day full of fun, hope and remembrance. If you would like to join YLS in its fight against cancer, please contact Samantha Powers at spowers@foley.com and/or join our team. Donations are

always welcome from anyone!

The Young Lawyers Section of the OCBA invites you to its annual Evening with the Judiciary, a casual get together with the state and federal judiciary. Please join us for an evening of Florida-inspired cuisine, beer, wine, refreshments and great conversation in a relaxed atmosphere. This year's annual Evening with the Judiciary will be held on Tuesday, April 29, 2008, from 5:30 p.m. till 8:30 p.m. at Doc's Restaurant (across from ORMC). The price is \$30 for government lawyers and solo practitioners and \$35 for everyone else. The deadline to RSVP for this great event is Wednesday, April 16. For further information and to RSVP, please contact Mike Remensnyder at miker@ocbanet.org. Be on the look out for more information and a registration flyer in upcoming YLS e-mail blasts.

The Guardian *Ad Litem* lunchtime training sessions continue this month on April 8 and April 22 from noon to 1:30 p.m. at the Eddington Ministry Center, 3rd floor, room 310A. If you are handling a GAL case, please join us for an informative lunch training session at the First Presbyterian Church of Orlando located at 106 E. Church Street. Lunch will be provided to all those in attendance and you will receive one CLE credit. The topics for this month's training sessions will be "Helping the Medically Needy Child: An Introduction to Children's Medical Services" presented by Children's Medical Services, and "GAL 101: The Basics of Serving as a GAL in a Dependency Case" presented by Diego "Woody" Rodriguez. For OCBA members, the training is free. For non-OCBA members participating in the LAS *pro bono* program, the training is free. Pre-registration is required for the free lunch and requested for training (or subject to space availability if not pre-registered). For more information, please e-mail ctucker@legalaidocba.org or mcarbo@legalaidocba.org or mvanderhorst@legalaidocba.org.

The Great Oaks Village Fun Day/Law Day is scheduled for May 10, 2008, from 10:00 a.m. to 2:00 p.m. Great Oaks Village is a foster care facility that houses over 100 abused and/or neglected children in Orange County. In addition to the usual fun in the sun and Olympic Fun Day events, YLS will be holding a Law Day event where we will hold interactive sessions with the children about law, democracy and human rights. The day will conclude with the presentation of new computers and printers to Great Oaks Village.

As a further reminder, the Florida Bar Young Lawyers Division is always accepting submissions for its quarterly newsletter, "Across the Bar." If you have an article or photo of interest to young lawyers across the state that you

Continued on page 29



What We Do . . .

Helping Build a New Life

— *Robert B. Storrs, Jr.*



Like all brides, Anne Marie had high hopes for her marriage. It wasn't long, however, before she realized that she had made a terrible mistake. She worked as a waitress, supporting her husband and two children while he completed a local mechanic's school. Every Friday he would take her pay check, ostensibly to pay bills, and leave her with nothing but the coins she collected from tips. But when their utilities were disconnected, she discovered he had been keeping all the money for himself. Shortly after that, they were evicted from their apartment for non-payment of rent. The family of four then moved into a single motel room that offered weekly rates. In the meantime, her husband graduated from mechanic's school, but made no attempt to find employment. Anne Marie worked double shifts to provide basic food and shelter for her family. Life was difficult. Tensions ran high. Then the physical abuse began.

One night, after a drinking bout, her spouse became enraged at Anne Marie's refusal to let him drive and attacked her physically. The next morning, her employer took one look at her swollen jaw and drove Anne Marie to the emergency room at the nearest hospital. When pressed, she claimed her injuries were accidental, but the physician rapidly determined otherwise. When he announced his intent to file a police report, she checked herself out of the facility before officers could arrive. She hoped that her husband's violent outburst was a one-time thing. Her hopes were dashed. From that point on, Anne Marie often had to conceal bruises and cigarette burns under long sleeved clothing. When they were once again evicted for non-payment, she knew that she could not endure the emotional and physical abuse any longer. A friend had told her about the Legal Aid Society, and she summoned up her courage and made an appointment.

The Society, through staff attorney Tenesia Connelly Hall, represented her in a contested petition for an injunction for protection against domestic violence. A permanent injunction was issued in her favor giving her, among other things, custody and support. This did not stop serious ongoing harassment problems with her spouse, however. For instance, he had placed all of the family's belongings, including the children's clothes and possessions, in a storage

unit. After the injunction was filed, he excluded the family from having access to the unit, leaving them with very few clothes or items necessary for their day to day living.

As a result, immediately after the entry of the domestic violence injunction, the matter was transferred to senior staff attorney Angel M. Bello-Bellini for representation in a dissolution of marriage action. Resolving all aspects of this relationship took more than a year and a half in a heavily contested dissolution, in which the husband sought, among other remedies, custody, support, payment of sundry bills, etc. After lengthy motion practice, orders were obtained returning many of the items held in the storage unit (some had disappeared), and eventually, at a final hearing, the court denied all of the husband's contentions and awarded Anne Marie custody and support. It further rejected the husband's argument to have her transport the children to the east coast for visitation as well as requiring any payment for the debts accrued, the responsibility for all debts being placed on the shoulders of the husband based on his mismanagement of all of the family's funds and his role in the creation of these debts.

During the ongoing litigation, legal assistant Sandi Summer, who is well-versed in the problems of recovering domestic abuse victims, helped Anne Marie to benefit from many of the services provided by the

local spouse abuse shelter. With Sandi's guidance, Anne Marie was able to empower herself, increase her ability to assist in the preparation of her case and withstand a long and painful period of litigation. She also received some educational services and financial assistance, which enabled her to pursue a course of studies at a local community college. More urgently, she received financial and other assistance that helped her to better provide for her family.

Towards the end of the dissolution, Anne Marie was additionally threatened with an improper eviction from her newly rented home, which subsequently was found to be infested with termites so numerous that they could be found crawling on the children while they slept. Staff attorney Michael Resnick represented her in this matter and obtained a settlement giving her sufficient time to move as well as



Senior staff attorney Angel M. Bello-Bellini of the Legal Aid Society and client Anne Marie Sandlin.

Continued on page 29

YLS on the Move! *Continued from page 27*

would like to be considered for publication, please send it to Chelsie Roberts at croberts@fordharrison.com.

