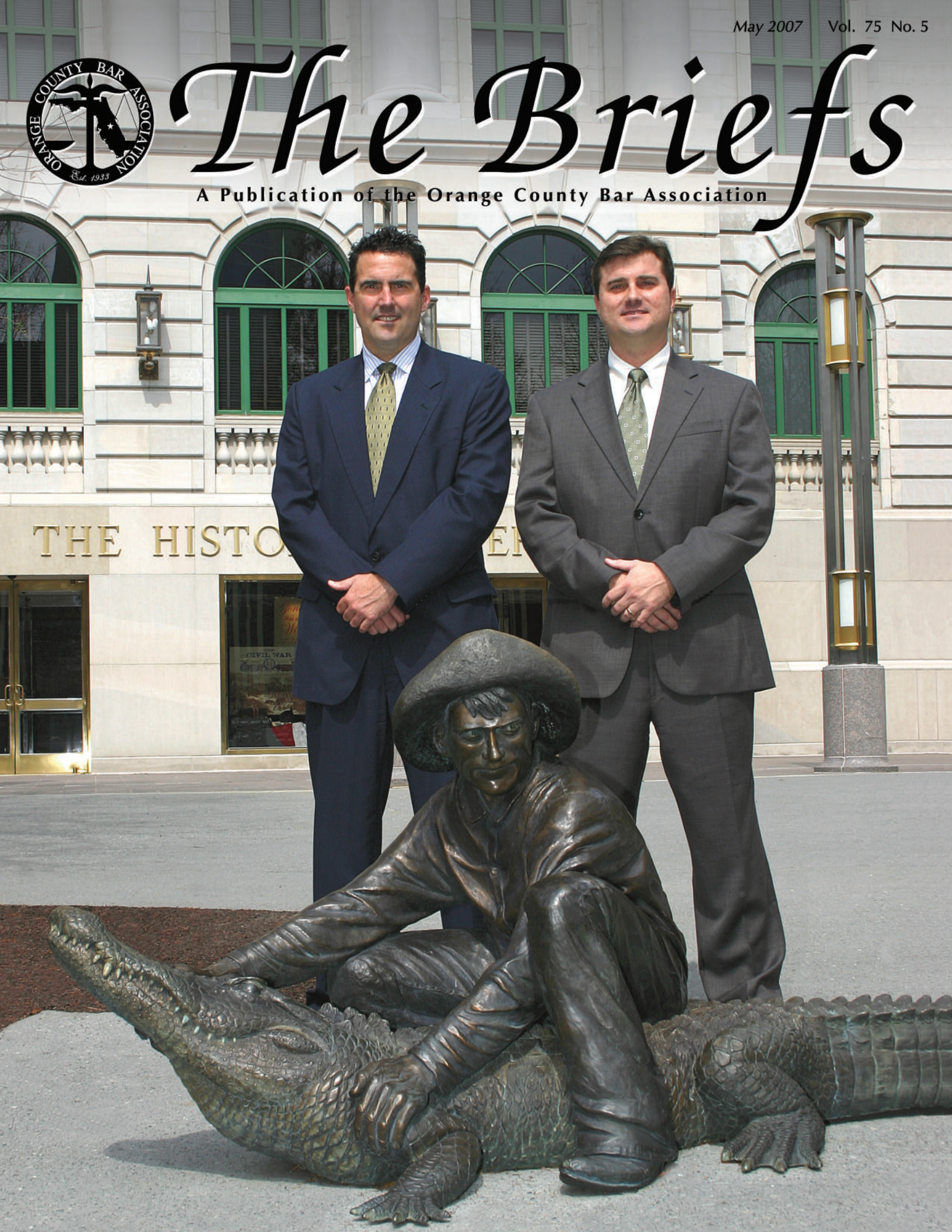




The Briefs

A Publication of the Orange County Bar Association



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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.

Mitchell v. Metropolitan at Lake Eola LLC,

32 Fla. L. Weekly D365 (Fla. 5th DCA 2007)

Reduced lis pendens bond from \$600,00 to \$20,000.

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 permanent 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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The Briefs

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DEADLINE INFORMATION

Deadline for July Edition: 6/1/2007

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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Fathers Rock!!!

Thomas P. Wert

I was thinking about how much last month's Bar Luncheon speaker epitomizes the love of a father for his children. There was Nick

Buoniconti, NFL Hall of Famer, two-time Super Bowl champion, team captain of history's only perfect NFL team, past president of a Fortune 500 company and co-host of the longest running weekly television sports show ever, telling us that he would give up all of it to see his paralyzed son, Marc, walk again. Since 1985, Mr. Buoniconti and his family have raised hundreds of millions of dollars for Marc's cause and built the largest and most comprehensive spinal cord injury research facility in the world. I truly believe that some day in the not too distant future, we will find a cure for spinal cord injury paralysis. And, it all started with the love of a father for his son.

Similarly, OCBA member David Corso's father, Lee Corso, told us at a Bar Luncheon last year that nothing is more important than *family*. Corso, whose name is synonymous with college football and whose family includes his wife of 50 years, four children, and six grandchildren, recounted the story of his 1983 firing as head football coach at Indiana. He had been assured his job was safe just days before his wife, Betsy, read in a newspaper that he had been fired. "My kids came home from school crying," Corso said, choking up himself. "They had every right to fire me but not hurt my family. It almost destroyed me." Nevertheless, the incident led to Corso's favorite memento. Betsy and their four kids presented him with a plaque several days later, citing his "excellence and integrity." Today, when Corso tells the story, he concludes "that taught me a very important lesson: 95 percent of your true friends live under the same roof as you."

The words "excellence and integrity" remind me of somebody else's father, mine. Thomas F. Wert, Jr. served honorably in Europe during World War II, returned home and spent 27 years as a police officer for the Metropolitan Police Department in Washington, D.C. He and my mom

had eight children¹ while he worked his way up through the ranks from private to inspector. Before our Nation's Capital was the murder capital and its mayor did crack, my dad patrolled its streets, guarded President Truman, directed traffic for President Kennedy and kept the peace during the turbulent 1960s. He was revered by his men for his work ethic, his sense of humor and, above all else, his honesty.

Inspector Wert taught me the meaning of justice. If you made a mistake, there were inevitable consequences but mistakes were life's lessons. Learn from them and everything would be okay. In contrast, lie about a mistake and the consequences, i.e., the punishment, would be tenfold. He would say, "You cannot drive straight on a twisted road." My father was old school but fair. He taught by example and he loved his kids more than life itself.

Tom Wert, the cop, the husband and the father, died in 1994 and is buried at Arlington National Cemetery. At his funeral, a police officer eulogized him, "Back in the '60s, Tom Wert was in Internal Affairs when I screwed up really bad. So bad, I could have been kicked off the force. Tom was investigating the matter and interviewed me in the process. He told me, 'Look, you messed up big time but tell me the truth, ... the whole truth, and I'll see what I can do to get the Review Board to let you keep your job.' I told him everything and he went to bat for me with the Board. In the end, I kept my job and retired 25 years later with full honors. I owe my career to Tom Wert."

I feel very blessed to have had such a father and I think all of us should strive every day to set the same example for our children. The truth is we can all learn a lot from Dear Old Dad (and Mom). Peace and Happy Father's Day everybody.

¹ Yes, my mom was Catholic but she swears all the kids were my father's fault. As she likes to say, "My husband was a passionate protestant."

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

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OCBA Luncheon Speaker



May 31, 2007



Randall James

President

First Orlando Foundation

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

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

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

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

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

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

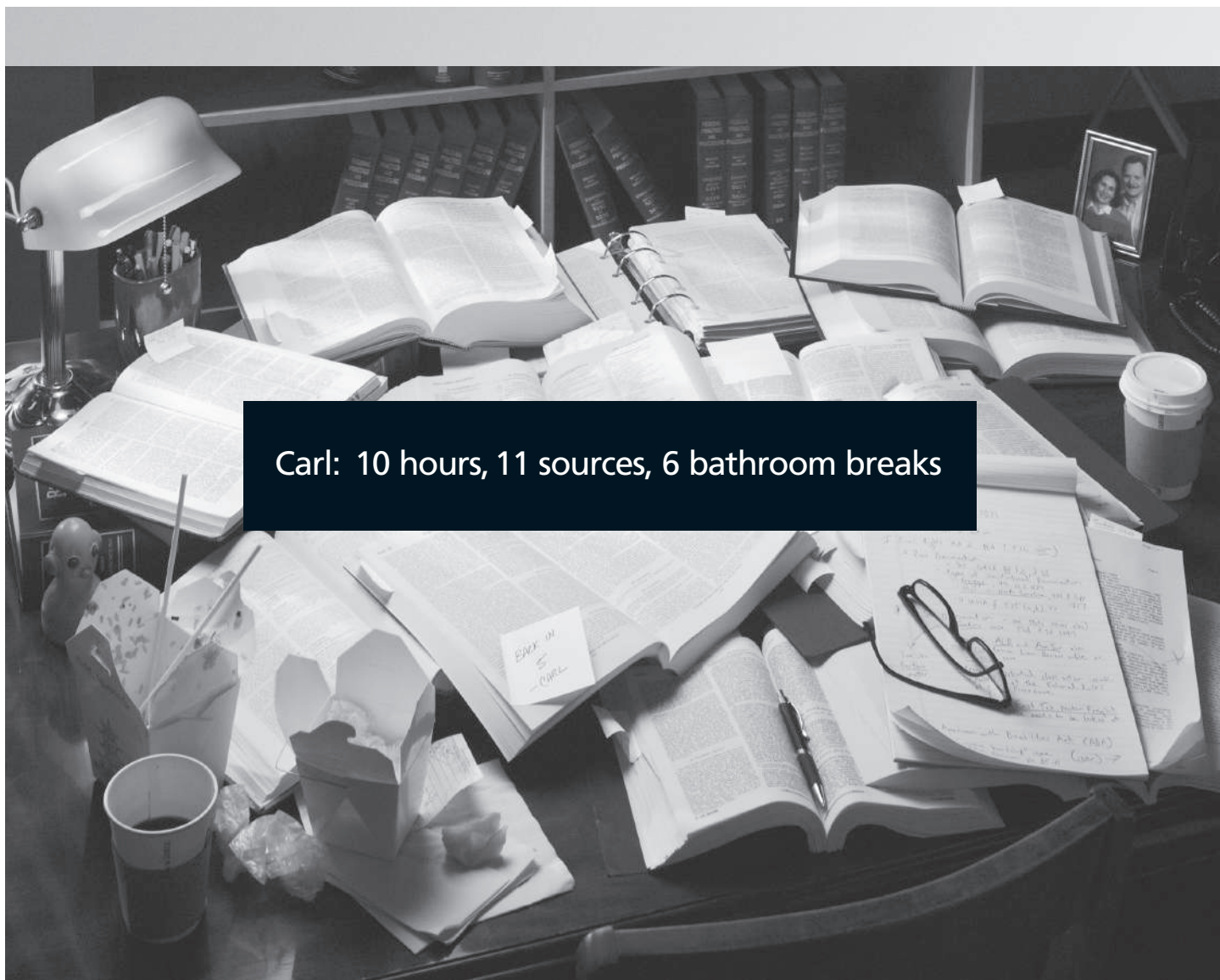
The Ballroom at Church Street • 11:30 a.m. - 1:00 p.m.

