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The Briefs

A Publication of the Orange County Bar Association



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S.C. Read, Inc. v. Seminole County School Board,
31 Fla. L. Weekly D1900a (Fla. 5th DCA 2006)
Dismissed sunshine law challenge to school rezoning plan.

Florida Emergency Physicians-Kang & Associates, M.D., P.A. v. Parker,
800 So. 2d 631 (Fla. 5th DCA 2001)
Protected liability on multi-million dollar medical malpractice action.

Miller v. Jacobs & Goodman,
699 So. 2d 729 (Fla. 5th DCA 1997)
Declared liquidated damages clause of attorney employment agreement void and unenforceable.

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.

Whigham v. Shands Teaching Hospital,
613 So. 2d 110 (Fla. 1st DCA 1993)
Reinstated multi-million dollar medical malpractice action against blood bank.

Pettry v. Pettry,
768 So. 2d 8 (Fla. 5th DCA 2000)
Reversed conversion of rehabilitative alimony to peranent alimony.

Caiazza v. Tuff Realty Corp.,
805 So. 2d 29 (Fla. 5th DCA 2001)
Protected ownership of two multi-million dollar Florida corporations.

Owen v. Owen
867 So. 2d 1222 (Fla. 5th DCA 2004)
Reversed imputation of income with directions to reduce by 50%.

Pixton v. Scotsman,
924 So. 2d 37 (Fla. 5th DCA 2006)
Reversed dismissal of negligence action for failure to comply with RCP 1.070(j).

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Table of Contents

President's Message — **3**
A Great American President's Message
Thomas P. Wert

Editor's Note — **4**
Letters to the Editors
Jessica K. Hew, Tad A. Yates

OCBA Luncheon Speaker — **5**
Our Kids Can Suceed
Lorenzo W. Phillips
Principal, Jones High School (Retired)

Professionalism Committee — **7**
Unprofessional Conduct – Why Bother With It?
William B. Wilson

OCBA Legal Aid News — **8**
Pro Bono Spotlight – Jim Grodin

Diversity Committee — **11**
Avoiding A Barbaric, Heinous and Cruel Death – Some Comments on Recognizing and Respecting Diversity
Magistrate Howard D. Friedman

Insurance Law Committee — **13**
Litigation and Prevention of Insurer Bad Faith, Second Edition
Dennis J. Wall

Presentation Skills for Lawyers — **15**
How to Create a Winning Record – Part 2
Elliott Wilcox

Rainmaking — **17**
Lesson 8 – Client Interviews
Mark Powers

Hearsay — **18-19**
Kristyne Kennedy

YLS on the Move! — **21**
Judith A. Garabo

Financial Planning — **29**
Divorce Settlements Profit from a Long-term Approach
Andrew C. Orr, CFP®, CLU, ChFC, AIF®

New Members — **30**

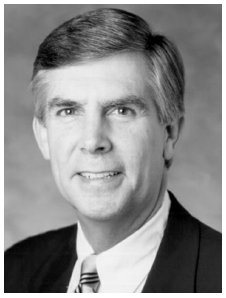
Announcements — **31**

Classifieds — **32**

OCBA Calendar — **36**



Page 5



Page 7



Page 8



Page 11



Page 13

The Briefs

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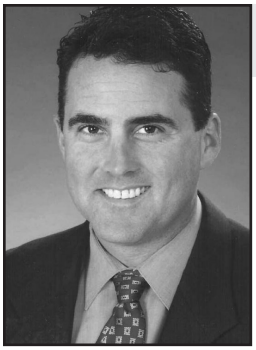
Deadline for March Edition: 2/1/2007

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

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A Great American President's Message

Thomas P. Wert

One of my favorite places on the planet is the Lincoln Memorial. Having grown up in Washington, I have been there many times and the place, like the man it honors, never ceases to inspire me with reverence and hope for this Nation. We can learn a great deal from the life and leadership of Abraham Lincoln. As you are surely aware, not only did President Lincoln successfully lead our country through its darkest days, Mr. Lincoln was a lawyer and a businessman who spent many years of his life serving and fighting for his family and his fellow men and women. In my opinion, he is our most admirable president because he personifies the honorable way of dealing with the struggles and the triumphs we all face in our lives.

I recently stumbled across some notes Lincoln prepared for a lecture to fellow lawyers, when he had returned to Illinois to practice law after his first term in Congress. The lecture dealt with the standards essential for the ethical practice of law, long before codes and canons of professional responsibility were commonplace. Not surprisingly, ideals such as diligence, readiness, candor, compromise and integrity were as important in 1850 as they are today. On the 198th anniversary of his birth, Lincoln's humble words still ring true:

> **I am not an accomplished lawyer. I find quite as much material for a lecture in those points wherein I have failed, as in those wherein I have been moderately successful. The leading rule for the lawyer, as for the man of every other calling, is diligence. Leave nothing for to-morrow which can be done to-day. Never let your correspondence fall behind. Whatever piece of business you have in hand, before stopping, do all the labor pertaining to it which can then be done. When you bring a common-law suit, if you have the facts for doing so, write the declaration at once. If a law point be involved, examine the books, and note the authority you rely on upon the declaration itself, where you are sure to find it when wanted. The same of defenses and pleas. In business not likely to be litigated, – ordinary collection cases, foreclosures, partitions, and the like, – make all examinations of titles, and note them, and even draft orders and decrees in advance. This course has a triple advantage; it avoids omissions and neglect, saves your labor when once done, performs the labor out of court when you have leisure, rather than in court when you have not.**
>
> **Extemporaneous speaking should be practised and cultivated. It is the lawyer's avenue to the public. However able and faithful he may be in other respects, people are slow to bring him business if he cannot make a speech. And yet there is not a more fatal error to young lawyers than relying too much on speech-making. If any one, upon his rare powers of speaking, shall claim an exemption from the drudgery of the law, his case is a failure in advance.**
>
> **Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser -- in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.**
>
> **Never stir up litigation. A worse man can scarcely be found than one who does this. Who can be more nearly a fiend than he who habitually overhauls the register of deeds in search of defects in titles, whereon to stir up strife, and put money in his pocket? A moral tone ought to be infused into the profession which should drive such men out of it.**
>
> **The matter of fees is important, far beyond the mere question of bread and butter involved. Properly attended to, fuller justice is done to both lawyer and client. An exorbitant fee should never be claimed. ...**
>
> **There is a vague popular belief that lawyers are necessarily dishonest. I say vague, because when we consider to what extent confidence and honors are reposed in and conferred upon lawyers by the people, it appears improbable that their impression of dishonesty is very distinct and vivid. Yet the impression is common, almost universal. Let no young man choosing the law for a calling for a moment yield to the popular belief – resolve to be honest at all events; and if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation, rather than one in the choosing of which you do, in advance, consent to be a knave.**

As my friend, Dave Cannella, would say, "Word," as in "Words to live by." I hope you all have a very prosperous and fulfilling President's Month. Peace.

Thomas P. Wert is a partner with Roetzel & Andress, LPA. He has been a member of the OCBA since 1993



Editor's Note

Letters to the Editors — *Jessica K. Hew, Tad A. Yates*

During the past year as your editors, we have received many positive comments and a few pieces of constructive criticism relating to *The Briefs*' content and form. This month, we present a new twist on commentary from the OCBA membership: Letters to the Editors. We previously invited the membership to send us your thoughts on the subject matter presented in *The Briefs*. One of you did. So, in commemoration of our first official substantive commentary, here is our "Letter to the Editor" by member Robert G. Petree.

January 16, 2007

Editor, The Briefs
880 N. Orange Avenue
Orlando, FL 32801

Dear Editor:

Congratulations to President Thomas P. Wert on his message in the January 2007 issue of The Briefs.

At long last leadership of our Bar has publicly expressed concerns about the proliferating government abuses of the Federal Constitution, particularly with respect to due process.

Wert's message focused on the Military Commissions Act of 2006, which in itself is an insult to fundamental concepts of due process in derogation of the safeguards of habeas corpus, and respect for treaty law.

This one act is but a ripple on the surface of repeated and numerous abuses of our individual constitutional guarantees and our personal freedoms. The list is endless and includes:

1. Detention of American citizens without right to speedy trial;
2. Misuse of the National Security Agency to spy on United States Citizens in violation of the Fourth Amendment and the Foreign Surveillance Intelligence Act;
3. Holding United States Citizens in solitary confinement for years without formal charges;
4. Depriving U.S. Citizens of right to counsel;
5. Monitoring telephone and internet communications of United States citizens without judicial review or warrant;
6. Assertions by the former United States Attorney General that opposition to the Iraq war is tantamount to terrorism;
7. Assumption by the President to declare anyone he chooses as "enemy combatant", thus depriving them of substantially all constitutional safeguards.
8. The Patriot Act - which among many other abuses authorizes the INS to detain immigrants without charge for up to seven days;
9. An Attorney General who equates the Geneva Convention to a "quaint artifact" of the past.

The list goes on and is detailed in "The Case for Impeachment" by Donald Indorff and Barbara Olshansky.

The time for "impeachment" is long overdue. It is certainly time for American lawyers to speak out in protest of the present government's usurpation of virtually dictatorial power. Let us not follow the precedent set by our counterparts who remained silent when the Nuremberg Laws sealed the fate of democracy in their country.

Benjamin Franklin summed it as well: "Those who would give up essential liberties to obtain a little temporary security deserve neither liberty nor security."

Very truly yours,

R. G. PETREE

OCBA Luncheon Speaker





February 22, 2007

Lorenzo W. Phillips

Principal, Jones High School (Retired)

Our Kids Can Succeed

Lorenzo Phillips, a native Floridian from Polk County, was fortunate in that he grew up with grandparents as his parents: his biological parents divorced and went their separate ways -- ways that did not include him. Lo's grandparents, however, provided the kind of care a young boy needs and instilled in him a desire to achieve his goals.

Lo graduated from Oakland High School in Haines City and received his undergraduate degree from Florida A & M University in Tallahassee. Upon graduation, he received a commission as a 2nd Lieutenant in the U.S. Army (Infantry). Lo's first duty station was the 25th Infantry Division in Hawaii. After approximately eight months, he volunteered for the first of three combat tours in the Republic of Vietnam (RVN). As a door gunner platoon leader, Lo took twenty-five door gunners out and returned with twenty-four. When he returned to Hawaii, the 25th Infantry Division was assigned again to RVN less than 100 days after Lo's first tour. While in RVN, Lo was shot down in a helicopter in August 1965, and he ran over a land mine in December 1966, but escaped injury. Lo was awarded four Bronze Stars (one of which was for heroism), three Air Medals (one for heroism), the Combat Infantryman's Badge and ten other medals. He was honorably discharged as a Major.

In 1976, Lo returned to Orange County and began working for the Orange County Public School System. His career in education spanned the next thirty years. He received two graduate degrees in Education Administration from Rollins College while he worked full time as a teacher and part time as a salesman at Sears. After ten and a half years of teaching and working part time, Lo became an assistant principal at Winter Park High School. He later served as principal at Westridge Middle School and for the past three years has served as principal at Jones High School.

In addition to his years of service as an educator, he has also found time to support the community in every one of his stateside assignments. Throughout the years he has coached Little League baseball, served as a Scout Master and been an Explorer Post Advisor. He continues to be an active mentor in the Orange County Public School System.

Lo and his wife of 41 years, Joyce, have three children and one granddaughter. Lo and Joyce are both active members of Trinity Lutheran Church and School in Orlando, where Lo currently is Trinity's Head Elder and Joyce is in the church choir.