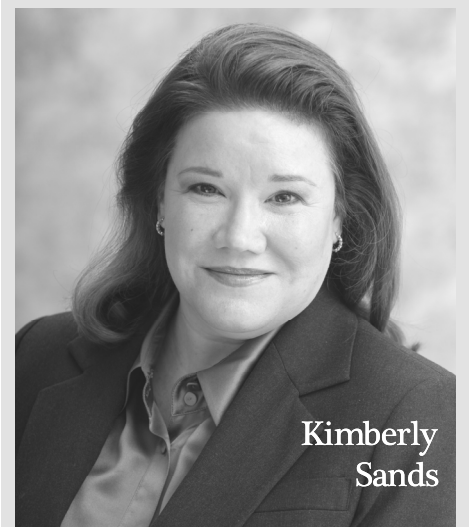
With the spring months coming to a close and summer creeping up, this is also a time for cleaning up and organizing your calendar. To help with that task, here are a few important dates for upcoming YLS events:

- June 7 - YLS Summer Pub Crawl
- June 19 - YLS Lunch
- June 20 - Afternoon at the State Courthouse
- July 17 - YLS Lunch and Law Clerk Reception
- August 8 - YLS Happy Hour

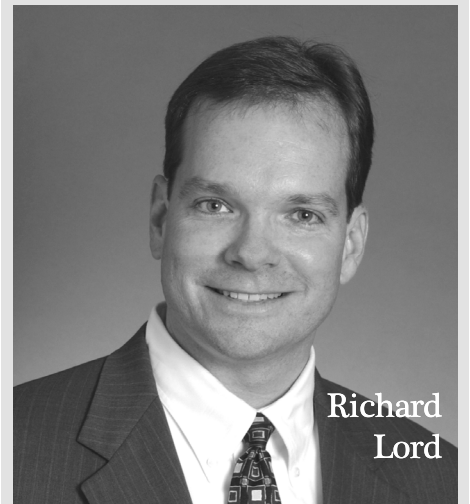
The Boone High School Law Magnet Program and the coordinator of the Law Program are looking for donations of fiction and nonfiction books with a law theme or a law angle. If you have books or materials to donate, please e-mail Cindy Schmidt at cynthia.schmidt@ocps.net so she can arrange to pick them up. If you have a number of books, she can put together a tax deductible letter for your use with the IRS.

If you are not receiving the YLS e-mail blasts, please send an e-mail to ocbayls@gmail.com to sign up. Also, if you have an exciting story to share about a YLS member, or know of an award or accolade presented to one of our members, please e-mail me and I will be sure to include it in the next month's edition of YLS on the Move. Until next time, if you have any questions or want to find out more about our section, please contact me, Taylor Kessel, at 407-540-7595 or e-mail at taylor.kessel@cnl.com.

Taylor C. Kessel is an attorney in the acquisitions department at CNL Income Company, LLC. He has been a member of the OCBA since 2005.



**Kimberly
Sands**



**Richard
Lord**



**Michelle
Jernnigan**

What We Do . . . *Continued from page 28*

several thousand dollars in relocation assistance from the landlord.

A few months thereafter, Anne Marie was asked to participate in a Judicial Conference held in Orlando, where, with preparation from attorney Bello-Billini, she spoke to approximately 400 judges from the courts of the state of Florida about her experiences in the court, and about what it is like to be a poor person going through a complicated and seemingly overly slow process (as seen from the eyes of the litigant), as well as her views regarding needed reforms.

It has been a long and sometimes painful process, but Anne Marie is making her dream of a stable and safe family come true. She has a steady job, an attractive small home, and is only a few hours away from graduation at her community college. Her major is Criminal Justice, and her desire is to become a Victim's Advocate. "I didn't have anyone to support or help me," she said in a recent interview. "I felt completely alone until I came to Legal Aid. They became my 'family' through this whole ordeal. Without them [Angel, Tenesia, Mike and Sandi], I don't think I would have made it."

***Congratulations, Anne Marie!
Thanks, Angel, Tenesia, Sandi and Mike***

Robert B. Storrs is the Director of Development for the Legal Aid Society of the OCBA. He has been a member of the OCBA since 2007.

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Insurance Law Committee

Overview and Recent¹ Insurance Cases



Dennis J. Wall, Esquire

Commercial General Liability (“CGL”) Issues

Cooperation: Under Florida law, the liability insurance company has a duty to take reasonable steps to attempt to obtain the insured’s cooperation. *See Continental Cas. Co. v. City of Jacksonville*, 2006 WL 2048249 *5 (M.D. Fla. July 20, 2006)(Richardson, Magistrate Judge).

Notice: Florida law generally raises a presumption of prejudice if there is late notice of a claim against the insured-policyholder. However, as a practical matter, the parties benefit by introducing evidence on the issue of prejudice, one way or the other, where there is likely to be a holding or finding of late notice. *See, e.g., Donovan Constr., Inc. v. Vacker*, 938 So. 2d 597, 598-99 (Fla. 4th DCA 2006)(Late Notice issue under a CGL insurance policy, and underlying liability claim was based on the presence of mold; summary judgment for insurance company was reversed).

All Liability Policies - Including EPLI with a Duty to Defend

Florida allows a liability insurer to claim reimbursement of certain *uncovered* defense expenses, such as where (1) the liability insurance company “timely and expressly” reserved a right to later ask for reimbursement of the liability insurance company’s defense costs incurred in defending clearly uncovered claims, (2) the policyholder clearly accepted the insurance carrier’s offer of a defense in the face of such a right, (3) a court determines that there was never any duty to defend the uncovered claims. *Jim Black & Assoc’s, Inc. v. Transcontinental Ins. Co.*, 932 So. 2d 516, 517 (Fla. 2d DCA 2006).

Florida Allows Expert Witnesses to Testify on Insurance Issues - Including Expert Witnesses who are Lawyers

In *Barry v. GEICO General Insurance Co.*, 938 So. 2d 613, 615-17 (Fla. 4th DCA 2006), an attorney-expert witness testified to opinions that GEICO did not act in bad faith in that case, that the injured claimant “made it clear that she was not intending to settle” and that the actions of the Plaintiff and her counsel “were inconsistent with a willingness to settle.”