225 S. Garland Avenue • Orlando, FL 32801

Please RSVP for the luncheon no later than May 25, 2007.

RSVP to Wendy Mazlin, Events Manager, at reservations@ocbanet.org.

To ensure proper luncheon count, RSVPs are requested no later than 5 days 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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Installation of 2007-2008 Officers and Executive Council

The Ballroom at Church Street

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The Honorable Patricia C. Fawsett will preside over the installation of the 2007-2008 OCBA Officers and Executive Council members at the May 31, 2007 Luncheon. Outgoing President Thomas P. Wert will present awards to members for their outstanding Bar work during the past year.

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Professionalism Committee

Lessons Learned



Diego "Woody" Rodriguez

I am honored to have received the Lawrence G. Mathews, Jr. Professionalism Award, but I would be remiss without thanking my wife, Heather Pinder Rodriguez. Without her constant support this award would not be possible. I would also like to thank two individuals who have made a profound impact in my daily practice. Jim Moreland recently retired after almost 40 years of practicing law. He taught me that you should always make time for younger associates and that kindness and professionalism go hand in hand. My other mentor, Bryant Applegate, who now practices in Washington, D.C., taught me that while hard work is rewarding, it should never replace your devotion to your family. Finally, I would like to thank the partners at my firm, Marchena & Graham, P.A., who fully embrace the concept of a balanced lifestyle.

I was asked to present a speech on professionalism to the Young Lawyers Section, and it occurred to me that I could best prepare it by sharing some "war stories" in those rare instances in which I was disappointed in the conduct of my fellow colleagues. On one occasion, as I was heading out the door, my wife wished me luck in preparing for a particular hearing that she believed I had the following day. I informed her that I was not aware of any such hearing, and she then proceeded to tell me that she had heard of the hearing during an interview with the other party in this matter on a local radio show. I was surprised to hear of this and, needless to say, the first thing I did that morning was to attempt to contact opposing counsel. Surely the hearing referred to on the radio must have been a mistake as I had not received any notice of said hearing. After several phone calls with no response, I notified opposing counsel in writing that without proper notice no such hearing could take place without my presence. To my greater surprise, the following morning I received a call from the judge's chambers asking why I was not in attendance. I informed the judge that no notice of the hearing had been provided and that despite my repeated attempts to ascertain the nature and time of the hearing, opposing counsel had not responded. This lawyer's efforts were to "do his client's bidding, regardless of its impropriety." The judge refused to hear the matter, but, in the end, what was truly disappointing was that my trust in this colleague was now forever gone. Throughout the course of the litigation all issues had to be reduced to writing because a phone call could no longer be counted upon to properly reflect the intentions of the parties. His word became meaningless even when he reduced it to writing.

Your reputation, once sullied, carries with you on all subsequent dealings. A year later, on an unrelated matter, opposing counsel was now representing a different political

client in an onerous lawsuit against one of the local municipalities. A deposition of a non-party individual that I represented was requested and we obliged. However, I specifically requested that counsel provide all parties, including the city defendant and my client, with proper notice of the date and time of the deposition. I soon realized that this lawyer was not going to follow the rules. The day before the deposition, after failing to provide the parties to the suit or myself with proper notice of the deposition, I contacted counsel in writing that the deposition would not go forward. The following day, approximately 20 minutes before the deposition was to be held, the lawyer contacted me telephonically to apologize for his tardiness in responding and to confirm that the deposition would be rescheduled. But the conversation was odd and I could hear his client in the background. I quickly contacted my client to warn him of the possibility of a surprise visit from this attorney. Not more than 30 minutes later, this attorney arrived at my client's place of business, uninvited and unannounced, to simply ask this public official "a few questions," even though he knew very well that my client was represented. My client refused to meet with him and he got no further on his case. Even though this lawyer's conduct was not subject to sanctions, it was yet another disappointing strike against this individual's reputation. I am well aware that our bar association has "grown from a local professional association that once kept in touch by casual discussion in various coffee shops to a huge professional organization that must make an effort to keep its members advised of issues of concern." But a lawyer's reputation among that small circle of attorneys is still just as important as it once was. To this day, I loathe any cases with this particular attorney because I know that the rules of conduct and professionalism will not be observed.

Thankfully, I recognize that this is not the typical behavior in Orlando's legal community. But I wanted to share just one more thought on how "we are seeing the tragic transformation of a once proud calling from that of a profession to that of a business." The issue of billable hours is always a difficult topic to address. "There is nothing wrong with being business-like. The application of business principles to the practice of law is not just desirable, it is necessary. However, to be professional and to be business-like should not be mutually exclusive, as is so often the case." On the one hand, a firm must generate enough hours to be successful. On the other hand, some clients refuse to pay the appropriate going rates. Shortly after commencing the practice of law, I was shocked to learn that a certain lawyer was billing what amounted to 15 hours per day, for

Continued on page 12

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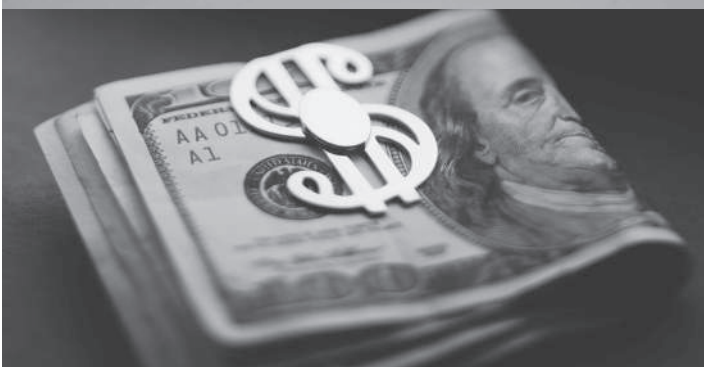


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Entertainment Law Committee

DMCA Take Down . . . Or Copyright Law Breakdown?

Stephen H. Luther



It is late Friday afternoon. You have worked through most of your to-do list and begin to look forward to a relaxing weekend. Just then, you receive a call from a client who has discovered that the website on which her entire corporation depends has vanished from the Internet. After some research, you determine that there has been no lawsuit filed, no hearing before a judge, and no injunction issued. Your client is not the victim of some conspiracy. Instead, your client's hosting provider has complied with the requirements of the Digital Millennium Copyright Act of 1998, 17 U.S.C. § 512 (DMCA) at your client's expense. The DMCA provides a safe harbor for web hosting companies and other online service providers that insulates them from copyright infringement liability by removing allegedly infringing content from the Internet after a take-down notice is received.

The take-down procedure is simple and straightforward. The copyright owner writes a letter to the host's designated agent for handling DMCA take-down notices. The notice must identify the copyrighted work, provide the location of the allegedly infringing material, and meet a few other simple requirements set forth in Section 512(c)(3). After the host receives a notice that meets the statutory requirements, the host must take down the material "expeditiously" to prevent copyright infringement and stay within the safe harbor.

At this point, the owner of the website whose web content has been disabled or removed may send the hosting provider a counter-notice informing the host that the request was improper and that the disabled web content should be put back on the Internet. 17 U.S.C. § 512(g). The counter-notice starts the clock running on a 14-day period in which the copyright owner who sent the notice must bring suit over the alleged copyright infringement. During this 14-day period, the DMCA insulates the host from any liability for taking the material down. *Id.* If no lawsuit is brought by the end of the 14-day period, and the website owner has submitted a counter-notice, the host must put the content back on the Internet.

The absence of any investigation of the merits of the copyright claim is what makes the DMCA both effective and troubling. Effective, because electronic infringements may be stopped quickly and in a more cost effective manner than seeking an injunction in federal court. Troubling, because the DMCA take-down is easily abused. For example, the Church of Scientology used a DMCA take-down notice to force Google to remove xenu.net, a website critical of Scientology, from its index of web pages. Before the take-down, xenu.net was the number one search result in a Google search for "scientology," yet it completely disappeared from Google's search results after the take-

down. Following extensive criticism of this take-down, Google returned xenu.net to its index and worked with other organizations to create chillingeffects.org, a website that posts all the DMCA notices received by Google and other web hosts. A study of more than 800 of these take-down notices has returned disturbing results, including evidence of a motive to abuse the take-down because more than half of the take-down notices appear to have been submitted by competitors and evidence of actual abuse with nearly one-third of the take-downs presenting an obvious question for a court involving uncopyrightable material, fair use or other serious problems. Jennifer Urban and Laura Quilter, *Efficient Process or "Chilling Effects"? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 Santa Clara Computer & High Tech L.J. 621 (2006). This group of take-down notices, while admittedly small, provides strong evidence that the DMCA can and is being used for improper purposes.

What should an attorney do when a client's website has been taken down using a DMCA notice? The first step is to write a counter-notice demanding that the website be put back on the Internet. Clients are unlikely to be satisfied with this action alone, because the process requires up to 14 days before the website is returned to the Internet. The owner of the website may also bring a claim for damages caused by misrepresentations in the take-down notice under Section 512(f). This provision was first successfully litigated in *Online Policy Group v. Diebold, Inc.*, 337 F. Supp. 2d 1195 (N.D. Cal. 2004), where Diebold was forced to pay slightly more than \$5,000 in damages for an improper take-down. This after-the-fact remedy does not prevent websites from being taken down and is of questionable value as a deterrent. For example, in the same year Diebold was assessed \$5,185.50 in damages for a wrongful take-down, it generated \$2.38 billion in revenue. If there was any real deterrent in the *Diebold* case, it was the negative publicity surrounding the case, and the potential for such negative publicity should be discussed with clients who are considering using a take-down notice.