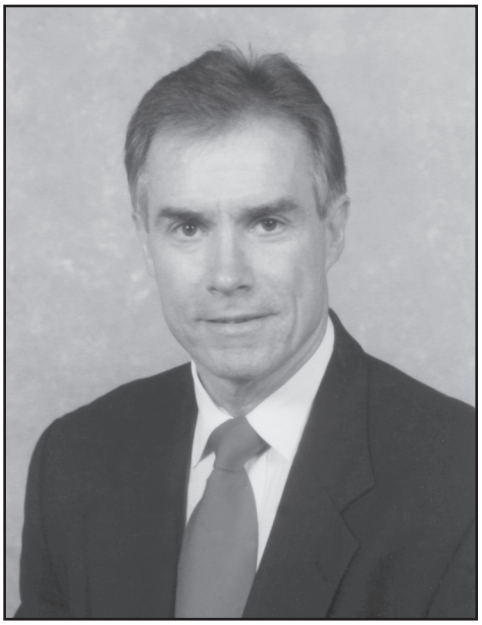
Downtown Marriott Hotel • 11:30 a.m. – 1:00 p.m.

The February OCBA Luncheon is hosted by the Paul C. Perkins Bar Association.

To RSVP for the luncheon, please e-mail Mike Remensnyder, Events Manager, at reservations@ocbanet.org. Phone calls will not be accepted.

To ensure proper luncheon count, RSVPs are requested no later than 48 hours in advance. Those reserving less than 24 hours in advance will not be guaranteed a name badge. If you have made a reservation and find that you are unable to attend, please notify us as soon as possible via e-mail. We appreciate your effort to keep us up-to-date on your reservation status.

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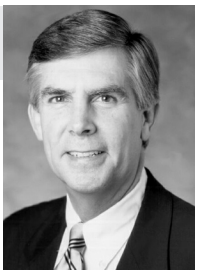
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Professionalism Committee

Unprofessional Conduct - Why Bother With It?



William B. Wilson

It was a little after five on a Friday evening, and I was trying to clear off my desk for the weekend when my computer announced the arrival of a new motion from an opposing attorney. While I wanted to give my opponent the benefit of the doubt that the timing of this was a mere coincidence, such "Friday evening surprises" were becoming a recurring event in the case. I did not want to think that another attorney would intentionally schedule the service of an item to be irritating; however, at parties I had overheard lawyers bragging about how they had ruined an opponent's weekend with such tactics. As I finished up my work, I began to consider why an attorney would engage in unprofessional practices. What would be gained from them? In this instance, would irritating me on Friday evening cause me to represent my client less zealously? Hardly. If anything it would encourage me to redouble my efforts. So there had to be another reason for such conduct.

I wondered if some lawyers thought that judges liked unprofessional conduct, but that would be absurd. The lack of professionalism had been a target of the judiciary at least since the days of Warren Burger as Chief Justice of the Supreme Court. All Florida courts had long ago subscribed to one or more codes of professionalism. Furthermore, I could not recall a single instance in which a lawyer's unprofessional conduct had been rewarded by a judge. To the contrary, I remembered cases in which the ultimate outcome for a client had been adversely affected by the unprofessional conduct of his or her attorney.

If unprofessional conduct did not appeal to judges, could it be that some attorneys thought it would be helpful with a jury? That had never been the case in my experience. All of the studies and surveys had shown that juries give high marks to the attorneys who act with professionalism. And that just stood to reason. Why would anyone whose life had been disrupted by jury duty want to waste their time watching a lawyer act like a jerk? They would not. On the contrary, in my experience, juries tended to reward professional conduct. I remembered an extremely professional plaintiff's personal injury attorney for whom juries consistently returned verdicts in amounts greater than he had requested. And I recalled my closing argument at the conclusion of a lengthy trial in which I was running out of my allotted time before I had adequately addressed the issue of damages. As I was racing to cover as much ground as possible before my remaining minutes expired, I watched my opposing counsel rise and state, "Your Honor, this is an important case, and I think Mr. Wilson should be given enough additional time to complete his closing." I had been surprised by this act, and I had always felt that the resulting verdict had been a little more favorable to my opponent because of his professionalism.

Still trying to find a reason that would justify unprofessional conduct, I wondered if some attorneys felt that clients regarded it favorably? Again, my answer was in the negative. I had never heard a client brag about unprofessional conduct by his or her attorney. The available data indicated that clients, like judges and juries, wanted attorneys to be knowledgeable, responsive and professional. I remembered a lawyer who made it a habit of writing nasty and aggressive letters to opposing counsel. The result was a flurry of correspondence and a war of words that was "full of sound and fury, signifying nothing." I had always imagined that this individual's clients must have liked the tough tone of those letters up until they received their first invoice. The bottom line was that such tactics accomplished nothing beneficial to his clients, and he is no longer in practice.

Try as I might, in my thirty-four years as an attorney, I could not recall a single instance in which unprofessional conduct had benefited a client in the ultimate outcome of a case. And while I looked at things from the perspective of a trial lawyer, I doubted that they were any different on the transactional side. In the rare instances in which I had been involved in negotiating a contract, an attempt by an attorney to slip in a change in the hopes it would be unnoticed was futile. I was coming to the conclusion that unprofessional conduct is simply unproductive. There was no good reason for it.

On the other hand, there seemed to be good reasons for attorneys to act professionally. First, clients liked and respected attorneys who acted professionally. I could even recall instances in which parties had retained an attorney who previously had been adverse to them, in part because of effective advocacy, but also because of their professionalism. Good clients seemed to return to attorneys who were effective advocates and who conducted themselves with professionalism. The message was, if you wanted good clients, act professionally.

Second, attorneys who conducted themselves with professionalism appeared to get better results. While no one could say that by acting professionally you would always be the winner, judges and juries did like professionalism and the attorneys who conducted themselves professionally, and they seemed to reward them for that conduct.

Finally, and most importantly, there was the clear conscience syndrome. Act professionally, and you would sleep better at night and you would feel better looking at yourself in the mirror in the morning.

As I shut down my computer, my musings ended with the conclusion that there was no rational justification for unprofessional conduct. It was in no sense beneficial, and it could be detrimental to one's clients. Thus, the message is that if you are ever tempted to engage in unprofessional conduct you should ask yourself the question, "Why bother with it?"

William B. Wilson is the executive partner of Holland + Knight's Orlando office. He has been a member of the OCBA member since 1973.



OCBA Legal Aid News

Pro Bono Spotlight – Jim Grodin

Legal Aid Society of the OCBA



James S. Grodin, a partner at Foley & Lardner, LLP, has been helping clients referred by Legal Aid for almost 20 years. He has handled family law and consumer cases, and was recognized by Legal Aid in 2002 with an Award of Excellence for his outstanding *pro bono* contributions.

One of his recent cases involved Ms. C., an elderly resident of Eatonville, who unfortunately got behind by about $3,600 on her real estate taxes. An opportunistic person persuaded her to enter into an agreement by which he would pay the delinquent property taxes in exchange for an agreement that stipulated that Ms. C. would repay him in 16 monthly installments in the amount of $400 per payment for a total of $6,400. The agreement was "secured" by a quitclaim deed to the property. The interest rate on the repayment works out to more than 92 percent, which is well in excess of Florida's 45 percent criminal usury ceiling.

Ms. C. came to the Legal Aid Society for help. After accepting the referral case, Jim sued on Ms. C.'s behalf and won a summary judgment nullifying the debt and cancelling the deed (which the defendant had recorded shortly after the dubious deal was struck). As a result of the judgment, Ms. C. has her home back, clear of any claims of the defendant. Under Florida law Ms. C. is absolved of the entire debt.

The story has a wonderful extra twist. Shortly thereafter, the Orangewood Christian Church of Maitland identified Ms. C.'s home as a charitable rehabilitation project. Now that title has revested in Ms. C., church members will be undertaking much-needed repairs on her home.

Jim is the deputy chair of Foley & Lardner's national litigation department and handles bank-related work throughout the country. He earned his JD from the University of Wisconsin 1972 and began his legal career, including taking *pro bono* cases, in Wisconsin. He relocated to Orlando and was admitted to The Florida Bar in 1987.

Jim and his wife Barbara have three children: Benjamin, an anesthesiologist, and Ann D'Agostino, an attorney; both live in Atlanta. Michael, a software developer, lives and works in Redmond, Washington. Jim is a past president and board member of the Jewish Federation of Greater Orlando.

Submitted by the Legal Aid Society of the OCBA.





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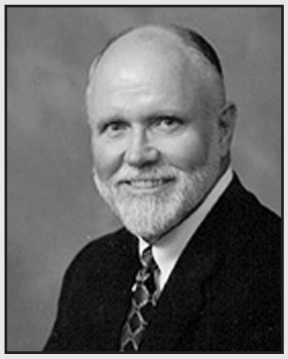
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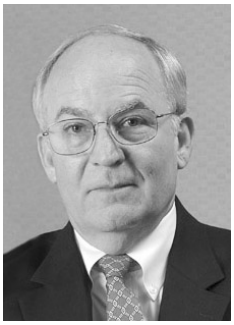
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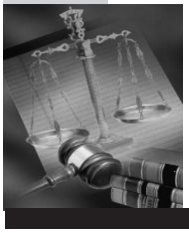
"The Cost of Confidentiality in Settlement Agreements and Releases"

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Mac Voght



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Diversity Committee

Avoiding A Barbaric, Heinous and Cruel Death – Some Comments on Recognizing and Respecting Diversity



Magistrate Howard D. Friedman

In our ancestors' times sovereign leaders ruled. Each state had one authorized religion determined by the sovereignty. Those who did not share the authorized religious belief would be labeled separatists, sectionalists, factionalists, dissenters, heretics, blasphemers or pagans. These individuals would be subject to a barbaric, heinous and cruel death at the hands of those acting in furtherance of the sovereign authority. This practice, of course, resulted in revenge, blood lust and generational cycles of sectarian violence and hatred based upon differences.

To escape religious persecution, various religious groups established colonies in the wilderness of Northern America. For the most part, each group separately settled in areas along the vast Atlantic Coast of North America. Despite religious differences, the colonists, through time, collectively realized a commonness of interest in freedom and liberty, stood united and became our nation. We must recognize that this commonness of interest and willingness to stand united as a people, despite our differences, still defines our great nation. Religious persecution and racism are not tolerated in our state or nation. Religious persecution, racism and murder of religious dissenters now describes the conduct of our nation's sworn enemies.

But what is this "diversity" thing and who exactly are you saying I should recognize and respect?

There may be no universal consensus on how we specifically define this "thing," this "idea," that is described as "diversity" and who is included or excluded from being "recognized and respected." However, we must build on the foundation that unfair discrimination, bigotry and racism are just plain wrong. Stereotyping an individual is not an action of insight, but rather an action of ignorance. Unfair discrimination, bigotry, racism and stereotyping are certainly not "ideals" that should be perpetuated in our state or in our nation.

There needs to be awareness that this issue of "recognition and respect of diversity" arises from the history of unfair or unequal treatment of others because of their differences. In the days of our ancestors, recognizing and respecting diversity may have meant if you renounce your religion you will be spared a barbaric, heinous and cruel death (although, you might still be killed). Perhaps, more poignantly, it meant if you leave your home country with your family and take a lengthy journey to colonize the vast unsettled area of Northern America you could avoid persecution and death. Currently, the "recognition and respect of diversity" means to some that they will be ensuring that their children and future generations will not suffer the indignity of racial discrimination. To others, it may mean a commitment to being a person who is willing to give a "fair shake" to all Americans despite their differences.

What moral direction shall we take on the issue of respecting and recognizing diversity? As attorneys, we comprise a majority of the movers and shakers in our community. As professionals, we must sense a duty to lead our community by example. We currently are the "torch-carriers" and must plan to be the future "torch-passers." We must consider the moral legacy we will leave for our future generations. We must stand united and move forward to eliminate any vestiges of unfair discrimination from our state and our nation, lest we digress back toward the cycles of violence, hatred, discord and strife.