On the strength of the holding in *Barry*, the U.S. District Court for the Middle District of Florida subsequently denied Plaintiffs’ motions “to exclude evidence, argument, and references regarding the motives or conduct of Mr. Ackley’s attorney, Theodore Leopold, and the attorney’s paralegal, Joe Vaccaro.... This Court agrees that evidence and argument regarding the motives or conduct and [sic] Mr. Leopold and Mr. Vaccaro is relevant and should not be prohibited.” *Mendez v. Unitrin Direct Property & Casualty*

Insurance Co., 2007 WL 2696795 *3-*4 (M.D. Fla. Opinion Filed Sept. 12, 2007).

Other States also Allow Attorney-Expert Witnesses to Testify on Insurance Issues

Similarly, in *Johnson v. Tennessee Farmers Mutual Insurance Co.*, 205 S.W.3d 365, 371-72 (Tenn. 2006), an attorney-expert testified to opinions that the insurance company “failed to adequately evaluate the case, that it should have settled the case, and that its failure to do so was in bad faith.”

Attorney-Expert was Proffered on the Issue of Liability Policy Limits that were Reduced as Attorney’s Fees and Costs were Incurred

In *Pueblo Country Club v. AXA Corporate Solutions Insurance Co.*, 2007 WL 951790 *5 (D. Colo. March 28, 2007), a Colorado District Court held that a jury is “entitled” to hear the testimony of an attorney-expert witness presented by the policyholder that the insurance company defendant knew “that attorneys’ fees and costs were reducing the available policy limits,” even though the policyholder allegedly was exposed to a judgment in excess of the same policy limits which were being reduced by the insurance company’s instructions to defense counsel that resulted in incurring the fees and costs.

Recent Florida Case Law Regarding Hurricanes and Recurring Homeowner’s Policy Issues

Vanguard Fire and Casualty Co. v. Golmon, 955 So. 2d 591 (Fla. 1st DCA 2006): Hurricane Ivan totaled the residence of Roy and Kerry Golmon in 2004. Vanguard was the Golmon’s homeowner’s insurance carrier. Vanguard paid part of its policy limits for the Golmon’s residence, a fact which is buried in the opinion. *See Vanguard*, 955 So. 2d at 593. However, Vanguard left unpaid some of the loss to Mr. and Mrs. Golmon’s dwelling, and did not pay any part of the Golmon’s other claimed losses including Other Structures, Personal Property, and Loss of Use. *Id.* at 594. Vanguard denied any remaining coverage for a reason central and common to many Catastrophe Claims Coverage disputes: that the loss to the policyholder’s property was caused by both a covered cause or peril under the policy (*i.e.*, wind) and an uncovered cause or peril (*i.e.*, water). . at 593.

The Golmons sued Vanguard for breach of contract and for Florida statutory bad faith. Vanguard filed a motion to

Continued on page 32

¹ Cases decided no later than one year before the OCBA Insurance Law Committee’s June 2007 seminar; updated for *The Briefs* April 2008 issue.

Side Bar

Jessica K. Hew

Spring has sprung! Get out and enjoy some networking!

Central Florida Paralegal Association, Inc. (CFPA) hosts monthly lunches at four locations: Winter Park/Maitland (2nd Thursday of the month), Downtown Orlando (2nd Wednesday of the month), South Orlando (Quarterly) and Altamonte Springs (final Friday of the month). On April 2, 2008, CFPA will present "Getting the Most out of Your Database," and on April 22, 2008, "Electronically Stored Information - Federal Rules of Civil Procedure." CFPA's Community Service project for April is the Cystic Fibrosis Foundation, and the organization will again host its monthly Membership Mixers/Happy Hours on the 3rd Thursday of the month. For more information on any and all of these events, please visit CFPA's website at www.cfpainc.org.



On March 7th, CFAWL presented the Children's Home Society with a check for \$8,722.80 to be used in support of A Place For Children at the Orange County Courthouse. The funds were raised through CFAWL's Professional Women's Exchange held on February 27, 2008. Over 200 women attended the professional event; CFAWL is already planning for next year! Pictured above are members of CFAWL's PWE committee along with representatives from the Children's Home Society, including CHS's Executive Director, Andry Sweet, and Program Operations Director, Chris Connell.

Donell Hicks, Esq., Chair of the Paul C. Perkins Las Vegas Night, announces the annual event will be on May 17, 2008, from 8:00 p.m. to 11:00 p.m. at the Disney Beach Club Resort. Tickets are currently \$50.00; after May 1, 2008 tickets are \$75.00. Heavy hors d'oeuvres are included with a cash bar. Semi-formal attire is requested. Proceeds from the event will benefit the PCP Bar Scholarship Fund. Tickets may be purchased at www.pcpbar.com.

The Central Florida Gay and Lesbian Law Association (CFGLLA) will participate in AIDS WALK Orlando 2008, benefiting the Hope and Help Center of Central Florida (hopeandhelp.org), on Saturday, April 19, 2008, at Lake Eola, Downtown Orlando, with registration at 8:00 a.m., followed by the walk at 9:00 a.m. Over the past three years, CFGLLA walkers have raised thousands of dollars to benefit Hope and Help. Please e-mail Ken Bryk at kbryk@flabar.org if you will be participating.

Have a great April!

If you have any legal organizational news to share, please e-mail Jessica K. Hew at jhew@grahambuilder.com.

Jessica K. Hew is a partner with Graham, Builder, Jones, Pratt & Marks, LLP. She has been a member of the OCBA since 1995.

Insurance Law Committee Continued from page 31

dismiss the statutory bad faith counts. On appeal, the First District Court of Appeal noted that "the trial court denied the motion to dismiss, finding that coverage was not in dispute, because counsel for Vanguard had admitted at the hearing that Vanguard was liable for at least some amount to the Golmons." *Id.* at 593-94. When Vanguard paid part of the Golmon's claims, Vanguard apparently admitted that at least the part it paid was covered under the policy.

Nonetheless, the court in *Vanguard* reached two holdings under established Florida insurance law: (1) establishing insurance coverage is required in order to pursue statutory bad faith claims and (2) the insurance company would be prejudiced if it was forced to defend itself simultaneously on the contract claim and on the bad faith counts. *Id.* On the first issue the appellate court held: "Both the existence of liability and the extent of damages are elements of a statutory cause of action for bad faith that must be determined before a statutory cause of action for bad faith will lie." *Id.* On the second issue (in the context of quashing the trial court's order), the court further pointed out that the trial court should consider abating, but not dismissing, the statutory bad faith claims against Vanguard while the case went forward on the contract claims in which the issue of coverage will be determined. *Id.* at 595.