There are a number of legal strategies that can prepare your client for DMCA take-down problems before they occur, including negotiating with the client's hosting provider to avoid take-down before any notice is received. The negotiation is difficult because the client is asking the host to risk copyright infringement liability when the host agrees to keep material up on the Internet after a take-down notice. Agreeing to indemnify the host is of little value because standard hosting contracts already require the website owner to indemnify the host, although an escrow

Continued on page 12

365 days a year. No lawyer could possibly bill that much, but the clients he served would only pay this seasoned trial lawyer \$85 an hour for his services when they should have been paying him closer to \$250 per hour. When the monthly totals were circulated, the intended effect was to encourage the younger lawyers to adhere to the same practices or else eventually be replaced. I eventually left that firm, but many young lawyers find that they must continue to work and endure such practices at the expense of their professional integrity. In the end, it creates a different breed of lawyer: one who is a slave to the billable hour and does not truly enjoy his or her practice in the law.

But now for my confession. My thoughts on these topics are not original. In fact, I have lifted some of the very words from another lawyer. For you see, almost twenty years ago, the outgoing President of the OCBA wrote in his last column as President about how "the actions we take today as lawyers affect our future well-being and that of our profession." In fact, he contributed many of the quotes you see in this article. And as you can tell, these issues are still a concern today. But now, as Paul Harvey says, the rest of the story. What you may not know is that these topics were addressed by then-President Lawrence G. Mathews, the very lawyer and bar leader for whom my award is named. Most young lawyers, myself included, never knew Larry Mathews or his ethics. But thanks to the annual presentation of this award, we honor the memory of a bar leader who was able to lead this organization and who spoke volumes on the importance of professionalism better than many of us ever could. For that I am truly honored and grateful.

Diego "Woody" Rodriguez is an associate with Marchena & Graham, P.A. He has been a member of the OCBA since 1998.

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Dues Renewal Begins May, 2007

Be on the lookout for your 2007-2008 Dues Renewal Statement. Renewal notices will be sent at the end of April and payment is requested by June 30, 2007. A \$25 late fee will apply beginning July 1, 2007. Look for information on your form about paying online, signing up for free committees and sections, selecting practice areas, making Foundation donations, and purchasing the new Online Lawyer-to-Lawyer Referral Network media package. For information, contact Susan Laviolette, Membership Manager at susanl@ocbanet.org.

for potential damages may help persuade the host to keep material up on the Internet after a take-down notice. In some cases, technological, rather than legal, solutions may be best. For example, if a client provides its own hosting services, it will also be the recipient of the take-down notice and can decide how to respond. Depending on the situation, other technological or legal solutions may also be available.

Although it is by no means a perfect system, the DMCA take-down provision provides a highly effective tool to rapidly enforce a client's copyright rights. Unfortunately, the legal remedies for wrongful take-down are slow and not likely to deter misuse. Attorneys should, therefore, be aware of potential abuse of the take-down provision and advise their clients accordingly. Attorneys practicing in this field should suggest technical solutions to assist clients in overcoming legal hurdles.

Stephen H. Luther is an associate with the firm of Allen, Dyer, Doppelt, Milbrath & Gilchrist, P.A. He has been a member of the OCBA since 2003.



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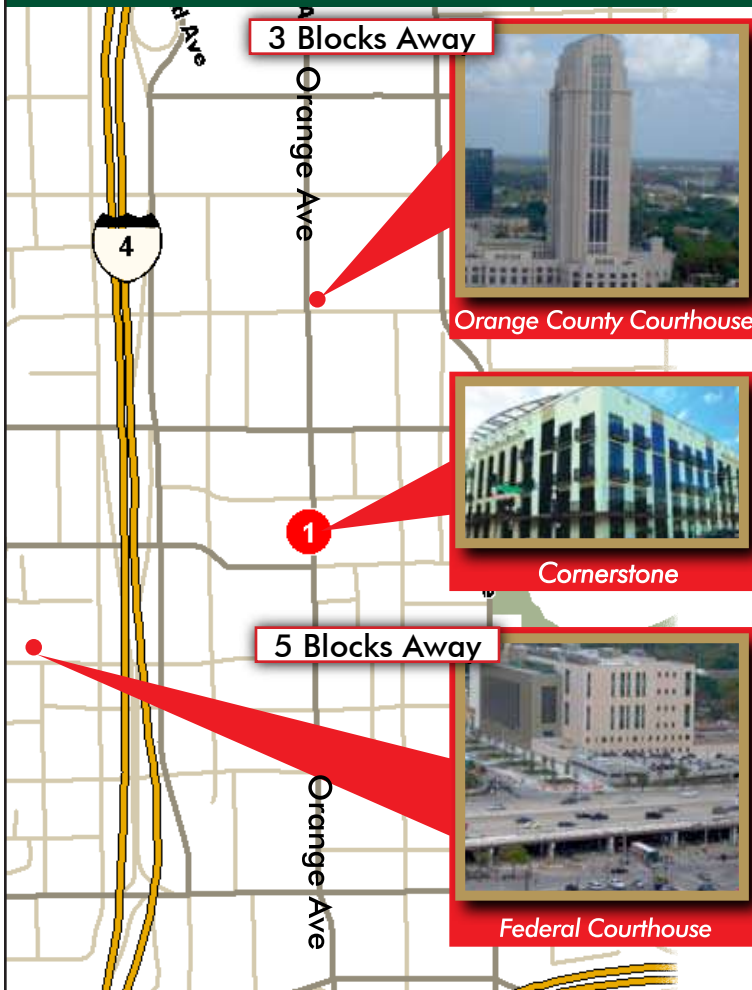
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Case Note

Suing the Employer for Intentional Tort: Overcoming Worker's Compensation Immunity

Marie L. De Marco Miller

Although generally an employee's exclusive recourse for injury sustained in the workplace is worker's compensation, there are cases that fall within the exception to that immunity.¹ If the injury arose prior to October 1, 2003, the standard is one of "substantial certainty." After October 1, 2003, "virtual certainty" is required. It is well established that conclusory allegations are insufficient to overcome the immunity, and even gross negligence is insufficient to support the finding of an intentionally tortuous act.

History of Exception to the Immunity

In *Fisher v. Shenandoah*, 498 So.2d 882 (Fla. 1986), the Florida Supreme Court held that an employer's conduct constitutes an intentional tort where the employer either exhibits a deliberate intent to injure or engages in conduct virtually certain to result in injury or death. *Id.* at 883. In *Turner v. PCR, Inc.*, 754 So.2d 683 (Fla. 2000), the Florida Supreme Court reaffirmed its decision in *Fisher* but receded from any "virtual certainty" standard of proof.² Moreover, the *Turner* Court disapproved district court decisions that would require plaintiffs to prove the employer acted with a subjective intent to harm. The Court made clear that "the conduct of the employer must be evaluated under an objective standard." *Id.* at 684 (emphasis added).

In *Turner*, an explosion occurred at a chemical plant and caused injury and death to employees. Experts opined that the chemicals being utilized at the plant were highly reactive and needed to be handled with extra caution. *Id.* at 685. The employer had notice of the chemicals' hazards and the fact the chemicals were being removed from the market, but did not disclose that information to its employees. There was also evidence of at least three other uncontrolled explosions at the plant prior to the one that killed and injured the plaintiffs. *Id.*

The Court affirmed the lower court's finding that the objective test is whether there is "substantial certainty" that injury will occur. Although the standard is higher than gross negligence,³ it does not require "virtual certainty." *Id.* at 687. Rather, substantial certainty is similar to culpable negligence.⁴ Moreover, under an objective standard, the question is whether a reasonable person would understand the employer's conduct was substantially certain to result in injury to the employee. *Id.* at 688. "Where a reasonable man would believe that a particular result was substantially certain to follow, he will be held in the eyes of the law as though he had intended it." *Id.* (citations omitted). Applying those standards, the Florida Supreme Court in *Turner* concluded that an intentional tort was properly alleged.

The *Turner* Court cited with approval two earlier lower court decisions. In *Cunningham v. Anchor Hocking Corp.*, 558 So.2d 93 (Fla. 1st DCA 1990), the appellate

court reversed the trial court's dismissal of the plaintiffs' cause of action based on worker's compensation immunity. The plaintiffs alleged that the employer diverted a smokestack, allowing toxic fumes to enter the workplace, and periodically turned off the ventilation system, which intensified the plaintiffs' exposure to the toxic substances. *Id.* at 96. The plaintiffs in that case also alleged that the employer: removed warning labels and misrepresented the toxic nature of the substances; knowingly provided inadequate safety equipment; and misrepresented the need for safety equipment. *Id.* at 97. Those allegations, if true, were sufficient to show that injury was substantially certain. *Id.*

Connelly v. Arrow Air, Inc., 568 So.2d 448 (Fla. 3d DCA 1990), is yet another case in which the trial court was reversed for dismissing the plaintiff's intentional tort case against its employer. In *Connelly*, the plaintiff alleged that the employer intentionally misstated the maximum weight that could be carried on its planes and had, prior to the crash at issue, sold its last plane capable of complying with the weight requirements. The plaintiff alleged that the defendant intentionally pursued a course of conduct that subordinated safety to profits. *Id.* at 449. The Third District Court of Appeals held that where an employer withholds knowledge of a defect or hazard from an employee so that the employee cannot make an informed decision, and such defect or hazard poses a grave risk of injury, the employer will be considered as acting with a belief that harm is substantially certain to occur. *Id.* at 451.

Post-Turner Cases that Clarify its Holding

In 2004, the Florida Supreme Court in *Taylor v. Sch. Bd. of Brevard County*, 888 So.2d 1 (Fla. 2004), confirmed that exceptions to the worker's compensation immunity are to be narrowly construed. Subsequently, in *Travelers Indem. Co. v. PCR Inc.*, 889 So.2d 779 (Fla. 2004), the Florida Supreme Court was asked to determine whether there was

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¹ Florida Statutes § 440.11 (2003).