I believe, as a Floridian and an American, that respecting and recognizing diversity is important. The Florida Bar's Henry Latimer Center for Professionalism and The Supreme Court Commission on Professionalism's Diversity Subcommittee jointly sponsor a legal education program entitled, "Training the Trainer," which is designed to enable those completing the course to be able to moderate classes on diversity in their local area and/or around the state. As chair of the OCBA Professionalism Committee, this emphasizes to me that professionalism and recognizing and respecting diversity share a consistency of purpose recognized by our state bar association. To this end, the Professionalism and Diversity Committees of the OCBA are planning a jointly sponsored CLE seminar slated for March 2007. I would encourage all OCBA members to attend.

For a brief primer on the history of religion in America, please see the Library of Congress website on that topic. This was one resource I used for the oblique (and hopefully not too revisionist) historical references in this article. Finally, I'd like to be on the list of those congratulating the OCBA October Luncheon Meeting Speaker, Florida Bar President-Elect Francisco R. Angones. Mr. Angones is a very well qualified and highly respected attorney in the Miami area. He also will be the first Hispanic-American President of the Florida Bar.

Howard D. Friedman is a Magistrate in the Ninth Judicial Circuit Court and is Chair of the OCBA Professionalism Committee. He has been a member of the OCBA since 2005.



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The Florida Board of Bar Examiners is seeking assistance in administering/proctoring the February 2007 General Bar Examination on February 27 and 28, 2007, at Rosen Shingle Creek Resort, 9939 Universal Boulevard, Orlando.

A lawyer/proctor should have been admitted to practice for at least for one year and must not work for a law school.

At least 48 lawyers will be needed, and every effort will be made to assign proctors to the session they select.

Tues., Feb. 27th - 7:00 a.m. - 12:00 Noon (12 lawyers)
Tues., Feb. 27th - 12:00 Noon - 4:30 p.m. (12 lawyers)
Wed., Feb. 28th - 7:00 a.m. - 12:00 Noon (12 lawyers)
Wed., Feb. 28th - 12:00 Noon - 4:30 p.m. (12 lawyers)

Volunteers should indicate the time and date they wish to proctor and provide a mailing address. Specific information will be sent to volunteer proctors about two weeks prior to the examination. For more information or to volunteer, please contact Audrey Fish, Examination Supervisor, at 850-488-0637, ext. 146 or e-mail at FishA@flcourts.org.

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Insurance Law Committee

Litigation and Prevention of Insurer Bad Faith, Second Edition *

Database updated July 2006



Dennis J. Wall, Esquire

Part II. Third-Party Claims
Chapter 3. Standards of Conduct Toward the Insured

I. Settlement

§ **3:1**. Requirements for fulfillment or enforcement of good faith in settlement: A working definition of third-party insurance and a standard for measuring insurer conduct

Third-party insurance is liability insurance. It always involves a claim of loss and three distinct parties: an injured claimant, an insured, and the insured's insurance company.[FN1] In contrast to first-party insurance, [FN2] which applies to the insured's own claimed losses, third-party insurance is intended to protect the insured from the expense of defending and paying the claim of a third party within the policy's limits.[FN3]

Liability policies provide for absolute control by the insurer over the defense and settlement of all covered claims.[FN4] By virtue of the insurer's absolute control of defense and settlement, the insurer owes the insured a duty of good faith and fair dealing in the exercise of that control.[FN5] Breach of that duty may result in liability to the insurer for extracontractual damages, which are sums beyond the costs, fees, and limits for which the insured contracted.[FN6]

The insurer's duty of good faith and fair dealing in settlement is activated by a conflict between the insurer and the insured concerning a particular claim. The courts appear to differ in their views over the nature of this activating conflict. It has been described as occurring "[w]hen there is a likelihood liability may exceed policy limits and there is an opportunity for settlement within policy limits ...."[FN7] It has also been characterized as occurring by virtue of the fact that the claim is for damages in excess of policy limits as distinct from being dependent on a settlement demand from the injured party. [FN8]

As will be seen, the results of decided cases indicate that most courts are willing to accept twin propositions. First, that the insurer's duty of good faith and fair dealing in *settlement* is activated by a comparison of:

1. The insurer's policy limits
2. The insured's liability
3. The reasonably foreseeable amount of damages if the claim were tried[FN9]

Second, that the duty of good faith and fair dealing in *defense* of the claim is activated simply by virtue of the fact that a claim has been made which is covered by the policy.[FN10]

With regard to fulfillment of the duty of good faith and fair dealing in settlement when the respective interests of the insured and of the insurer are in conflict, a variety of standards have been judicially stated. These are all measures of insurer liability for extracontractual damages in such situations. What "Good Faith" or "Bad Faith" means is particularized in the case law; the terms are not meant in other words to convey that a claim or a cause of action can somehow be based on general allegations or theories that the insurance company defendant is "bad". *See Mattadeen v. State Farm Mutual Automobile Insurance Co.*, No. 04-80034-Civ-Hurley/Hopkins (S.D. Fla. filed 2004), December 17, 2004 "Order Granting Defendants' Motion For Final Summary Judgment", at 13. The author filed a Report as an Expert Witness for the defendant in that particular case.

One such standard is that liability insurance companies "should be held to that degree of care and diligence which a man of ordinary care and prudence should exercise in the management of his own business."[FN11] Another standard is that the insurer must give at least equal consideration to the insured's interests as to its own in determining whether and how to settle the claim that has called forth the insurer's duty of good faith and fair dealing in settlement.[FN12] Still another standard would have the insurer evaluate such a claim as though only the insurer would be responsible to satisfy it, i.e., as though the insurer had issued its policy without limits.[FN13]

Another standard holds that a decision not to settle such a claim "must be a realistic one when tested by the necessarily assumed expertise of the company." [FN14] The standard of liability will be more exacting after a verdict or judgment in excess of the policy limits has been returned against the insured and the insurer is considering an appeal instead of settlement for the policy limit.[FN15]

It is generally agreed that the insurer's liability for extracontractual damages on account of alleged bad faith and unfair dealing in settlement is tested in light of facts known or reasonably knowable at the time the decision not to settle was made.[FN16] Ordinarily, application of this standard to the insurer conduct in question in a particular case is left to the trier of fact.[FN17]

In succeeding sections, the kinds of insurer conduct which have been or might soon be litigated in bad faith cases are examined.

[FN1] *E.g.*, Zephyr Park, Ltd v Superior Court, 213 Cal App 3d 833, 262 Cal Rptr 106, 107 n2 (1989); *see, e.g.*, Lamar Truck Plaza, Inc v Sentry Ins, 757 P2d 1143, 1143-44 (Colo Ct App 1988); Mason v Home Ins Co, 177 Ill App 3d 454, 532 NE2d 526, 527-29 (1988) *cert. denied*, 125 Ill 2d 567, 537 NE2d 811 (1989); Falkenstein's Meat Co v Maryland Casualty Co, 91 Or App 276, 278-79, 754 P2d 621, 622-23 (1988); Campbell v State Farm Mut Auto Ins Co, 840 P2d 130, 137 n12 (Utah Ct App), cert

Continued on page 22



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Presentation Skills for Lawyers

How to Create a Winning Record – Part 2



Elliott Wilcox

Last month we discussed the secrets of creating a winning record for appeal. These tips and techniques were compiled from conversations with nearly a dozen different court reporters who not only told me all of the things lawyers do that contribute to a confusing record, but also revealed techniques for avoiding the problems and ensuring a clear appellate record. In this issue, we'll finish discussing "How to Create a Winning Record."

13. Frisk your witnesses before they leave. Almost every lawyer with a few years under his or her belt has a story like this one:

> After the witness finishes testifying, he gathers his notes, stands up and leaves the deposition room. Halfway through your next deposition, you need to refer to a document or a photograph that had previously been marked as "Defense F." You look through the papers on the table, turn your briefcase inside out, and have your opponent do the same, but no luck. It's gone! Where did it go? A few frantic phone calls later, you connect with the witness, who sheepishly admits he accidentally took it with him.

Depending on whether it happens to your or your opponent, it can either be comical or terrifying. Either way, you can avoid the problem by frisking your witness before he leaves to ensure he hasn't accidentally gathered up any of your exhibits.

Of course you don't want your witnesses to leave with any exhibits, but make sure that you don't take any exhibits, either. Use your exhibit list to keep track of exhibits, and make sure that either the clerk or the court reporter has custody of everything before anybody leaves the courtroom.

14. Don't ask the reporter to swear in a telephonic witness. The court reporter doesn't want to lose her Notary license. She can't swear in a witness over the telephone because the witness needs to be in her presence before he can be sworn. The court reporter needs to ensure that the person making the statement is in fact who he says he is. If you're taking a telephonic deposition, you need to have a court reporter at the witness's location, not yours. To make the process even easier, remind your witness to bring a photographic form of identification with him to the deposition.

15. State your objections clearly. If you mumble them or merely raise your hand, the record will reflect that you "indicated," not that you objected. The rules in a deposition aren't any different than they are in trial. You need to put your opponent on notice that you're objecting, so that he can clarify things if necessary. If you want to object, clearly state the word "Objection!" followed by your grounds.

16. Eliminate barriers between you and the court reporter. Try to avoid any physical obstructions between you and the court reporter. Many times, court reporters supplement their listening by looking at your face and reading your lips. Your record will be clearer if you stand up and speak over those boxes on your desk or if you move so the lectern doesn't impede your view of the reporter.

17. Don't descend to your witness's language level. Just because your witness uses phrases like "Crib," "Peeps," or "Schnizzle-fanizzle" doesn't mean that ***you*** should use that language. When you add up all of the money you've spent on education, your vocabulary is probably worth more than $100,000. That means you have a better palette of words with which to paint verbal images. Don't descend to your witness's vocabulary level. Instead, translate his phrases, not only for the record, but so your jury understands, too.

18. Clearly state what your exhibit is. "Take a look at this," isn't very clear. "I'm showing you a photograph which I have marked as State's Exhibit #2" tells the record exactly what you're talking about. Remember that you're not just talking to the people in the courtroom. You're talking to an appellate court, or creating a written record for impeachment use in trial. To ensure your record has impeachment or evidentiary value, clearly identify the objects you're discussing.

BONUS: Things that make you look bad on paper. When your final transcript is littered with verbal clutter, you're going to appear disorganized at best, or at worst, downright incompetent. One reporter, under condition of anonymity, told me, "I don't clean you up unless I like you." That means the responsibility falls on your shoulders to eliminate the verbal clutter that diminishes your trial record. Here are the most common things that cause you to look bad on paper:

- **Verbal noise:** "Ahh's" and "um's."
- **Verbal fillers:** "Gotcha," "you know..."
- **Skimming:** Mumbling as you read through caselaw or a statement: "Judge, the Jones case says, um..."
- **Disjointed phrases:** "It's just a quick... hold on a minute... I've got it right here... motion for continuance,"
- **Needless taglines:** ex., saying "Right" or "Ok" after each witness's answer.

Hopefully, you'll apply all of these tips the next time you work with a court reporter. Make a special effort to think how your words will appear on paper, and you'll create a record that not only persuades your jurors, but persuades the appellate court, too.

Elliott Wilcox is the editor of Trial Tips Newsletter. To collect your free special report, "How to Become the Best Trial Lawyer in Your Courthouse - The Top Ten Tips for Trial Lawyers," send an email with the subject line "OCBA" to FreeTips@TrialTheater.com

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Rainmaking 101

Lesson 8 – Client Interviews



Mark Powers

In the last two columns we've discussed the use of strategic conversations, the "What To Say," part of a word-of-mouth marketing program. Specifically, we've focused on a simple technique for turning a normal conversation into a strategic conversation: asking questions. Asking the right questions of the right group of people is a powerful tool to gather valuable information, build rapport and foster trust.

The rainmaking scenario we'll focus on today involves interviewing your clients. Interviewing clients can be surprisingly fruitful - not only for the valuable information you'll learn, but also for the depth of relationship you'll create. In client development, depth of relationship translates into increased "know, like and trust," which translates into a more satisfied client. More satisfied clients tend to talk about you to their friends and associates. This leads to more referrals.