The Second District recently announced its agreement with both of these holdings. First, "[t]here is an abundance of case law that holds that a first-party bad faith claim does not accrue until there has been a final determination of both liability and damages in an underlying coverage claim." *State Farm Mutual Auto. Insurance Co. v. O'Hearn*, 2008 WL 612311 *2 (Fla. 2d DCA Opinion Filed March 7, 2008). Second, "[a]n allegation that an insurer has paid a portion, but not all, of the damages that it allegedly owes does not constitute a legally sufficient allegation that the amount of damages has been finally determined." *Id.* In *O'Hearn*, the Second DCA also noted, however, that it disagreed with any implication arising from the First DCA's decision in *Golmon* that certiorari can be available in Florida as a vehicle to review an order denying a motion to dismiss "even when the cause of action is one for first-party bad faith." *Id.* at *3.

Conclusion

This is an overview of new cases decided in many of the areas that were addressed by particular speakers on specific topics at our June, 2007 Insurance Law Committee Seminar sponsored by the OCBA, "Survey of Insurance Issues That EVERYONE Should Know." The speakers will address many general principles applicable to their specific topics in articles to be published in upcoming issues of *The Briefs*.

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Dennis J. Wall has been a member of the OCBA since 1978.



Presentation Skills for Lawyers

Punch a Juror in the Mouth



Elliott Wilcox

You only get one chance to make a first impression.

Whether you like it or not, your audience judges you based upon their first impressions. Your first impression affects how much they'll listen to you, how much they'll like you, and whether or not they will find you credible. A bad first impression isn't necessarily set in stone, but it takes a tremendous amount of effort to overcome someone's initial "gut reaction," so that means a negative first impression can taint every other interaction you'll have with your audience. As an attorney, one of the most important opportunities you'll have to create a strong first impression is when you deliver the opening statement in a trial or hearing.

So, if first impressions are so important, why do so many attorneys present such **lousy** first impressions during opening statements?!?

Think about the last 10 opening statements you heard. Out of those 10 openings, how many times did the attorney take advantage of the power of "primacy" and create a powerful first impression? Probably not many, right? In most cases, attorneys completely **waste** the first moments of their opening statements. How many times have you heard an opening statement that started like this:

- "An opening statement is like a roadmap..."
- "Before I begin, let me remind you that what Mr. Wadsworth said is not evidence, and what I say isn't evidence, either..."
- "My name is James Minster, and it's my privilege to represent Kyle Lauten..."

[Yawn!] What a wasted opportunity! The first moments of your opening statement serve the same purpose as the first line of a book: it should grab the decision-makers' attention and give them a compelling reason to listen to you. Think of how great novels grabbed your attention with their opening line:

- "All happy families are alike; each unhappy family is unhappy in its own way." (*Anna Karenina*)
- "In our family, there was no clear line between religion and fly-fishing." (*A River Runs Through It*)
- "Whether I shall turn out to be the hero of my own life, or whether that station will be held by anybody else, these pages must show." (*David Copperfield*)
- "It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us, we

were all going direct to Heaven, we were all going direct the other way – in short, the period was so far like the present period, that some of its noisiest authorities insisted on its being received, for good or for evil, in the superlative degree of comparison only." (*Tale of Two Cities*)

(Dickens not only knew he how to start a novel, he knew how to finish one, too. Check out the closing line: "It is a far, far better thing that I do, than I have ever done; it is a far, far better rest that I go to, than I have ever known.")

All of those lines are a lot better than, "May it please the court," don't you think?

Don't waste the initial moments of your opening with drivel or blather. Instead, follow the advice of Judge Pat Siracusa, who tells lawyers to "punch a juror in the mouth" (figuratively, of course) with their opening comments. What he means is that your opening salvo should grab the jurors by their collars, pull them in, and give them a reason to pay attention to everything else you have to say. A great way to grab their attention is to begin with the equivalent of, "I've got a story I want to tell you..." For example, look at these opening lines:

- "It's a warm July afternoon. Mike Thompson thinks that he's going outside to fix his sprinkler system. But he's mistaken. His neighbor has been drinking, and he's got other plans for Mike..."
- "It's an early spring morning, and Julie Malcolm's life is about to be changed forever..."
- "Let me take you back to an early December morning, just three years ago. There are only two more weeks until Christmas, and 7 year old Bobby Sheridan is eagerly awaiting tonight's trip to the mall where he'll get to sit in Santa's lap and tell him exactly what he wants for Christmas. But because of a driver who is more focused on his Blackberry than where he's driving, Bobby will never get to tell Santa what he wants."
- "Mike Richards is a proud man. Too proud. And pride can lead a man to take crazy risks."
- "It's early March of last year, and Roger Wooden is the most successful salesperson in his company. He's also the only gay salesperson in his company. And his co-workers can't get that fact out of their heads."
- "Lisa Hammish exercised every day. She ate healthy

Continued on page 35



Financial Planning

How Fees Negatively Impact 401(k)s *The little costs that eat away at your retirement savings.*



Andrew C. Orr, CFP®, CLU, ChFC, AIF®

Your 401(k) offers you an outstanding retirement savings vehicle ... with fees attached. Some of these fees are hard to detect unless you read the fine, fine print about what's going on with your investments. Over time, those fees will actually cut into your retirement savings potential.

How high are these fees? Typically, 401(k) annual fees run from .25% to 1.5%. I have seen fees even higher, upwards of 3% or more. The fees are subtracted right out of the savings in your account, and there is no requirement to notify you about them: when you get your quarterly 401(k) statement in the mail, you will generally find no line-item expense labeled "fees." The bulk of these fees are for investment services. Most people who invest in 401(k)s invest in the major mutual funds and have to pay these investment fees by law. (In response, some corporations have opted to use only low-cost index funds to give employees lower-cost options.) Some plans also charge fees for legal, administrative, record-keeping and even advertising costs, with these fees also coming out of your account without notice.

The cost to you. Over a 20- or 30-year period, these fees can dramatically affect the compounding of your assets. The Department of Labor offers an example: if you have \$250,000 right now in your 401(k) and just let it sit there, and your investment returns average 7% across the next 35 years with 0.5% annual fees, you will end up with \$2,270,000 in 2042. But if those annual fees are set at 1.5%, you will end up with only \$1,630,000 in 2042. A 1% difference in fees and expenses would leave you with 28% less money for retirement. Wow.