² All prior cases utilizing the higher standard were reversed by *Turner*, including: *Lawson v. Alpine Engineered Products, Inc.*, 498 So.2d 879 (Fla. 1986); *Gerth v. Wilson*, 774 So.2d 5 (Fla. 2d DCA 2000); *Clark v. Gumby's Pizza Sys., Inc.*, 674 So.2d 902 (Fla. 1st DCA 1996); *United Parcel Serv. v. Welsh*, 659 So.2d 1234 (Fla. 5th DCA 1995); and *Kenann & Sons Demolition, Inc. v. Dipaolo*, 653 So.2d 1130 (Fla. 4th DCA 1995).

³ "Gross negligence" is defined as an "act or omission that a reasonable, prudent person would know is likely to result in injury to another." *Turner*, 754 So.2d at 686-87 n.3 (citation omitted).

⁴ Culpable negligence is negligence of a gross and flagrant character which evinces a reckless disregard for the safety of others. It is the entire want of care which raises a presumption of indifference to consequences. See *Turner*, 754 So.2d at 687 n.3.

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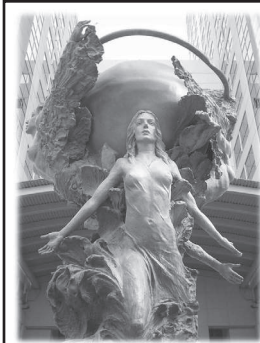
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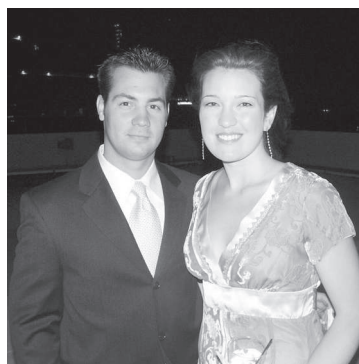
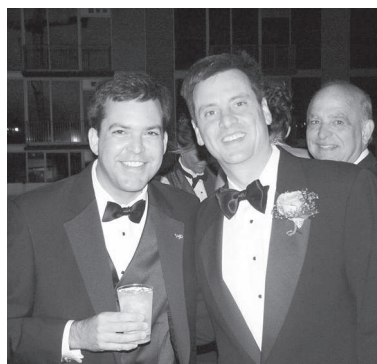


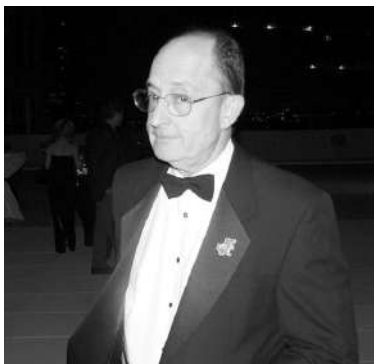
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insurance coverage for an intentional tort committed by the employer. *Id.* at 781. In deciding that there was coverage, the Florida Supreme Court reiterated its analysis in *Turner*:

Our decision in *Turner* rested squarely on tort law principles. In adopting an objective substantial-certainty test, we relied on *Spivey v. Battaglia*, 258 So.2d 815 (Fla.1972), which itself relied on the Restatement of Torts, for the proposition that “where a reasonable man would believe that a particular result was *substantially certain* to follow, he will be held in the eyes of the law as though he had intended it.” *Id.* at 817. (first emphasis added). . . . **Importantly, under this standard the employer need not have known that its conduct was substantially certain to cause injury; the fact that it should have known of the substantial certainty of injury would be sufficient to negate the “unexpectedness” or “unusualness” of any resulting injury, regardless of whether the injury truly was unexpected by the employer.**

Id. at 788 (italicized emphasis in original) (bold emphasis added).

In *Bombay Co. v. Bakerman*, 891 So.2d 555 (Fla. 3d DCA 2004), a wooden ladder supplied to employees to reach shelves in the storeroom was in bad condition and swayed. There were numerous complaints and requests for a new ladder. The employee was injured when the ladder broke as he was retrieving a package, and he sued the employer. The appellate court found that the “common thread of evidence that the employer tried to cover up the danger, affording employees no means to make a reasonable decision as to their actions” was missing. That common thread was present in cases wherein the exception to the immunity was upheld. *Id.* at 557. Since the dangerous condition was evident, there could be no exception. *Id.*⁵

In 2003, the Florida legislature amended its worker’s compensation statute by replacing the “substantial certainty” standard with a higher standard of virtual certainty. Fla. Stat. §440.11(1)(b) (2003). The amendment, however, is not retroactive. *Feraci v. Grundy Marine Constr. Co.*, 315 F.Supp.2d 1197, 1205 n.11 (N.D. Fla. 2004).

Stating a Cause of Action for Intentional Tort

For causes of action arising before October 1, 2003, proper application of the “substantial certainty” standard turns on the particular facts of a case. *Turner*, 754 So.2d at 686. Additionally, any evidence “that the employer tried to cover up the danger, affording employees no means to make a reasonable decision as to their actions,” is critical to a finding that the employer committed an intentional tort. *Id.* at 691. It is an employer’s responsibility to identify actual or potential hazards in the workplace, to evaluate the extent of those hazards, and to minimize or eliminate those hazards. The employer is charged with the body of available scientific knowledge.⁶ An employer’s compliance with federal standards is not a defense to a cause of action

based on this “intentional” tort.⁷

As with any personal injury case, the elements of duty, breach, causation and damages are necessary pleadings. But the plaintiff’s lawyer clearly needs additional allegations that raise the level of the employer’s conduct to that of an intentional tort as defined by law. The “common thread” (*Bombay Co.*, 891 So.2d at 557) in the cases where the exception to immunity is upheld include: the employer’s knowledge of the dangerous condition;⁸ evidence of concealment or misrepresentation to the employee; a failure to take reasonable precautions to protect the employees; an absence of warnings, training, Material Safety Data Sheets, precautionary measures, and safety equipment; physical evidence of dangerous conditions; prior accidents or incidents; and complaints by employees. An expert affidavit from a warnings or causation expert is critical at the summary judgment stage. For injuries occurring after October 1, 2003, it appears the legislature has brought us back to the pre-*Turner* “virtual certainty” analysis, which will most likely require a showing of actual knowledge and evidence of a subjective intent to injure.

A Case Study

ConstarPlastics, Inc., began as Sewell Plastics in Atlanta, Georgia, in 1964. Constar manufactured milk bottles from numerous plastics. In 1965, the company expanded to make bottles for the chemical industry. In 1977, the company expanded again by manufacturing beverage bottles and mustard containers. The Orlando, Florida, manufacturing plant was added in 1966. By 1982, the Orlando plant had 150 employees.

Polyvinyl chloride (PVC) was used in other Constar plants starting in the early to mid-1970s. Hydrochloric acid (HCl), an off-gas of PVC processing, is an undisputed irritant to persons exposed to it, and such exposure can result in permanent injuries or death. The Occupational Safety and Health Administration (OSHA) and other governmental agencies set limits for allowable exposure to HCl. The facts clearly demonstrated repeated excessive exposures to dangerous gas. Employees who complained were told to

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⁵ Other cases in which there was a finding of *no* exception include: *Allstates Fireproofing, Inc. v. Garcia*, 876 So.2d 1222 (Fla. 4th DCA 2004) (no evidence to conceal and no failure to warn); *Fleetwood Homes of Florida, Inc. v. Reeves*, 833 So.2d 857, 859-861 (Fla. 2d DCA 2002) (no prior injury or incident); *Pacheco v. Power & Light Co.*, 784 So.2d 1159, 1163 (Fla. 3d DCA 2001) (no evidence of willful or deliberate indifference to safety); *Tinoco v. Resol., Inc.*, 783 So.2d 309 (Fla. 3d DCA 2001) (defect obvious to all).

⁶ *AFL-CIO v. OSHA*, 965 F.2d 962, 972 (11th Cir. 1992); *Miles v. Vicksburg Chem. Co.*, 588 F.2d 512, 516 (5th Cir. 1979), *reh’g denied*, 591 F.2d 102; 602 F.2d 683 (5th Cir. 1979); 29 C.F.R. 1910.1200; RESTATEMENT (SECOND) OF TORTS §388 (1965).

⁷ *Freightliner’s Corp. v. Myrick*, 514 U.S. 280 (1995); *Kidron, Inc. v. Carmona*, 665 So.2d 289 (Fla. 3d DCA 1995).

⁸ Although *Turner*, discussed *infra*, indicates an objective standard applies, (*i.e.* knew or should have known), in practice, absent some evidence of actual knowledge, it would be difficult to convince the court that a case is excepted from worker’s compensation immunity.



OCBA Legal Aid News

Pro Bono Highlight: *Guardian ad Litem* Program Filling in the "Dash"

Legal Aid Society of the OCBA

Imagine this scenario: A colleague calls you with a new client referral. Due to a handicap, this individual has been trapped in an abusive relationship for many years. As the result of an anonymous "hot-line" tip to the authorities, this victim is rescued and transported to the hospital. The initial medical examination reveals bruises covering the victim's body as well as signs of ongoing sexual abuse. You learn from your colleague that this beaten and battered soul's handicap is that she cannot protect herself because she is a six-year-old child.

Stories similar to this are told every day in the halls of the Juvenile Justice Center. Fortunately, there are individuals, both attorneys and lay people, who help children like those described above by volunteering in the *Guardian ad Litem* Program (GAL). Diane Smith is one of them. A lay volunteer with Legal Aid's GAL Program since 1990, Diane has assisted more than 70 children. "Unfortunately," notes Diane, "there are many more children that need protection through representation, which is where my story begins."

As Diane relates her experience, in 1990 she decided she was at a point in her life when she needed to work toward "filling in the dash." Diane describes this as the space on your tombstone between the date of one's beginning and the date of one's end. "I needed to do something meaningful to fill in those years," she said. "Something worthy of the many blessings that have been bestowed upon me. I was able to fulfill this desire by joining Legal Aid's Volunteer Advocates for Children (VAC) Program."

VACs, formerly known as GAL Volunteer Assistants, have been an integral component of our GAL Program since its inception in the early 1970s. For those unfamiliar with the VAC Program, Legal Aid provides lay volunteers, trained and mentored in issues arising in dependency cases, to help *pro bono* GAL attorneys with various tasks that routinely arise in these cases.