Large retail and corporate institutions have long recognized the need to stay in touch with their clients and customers. Many large law firms have institutionalized feedback loops and do their best to stay in touch with their client base despite their size. This is where small and mid-size law firms have the advantage: they are small enough to deliver personalized service and can easily stay in touch with their clients. But a great many attorneys in small and mid-size firms don't make the extra effort required to get feedback from their clients on a regular basis. They rely instead on the number of complaints they hear to tell them how clients perceive their services. This is the *ad hoc* approach: when the number of complaints goes up - the attorneys move in to fix the problem. When they hear no complaints, they make the mistaken assumption that all is going well.

Don't assume all is well with your clients. Doing so ensures that you'll deliver an *acceptable* level of service to your clients when you should strive to *exceed* client expectations. We recommend that you regularly engage your clients in questions about your practice and their experience when dealing with you and your office. This is the best way to know how your services are being perceived.

Here's what we suggest to the attorneys we advise: do an in-person exit interview at the conclusion of substantial matters with significant clients. You can do this by taking the client out to lunch, or you can have the conversation in your office. If the client is someone who has recurring work that they can send you, is well-connected and has the ability to refer friends and associates, or is your main contact at an institution you represent and you want to increase the likelihood you'll get more work, take them out to lunch. If you've just gotten a good result for the client, you can create a celebratory mood at the lunch and this interview will be especially effective.

When talking with the client, choose the right time to bring up the interview questions; don't launch into them immediately. Chat casually about the matter that has just been completed, discuss what's next for them, and whatever else is relevant. When the time is right, open up the conversation by saying:

> "Now that we've had a chance to work together, I'd like to ask for your feedback. I'm always trying to improve the level of service we provide and the best way to do that is to find out what we did right and what we could do better to serve our clients. Can I ask you a couple of questions about this?"

In all likelihood, the clients will respond positively to the request and may even be complimented that you think enough of them to ask their opinions. Continue the conversation with the following questions, keeping the tone light and fostering an open exchange.

> "Is there is anything you would change about how we worked with you?"
> "Were the attorneys and staff accessible to you?"
> "Were they responsive to your needs?"
> "Did you feel taken care of by our team?"

Take in the information given you by the clients and refrain from becoming defensive about any remarks they make. For the most part, your clients will give you positive feedback, which is valuable; but, press them to give you any constructive criticism they have. Let them know you'll use any information they give you to improve service overall.

At the end of the conversation, if you've received mostly positive feedback, mention again that you've enjoyed working with them. Also say you'd appreciate it if the client would think of you if he has additional work or any friends that need your services. Some attorneys find it comfortable, and complimentary to the client, to say, "My practice is built on referrals from great clients like you." This final step in the conversation is critical to ensure that the clients know your practice depends upon referrals. Be sure to plant this seed - don't count on clients to think of this on their own.

The interview in all its many forms is a very powerful strategic conversation. Adopt this tradition in your office and begin booking clients for these lunch interviews right away. You'll be pleasantly surprised by how much rapport you can build, by how much useful information you receive, and by how much the referrals pick up.

Mark Powers is the President of Atticus, Inc. and a regular contributor to The Briefs. Mark co-authored "The Making of a Rainmaker: An Ethical Approach to Marketing for Solo and Small Firm Practitioners" and founded Rainmakers™, a simple process for attorneys at all levels to stay focused on marketing, creating fresh ideas, and on-going accountability to marketing. To learn more about Atticus or Rainmakers™, please visit the Atticus website at www.atticusonline.com or contact the Atticus office at 352-383-0490.



Dean Joseph Richard Hurt, Barry University School of Law, received a commemorative vase from OCBA president Tom Wert at January's luncheon. The Dwayne O. Andreas School of Law School was granted full accreditation by the ABA Council of the Section of Legal Education and Admissions to the Bar on December 2, 2006.



Jamie Billotte Moses, OCBA treasurer, introduced Florida Supreme Court Justice Barbara J. Pariente at January's bar luncheon.



Justice Pariente spoke on January 11th about the necessity of maintaining judicial independence. She focused on the idea that the judiciary needs to remain free from political, legislative, financial, and public pressures. She also remarked upon the generosity of OCBA members who serve the community through their pro bono *work.*

HEARSAY

Well, here we are in February, and we have managed to survive the crazy holidays and post-holiday race to get caught up at work. Everyone seems to be getting back to business, tapping away on hand-held electronic devices with calendars filled more with depositions than parties (or, if you're like me, still tapping away trying to figure out how to use the darned thing!). Yes, things are getting back to normal...overzealous college football fans are finally quieting down and I've managed to stay away from a shopping mall for more than two days (hey, online shopping doesn't count!). Of course, OCBA members haven't stopped keeping busy as usual! Here's what's up...

Congratulations to **Leslie Thomas**, who was one of two Public Defenders from the Ninth Circuit crowned a winner of "Brain Bowl V," a competition of case law knowledge put on each year at the Winter Conference of the Florida Public Defender's Association! In a spirited competition against teams comprised of Assistant Public Defenders from each of Florida's other judicial circuits, Thomas took one of the coveted awards after correctly answering the most questions regarding Florida case law. The game show-style competition was held during the conference's "Trial With Style" seminar.

Foley & Lardner LLP announced that **Michael Gay** will succeed **Edmund Baxa** as managing partner of the firm's Orlando office. Gay will now lead the office that was originally the Orlando firm of van den Berg, Gay, Burke, Wilson & Arkin, which Gay's late father, Frank, co-founded in the late 1960s. The firm merged with Foley in 1985. Gay is the head of the Litigation Department for the firm's Orlando office, and he is a member of the firm's General Commercial Litigation and Intellectual Property Litigation Practices, as well as the Entertainment & Media Industry Team.

Anne-Marie L. Bowen of Anne-Marie L. Bowen, P.A., a consumer debtor law firm, was recently elected as President of the Central Florida Bankruptcy Law Association. United Cerebral Palsy of Central Florida's board of directors has elected **Leslie Armstrong** with Holland + Knight LLP and **Bill Sublette** with Sublette, Sanders and Sanders as officers for 2007. **Barbara Anne Eagan** with Broussard Cullen DeGailler & Eagan, P.A., was appointed to the Executive Council of the Florida Bar Appellate Practice Committee. Eagan handles appeals in the Florida and federal appellate courts and before local government bodies.

Dellecker, Wilson, King, McKenna & Ruffier partner **Brian T. Wilson** has been elected vice chair of the Coalition for the Homeless of Central Florida for 2006. He has served on the organization's board of directors since 2004. The Coalition for the Homeless is the largest provider of homeless services in Central Florida. The non-profit organization works to address the needs of the homeless in the community and serves as a catalyst for community collaboration to end homelessness by offering comprehensive case management programs to help the homeless become self-sufficient.

Thanks to a $5,000 sponsorship from **Carlton Fields, P.A.**, the Orange County Regional History Center will be exhibiting a rare copy of the Emancipation Proclamation signed by Abraham Lincoln in its upcoming "The Civil War: America Divided" exhibit.



Kristyne Kennedy

Jay Crenshaw with Holland + Knight has authored an article entitled "Hedge Funds: Regulatory, Tax and Organizational Considerations." It is published in the *Florida Journal of International Law*, which is distributed nationally and will be available on Westlaw and Lexis. **David W. Henry** of Allen, Dyer, Doppelt, Milbrath & Gilchrist, P.A. recently received board certification as a circuit court civil mediator and will be accepting mediation referrals in state and federal court. Henry has been an OCBA member since 1989.

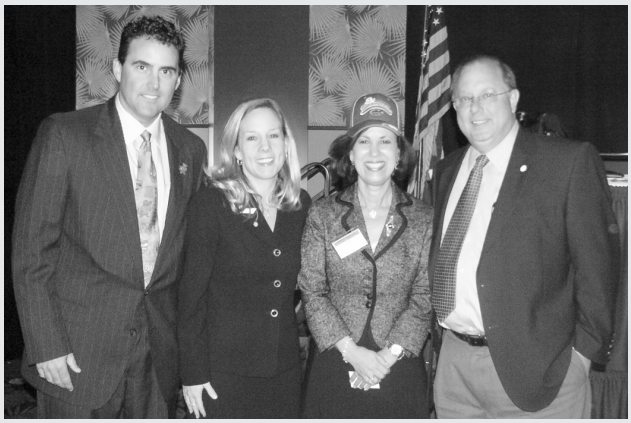
The holiday and football parties may be over, but there are still plenty of great events coming up! Be sure to mark your calendars and plan to attend the OCBA Young Lawyers Section's annual **Evening with the Judiciary** on **March 27, 2007**, at Doc's. This event always draws a big crowd, and is a great opportunity to socialize with friends and members of the judiciary in a casual environment while enjoying great food and drinks. For more information, contact **Tony Sos** at asos@dwklaw.com or **Jeremy Springhart** at jspringhart@broadandcassel.com. Also be sure to save the date for the **OCBA's 10th Annual Gala** on **March 31, 2007!** Planning is underway for another fabulous event and you won't want to miss it! For more information, contact Vivian Cocotas at vcocotas@orlandolaw.net.

In February, the Jewish Community Center of Greater Orlando (JCC) and the OCBA will be co-sponsoring a screening of the documentary film, "**Hitler's Courts: The Betrayal of the Rule of Law in Nazi Germany**." Created by Emmy Award nominees Joshua M. Greene and Shiva Kumar, the documentary examines the perversion of law under Nazi rule and features archival footage from the Nazi era, rarely seen photographs, and interviews with leading voices in international law. The screening will be at the JCC Auditorium on **February 15, 2007**, at 7:15 p.m., with a panel commentary and discussion after the film. For information, contact Al Krulick at 407-645-5933 ext. 314.

The **OCBA Social Committee** will soon be announcing its exciting calendar for the upcoming year, so stay tuned! Our past years' events, like the poker tournaments, trivia events, joint happy hours and wine and cheese parties, have been very popular and are always fun and well attended. We're looking forward to another great year, so if you would like to get involved with this committee, now is a great time to join and help. The Social Committee always welcomes new members and new ideas and you can be a part of it with minimal time commitment. For more information about Social Committee events, sponsorship opportunities or being a part of the committee, contact me at kennedyk@jacksonlewis.com or check out the OCBA website at www.orangecountybar.org.

Until next time, don't forget to keep sending any of your news, updates, gossip or other interesting information to me at kennedyk@jacksonlewis.com or fax (407) 246-8441!

Kristyne E. Kennedy is an associate with Jackson Lewis LLP. She has been a member of the OCBA since 2001.



Justice Pariente bowed to the prevailing mood of the day by wearing a Gators cap to recognize the Gators' BCS National Championship win! Tom Wert, Jamie Moses and Bruce Blackwell take a few minutes to have their photo taken with Justice Pariente.



The Honorable Fay Allen, Ninth Judicial Circuit, and Justice Pariente spend a few moments together after January's luncheon.



Orange/Osceola Public Defender Bob Wesley (standing, left) and Orlando City Clerk Alana Brenner (standing, right) attended the City's Project Homeless Connect event, which provided information on an array of available services. Assistant public defenders from Wesley's office participated by answering legal questions.

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YLS on the Move!

Coming Attractions

Judi Garabo

Now that February has rolled around and all of the hoopla surrounding college football has settled (I've never been more relieved to see a season end!), it's time to start looking forward to spring and some of the upcoming projects that the Young Lawyers have in store. First and foremost, the **Evening with the Judiciary** will be on **March 27th**, and this year we're moving to a new location - **Doc's Restaurant** on Orange Avenue! It's definitely more weatherproof than the Farmer's Market, which nearly always found us braving a torrential downpour. Join us for an evening of low country Southern barbecue, beer and wine with the local judiciary. **Jeremy Springhart** and **Tony Sos** are at the helm this year, and your RSVP is requested by March 16th. Watch for more details and information about reservations. Back when I was a fledgling young lawyer, the Evening with the Judiciary was the "Dinner" with the Judiciary and it was a very formal affair, indeed. Over the last few years, we've tried to make it more accessible to everyone and host the judges in a more laid-back, casual setting. Any way you look at it, the opportunity to mix and mingle with the Judiciary is always welcomed, and it's rewarding both for the young lawyers and for the judiciary alike.