How are fees determined? 401(k) plans, like cars and life insurance, are *sold*, usually by sales representatives of financial companies such as life insurance agents and brokers of Wall Street firms. So, a huge part of the fee structure of your 401(k) plan relates directly to their choice and the amount of compensation they will be paid by the plan for their service to the plan. There is literally a "cafeteria of compensation options" made available to these brokers by the 401(k) companies to pick and choose from to determine how they will be paid and in what amount. Understanding these pay methods is the first step to getting a handle on fees.

The most common compensation choice for a sales rep to choose is an asset-based fee. This is a fee that is calculated by multiplying the plan's total asset balance by a percentage amount. This is typically paid in quarterly installments. A reasonable asset-based charge would be,

for example, .50% of assets, or even less on larger plan sizes in excess of \$5,000,000. Yet I have seen these as high as 1% or 1.5%, which is excessive in my view.

Additionally, commission brokers can dial-in added compensation during the selling process. For example, it is common for commissioned insurance agents and stock brokers to get paid a "front load" commission on any assets that are transferred from the old plan into the new plan they are selling. What I commonly see is a 1% front-load commission being paid as a lump sum when a plan leaves one company and goes to another. This is an attractive enticement for these insurance agents and brokers, because a 1% commission on a plan that has \$2,000,000 in assets equates to \$20,000. It also creates an obvious conflict of interest and can result in a practice of "churning the k-plan." Churning the k-plan is a practice where every few years an advisor recommends the plan be moved to another company simply to earn another 1% commission.

This would not be a fiduciary practice but, unfortunately, insurance agents and stock brokers who sell 401(k) plans are not subject to a fiduciary standard.

Another way these commissioned reps dial-in added compensation paid on an ongoing basis is when they design into the plan a commission on all *future* deposits, such as employee (payroll deductions) and employer (matching and profit-sharing) contributions. Similar to the one-time front-load paid on transferred assets, this is an ongoing load that is paid each and every time dollars enter into the plan. Again, the most common of these loads that I see is a 1% load.

The crescendo of greed, and most egregious of these practices, is found when a financial representative "piles on" to the plan and charges all of these forms of compensation. Yes, this is legal. And I almost always find that the trustees are totally unaware of this when it is happening. For example, the servicing broker to the plan may have been paid a 1% commission when the plan transferred assets, and they also may have earned 1% on all deposits going forward and a 1% asset-based fee to boot. I have a client who was advised by their former rep to move a 401(k) plan from one life insurance company to another life insurance company. The rep dialed in a 1% commission on transferred assets, was paid a 1% commission on all deposits, and was being paid a .25% asset-based fee. When you added all costs together, the new supposedly-superior plan resulted in an

Continued on page 35

Presentation Skills for Lawyers *Continued from page 33*

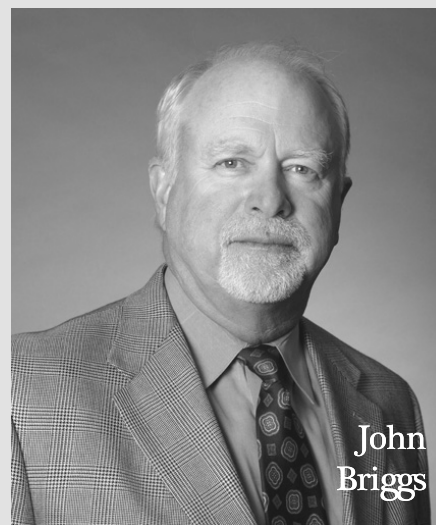
foods. She didn't drink. She didn't smoke. She took exceptional care of herself and she was in excellent shape. But on a late Sunday afternoon in February of last year, none of that would protect her..."

- "This is a case about a young child's eyes."

The first words of your speech may be the most persuasive words of your entire presentation. Don't squander that opportunity by thanking your audience, addressing dignitaries at the head table, or otherwise wasting your opening remarks. Save that fluff for later. Instead, say something within the first ten seconds of your presentation that demands attention. Grab your audience's attention with your opening remarks, and they'll gladly listen to everything else you have to say!

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John
Briggs

Financial Planning *Continued from page 34*

average expense ratio of 2.85%! This is unconscionable. Plus, because the rep was paid a lump sum when the assets transferred, a CDSC (known as a contingent deferred sales charge) was put on the plan, resulting in a surrender charge that would be accessed if the plan moved away from the new company in the next five years. The client understandably felt handcuffed to the new insurance company.

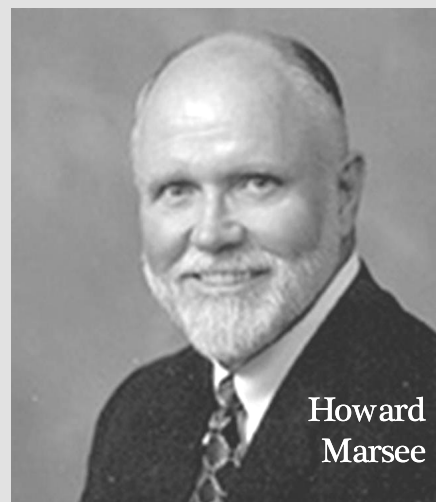
Active or passive? The other major part of plan costs relate to the investment choices you have within the plan. If your plan is with a large life insurance company or a brand name Wall Street firm, you may have noticed that the vast majority - maybe all - of the funds in your plan are the more expensive actively-managed fund variety. Active funds average 1% or 1.5% in expenses, which is more expensive than the .3% average for passive index funds. It's no wonder that, according to many studies on the subject, the vast majority of active funds underperform index funds over time. The 401(k) companies prefer that you not know this research, however, because active funds are the most profitable to them, not to you.

Many of the 401(k) providers also choose to use their very own proprietary funds within the mix because these in-house funds are even more profitable to them compared to using outside fund managers. One of the largest life insurance companies in the 401(k) market is one example of this. Their much-touted target-date funds (a relatively new fund concept where the fund's management corresponds to a specific retirement date) contain about 50% of proprietary in-house funds. They also recently threw out a competing fund choice from their platform as well. Interestingly, the competing funds contain no in-house funds. In my view, profitability was the major motivation for this move.