B. Diane Smith, Paralegal
Wilson, Garber & Small, P.A.
Volunteer Advocate for Children
(VAC), 1990-present



Robert Dietz, Esquire
Zimmerman, Kiser and Sutcliffe, P.A.,
GAL Volunteer, 1988-present



Tiffany Smith
Volunteer Advocates for
Children Program Coordinator

Robert Dietz, Esq. is a *pro bono* GAL volunteer who can attest to the tremendous help a VAC can provide in a case. Since 1988, he has represented more than 90 kids and has donated some 1100 hours. As Robert points out, "The challenge of keeping up with all of the hearings, pretrials and home visits in any one case is daunting. If there are 'heavy maintenance' parties in a case, child or adult, the challenge increases. If any of the parties, or worse, if more than one party, in the case is in drug court, new hearings at least twice a month are added to the calendar. While there may be resources within one's firm on which to rely, the assignment of a VAC provides for teamwork to get all the work done necessary to protect the child."

Diane and Robert's paths crossed when she was assigned as Robert's VAC on a particularly complex case. At his request, Diane assisted him by contacting teachers regarding school performance and conducting home visits to both confirm appropriate housing and appropriate adult supervision. As Robert notes, "A different viewpoint is important and someone else to 'read between the lines' can provide valuable assistance in representing the child. When litigation revolves around destructive behavior to the individual or the family unit, the reassurance of having two people there instead of only one is important." Likewise, Diane describes her relationships with GALs as being ones where "...[they] can count on me for a second opinion, a second set of ears and a second heart. More importantly, the children grow to count on me always being there." Robert notes that "[t]he contributions made by VACs like Diane Smith are greatly appreciated and allow me to accept new cases needing immediate attention."

Tiffany Smith is the new VAC Program Coordinator at Legal Aid who recruits, trains and assigns VACs upon request of the GAL or when otherwise needed. In

Continued on page 22

HEARSAY



Nick Buoniconti, NFL Hall of Fame football player and national spokesman for The Miami Project to Cure Paralysis, entertained OCBA members at April's luncheon with anecdotes, but he also spoke soberly about the need for continued work in finding a cure for paralysis.



Tom Wert and other OCBA members were thrilled to have a few minutes of "overtime" with Nick Buoniconti Jr. and Nick III of Morgan & Morgan, P.A. (right). Nick III introduced his dad to a packed house!



Lissa Bealke and Lori Spangler once again co-chaired the OCBA's Law Week Committee. They, along with many volunteers, were recognized for their dedication in planning and implementing a full month of law-related activities in Central Florida.



Judge Faye L. Allen (left) presented Law Day Awards to Orange County high school students at April's luncheon. Judge Patricia C. Fawsett was on hand to congratulate the winners.

Once again the year has flown by, and here we are back in May! At the OCBA that means a "changing of the guard" as we welcome new officers, board members and committee chairs. We really are fortunate to have such dedicated leaders among us, those hard working members who consistently demonstrate their commitment to furthering the mission of the OCBA, including promoting "...honor, dignity, truth and professionalism within the legal community." Congratulations to all of you who have stepped into these leadership positions while still maintaining this professionalism and integrity that is so very important. I know everyone is looking forward to another great year! Of course, we also must thank our outgoing leaders for their hard work and dedication (you know who you are and I know you're getting tired of all the attention, so I won't mention any names) (e.g., **Tom Wert**). It's also time for a new Hearsay columnist, so starting next month I will be leaving all of you in the capable hands of the very entertaining and incredibly witty **Nick Shannin**. I will miss bringing you these updates each month, but never fear ... I am not going far! You will still find me here as one of the new editors of *The Briefs*, along with my buddy and co-editor **Tom Zehnder**. Tom and I will be stepping into the mighty big shoes of **Jessica Hew** and **Tad Yates**, who truly have done an incredible job making *The Briefs* as great as it is today. Okay, okay - you know I could go on and on talking about how wonderful your OCBA leadership is (actually ... keep reading, I'm sure I'll start back on it again below)... but my job today is to deliver great news about all of your fellow members. So, here's what's up ...

Attorney General Bill McCollum has appointed **John Paré** to the post of Deputy Attorney General for Central Florida. Paré will be responsible for the agency's offices in Bradenton, Daytona, Orlando, St. Petersburg, and Tampa. Paré is also in the news through his work as a longtime board member of Big Brothers Big Sisters (BBBS), as he is currently the incoming President of BBBS. **Charles H. Egerton**, a shareholder with Dean Mead, was recently appointed to serve on a special task force established by the ABA Tax Section to study the growing problem of patenting of tax strategies. **Scott Richman** with Carlton Fields has been appointed to the Orange County Board of Zoning Adjustment. **Robert Dietz** of Zimmerman, Kiser & Sutcliffe was elected to the Board of Directors of the Association of Attorney Mediators (AAM), the first Floridian to be so honored. The AAM was formed in 1988 and is the only mediator-related association limited to mediators who are also licensed attorneys. The nine-member board is elected by the national membership.

Bill Wilson with Holland & Knight LLP was appointed to the board of directors of Heart of Florida United Way. **Deborah N. Cross** with Geico Insurance has joined the board of directors of Athlete Connections, an Orlando-based nonprofit organization that will help current and former student athletes make the transition from sports to the business world. Former OCBA President **Bill Sublette** with Sublette, Sanders, *et al.* has been elected as Chair of the board of trustees for the non-profit public broadcasting stations of WMFE. **Ana Tangel-Rodriguez** with Tangel-Rodriguez and Associates was also elected to the board.

Once again in the spotlight for another of his courageous feats is our very own OCBA President **TOM WERT** with Roetzel & Andress, who finished in the Boston Marathon last month! Battling

Kristyne Kennedy

weather, hilly conditions and injuries, **Wert** made it to the finish line *and* raised over \$5,500 for The Accelerated Cure Project for Multiple Sclerosis. Congratulations and kudos to **Tom** for once again using his power to do good deeds. Incoming OCBA President **Gene Shipley** with Nardella Chong P.A. also traveled up north recently, when he joined other leaders of local and state bars and other attorney organizations from across the country at the ABA's Leadership Institute (BLI) in Chicago. The BLI is held annually and provides the opportunity for attendees to confer with ABA officials, bar leader colleagues, executive staff and other experts on association operation. The OCBA's Executive Director, Brant Bittner, also attended the conference.

The annual OCBA Gala on March 31st was another fabulous success! Attendees dressed up in their finest to dance under the stars and take in the beautiful downtown Orlando view as they enjoyed cocktails, fine wines and wonderful cuisine. Thanks to all of the generous sponsors, volunteers, and committee members, as well as to everyone who attended in support of a very worthy cause. Special thanks to event co-chairs **Vivian Cocotas** and **Bill Sublette** for another fabulous job putting together this charity event, which raised money for the OCBA Foundation.

And now, time to get ready for another year of more exciting events from the **OCBA Social Committee**! We will be bringing back the popular wine and cheese party, poker tournament and other events, so be sure to mark your calendars for the following OCBA events: **July 18, 2007**: Summer Happy Hour and Trivia Event; **September 13, 2007**: Joint Happy Hour (with other voluntary bar associations such as CFAWL, PCPBar and HBA); **October 2007**: (event to be determined); **November 15, 2007**: Poker Tournament; **January 24, 2008**: Winter Wine & Cheese party; and **April 23, 2008**: (event to be determined). For more information about upcoming events, participating on the Social Committee or sponsorship opportunities, contact OCBA Social Committee Chair **Kim Webb** at kwebb@rumberger.com or check out updates on the OCBA website at www.orangecountybar.org.

So that's it for me.... I have really enjoyed bringing you the news every month in this column. I am proud to be part of this organization and it has been great having the opportunity to share news about our members (and also to sneak in my own personal little "can't we all just get along" messages here and there). Be sure to keep sending your news to Nick at nshannin@floridalawonline.com. And don't forget the mission ... at times we may get caught up in ourselves, our achievements (hey, we're lawyers – of course we love the attention!) or personal feelings, but we cannot ever lose sight of those essentials like honor, dignity, truth and professionalism. Of course we are not perfect and even though sometimes we don't really know where we're going, we always do know where we've been. So don't be a victim of the moment, but learn from mistakes, breathe in the madness, search for an answer, keep your integrity and remind yourself often how very lucky you are to have things like health and loved ones. Have a safe and happy summer, everyone!

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



Two elementary school children study an elaborate Law Week poster. Children who won awards and their parents attended the annual recognition luncheon, held this year at The Ballroom at Church Street.



The Young Lawyers Section's annual Evening with the Judiciary drew the crowds to Doc's Restaurant this year... beautiful weather prevailed!



More than 250 OCBA members turned out for Evening with the Judiciary, which is an event that always mixes the Bar and the Bench with a dollop of fun and fraternity.



Incoming OCBA President C. Gene Shipley (back, second from left) and OCBA Executive Director Brant Bittner (back, third from left) attended the Bar Leaders Conference in Chicago in March. The conference provides an opportunity for incoming bar leaders to share ideas about the direction and management of voluntary bars.

go back to work. After being exposed for years to the off-gases of hot processing, numerous employees were diagnosed with adult-onset asthma and chronic obstructive pulmonary disease.

In representing these employees, the law firm of Overchuck, De Marco, Byron & Overchuck alleged that the employer knew or should have known, based on available scientific literature, employee complaints, testing from its chemical suppliers, and other facts, that the employees' exposure to heated and burning PVC would be substantially certain to cause injury or death. It was also alleged and shown that there was a concealment of critical facts regarding the safety of the employees so that they were deprived of any meaningful choice. Knowledge, concealment, misrepresentation, failure to warn, and other "common threads" were present. As a result, the motions to dismiss and for summary judgment were denied.⁹

Conclusion

Although it has become more difficult to allege a cause of action against an employer that will withstand a motion to dismiss or a motion for summary judgment as a result of the legislatively imposed "virtual certainty" test, it is still possible to allege and prove a case against an employer for an intentional tort through the use of specific statements showing the intentional nature of the employer's conduct and the aforementioned "common threads."