YLS elections are upon us as well. We have three (3) at-large board seats coming open this year, and we will be accepting nominating petitions until **March 1, 2007**. Ballots will be mailed out by the OCBA by March 15th. You can contact YLS Secretary Sarah Reiner for more information (sreiner@moran-shams.com). Don't pass up this opportunity to get more involved with the board and help shape the future of the Young Lawyers Section! Unlike your "Big Bar" membership, your time in the Young Lawyers Section is limited, so make the most of it while you can before you turn 36.

Start looking for more social programming in the coming months - we'll pick up with our monthly happy hours again in February. Date and location are both yet to be determined, so watch your email in-box! If you haven't already set your spam filter to allow emails from OCBAYLS@gmail.com, now is a good time to do so. If you're not receiving our email blasts and you want to, send a request to that address and I'll add you to our always-growing distribution list. Further on down the calendar, you won't want to miss our summer pub crawl. The last two years have sold out, so get in line early this year!

And speaking of social engagements, don't miss *the* event of the season! No, not my wedding in April (that would be the event of a *lifetime!*). I'm talking about the **Tenth Annual OCBA Gala** on **March 31, 2007**, on the rooftop of the Premier Trade Plaza! Get ready to dance underneath the stars as the OCBA Foundation brings you yet another top-shelf event. Drinks, dinner, dancing and dazzling entertainment are in store for you. Again, watch your mail for invitations and order your tickets soon. We're bound to sell out yet again this year! The only drawback to having the Gala at such a swanky downtown location this year is that a YLS Party Bus won't be necessary. However, an afterparty is practically a sure thing.

On a more substantive note, the Florida Bar Young Lawyers Division held its annual **Affiliate Outreach Conference** the first weekend in February. As we go to press, we're still finalizing details of the service projects and award applications we will present at the conference, so I'll provide more details in the coming months.

Another note for those interested in volunteering: the Florida Bar is seeking proctors for the February Bar Exam administration, which will be in Orlando for the first time. You can find more information on the Florida Bar's website at www.floridabar.org. Wouldn't you just love to relive the sheer terror of sitting for the bar exam, even vicariously?

Finally, keep an eye out for our **February luncheon** at the Citrus Club on **February 15th**. In case you've forgotten to make reservations to take that someone special out for Valentine's Day, bring them to the Citrus Club for lunch on the 15th. Lunch is $18 if you reserve in advance (email OCBAYLS@gmail.com), $20 at the door and $10 for government attorneys or sole practitioners.

Judith A. Garabo is an associate with the firm of Greenberg Traurig, P.A. She has been a member of the OCBA since 1999.



denied, 853 P2d 897 (Utah 1992); Transcontinental Ins Co v Washington Pub Utils Dists' Util Sys, 111 Wash 2d 452, 454-59, 760 P2d 337, 339-41 (1988). *See, e.g.*, State ex rel. Brison v. Kaufman, 213 W. Va. 624, 630, 584 S.E.2d 480, 486 (2003). *See also* Wall, Avoiding "Bad Faith" in Settlement: What are the Developments?, 63 Defense Couns J 249 (April 1996).

[FN2] *See* § **9:1**. *E.g.*, Thomas V. Flaherty, Rebecca L. Ross, Michael D. Sullivan, & Charles T. Blair, Developments in West Virginia's Insurance Bad Faith Law -- Where do we go From Here?, 98 W Va L Rev 267, 269 & n.3 (1995), CITING THIS BOOK.

[FN3] *E.g.*, A&E Supply Co v Nationwide Mut Fire Ins Co, 798 F2d 669, 676 n8 (4th Cir 1986) (Virginia law), cert denied, 479 US 1091 (1987); Rova Farms Resort, Inc v Investors Ins Co of Am, 65 NJ 474, 323 A2d 495, 505 (1974); Radio Taxi Serv, Inc v Lincoln Mut Ins Co, 31 NJ 299, 157 A2d 319, 322 (1960); Beck v Farmers Ins Exch, 701 P2d 795, 798 n2 (Utah 1985); Wall, Bad Faith, Excess Liability Actions by or Against Excess Insurers, 48 Ins Couns J 311, 312-15 (1981).

Cf Boeing Co v Aetna Casualty & Sur Co, 113 Wash 2d 869, 784 P2d 507, 510 (1990) (en banc):

The question before us is whether these response costs to remedy an actual release of hazardous substances constitute damages within the meaning of the insureds' comprehensive general liability policies issued by insurers. In order for the policyholders to be indemnified, the plain meaning of the contract must provide coverage for the subject "response costs." Alternatively, before the insurers can avoid indemnifying the policyholders, this court must be satisfied that the plain meaning of "damages," as it would be understood by the average lay person, unmistakably precludes coverage for response costs, and any ambiguity is to be construed against the insurer.

See generally Anderson, Tydings & Lewis, Liability Insurance: A Primer for Corporate Counsel, 49 Bus Law 259 (1993). *E.g.*, Best Place, Inc. v. Penn Am. Ins. Co., 82 Haw. 120, 920 P.2d 334, 338 n.4 (1996).

[FN4] *E.g.*, Comment, Expanding the Insurer's Duty to Attempt Settlement, 49 U Colo L Rev 251, 251 & n2 (1978); *see, e.g.*, Maine Bonding & Casualty Co v Centennial Ins Co, 298 Or 514, 693 P2d 1296, 1298 (1985) (en banc); Appleman, Duty of Liability Insurer to Compromise Litigation, 26 Ky LJ 100, 100 & n2 (1938). Aside from vesting control over limiting liability in the hands of the insurer's agents, a further purpose behind this provision is to vest control in those same hands over the costs of investigation and defense. *See* Keeton, Liability Insurance and Responsibility for Settlement, 67 Harv L Rev 1136, 1166 (1954).

Where the insured controls the settlement decision because the policy requires the insured's consent, the contract "is more than a simple liability policy." Brion v Vigilant Ins Co, 651 SW2d 183, 185 (Mo Ct App 1983). Such a so-called pride provision is found in some professional malpractice liability policies and gives the insured "control over litigation which could jeopardize his professional reputation." Id 184. The liability insurer's basis of liability should it ignore this contractual provision and settle without obtaining the insured's consent is in contract. It is liable for the same damages to reputation and for mental anguish which the pride provision purchased by the insured was to prevent. *See* id 184-85.

A contrary result was reached in a recent case where the insurer had reserved the exclusive right to settle and settled against the insured's wishes. Shuster v South Broward Hosp Dist Physicians' Prof Liab Ins Trust, 570 So 2d 1362, 1368 (Fla Dist Ct App 1990), affd, 591 So 2d 174 (Fla 1992). To the same effect, analyzing *Shuster* and similar cases and considering the facts at bar, is Doe v. South Carolina Med. Mal. Liab. Joint Underwriting Ass'n, 347 S.C. 642, 653, 557 S.E.2d 670, 676 (2001):

Under these circumstances, JUA's decisions to settle the case on behalf of Doe and to charge a portion of the settlement against his policy were eminently reasonable.

In Florida, by the provisions of a statute entitled, "Medical malpractice insurance contracts," the so-called pride provisions in such contracts of insurance have been severely limited or legislatively abrogated:

It is against public policy for any insurance or self-insurance policy to contain a clause giving the insured the exclusive right to veto any offer for admission of liability and for arbitration pursuant to s. 766.106, settlement offer, or offer of judgment, when such offer is within the policy limits. However, any offer of admission of liability, settlement offer, or offer of judgment made by an insurer or self-insurer shall be made in good faith and in the best interests of the insured.

Fla. Stat. § 627.4137(1) (b)1 (2005).

See Cohen v. Freeman, 914 So. 2d 449, 449 (Fla. 4th DCA 2005), in which the appellate court remanded on appeal from a trial court's "initial decision declining to enter a judgment of enforcement" due to "procedural irregularities" in a motion to enforce a settlement in a medical malpractice action. The opinion for the appellate court went on, nonetheless, to emphasize that the objection of the defendant doctor "would not bar that settlement":

The pending bad faith claims by the doctor may not be used to delay or impair the entitlement of the settling parties to immediate enforcement of their settlement.

Id. at 450.

Where the liability policy provides for a deductible and the insurer has the unfettered right to settle all claims, with or without the insured's consent, it has been held that there is no duty of good faith or fair dealing which would prevent the insurer from settling a claim within the deductible amount even if the insured does not consent. Casualty Ins Co v Town & Country Pre-School Nursery, Inc, 147 Ill App 3d 567, 498 NE2d 1177, 1178-79 (1986).

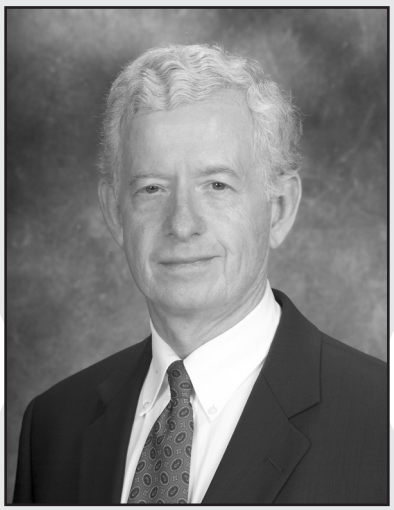
[FN5] *E.g.*, Northwestern Mut Ins Co v Farmers Ins Group, 76 Cal App 3d 1031, 1043, 143 Cal Rptr 415, 422 (1978); Farmers Group, Inc v Trimble, 691 P2d 1138, 1141 (Colo 1984) (en banc); General Accident Fire & Life Assurance Corp, 390 So 2d 761, 764 (Fla Dist Ct App 1980), review denied, 399 So 2d 1142 (Fla 1981); Fireman's Fund Ins Co v Continental Ins Co, 308 Md 315, 519 A2d 202, 204 (1987); Johnson v Federal Kemper Ins Co, 74 Md App 243, 536 A2d 1211, 1213, cert denied, 313 Md 8, 542 A2d 844 (1988); Bowers v Camden Fire Ins Assn, 51 NJ 62, 237 A2d 857, 861 (1968); Ambassador Ins Co v St Paul Fire & Marine Ins Co, 102 NM 28, 690 P2d 1022, 1024-25 (1984); Maine Bonding & Casualty Co v Centennial Ins Co, 298 Or 514, 693 P2d 1296, 1298 (1985) (en banc); Ranger County Mut Ins Co v Guin, 704 SW2d 813, 820 (Tex Ct App 1985), affd, 723 SW2d 656 (Tex 1987); Myers v Ambassador Ins Co, 146 Vt 552, 508 A2d 689, 690 (1986); Mowry v Badger State Mut Casualty Co, 129 Wis 2d 496, 385 NW2d 171, 178 (1986). *See* McNally v Nationwide Ins Co, 815 F2d 254, 263 (3d Cir 1987) (citing this book); Continental Casualty Co v Great Am Ins Co, 711 F Supp 1475, 1479 (ND Ill 1989) (holding that the rule obviously does not apply in the face of evidence that the insurer exercised no such control in the case at bar).