Things may change. In 2007, the Government Accountability Office issued a report commissioned by Congress that revealed that about 80% of 401(k) plan participants didn't know how many fees they were paying, or how much they were paying in fees. Federal legislators have recently pushed to change the rules on 401(k)s, and make the companies that manage them provide more clear and plain information on fees. In fact, the GAO report urged Congress to require the disclosure of 401(k) fees to permit investors to compare plan options. That would essentially permit you and your co-workers to shop for a 401(k) program as never before.

If you want to learn more about how fees might be affecting your 401(k), or if you'd like to learn more about your options, consider speaking with a qualified fee-only financial advisor who is also a fiduciary to the plan. The conversation may help you to better understand your 401(k) and other investments you may have.

Andrew C. Orr, CFP®, CLU, ChFC, AIF®, is an independent, fee-only financial planner and accredited investment fiduciary located in Orlando. He is president of ORRGROUP, a registered investment adviser and financial planning firm providing comprehensive fee-only financial planning services to individuals and businesses. For more info, visit: www.orrgroup.com.



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Rainmaking

Think and Act Like a Marketer

Mark Powers



Years ago, while having lunch with a friend, I spotted a potential referral source I wanted to meet, dining at another table. He'd been profiled in a local magazine recently and I had long wanted to make his acquaintance. I gestured for the waitress and said, "Can you find out what he's drinking?" indicating that I wanted to send over a drink. Upon receiving the drink he politely nodded his thanks to me, no doubt puzzled about who I was. I went over to his table, stuck out my hand and said, "I just read an article about you and I'd like to introduce myself." We started talking and in the brief conversation that ensued, he invited me to a fundraiser he was hosting. I accepted his invitation and we've been friends ever since.

That's how you think and act like a marketer. When serendipity presents you with an opportunity, you capitalize on it. And when serendipity doesn't present you with an opportunity, you create it.

When Susan, a family law attorney in North Florida, left her old firm to open her own practice, she didn't bring many clients with her. As an inexperienced marketer, she was understandably anxious about how she'd find new clients. Through clever positioning, however, her future clients would find her. After considering all her options, Susan opened her new office next to a popular day care center frequented by young professionals. If you know anything about the demographics of divorcing couples – and Susan definitely does – you know that divorce among parents with small children is unfortunately very common. Knowing that those busy working parents had to pass her office every day on their way to pick up their kids was a brilliant form of passive marketing. Her convenient new location did half the marketing for her. She then stepped it up a notch and introduced herself to the owners of the day care center and was soon conducting workshops for day care center owners and staff around the county.

Both of these stories illustrate the point that to think like a marketer, it helps to be somewhat creative. My willingness to introduce myself to a stranger was made possible by the fact I'd read about him and targeted him as an influencer long before we met. Without the nuggets of information I'd read, I wouldn't have had any common ground to venture out upon. Likewise, Susan could have opened her office in a building full of attorneys. It would have been the expected thing to do and she agonized over her decision before committing herself. Fortunately for her, she saw beyond what was expected and made an out-of-the-box decision that plunked her down in the path of future clients.

Creativity *can* come in the form of spontaneous urges, but often it's backed-up by a great deal of thought and preparation. To prepare yourself to maximize your

marketing opportunities, do two things. First, take time to review your referral source list each week. Second, while you do this, ask yourself the question: *Who should I cultivate this week?*

If you don't have a referral source list to look at during this exercise, you are at a serious disadvantage. Some of our clients claim they keep these lists 'in their head,' but to our way of thinking nothing beats an actual list that you can pour over, notate and tweak as referral sources come and go. So if you're someone who lacks a list, get busy and put one together. Instead of doing this manually, print a report showing all your cases for the last year, ranked by fees starting at highest and ending with the lowest. Your bookkeeping software probably has the ability to do this – many of them can generate a range of reports that far exceed what most people utilize. Then, using information noted in your files, your case management software and/or your memory, write in the referral source next to each case. Once you've done this, you'll have a list of referral sources ranked from the most productive to the least. From this you can create a list of top referral sources who send your best business and a list of secondary sources who send lesser business. Once you've done this pre-work, you can review and isolate those you want to cultivate. Hand off the list to your secretary or marketing assistant so she can schedule lunches, dinners or other events with these people when you prompt her. Stash your referral source lists in a file where you can easily retrieve them the following week.

When you begin the cultivation part of this effort, what you plan to do will be different for everyone on the list. It may mean calling a colleague to say hello and catch up; it could mean inviting several others to lunch. It might mean asking a referral source to attend a sporting event or sending thank you notes to those that recently referred business. Any number of different activities will serve the purpose of being in touch with or getting to know your referral sources better. What you do is up to you. But do something – with increased contacts to referral sources comes increased top-of-mind awareness. Increased top-of-mind awareness correlates directly with increased referrals.

We have one talkative client who is so fervently committed to building his practice that he keeps his list of referral sources in his planning folder at the office, on his cell phone and in his computer database. In addition to scheduling three marketing contacts a week – every week, he uses his commute to and from the office to stay in touch with his ever-expanding network, which includes a number of clients who have become great referrers for him.

He's made it a Friday afternoon ritual to plan the upcoming week and review his list of referral sources.

Continued on page 38

Monday mornings might work better for you, but whenever you do it, allowing time for this new habit supports you in thinking like a rain maker.

Here are a few more habits that will have you thinking and acting like a rainmaker:

Add at least five new names to your list of contacts every month.

One of our attorney clients serves on the welcoming committee of his local bar association just to meet new members each month. He takes them out to lunch and spends time learning where they came from, what their practice areas are, and what long-term goals they've set for themselves. Many productive referral sources have developed out of this effort and, not surprisingly, a few new friends.

Send a mailing to your contact list once a quarter.

We have a number of clients who send hard-copy and e-mail newsletters, though we have others who reject the long form of a newsletter and send post cards containing tips or reminders. Another client sends a legal update, which he authors himself, to all of his referral sources once per quarter. He works hard to ensure the topics are relevant to his intended audience.

Start showing up at your bar association lunches every month.

Bar events are obviously good to attend if most of your referrals come from attorneys. When you attend these events, work the room by greeting existing friends and referral sources, but try to sit with new people when you eat. This way you can expand the number of new attorneys that you befriend. Keep your eyes open for any attorneys in practice areas that have proven to be good sources for referral. Also, join alternate bar associations and organizations for which you might qualify, such as the women's bar, the Hispanic bar, the African-American bar, the trial lawyers bar, the Inn of Court, etc. We recommend you participate in the American Bar Association primarily for the educational opportunities and opportunities to meet others in your field. It is most beneficial, marketing wise, to those who want to gain national exposure for the out-of-area referrals that may come their way (though these may be few and far between unless you are in a niche that few others occupy).