⁹ The complaint and relevant pleadings can be viewed on the law firm of Overchuck, De Marco, Byron & Overchuck's website: www.productslaw.net.

Marie L. De Marco Miller is a partner at Overchuck, De Marco, Byron & Overchuck. She is a former Assistant United States Attorney and Federal Law Clerk and is a member of the Florida Bar, the Middle District of Florida Federal Bar, and Federal Tax Court. The author would like to thank Meghan M. McShane, M.A., J.D., with the Law Offices of Neal T. McShane, P.A., for her helpful suggestions and editorial review.

describing her role, Tiffany comments that she "...always assigns VACs with an eye toward matching individual volunteers to specific cases so that the needs of the GAL and the child are both met. Legal Aid's goal is to provide as much support as possible to our GAL volunteers. Given the complexity of the dependency court process, we have found that the combined work of GALs and VACs can be an exceptionally dynamic tool for our children."

In fact, many *pro bono* attorneys use staff in their own offices to assist them with their GAL work. Legal Aid would be glad to provide in-house VAC training to law firms who want to work with their own staff on their GAL assignments. VACs can be used for ongoing tasks or for a one time task such as a home visit, a court file or DCF file review.

Upon reflecting on her 16 years of experience, Diane has a message for GALs: "I've found that all tasks are more easily accomplished when they are shared with a partner. Please let the VACs be your partner and together you can help make a difference in the life of a child. Fill in the space between your dates."

If you would like more information on the VAC Program, VAC Training or would like to request the services of a VAC, please call Tiffany Smith, Program Coordinator, at (407) 841-8310 ext. 3149.

Submitted by the Legal Aid Society of the OCBA.



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Presentation Skills for Lawyers

Buzzwords, Slang, and Jargon – Oh My!

— Elliott Wilcox



Football isn't a game for dummies. To play the game, every player must master his team's playbook, which can contain anywhere between a few dozen to more than a hundred different plays. Not only that, he must also master the language his coach uses to call each of the team's plays. The more complicated the playbook, the more complicated the play calling language. One of the coaches most renowned for his complicated play calling abilities is Jon Gruden, the head coach of the Tampa Bay Buccaneers. To understand how complicated his play calling system is, take a moment to examine this transcript from a casual sideline conversation he shared with one of his quarterbacks last year:

"I like double wing, right X short, two hundred jet smoke X stick. Pick a side, you got me? Two deep, work the stick side. Single safety, take the smoke. But come back in a blitz down a second down triple right U right 50 A-Z-N. You get the ball around the 35 or 40, I like stall right west, U left H2 cat wide bingo. Remember you got no flare control underneath it, so if color flashes, work your triangle."

You're probably saying to yourself, "*Huh?!?* What the heck is he saying? Is he even speaking English?" Well, yes, he is, but unless you're a truly devoted football fan, you don't have a prayer of understanding what he's saying. Although the conversation makes perfect sense to Coach Gruden and his quarterback, you probably didn't understand a word of it.

The reason you didn't understand what he was saying was because Coach Gruden was using jargon to explain what he wanted. Almost every professional field develops its own specialized language. That specialized language allows the members of the profession to communicate with greater clarity, reducing errors and miscommunication. Jargon also promotes brevity of language, since a single technical term can often speak volumes. For example, if an emergency room nurse says that a patient is "coding," that single word causes a flurry of coordinated activity. Everyone familiar with the term knows how to react. The professionals leap into action, trying to save the patient's life. In that situation, jargon can be a lifesaver.

In your presentations, however, jargon can be a communication killer. If your audience can't understand the language you're using, they won't be able to grasp your ideas. As I've said before, ideas that are ill-presented are as worthless as ideas that are *not* presented. Analyze your presentation to ensure that you aren't using technical terms your audience can't understand. Words that make perfect sense to you may not make sense to your audience. You don't want your audience to be as confused as you were

earlier when you tried to decipher what Coach Gruden was saying.

To become an effective communicator, get tuned into your audience. Evaluate your script and look for any technical terms your audience may not be familiar with. Look for industry-specific terms or "Legal-ese" terms. Practice your presentation with a non-lawyer, and ask if there are any terms he or she doesn't understand. If possible, replace those terms with words your audience *will* understand.

If you **must** use industry-specific terms, make sure you define them for your audience. To see a great example of how to define terms so that your audience understands them, watch *The Blues Brothers*. At one point in the movie, Jake and Elwood are stopped by the police for running a red light. The police officer asks for Elwood's license and registration, and then walks back to the police car. Back in the Bluesmobile, Jake and Elwood have the following conversation:

Elwood: I hope these guys don't have SCMODS.

Jake: SCMODS?

Elwood: State - County - Municipal Offender Data Systems.

By defining the term, Elwood guaranteed that Jake could understand what he was talking about. If you want your audience to understand the technical terms you use, follow Elwood's example. After you use a technical word or acronym, take a moment to define it. This technique is particularly helpful when you are presenting testimony to a jury and your witness is using industry-specific terms that most lay people don't understand. Ask the witness to define the terms for your jury, and you'll minimize the risk of confusion.

Jargon isn't always evil, however. For some presentations, using jargon can actually *improve* your presentation. When you speak to an industry-specific group (ex., a group of realtors, insurance agents, or bankers), sprinkling some of their "code words" throughout your presentation enhances your credibility. Your audience members will recognize that you're speaking their language, so you'll appear more believable, more persuasive, and part of the group.

For the most part, however, you should try to avoid drowning your audience with industry-specific terms or "Legal-ese." Jargon can be a powerful communication device, but only when your audience understands what you're saying. Minimize your use of jargon, and you'll help your audience understand every word you say.

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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Is your firm part of the 100 Club? Any firm with two or more attorneys and 100% membership in the OCBA can be a member of the 100 Club. If you think your firm is eligible, e-mail a typed list of your attorneys to Susan Laviolette at susanl@ocbanet.org and she'll let you know!

Rudy W. Ferraro, deceased, of College Park, Florida. Searching for the attorney who represented and/or who may have prepared his will, advanced directives, and/or other estate planning documents.

If you have any information, please contact

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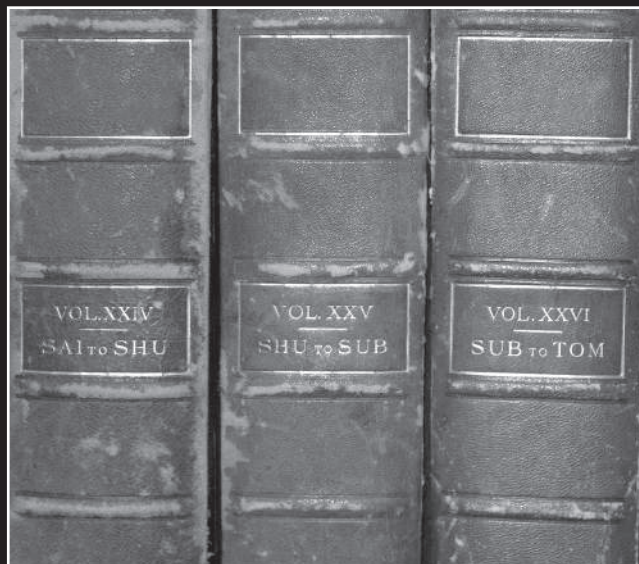
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Strategic Conversations: The Initial Consultation

Mark Powers



Your initial consultation with a prospective client is an often-overlooked Strategic Conversation and one that's critical to the client development process. When handled well, the impression you create with this first consultation will inspire trust and convert a prospective client into a paying client. When handled poorly, the client will seek the services of one of your competitors. Your success, and your firm's profitability, depends directly on how skilled you are in making this all-important conversion.

To make a significant first impression, think about the lawyer/client relationship from the client's point of view. Clients seek your professional services because they lack the necessary expertise to solve a problem. In hiring you, they gain the appropriate expertise they need, but lose something else: their sense of control over a problem or situation. Along with a lessened sense of control most clients tend to believe that their risk - the consequences that face them if they fail - is much greater than their lawyer's.

In many cases, they are right.

To compensate for this unbalanced feeling, clients will depend on the level of trust they feel for you. If, in the initial stages of getting to know you, clients feel you'll minimize their risk, they'll trust you and subsequently hire you. So how do you demonstrate that you are worthy of their trust?

By knowing what the client looks for in the initial interview.

First, the client wants to tell his story. Whether the situation involves a simple transaction or a complex business dispute, clients are impressed by someone who will listen to and understand their situation. For complex matters, the use of reflective listening techniques can help. Ask relevant questions and repeat back what the client has said using phrases such as, "Let me see if I understand what the main issues (or concerns) are..." or "What I hear you saying is..." This approach not only provides the client with the sense he is being heard, it allows you to gain clarification on important details. During this, or any meeting with clients, don't allow interruptions or take phone calls. Clients won't trust you if they don't feel important enough to have your full attention when face-to-face.

Once the client has told his story, if it is appropriate to express sympathy upon hearing the client's problem or situation, do so. Phrases such as, "I'm sorry you've had such a difficult time," or "It's unfortunate you've had to go through this experience," or "I sympathize with you - that must have been very hard," go a long way to building trust with a new client. Though this may seem like a minor point, clients need to believe you care about them and their matter before they'll trust you. Clearly, the need to be sympathetic will vary according to your practice area and the type of work you plan to do, so use your best judgment. For the most part, however, a client wouldn't be in your office if he wasn't experiencing some kind of a problem that requires professional help, so act accordingly.

The next step in earning the trust of potential clients is to explain how and why you can help them. In all likelihood, you've dealt with many situations similar to theirs; refer to these cases as you discuss the actions you might take. Clients want to hear that you have experience with similar situations - it provides evidence that you've got the appropriate experience.

In addition, especially with a client who is inexperienced, explain each stage of your work together to help him understand the process and potential pitfalls along the way. Explain how you'll handle the matter and what you can deliver within the established constraints. Don't over-promise and be sure to explain what you'll need from the client in terms of time, access, decisions, documents and information. The more you educate clients on the role they play, set appropriate expectations and involve them in the process, the more cooperative they become. You can say something like, "Here's what I'm going to do to help you...and here's what I need you to do to help me..." When appropriate, reiterate these points in your Engagement Letter.