In a recent federal case, it was even held under a standard directors' and officers' liability policy, which does not contain a duty to defend but provides instead for reimbursement of the insureds' defense fees and costs, that "[a]n insurance company has a duty implied in law to conduct good faith settlement negotiations whether or not the policy explicitly requires it to defend." Okada v MGIC Indem Corp, 608 F Supp 383, 390 (D Haw 1985), affd in part, revd in part, 823 F2d 276 (9th Cir 1987). *Cf.* Manley Bennett, McDonald & Co v. St Paul Fire & Marine Ins Co, 792 F Supp 1070, 1073 (ED Mich 1992), affd mem, 933 F2d 55 (6th Cir 1994), in which the District Judge held that "I reject this view [that indemnity for defense costs is governed by different tests and rules than the duty to defend under a liability policy] and hold that the duty to defend is the same as the duty to indemnify for defense costs." Obversely, where an indemnity policy provides that the insured has control over defense and settlement, it has been held:

The duty of good faith is also present in an indemnity type policy, although the relationship between the insured and the insurer changes. Often, excess insurance policies take the form of indemnity policies because they leave the duty to defend and settle a claim against the insured to the primary insurer, or in this case, the insured .... Similarly, the duty of good faith engrafted into the contractual obligations of these policies requires that the insured exercise diligence and good faith in conducting the defense for the benefit of both the insured and the insurer who each

Continued on page 24

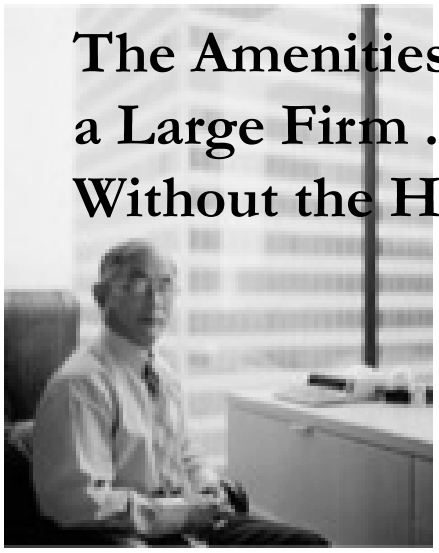
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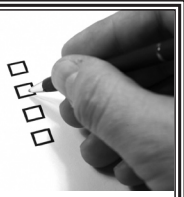


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ELECTION NOTICE



Election of Officers and Members of the Executive Council of the Orange County Bar Association

The following positions are open for election:

Vice President / President Elect (1 yr.)
Secretary (1 yr.)
Treasurer (1 yr.)

Three (3) Executive Council Seats (3 yrs.)

Election of Trustees of the Board of Trustees of The Legal Aid Society of the Orange County Bar Association, Inc.

The following positions are open for election:

Two (2) seat on the Legal Aid Society Board of Trustees; the elected Trustee will serve from June 1, 2007 through May 31, 2010.

Election of At-Large Members of the Board of Directors of The Young Lawyers Section of the Orange County Bar Association

The following positions are open for election:

Five (5) At-Large Board of Directors (2 yrs.)

Anyone interested in running for any of these positions should file a written petition at the Association office, 880 N. Orange Ave., Orlando, FL 32801, signed by not less that five (5) members of the Association.

Petitions must be received in the Association office no later than 5:00 p.m. on March 1, 2007. Petitions may be mailed or couriered.

Nominees must endorse their written acceptance on the petition and may NOT accept nominations for more than one (1) office.

No nomination for office of Vice President shall be accepted unless nominee shall have served on the Executive Council at least one (1) year.

Thereafter, the nominating petitions will be canvassed and tabulated by the President and Secretary, who shall thereupon certify the names of all members who have been properly nominated.

Voting shall be by secret ballot mailed to each member of the Association on or before March 15, 2007.

Voted ballots must be returned to the Association office no later than 5:00 p.m. on March 26, 2007.

In the event of a run-off election, the ballots will be mailed on or before April 5, 2007, with the voted ballot returned no later than 5:00 p.m. on April 17, 2007.

Blank petitions are available at the Association office and on the website at www.orangecountybar.org.

have a financial stake in the proceedings.
North Am. Van Lines v. Lexington Ins. Co., 678 So. 2d 1325, 1331 (4th Dist. Ct. App. 1996), review denied, 692 So.2d 185 (Fla. 1997*)*.

The rule stated in the text was recently followed in the unique but recurring situation of multiple claimants, in Farinas v. Florida Farm Bureau Gen. Ins. Co., 850 So. 2d 555, 559 (Fla. 4th DCA 2003), review denied, 871 So. 2d 872 (Fla. 2004). The author was thereafter retained as an Expert Witness on behalf of several of the injured claimants in that particular case.

The liability insurer's good faith settlement duties can arise even before the claim against the insured is in suit. Smith v Blackwell, 14 Kan App 2d 158, 791 P2d 1343, 1346 (1989). *Contra* Morrell Constr, Inc v Home Ins Co, 920 F2d 576, 581 (9th Cir 1990) (Idaho law).

It has recently been held that a third-party carrier's nonrenewal is also subject to duties of good faith and fair dealing:
As a general principle, we agree that an insurer may choose to nonrenew an insured for any reason. ... However, an insurer is required to act in good faith when carrying out its decision not to renew either a single insured or entire blocks of business. In this setting, we believe that good faith should be measured according to the legal standard used in the first-party claims context: unreasonable conduct and either knowledge or reckless disregard of the unreasonableness of the conduct.
Ballow v. PHICO Ins Co, 875 P2d 1354, 1363 (Colo 1993) (en banc). The legal standards used throughout the nation in the first-party claims context to measure extracontractual liability are discussed in Chapter 9 and legal standards for defenses are discussed in Chapter 11.

[FN6] *E.g.*, Continental Casualty Co v United States Fidelity & Guar Co, 516 F Supp 384, 387 (ND Cal 1981) (applying California law); Zumwalt v Utilities Ins Co, 360 Mo 362, 228 SW2d 750, 753 (1950); Kranzush v Badger State Mut Casualty Co, 103 Wis 2d 56, 307 NW2d 256, 259 (1981).

[FN7] Northwestern Mut Ins Co v Farmers Ins Group, 76 Cal App 3d 1031, 1043, 143 Cal Rptr 415, 422 (1978). *E.g.*, Myers v Ambassador Ins Co, 146 Vt 552, 508 A2d 689, 691 (1986); *see, e.g.*, Continental Casualty Co v United States Fidelity & Guar Co, 516 F Supp 384, 387 (ND Cal 1981) (applying California law); General Accident Fire & Life Assurance Corp v American Casualty Co, 390 So 2d 761, 764 (Fla Dist Ct App 1980), review denied, 399 So 2d 1142 (Fla 1981).

[FN8] Coleman v Holecek, 542 F2d 532, 537 (10th Cir 1976) (applying Kansas law); *see* General Accident Fire & Life Assurance Corp v American Casualty Co, 390 So 2d 761, 765 (Fla Dist Ct App 1980), review denied, 399 So 2d 1142 (Fla 1981); Comment, Expanding the Insurer's Duty to Attempt Settlement, 49 U Colo L Rev 251, 258-59 (1978).

[FN9] The Supreme Court of Louisiana similarly observed in the recent case of Smith v. Audubon Ins. Co., 679 So. 2d 372, 377 (La. 1996):
The determination of good or bad faith in an insurer's deciding to proceed to trial involves the weighing of such factors, among others, as the probability of the insured's liability, the extent of the damages incurred by the claimant, the amount of the policy limits, the adequacy of the insurer's investigation, and the openness of communications between the insurer and the insured.

E.g., Ross Neely Systems, Inc. v. Occidental Fire & Cas. Co. of North Carolina, 196 F.3d 1347, 1351 (11th Cir. 1999) (Alabama law); Haddick v. Valor Ins., 198 Ill. 2d 409, 763 N.E.2d 299, 304-05, 261 Ill. Dec. 329 (2001); *see* American Physicians Ins Exch v. Garcia, 876 SW2d 842, 849 (Tex 1994). *See, e.g.*, Brown v United States Fidelity & Guar Co, 314 F2d 675, 678-79 (2d Cir 1963) (case involved substantive law of New York); Henke v Iowa Home Mut Casualty Co, 250 Iowa 1123, 97 NW2d 168, 174, 179 (1959). *See* **3:31-3:39**.

[FN10] *See* **§ 3:48**. *See* Zurich Ins. Co. v. Texasgulf, Inc., 233 A.D.2d 180, 649 N.Y.S.2d 153 (App. Div. 1st Dep't 1996).

[FN11] Auto Mut Indem Co v Shaw, 134 Fla 815, 184 So 852, 859 (1938). *Accord* Bennett v Conrady, 180 Kan 485, 305 P2d 823, 827 (1957); Ranger County Mut Ins Co v Guin, 704 SW2d 813, 821 (Tex Ct App 1985), affd, 723 SW2d 656 (Tex 1987); Kranzush v Badger State Mut Casualty Co, 103 Wis 2d 56, 307 NW2d 256, 259 (1981). *E.g.*, Stetler v Fosha, 809 F Supp 1409, 1421 (D Kan 1992), affd mem, 7 F3d 1045 (10th Cir 1993). *see* Helfand v National Union Fire Ins Co, 10 Cal App 4th 869, 13 Cal Rptr 2d 295, 317 (1992), cert. denied, 510 U.S. 824, 114 S. Ct. 84 (1993). (arbitrary cancellation is a breach of covenant of good faith and fair dealing).

[FN12] *E.g.*, Torrez v State Farm Mut Auto Ins Co, 705 F2d 1192, 1195 (10th Cir 1982) (applying New Mexico law); Young v American Casualty Co, 416 F2d 906, 910 (2d Cir 1969) (applying New York law), cert dismissed, 396 US 997 (1970); American Fidelity & Casualty Co v All American Bus Lines, Inc, 190 F2d 234, 238 (10th Cir) (applying Oklahoma law), cert denied 342 US 851 (1951); Pavia v State Farm Mut Auto Ins Co, 82 NY2d 445, 454, 626 NE2d 24, 605 NYS2d 208, 212 (1993); *see, e.g.*, Camp v St Paul Fire & Marine Ins Co, 616 So 2d 12, 14 (Fla 1993); Warren v American Family Mut Ins Co, 122 Wis 2d 381, 361 NW2d 724, 727, 728 (Ct App 1984):
Bad faith has been described as being more than mere negligence on the part of the insurance company in deciding to litigate rather than settle. It is only when conduct evidences a significant disregard of the insured's interests that bad faith may be found .... The trial court properly noted that this is not the "bandana and pistol" type of dishonesty, and said when an insurance company's conscious decision not to settle a case within policy limits is the product of egregious failure on the company's part to perform the duties that it owes to its insured, then that conscious decision to expose its insured to a trial is deceitful and dishonest in the law. We agree with the trial court's statement that the "suggestion of dishonesty" is the equivalent of bad faith.