Show up at high visibility events every week that are likely to be attended by current or potential referral sources.

Sponsoring a table at charity events provides a great reason to invite referral sources to have dinner with you. Other historic, community or trade-specific organizations have live and silent auctions, galas, car rallies, tournaments and gatherings of all sorts. Find out what charities or causes your referral sources support; participating in their activities gives you one more reason to interact with existing referral sources and positions you to cultivate new ones.

Send out appropriate cards.

Send thank you cards to anyone that refers business, even if the client didn't hire you. You want to reinforce the fact that they thought of you. Also, scan the newspaper and any trade journals or websites you read and forward or clip articles of interest to clients and referral sources. Send the articles out with a quick note relating that you thought this might be of interest to them. This is a tiny action that requires little effort but lets people know you're thinking of them.

Practice your laser talk as often as you can.

It's easier than you think to work your laser talk, or pieces of it, into conversations. Keep in mind most of your family and friends, other than your colleagues, have no idea what you really do all day. Educate them: there may be well-connected people in this group that can carry the message of your firm far and wide.

Focus on referrals from clients.

Develop the habit of asking for referrals. Use a version of the "good patient" strategy which doctors have used for ages. Say, "You've been an outstanding patient (client) and we enjoy working with (or helping) people just like you. If you know of anyone else that could use our services please let them know about us." The clients you've helped probably like you and want to contribute to your success, but may not think of referring others to you. Remind them gently and in a complimentary fashion.

After all is said and done, probably the most significant habit which will support you in thinking and acting like a rainmaker is to be, in the words of Glenn Finch (a Senior Practice Advisor), "eternally optimistic." When it appears that your marketing efforts are not productive, make up your mind to stay proactive and committed to reviewing your list and initiating contacts every week. Your network will not produce if it is not developed, and you develop it by being in regular contact with those who can send business or can influence others to send business. Progress is slow at first but, as time passes and you gather momentum, it trends upward dramatically. Take time to invest now in the future of your firm.

Mark Powers, President of Atticus, Inc., co-authored "The Making of a Rainmaker: An Ethical Approach to Marketing for Solo and Small Firm Practitioners," is a featured marketing writer for *Lawyers, USA* and a number of other publications. To learn more about the work that Atticus does with attorneys or the Atticus Rainmakers™ program, please visit www.atticusonline.com or call 352-383-0490 or 888-644-0022.

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Announcements

New Associates

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New Shareholders

Andrea Caro - Zimmerman, Kiser & Sutcliffe, P.A.

Johanna Clark - Carlton Fields

Katherine E. McKinley - Zimmerman, Kiser & Sutcliffe, P.A.

Jeremy S. Sloane - Zimmerman, Kiser & Sutcliffe, P.A.

In Memorium

Mr. Richard F. Trismen, a member of the OCBA since 1962, passed away at his home in Winter Park, Florida, on February 28, 2008. We extend our sincere condolences to Mr. Trismen's family.

Speaking Engagements

Lauren Y. Detzel, a shareholder with the law firm of Dean Mead, was a featured guest at the Central Florida Association of Women Lawyer's (CFAWL) Professional Women's Exchange. Proceeds from the networking event benefited *A Place for Children*, a daycare center located in the Orange County Courthouse.

Published

Ralph C. Losey, a shareholder in the Orlando office of Akerman & Senterfitt, P.A., heads the firm's national electronic discovery practice group. He is the author of the ABA's feature book on e-discovery for 2008, *e-Discovery: Current Trends and Cases*. He is also the author of the popular multi-media blog *e-Discovery Team*. He has written extensively in this area, including the chapter on "Metadata" in West-Thompson's new book, *E-Discovery, a Report and Guide to the New Rules* (January 2008). Last year Losey also wrote a law review article on the mathematics underlying e-discovery: *HASH: The New Bates Stamp*, 12 Journal of Technology Law & Policy 1 (June 2007).

OCBA Executive Council Vacancy

Now accepting Nominating Petitions through May 9, 2008 for a term ending May 31, 2009. Nominating Petition is available online at www.orangecountybar.org.

Upcoming Seminars

Hold the Date!

Apr. 22 - Legal Aid Society GAL Training sessions. See website for details.

Apr. 25 - Pratfalls, Pitfalls, and Profits for an Export Transaction. International Law Committee; 8:30 a.m. - 1:30 p.m.; Citrus Club. CLE: 4.0.

May 21 - Practice Pointers for Family Law Attorneys: A Panel Discussion from Practitioners in Related Areas of Law. Family Law Committee. 1:00 p.m. - 5:00 p.m.; OCBA Center. CLE: TBA.

May 29 - Criminal Law Seminar. The OCBA and George C. Young First Central Florida Inn of Court. Afternoon (exact time: TBA); Marriott Downtown. Principal attendees will be State Attorneys, Public Defenders and criminal lawyers. Cost: \$25. CLE: 4.5.

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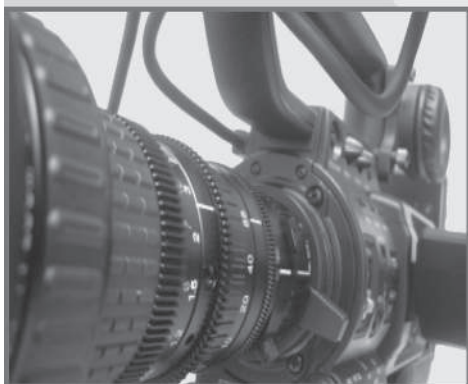
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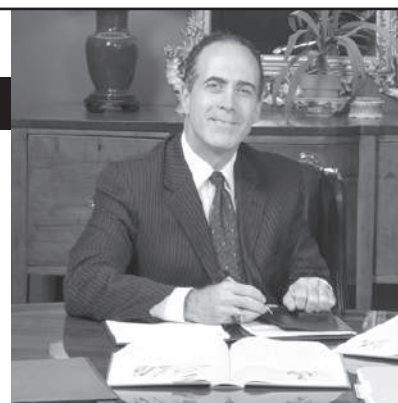
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2008

April - May Calendar

OCBA Luncheon • Thursday, April 24, 2008

Randall James

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RSVP by April 18th to reservations@ocbanet.org

April

14 Law Week Committee Judging
5:00 p.m. • Bar Center

15 Professionalism Committee
8:00 a.m. • Bar Center

Legal Aid Society Board Meeting
11:45 a.m. • 100 E. Robinson St.