To see how successful you are at inspiring confidence right from the start, keep track of the number of desirable clients who hire you compared to the number of desirable clients who don't. (If at all possible, screen undesirable clients over the telephone so you aren't spending face time talking to people who don't meet your standards.) If eight out of ten desirable clients sign on, your conversion rate is 80% - an excellent score.

If you score lower than 80%, ask yourself how you can improve your conversational skills to gain the trust and confidence of clients early on. Do you listen and fully understand the needs of the client, sympathize when appropriate and then demonstrate your expertise? Or do you shortcut the first two steps in your desire to demonstrate your expertise right away? Remember the old adage, "I don't care how much you know, until I know how much you care." It's the key to building trust.

Trust is critical to the attorney/client relationship from the beginning of an engagement through to the end. It's important to inspire the trust with the initial consultation and equally important to maintain it throughout the course of the matter.

From the beginning, track the number of people that call and inquire about working with you. Subsequently, track the number of people that set a first appointment with you, and finally, track the number of people that become paying clients. This will tell you how good you are at the intake conversation and how much trust you have inspired.

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.



Orange/Osceola Public Defender's Office News

Law Day Event – Orange County High Schoolers Get DUI Lessons as Part of Law Day Activities

Bob Wesley



Students from several Orange County high schools visited the Orange/Osceola Public Defender's Office in April for Mock DUI Trials. The trials and other DUI-related events were part of the activities for 2007 Law Day being celebrated from April 10 through May 25.

The Orange County Bar Association hosts the events surrounding Law Day. This year's theme is "Liberty Under Law: Empowering Youth, Assuring Democracy."

"Young people, like all citizens, should have a good awareness of how their justice system operates," explains Bob Wesley, Orange/Osceola Public Defender. "This being prom time, we hope that we can educate students to keep them from becoming our clients. The best defense is no offense."

Students from Colonial, Oak Ridge, Bishop Moore, Freedom and Timber Creek high schools, St. James Cathedral School, Lake Highland Prep and Lake Eola Charter School

participated in mock DUI trials at the Orange County Courthouse. Students witnessed how our court system works as well as the legal consequences of driving under the influence of drugs or alcohol. Following the mock trial demonstrations, students viewed a documentary entitled: *Jane: A Film*, in which Jane Dwyer details her harrowing experience when she drove into a concrete embankment at the end of the old Seven-Mile Bridge in the Florida Keys. The film recounts her life-threatening injuries and painful recovery, the five-year prison sentence she served for the death of her boyfriend who was a passenger in the vehicle, and the reality of having lost her driving privileges for life.

The Mock DUI Trials were supported by a grant from the League of Women Voters Education Fund and the Program on Constitutional and Legal Policy of the Open Society Institute.

Submitted by the Orange/Osceola County Public Defender's Office.

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YLS on the Move!

Thanks for a Great Year!

Wiley S. Boston



Congratulations to **Judi Hayes** (formerly known as **Judi Garabo**) on her marriage to Ryan Hayes in April. Judi is enjoying her honeymoon in Paris at present, so this month's YLS On the Move column is written by outgoing YLS President Wiley Boston.

Summer is fast-approaching and with it comes the traditional action-packed lineup of Young Lawyers events. First, on Saturday, June 2, 2007, the Young Lawyers Section will be having its family-oriented YLS Zoo Day. Details can be obtained from **Maria Hale** (mhale@fisherlawfirm.com). Second, a "Pub Crawl" to welcome all of the new summer associates is tentatively scheduled for Friday, June 8, 2007. More details will follow in the YLS email blast, but questions in the meantime can be directed to YLS social coordinator **Kristen Cox** at Shutts & Bowen. Also to follow is scheduling information for the annual Law Clerk Reception, "Dog Day Afternoon" family picnic, and other summer events.

The Honorable Buddy Dyer, Mayor of the City of Orlando and himself a former Young Lawyer, appeared as the guest speaker at the April YLS luncheon. He provided an entertaining and informative discussion about several topics of current interest, such as the legislature's proposals to modify the state's tax system, the growth of downtown Orlando as a cultural center, and the city's plans for a Performing Arts Center and Events Center. He also fielded several questions with a high level of enthusiasm, responsiveness and civility that are characteristic of his visits to our luncheons and a part of the reason that he is invited back time after time.

Later in April, the YLS held its annual Evening with the Judiciary at Doc's Restaurant. The risk of experimenting with a new venue paid off handsomely for the YLS, and we received a great deal of positive feedback about the dinner menu, the desserts, indoor/outdoor seating, and the convenience of the location. Kudos to event chairs **Anthony Sos** and **Jeremy Springhart** for putting on a great event and for making it happen on time and under budget. The success would not have been possible without the assistance of several additional people. In particular, thanks go to committee members **Lindsay Gergely**, **Kim Healy**, **Jennifer Jones**, **Kristopher Kest**, **Sunny Lim**, **Nicole Smith** and **Andrea White**.

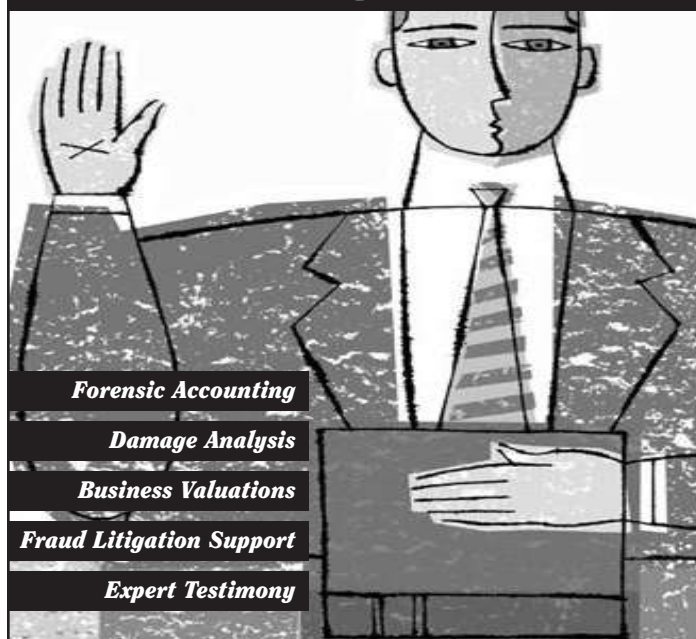
The Young Lawyers Section's 2006-2007 fiscal year is drawing to a close, and I would like to take this opportunity to thank a lot of people for a tremendous year: the law firms that sponsor our annual charity golf tournament and law clerk reception, and that reimburse young lawyers for participating in luncheons and the recent Evening with the Judiciary event; the Communications Coordinator and regular author of this column, **Judi Garabo**; Secretary **Sarah Reiner**; Treasurer **Chelsie Roberts**; numerous members of the judiciary that attend our events and provide regular support (you know who you are); directors, committee chairs, committee members

and other participants in all of our events; **Brant Bittner** and the rest of the OCBA staff and Executive Council. It has been a very enjoyable year for me, and while I am sorry to see it end, I am looking forward to an exciting calendar of events in the coming year and will continue to participate in the leadership of the Orange County Bar Association on the Executive Council. The Young Lawyers Section will be in good hands with incoming President, **Elizabeth McCausland**, as it continues its mission of supporting charitable causes, providing a social outlet, and promoting professionalism.

The members of the YLS are an energetic, capable and honorable group, worthy of a local bar association that is known nationwide and highly respected throughout Florida. The members of the YLS are in large part responsible for the OCBA's success and will continue the tradition by continuing to make a difference for the better. Thank you for all that you do.

Wiley S. Boston is a real estate associate with Holland & Knight LLP. He has been a member of the OCBA since 1998 and served as the 2006-2007 President of the Young Lawyers Section of the OCBA.

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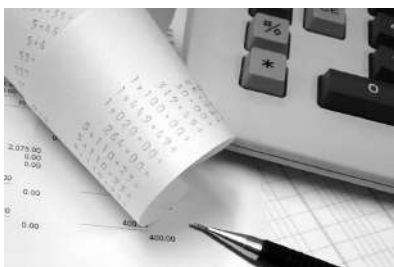
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It's all about control. I understand. Investors want it; we all do. Many individual investors feel they gain a measure of control by actively managing their investments. They, and their money managers, attempt to time and beat the market – the S&P 500 (large stock index) and the Russell 2000 (small stock index), for example. In reality, active investing forces you to focus on things out of your control. And since this style of investing has not proven to be superior to passive investing as far as returns and expenses go, why not focus on things in your life that are in your control, such as your own cash flow management, and leave investing in the hands of providence?

Active investing can call into play any number of elements. It involves over-weighting securities and sectors within an asset class that are believed to be undervalued, and under-weighting securities and sectors believed to be overvalued. Purchasing a stock, for example, is effectively an active investment that can be measured against the performance of the stock market itself. When compared to a passive investment in a stock index, the purchase of an individual stock can be viewed as a combination of an asset allocation to stocks and an active investment in that stock with the belief that it will outperform the stock index. You can be right on your asset allocation and wrong in your active security selection – and vice versa.

Prevailing market trends, the economy, political and other current events, and company-specific factors (such as earnings growth) all affect an outcome. And, the aim of active fund management – after fees are paid – is to outperform the index for a particular fund (not to mention other fund managers they may be competing against).

Passive investing is more commonly called indexing. Indexing is an investment management approach based on investing in exactly the same securities, in the same proportions, as an index. The management style is considered passive because individual investors and portfolio managers don't make decisions about which securities to buy and sell; they simply copy the index by purchasing the same securities included in a particular stock or bond market index.

Passive managers generally believe that it is difficult to beat the market. Therefore, they essentially offer asset class performance that closely matches an index.

Active managers believe the market can be beaten. While they can't beat it all the time, many active managers do believe there are certain irregularities in the market that can be taken into consideration to achieve potentially higher returns.

With respect to market behavior, there are two extremes: the well known efficient market hypothesis, which says that prices are always fair and quickly reflective of information,

and where neither the money managers nor the individual investors will be able to systematically pick winners; and the market failure hypothesis, which says that prices react to market action slowly enough to allow some professional investors to systematically outperform markets and most other investors.

Active Management Advantages

- Seasoned money managers make informed decisions based on experience, judgment, and prevailing market trends.
- Investors have the possibility of higher-than-index returns.
- Managers can make changes if they believe the market may take a downturn.