E.g. Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 659, 328 P.2d 198, 201, 68 A.L.R.2d 883 (1958); Northfield Ins. Co. v. St. Paul Surplus Lines Ins. Co., 545 N.W.2d 57, 60 (Minn. Ct. App. 1996). Factors involved in the "equality of consideration" standard, which are followed in most jurisdictions, are set out at length under Idaho law in Truck Ins. Exchange v. Bishara, 128 Idaho 550, 555, 916 P.2d 1275, 1280 (1996). As the court described it in the case of State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 62-63 (Fla. 1995), the standards in Florida are unique in that bad faith claims of third-party settlement are treated the same as all other situations of alleged bad faith:
Florida differs, however, from most jurisdictions given that first-party bad faith actions are actionable only under section 624.155 and not the common law. ... Additionally, as previously discussed, section 624.155 provides remedies for *both* first- and third-party causes of actions. Section 624.155 provides that an insurer has acted in bad faith if it has "[n]ot attempt[ed] in good faith to settle claims when, under all the circumstances, it could and should have done so had it acted fairly and honestly toward its insured and with due regard for [the insured's] interest." § 624.155(1)(b)1. Because this specific standard is set forth in section 624.155, we find it unnecessary and inappropriate to apply the "fairly debatable" standard to bad faith actions in Florida.
Recently, several district courts have also rejected the fairly debatable standard in both first-party unfair insurance trade practices and third-party bad faith actions, applying instead a totality-of-the-circumstances standard somewhat similar to the standard set forth in the statute. *John J. Jerue Truck Broker v. Insurance Co. of N. Am.,* 646 So. 2d 780 (Fla. Dist. Ct. App. 2d Dist. 1994); *Robinson [Robinson v. State Farm Fire & Casualty Co.*, 583 So. 2d 1063 (Fla. Dist. Ct. App. 5th Dist. 1991)]. In *Robinson*, the Fifth District Court of Appeal evaluated a number of Florida cases in concluding that a totality-of-the-circumstances approach should be used in evaluating third-party bad faith actions. The court determined that at least five factors should be taken into account: (1) whether the insurer was able to obtain a reservation of the right to deny coverage if a defense were provided; (2) efforts or measures taken by the insurer to resolve the coverage dispute promptly or in such a way as to limit any potential prejudice to the insureds; (3) the substance of the coverage dispute or the weight of legal authority on the coverage issue; (4) the insurer's diligence and thoroughness in investigating the facts specifically pertinent to coverage; and (5) efforts made by the insurer to settle the liability claim in the face of the coverage dispute. 583 So. 2d at 1068. In *Jerue*, the Second District Court of Appeal adopted this same approach, finding that the second, third, and fourth factors promulgated in *Robinson* should likewise be considered in a first-party cause of

Continued on page 26

Laissez les bons temps rouler!!

An Evening with the Judiciary

Presented by the OCBA Young Lawyer's Section

The Young Lawyer's 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 Southern / Creole cuisine, beer, wine and refreshments, and great conversation in a relaxed atmosphere.

Doc's Restaurant 1315 S. Orange Ave. (across from ORMC) **Low Country Southern Barbeque*** • *Bouguet of Baby Greens, Glazed Pecans, Seasoned Berries, Gorgonzola Cheese and Tangerine Vinaigrette* • *Pork Loin rolled in a dragon sauce* • *Jambalaya with Shrimp, Scallops and Sausage* • *Cheddar Cheese Grits* • *Corn Bread Pudding* • *Collard Greens* • *Chef's choice of another vegetable* • *Assorted cakes*	DATE: Tuesday, March 27, 2007 TIME: 5:30 p.m. to 8:30 p.m. PRICE: $35 Advance $40 Door (Complimentary valet parking) RSVP BY: Friday, March 16, 2007 *Further information or RSVP please contact:* Cathy Pyle at cathyp@ocbanet.org 407-843-3470 or fax or mail below form to P.O. Box 530085, Orlando, FL 32853

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action. We agree, finding that a determination of whether an insurer has acted "fairly and honestly toward its insured and with due regard for [the insured's] interests" includes a consideration of these factors. Consequently, we reject the fairly debatable standard of determining whether a reasonable basis exists for rejecting coverage.* * *
Interestingly, in the 1990 amendment to section 624.155, the Legislature, in addition to other changes, provided that "any person may obtain a judgment under either the common law remedy of bad faith or this statutory remedy, but shall not be entitled to a judgment under both remedies." § 624.155(7), Fla. Stat. (Supp. 1990). Because the statute otherwise makes specific reference to third-party causes of action brought under the statute, *see, e.g.*, 624.155(2)(b)4., it is clear that a third-party cause of action can now be brought under either section 624.155 or the common law. This is untrue for first-party actions because, as discussed previously, first-party actions do not exist at common law. For consistency, however, we find that the standard set forth in this opinion should apply equally to third-party actions brought at common law.

Florida's common law "standard of care" to be followed by insurers handling claims against their insureds, was recently stated to be "further reflected" in Florida Statute Section 624.155(b)(1). Farinas v. Florida Farm Bureau Gen. Ins. Co., 850 So. 2d 555, 559 (Fla. 4th DCA 2003), review denied, 871 So. 2d 872 (Fla. 2004). After this opinion, the author was retained as an Expert Witness on behalf of several of the injured claimants in that case, and the case which had involved years of litigation among the parties settled a short time thereafter.

[FN13] *E.g.*, Kissoondath v. United States Fire Ins. Co., 620 N.W.2d 909, 916 (Minn. Ct. App. 2001), review denied (Minn. April 17, 2001). *E.g.*, Employers Natl Ins Corp v Zurich Am Ins Co, 792 F2d 517, 519 & n2 (5th Cir 1986) (Texas law); Bohemia, Inc v Home Ins Co, 725 F2d 506, 512 (9th Cir 1984) (applying Oregon law); North River Ins Co v St Paul Fire & Marine Ins Co, 600 F2d 721, 724 (8th Cir 1979) (applying South Dakota law); Coleman v Holecek, 542 F2d 532, 537 (10th Cir 1976) (applying Kansas law); Betts v Allstate Ins Co, 154 Cal App 3d 688, 706, 201 Cal Rptr 528, 538 (1984); Wierck v Grinnell Mut Reins Co, 456 NW2d 191, 195 (Iowa 1990); Maine Bonding & Casualty Co v Centennial Ins Co, 298 Or 514, 693 P2d 1296, 1299, 1303 (1985) (en banc); Keeton, Liability Insurance and Responsibility for Settlement, 67 Harv L Rev 1136, 1146-48 (1954).

[FN14] Bowers v Camden Fire Ins Assn, 51 NJ 62, 237 A2d 857, 861 (1968). *Accord* McChristian v State Farm Mut Auto Ins Co, 304 F Supp 748, 753 (WD Ark 1969) (applying Arkansas law); Shearer v Reed, 286 Pa Super 188, 428 A2d 635, 638 (1981); *see* Boston Old Colony Ins Co v Gutierrez, 386 So 2d 783, 785 (Fla 1980), cert denied, 450 US 922 (1981).

[FN15] Bowers v Camden Fire Ins Assn, 51 NJ 62, 237 A2d 857, 862 (1968). *Accord* State Farm Mut Auto Ins Co v Brewer, 406 F2d 610, 612-13 (9th Cir 1968) (applying Oregon law); Hazelrigg v American Fidelity & Casualty Co, 241 F2d 871, 873 (10th Cir 1957) (applying Oklahoma law).

[FN16] *E.g.*, American Fidelity & Casualty Co v Greyhound Corp, 258 F.2d 709, 716 (5th Cir 1958) (applying Florida law); Certain Underwriters of Lloyd's v General Accident Ins Co of Am, 699 F. Supp. 732, 742 (SD Ind 1988), affd with opinion, 909 F.2d 228 (7th Cir 1990); Glenn v Fleming, 247 Kan 296, 799 P.2d 79, 85 (1990); Commercial Union Ins Co v Liberty Mut Ins Co, 426 Mich 127, 393 N.W.2d 161, 166 (1986); Continental Casualty Co v Reserve Ins Co, 307 Minn 5, 238 N.W.2d 862, 867 (1976); Campbell v. State Farm Mut Auto Ins Co, 840 P.2d 130, 139 (Utah Ct App), *cert. denied*, 853 P.2d 897 (Utah 1992). The same standard is now being applied to first-party insurers' extracontractual liability for denial of covered claims. *E.g.*, Erwin v State Farm Fire & Casualty Co, 618 F. Supp. 1040, 1042 (ED Mo 1985); Duckett v Allstate Ins Co, 606 F. Supp. 728, 731 (WD Okla 1984); Nationwide Mut Ins Co v Clay, 525 So. 2d 1339, 1342 (Ala 1987), cert denied, 488 US 1040 (1989). *See* **§§ 9:1**, **9:6**, **11:4**. *E.g.*, Troutt v. Colorado W. Ins. Co., 246 F.3d 1150, 1161, 1163 (9th Cir. 2001) (noting in particular in this case arising under Montana law: "With respect to this last contention, Troutt is trying to impose oracle-like skills on CWIC, and then holding CWIC to the fact that its ESP is lacking."); Ross Neely Systems, Inc. v. Occidental Fire & Cas. Co. of North Carolina, 196 F.3d 1347, 1352 (11th Cir. 1999) (Alabama law); Behn v. Legion Ins. Co., 173 F. Supp. 2d 105, 113 (D. Mass. 2001) ("The relevant inquiry is what the insurance company reasonably believed at the time in question, not what the jury ultimately found."); Camelot by the Bay Condominium Owners' Assn. v. Scottsdale Ins. Co., 27 Cal. App. 4th 33, 32 Cal. Rptr. 2d 354, 361, 94 C.D.O.S. 5863, 94 Daily Journal D.A.R. 10619 (4th Dist. 1994).

A United States Magistrate Judge's Order And Memorandum predicted Montana substantive law in EOTT Energy Operating Ltd. v. Certain Underwriters at Lloyd's of London, 59 F. Supp. 2d 1072 (D. Mont. 1999), concerning the issue of evidence in certain categories which may *not* serve as evidence of "reasonableness" of a denial of coverage. The insured in that case settled the underlying liability case. The insured then "sought indemnification from its excess insurance carriers" for the settlement amount it paid. Id. at 1074. The insured's alleged causes of action included breach of contract and asserted violations of Montana's Unfair Trade Practices Act. The insured's causes of action, more specifically, were based on allegations that (1) the defendants had failed to indemnify the Plaintiff Policyholder without conducting a reasonable investigation and (2) the defendants had refused to attempt to effectuate prompt and equitable settlement of the Policyholder's claims to indemnification, in good faith, when liability had become reasonably clear. Id.

The basis for each of the pertinent holdings in the *EOTT* case is crucial to understand. The Magistrate Judge clearly bottomed all of the following decisions in the case on the stated understanding that Montana law requires a determination of Bad Faith, as of the time the decision to deny coverage was made. The following rulings were made concerning admissibility of evidence on the question of "reasonableness" of the insurance carriers' denial of coverage in the *EOTT* case:
(1)Not facts *known after* the time the Defendants made their decision to deny coverage, id. at 1075-76;
(2)Not law in terms of cases *published after* the defendants made their decision to deny coverage, id. at 1077, and
(3)Not a favorable *prior* ruling on coverage by the trial court in the same case, or the result in the appeal of that ruling. Id. at 1080.

[FN17] *E.g.*, Pace v Insurance Co of N Am, 838 F2d 572, 580 (1st Cir 1988) (Rhode Island law); St Paul-Mercury Indem Co v Martin, 190 F2d 455, 458 (10th Cir 1951) (applying Oklahoma law); Continental Casualty Co v United States Fidelity & Guar Co, 516 F Supp 384, 390 n7 (ND Cal 1981) (applying California law); Higgs v Industrial Fire & Casualty Co, 501 So 2d 644, 645 (Fla Dist Ct App 1986), review denied, 511 So 2d 298 (Fla 1987); Ranger Ins Co v Travelers Indem Co, 389 So 2d 272, 277 (Fla Dist Ct App (1980); Grant v Transit Casualty Co, 71 Or App 777, 693 P2d 1328, 1329-30 (1985); Myers v Ambassador Ins Co, 146 Vt 552, 508 A2d 689, 692 (1986); Mowry v Badger State Mut Casualty Co, 129 Wis 2d 496, 385 NW2d 171, 181 (1986); *see, e.g.*, Maine Bonding & Casualty Co v Centennial Ins Co, 298 Or 514, 693 P2d 1296, 1303 (1985) (en banc); Ranger County Mut Ins Co v Guin, 704 SW2d 813, 820-21 (Tex Ct App 1985), affd, 723 SW2d 656 (Tex 1987). *See generally* Syverud, The Duty to Settle, 76 Va L Rev 1113 (1990).

Liability under unfair claims-handling statutes has been similarly held to generally present questions of fact. Kyriss v Aetna Life & Casualty Co, 624 F Supp 1130, 1133 (D Mont 1986). *See* **§§ 3:25**, **3:58**, **3:87**.