Entertainment Law Committee
12:00 p.m. • TBA

16 Solo and Small Firm Committee
12:00 p.m. • Bar Center

Insurance Law Committee
12:00 p.m. • Bar Center

Workers' Compensation Committee Seminar
The Employment Relationship during a Workers' Compensation Case
3:00 p.m. • Bar Center

17 Law Week DUI Mock Trials
9:00 a.m. • City Hall

YLS Luncheon
11:30 a.m. • Citrus Club

Appellate Practice Committee
12:00 p.m. • Bar Center

Social Committee
5:30 p.m. • TBA

18 Family Law Committee
8:00 a.m. • 425 N. Orange Ave., #2310

Law Week DUI Mock Trials
9:00 a.m. • City Hall

YLS Fundraising Happy Hour
5:30 p.m. • Slingapour's

19 YLS Relay for Life
1:00 p.m. • Winter Park High School

22 Legal Aid Society Lunchtime Training
Helping the Medically Needy Child: An Introduction to Children's Medical Services
12:00 p.m. • First Presbyterian Church

Legal Aid Society Lunchtime Training
GAL 101: The Basics of Serving as a GAL in a Dependency Case
12:00 p.m. • First Presbyterian Church

23 Labor and Employment Committee
12:00 p.m. • Bar Center

24 OCBA Monthly Luncheon
Randall James
12:00 p.m. • The Ballroom at Church Street

25 International Law Committee Seminar
Pratfalls, Pitfalls & Profits of an Export Transaction
8:30 a.m. • Citrus Club

Bankruptcy Law Committee
12:00 p.m. • Bar Center

29 Evening with the Judiciary
5:30 p.m. • Doc's Restaurant

30 Business Law Committee
12:00 p.m. • Baker Hostetler

May

1 Elder Law Committee
12:00 p.m. • Bar Center

Federal Judicial Relations Committee
12:00 p.m. • Judge Conway's Chambers

6 Criminal Law Committee
12:00 p.m. • Bar Center

8 Legal Aid Society Board Meeting
11:45 a.m. • 100 E. Robinson St.

Real Property Law Committee
12:00 p.m. • Bar Center

Social Security Committee
12:00 p.m. • Bar Center

YLS Executive Board Meeting
5:30 p.m. • Bar Center

9 Workers' Compensation Committee
11:45 a.m. • Smokey Bones

13 Executive Council Meeting
11:30 a.m. • Bar Center

Legal Aid Society Lunchtime Training
Domestic Violence & Litigation Issues in Family Law Cases
12:00 p.m. • First Presbyterian Church

OCBA Paralegal Committee
5:30 p.m. • Bar Center

14 Estate Guardianship & Trust Committee
12:00 p.m. • Bar Center

Judicial Relations Committee
12:15 p.m. • Courthouse

15 OCBA New Member Orientation
8:00 a.m. • Bar Center

YLS Luncheon
11:30 a.m. • Citrus Club

Appellate Practice Committee
12:00 p.m. • Bar Center

Social Committee
5:30 p.m. • TBA

Entertainment Law & Social Committees
Lawyers Rock! - A Benefit for the OCBA Legal Aid Society and the GRAMMY Foundation
6:00 p.m. • TBA

16 Family Law Committee
8:00 a.m. • 425 N. Orange Ave., #2310

20 Professionalism Committee
8:00 a.m. • Bar Center

Legal Aid Society Board Meeting
11:45 a.m. • 100 E. Robinson St.

Entertainment Law Committee
12:00 p.m. • TBA

21 Insurance Law Committee
12:00 p.m. • Bar Center

Family Law Committee Seminar
Practice Pointers for Family Law Attorneys: A Panel Discussion from Practitioners in Related Areas of Law
1:00 p.m. • Bar Center

22 Law Week Naturalization Ceremony
TBA • Orange County Convention Center

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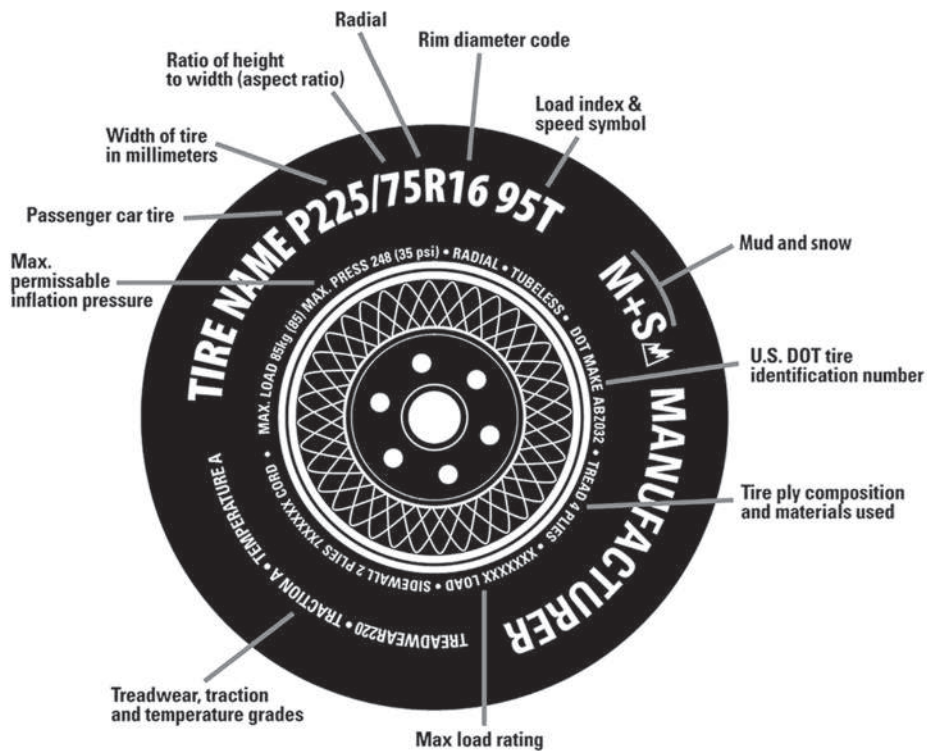
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