Moreover, application of this same standard in a first-party case is likewise ordinarily left to the trier of fact. *E.g.*, Suggs v State Farm Casualty Co, 833 F2d 883, 891 (10th Cir 1987) (New Mexico law), cert denied, 486 US 1007 (1988); Erwin v State Farm Fire & Casualty Co, 618 F Supp 1040, 1042 (ED Mo 1985). See **§§ 9:1**, **9:6**, **11:4**. *E.g.*, Smith v. Audubon Ins. Co., 679 So. 2d 372, 377 (La. 1996).

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Louis B. Ganci, incapacitated, of Winter Park, Florida. Searcing for the attorney who represented and/or who may have prepared his will, advanced directives, and/or other estate planning documents.
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Couples who are divorcing usually focus on two things: getting out of their unhappy marriage and getting a fair financial settlement. In their haste, they often fail to see beyond the immediate gains. Taking a look at the big picture and how the spouses will fare years after the divorce will help ensure that no costly errors in judgment are made now. As witnessed by many financial planners, the long-term financial consequences of divorce are frequently the most devastating.

Here are some of the "famous last words" divorcing couples utter in making their settlements that should send up red flags.

"OK, I'll take the house." Most divorcing couples decide that the house should go to the spouse who will be taking care of the children. Their concern is with the kids, who they feel may want to continue to stay in their home. While this may be desirable emotionally, it can be financially problematic.

A home is not a liquid asset and it costs money to pay for and maintain. But the parent with the children often is the woman and may not have the income resources to take care of both the home and the children, particularly if she gives up other financial resources in return for the house. The better alternative may be to sell the home and split the proceeds.

"Let's divide things down the middle." This may sound fair on the surface, but the divisions are not always equal. One example is if the wife takes the house and the husband keeps his pension or retirement accounts. Say both are valued at $400,000. The home is a cost-burden, while the retirement account is a liquid asset that can continue to grow tax deferred, probably at a faster growth rate than the home.

"We'll both be better off financially once we're divorced." This thinking can penalize the spouse who has minimized a career in order to raise children. If the settlement doesn't take this into account, perhaps by providing extra money to the homemaking spouse to pay for additional career training or education, she or he may not be better off financially down the road.

"I'll take the IRA, you take the other investments." Even splitting the savings can be troublesome. If one spouse keeps a $150,000 individual retirement account and the other keeps a $150,000 taxable investment account, the owner of the IRA will have to pay taxes on that money when it's withdrawn, so the two accounts are not truly equal in value.

"Don't worry about the retirement accounts, you'll get your share." A spouse who will be receiving part of his or her spouse's qualified retirement accounts needs a QDRO-qualified domestic relations order. To expedite the QDRO, pre-approval from the plans needs to be obtained before the settlement is final. The court must sign the order before an account can be divided. In addition, the order should be sent to the retirement plan and approved by the plan early in the divorce process. If not completed before the divorce is final, the spouse will have to go back to the court later and runs the risk of having the ex clean out the account.

Another pitfall is not including survivor's benefits in the QDRO. If a spouse is receiving retirement benefits from the ex's pension, the QDRO must include survivor's benefits, if the plan allows them. Otherwise, those benefits could stop if the ex dies before the divorced spouse.

"Sure, I'll pay for the kids' education." If a spouse is relying on an ex for child support, retirement benefits, alimony, or other financial benefits such as a commitment to pay for the children's college education, it is wise to take out a life insurance policy on the spouse to ensure the money will be there. The spouse should own the policy so she or he knows the payments are being kept up. Another step is to buy the insurance before the settlement is final so that the spouse knows for sure the ex is insurable.

Divorce settlements are optimally prepared by an attorney with the help of a financial planner who is trained in divorce financial issues. A financial planner can objectively examine all the long-range issues that can occur, such as budgeting, appreciation and tax ramifications of proposed settlement assets, and long-term costs associated with settlement proposals.

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



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Publications

Jay Crenshaw, a lawyer in the Orlando office of Holland + Knight, has authored an article entitled "Hedge Funds: Regulatory, Tax and Organizational Considerations." It is published in the *Florida Journal of International Law*, which is distributed nationally and will be available on Westlaw and Lexis. Crenshaw practices exclusively in the area of investment management.

News to Note

Amended Order Governing Complex Business Litigation Court Procedures and Criteria - Chief Judge Belvin Perry entered an Administrative Order on December 20, 2006, mandating electronic filing in the Complex Business Litigation Division cases effective January 2, 2007. The Bar will also be able to file electronically to any 2006 CBLD case. The Court has begun imaging/ scanning cases effective 2006, and all of those cases are completely scanned and ready to be filed to electronically. The order can be found on the OCBA website at www.orangecountybar.org under "News & Events." Please help us spread the word by contacting your partners and colleagues at your convenience.

Florida Board of Governors - is seeking applicants for the Supreme Court's Bar Admissions Committee, the Florida Patient's Compensation Fund and the Statewide Nominating Commission for Compensation Claims Judges. Please see OCBA's website; the Florida Bar's website at www.floridabar.org, or call Bar headquarters at (850) 561-5600, ext. 5757. The deadline for applicants is Friday, February 23, 2007.

New OCBA Committee - The OCBA's new Insurance Law Committee, chaired by Dennis J. Wall, is seeking input and members from every practice area. Meetings begin at 12:15 on the third Wednesday of the month at the OCBA Center. Bring your own lunch and join us for a lunchtime toolbox session on insurance issues of interest to you, whether you represent individuals, businesses, policyholders or insurance companies. All are welcome! For details, see the OCBA website.

Seminars - Don't forget to register for these upcoming seminars! *International Law Committee* - Feb. 14th, 1:30 p.m. - 5:45 p.m., OCBA Center (4.0 CLE pending). *Business Law Committee* - Feb. 21, 9:00 a.m. - 5:00 p.m. (or two half-day sessions), OCBA Center (1.0 - 7.0 CLE). Registration forms are on the OCBA website.

Thanks - The OCBA extends its thanks to attorney Ingo H. Dere for his donation of photographs of OCBA members from 1954 and 1962.

Law Books Needed - The Boone High School Law Magnet program is looking for a charitable donation of a set of *Florida Digests* or *Florida Jurisprudence*. Please contact Cindy Schmidt, Esq., Boone High, 407-893-7200, ext. 2638.

Membership Photos - RCL Design Photography will be back at the OCBA this year beginning April 10 to take professional-quality photos for our Membership Directory. Look for information in the mail later this month.

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Lost Will

LOST WILL - RUTH ASPROS, deceased May 23, 2005, of Windermere, FL. Please contact Michael B. Swindle, Esq., 174 W. Comstock Ave., Ste. 100, Winter Park, FL 32789. Phone: 407-246-1114; Fax: 407-740-8091; Email: mikeswindle60@yahoo.com.

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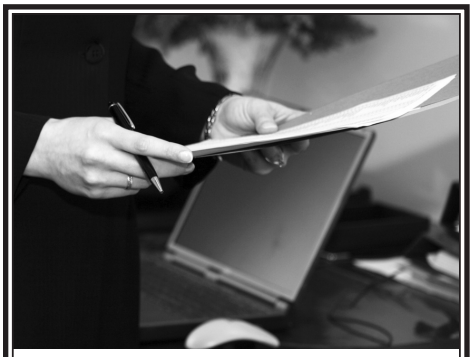
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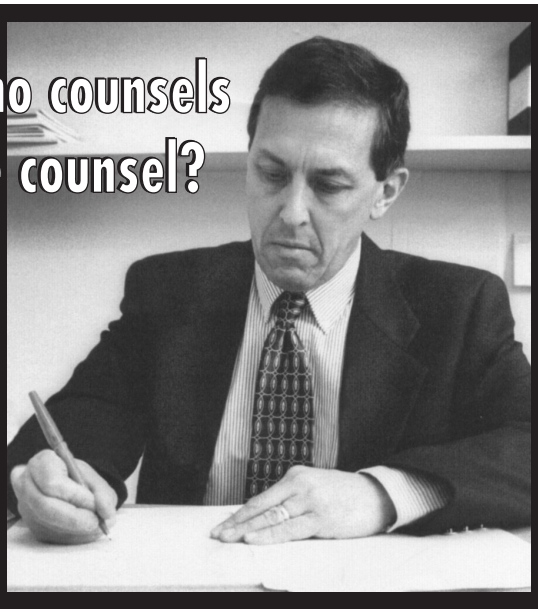


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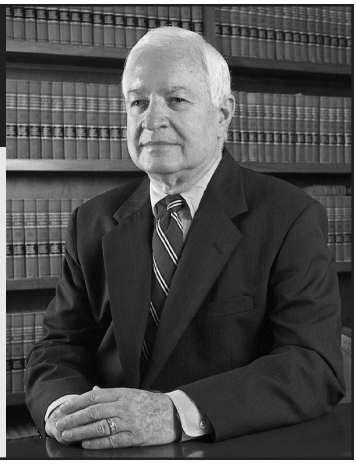
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2007 February - March Calendar

OCBA Luncheon • February 22, 2007

Lorenzo W. Phillips

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RSVP by February 20th to reservations@ocbanet.org

February

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

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

Contempt of Court - CLE 1 hr.
5:30 p.m. • FAMU College of Law

2 ***Diversity Committee***
8:00 a.m. • Bar Center

CFAWL Bar Luncheon
11:30 a.m. • Citrus Club

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

OCALSS Meeting
5:30 p.m. • Bar Center

8 ***Legal Aid Society Executive***
8:00 a.m. • 100 E. Robinson St.

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

9 ***Workers' Compensation Committee***
11:45 a.m. • Bar Center

12 ***Central Florida Family Law Inn of Court***
5:30 p.m. • TBA

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

14 ***International Law Seminar***
Pratfalls, Pitfalls, and Profits of Foreign Investors in U. S. Real Property Transactions
1:30 p.m. • Bar Center

Estate Guardianship & Trust Committee
11:30 a.m. • Bar Center

15 ***Young Lawyers Section Luncheon***
11:45 a.m. • Citrus Club

Paul C. Perkins Bar General Meeting
12:00 p.m. • Bar Center

Hispanic Bar Association
5:30 p.m. • TBA

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

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

Professionalism Committee
12:15 p.m. • Bar Center

Inn of Court
5:30 p.m. • Barry University

21 ***Business Law Committee Seminar***
What Every Litigator Needs to Know
9:00 a.m. • Bar Center

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

22 ***OCBA Luncheon***
Lorenzo W. Phillips
Our Kids Can Succeed
11:30 a.m. • Downtown Marriott

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

Labor & Employment Law Committee
12:00 p.m. • Bar Center

26 ***CFAWL Board Meeting***
12:00 p.m. • Bar Center

28 ***Business Law Committee***
12:00 p.m. • Baker Hostetler SunTrust Bank Bldg.

CFACDL
11:45 a.m. • Sorosis Club

YLS Board Meeting
5:30 p.m. • Holland + Knight

March

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

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

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

2 ***Diversity Committee***
8:00 a.m. • Bar Center

CFAWL Bar Luncheon
11:30 a.m. • Citrus Club

5 ***Central Florida Family Law Inn of Court***
5:30 p.m. • TBD

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

OCALSS
5:30 p.m. • Bar Center

8 ***Legal Aid Society Executive***
8:00 a.m. • 100 E. Robinson St.

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

9 ***Workers' Compensation Law***
11:45 a.m. • Bar Center

10 ***YLS Softball Tournament***
TBA • Lake Fairview Park
Shane Fischer:
sfischer@boginmunns.com
Eric Reed:
EReed@shutts-law.com

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

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

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

Judicial Relations Committee
12:15 p.m. • Orange County Courthouse
21st Floor Conference Room

15 ***Young Lawyers Section Luncheon***
11:45 a.m. • Citrus Club

Hispanic Bar Association
5:30 p.m. • TBA

Paul C. Perkins Bar General Meeting
6:00 p.m. • FAMU College of Law

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

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