Active Management Disadvantages

- Investors must pay higher fees and operating expenses.
- There is always the risk that managers may make unwise choices on behalf of investors, which could reduce returns.
- Managers' style issues may interfere with performance.
- Many studies show that over 80% of active managers do not, in fact, beat their index benchmarks.

Passive Management Advantages

- Investors benefit from low operating expenses.
- There is no decision making required by the manager or the investor.
- Investors enjoy greater diversification in most cases.

Passive Management Disadvantages

- Investors must be satisfied with market returns because that is the best any index fund can do.
- Managers cannot take action. Index fund managers are usually prohibited from using defensive measures, such as moving out of stocks, if the manager thinks stock prices are going to decline. This may also be viewed as an advantage of passive investing.

The investment information system, composed of the media, mutual fund families, stock brokerage firms, investment advisory services, and other entities, derives vast sums of money by encouraging investors to believe that they can beat the market. Hopes of finding the next hot stock tip, identifying the next winning mutual fund, or crowning the next investment guru saturate this world that many investors live in and from which they get their information about investing. But the numbers don't add up.

For the ten years ending September 1995, only 78 of

Continued on page 32

379 diversified U.S. equity mutual funds, slightly more than 20%, were able to outperform the S&P 500 index. *Consistent* superiority has been an even tougher challenge: only 23 funds have outperformed the S&P in each of the last five calendar years, and none has done it for more than seven years.

Over the past three decades, according to Weston J. Wellington of Dimensional Fund Advisors, a proponent of passive investing, in *Active Vs Passive Management*, passive management has progressed from an

oddball academic theory to the cornerstone of institutional investment practice, representing roughly 30% of institutional equity assets. If individual investors continue their historic pattern of gradually emulating the strategies pursued by the nation's major institutions, index funds are poised for substantial growth since only a relatively small fraction of individual investor assets currently employ this approach.

The bottom line, in my view, with how you should invest your money for the long haul, is to expend your time and energy on those things that you can control. We can control, for example, a focus on living beneath our means by constant attention paid to our cash outflows and not simply to our cash inflows. This alone is practically a full-time job that far too few people undertake.

Take your focus off of the market. It is truly out of our control. Let it do what it has always done. Be content with earning what the market as a whole produces. By so doing, with the help of your financial planner in managing emotions and investor behavior, you will greatly outperform most people over time.

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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Ninth Judicial Circuit Court News

Judicial Announcement

Re: Uncontested Final Hearings in which Parties are Represented by an Attorney

TO: ATTORNEYS PRACTICING IN ORANGE COUNTY FAMILY LAW DIVISIONS [Divisions 29, 31, 38, 42, 44, 45, and 46]

FROM: THE HONORABLE ALICE BLACKWELL WHITE
ADMINISTRATIVE JUDGE

DATE: APRIL 23, 2007

RE: FINAL HEARINGS ON UNCONTESTED DISSOLUTIONS OF MARRIAGE IN WHICH THE PARTY IS REPRESENTED BY AN ATTORNEY

Effective immediately, all final hearings on uncontested dissolutions of marriage in which an attorney is handling the final hearing will be heard in Courtroom 16C. These final hearings will be held Monday through Thursday of each week from 8:30 to 9:00.

Attorneys will still be responsible to bring the court file, together with the required paperwork, to Courtroom 16C. Attorneys who check in later than 9:00 may not be accommodated unless the court's schedule allows.

The Family Law Division judges are implementing this change in order to provide attorneys and their clients an efficient and effective way to plan for these routine court proceedings. We welcome any comments or suggestions in connection with this process.

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Announcements

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David P. Hathaway - *Dean, Mead, Egerton, Bloodworth, Capouano & Bozarth, P.A.*

Speaking Engagements

Gregory A. Chaires, managing partner of Chaires Hammond, P.L., presented the lecture, "Documentation Inaccuracies and Medicare Appeals," on April 20, 2007, at the Florida Orthopedic Society Coding Seminar in St. Petersburg.

Kenneth J. McKenna, a partner with the law firm Dellecker, Wilson, King, McKenna & Ruffier, spoke on the topic, "Nursing Home and Medical Malpractice Litigation," on March 16-17, 2007, at the Florida Legal Education Association's annual Guardianship Team seminar in Tampa.

James W. Smith III, Esq., Assistant Professor of Law at Florida A&M University College of Law, presented on a topic entitled, "A Refresher on the Hearsay Rule," on March 16, 2007, at the Advanced Evidence seminar in Tampa.

William Ruffier and **Anthony Sos**, attorneys with the law firm Dellecker, Wilson, King, McKenna & Ruffier, recently served as faculty presenters for the National Business Institute's seminar on "Automobile Litigation: Strategic Issues and Answers." The continuing education seminar took place in Orlando on April 26, 2007.

Louise B. Zeuli, JD, MSN, ARNP, RN, Louise B. Zeuli, P.A., presented "Estate Planning for the Simple Estate" on March 19, 2007, to employees at the American Automobile Association in Lake Mary. She also served as a scoring judge at the 2007 Florida High School Trial Competition on March 30, 2007, in Orlando.

News to Note

Seminars:

May 11th - Family Law Committee - "Parent Education and Family Stabilization Course for Lawyers." 1:00 p.m. - 4:30 p.m. OCBA Center. 3.0 CLE.

May 16th - Elder Law Committee - "Elder Abuse." Noon - 1:00 p.m. (working lunch, optional); 1:00 p.m. - 4:00 p.m. OCBA Center. 3.0 CLE (pending).

June 21st - Insurance Law Committee - "Survey of Insurance Issues Everyone Should Know." 1:30 p.m. - 4:30 p.m. OCBA Center. 3.0 CLE and 1.0 Ethics (pending). For registration information, visit www.orangecountybar.org.

The Caribbean Bar Association – Central Florida Chapter (CBA-CF) will hold its 3rd Annual Black Tie Barrister's Ball and Silent Auction on Saturday, June 2, 2007, beginning at 7:00 p.m. at the Wyndam Orlando Resort. The event is specifically coordinated to usher in the local, national and international celebration of June as "Caribbean-American Heritage Month," and the Ball's theme will be "Caribbean Women." For more information, please contact Wayne C. Golding Sr., CBA-CF President, at 407-383-4304 or cbacf@hotmail.com.



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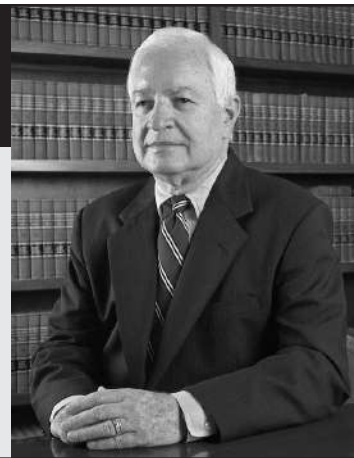
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Lost Will

ANYONE WHO HAS INFORMATION regarding the preparation, existence, or location, of any last will and testament and/or trust or estate planning documents of **Florence Clewell**, deceased, please immediately contact Ian L. Gilden, Esquire at (407) 645-4446.

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2007

May - June Calendar

OCBA Luncheon • May 31, 2007

Installation of 2007-2008 OCBA Officers & Executive Council

The Hon. Patricia C. Fawsett

RSVP by May 24th to reservations@ocbanet.org

May

- 1 Criminal Law Committee**
12:00 p.m. • Bar Center
- OALSS Meeting**
5:30 p.m. • Bar Center
- 3 Elder Law Committee**
12:00 p.m. • Bar Center
- Federal Judicial Relations**
12:00 p.m. • Judge Conway's Chambers
- OCBA Paralegal Committee**
5:30 p.m. • Bar Center
- 4 Diversity Committee**
8:00 a.m. • Bar Center
- CFAWL Bar Luncheon**
11:30 a.m. • Citrus Club
- 8 Executive Council Meeting**
11:30 a.m. • Bar Center
- 9 Estate Guardianship & Trust Committee**
11:30 a.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 Rm.
- OCBA Members Only Happy Hour**
6:00 p.m. • Bank of America Bldg.
390 N. Orange Ave.
- 10 Legal Aid Society Executive Meeting**
8:00 a.m. • 100 E. Robinson St.
- Real Property Law Committee**
12:00 p.m. • Bar Center
- CFPA Luncheon**
12:00 p.m. • Café Annie's
- 11 Workers' Compensation Committee**
11:45 a.m. • Smokey Bones
E. Colonial Dr.

- Family Law Committee Seminar**
Parent Education and Family Stabilization Course for Lawyers
1:00 p.m. • Bar Center
- 14 Central FL Family Law Inn of Court**
5:30 p.m. • TBA
- 15 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. • Seminole County/TBA
- 16 Solo & Small Firm Committee**
12:00 p.m. • Bar Center
- Insurance Law Committee**
12:00 p.m. • Bar Center
- Elder Law Committee Seminar**
Elder Abuse
1:00 p.m. • Bar Center
- 17 Young Lawyers Section Luncheon**
11:45 a.m. • Citrus Club
- Paul C. Perkins Bar General Meeting**
6:00 p.m. • FAMU
- Hispanic Bar Association**
5:30 p.m. • TBA
- Social Committee**
5:30 p.m. • Bar Center
- 18 Family Law Committee**
8:00 a.m. • 425 N. Orange Ave., Rm. 2310
- 22 Technology Committee**
12:00 p.m. • GrayRobinson
- 23 CFACDL**
11:45 a.m. • Sorosis Club
- YLS Section Board Meeting**
5:30 p.m. • TBA
- 25 Bankruptcy Law Committee**
12:00 p.m. • Bar Center
- 1 Labor & Employment Law Committee**
12:00 p.m. • Bar Center

- 28 Bar Center Closed**
Memorial Day
- 30 Business Law Committee**
12:00 p.m. • SunTrust Bldg.
- 31 OCBA Luncheon**
Randall James, President
First Orlando Foundation
11:30 a.m. • Ballroom at Church St.
225 S. Garland Ave., Orlando

June

- 1 Diversity Committee**
8:00 a.m. • Bar Center
- CFAWL Bar Luncheon**
11:30 p.m. • Citrus Club
- 4 Central FL Family Law Inn of Court**
5:30 p.m. • TBA
- 5 Criminal Law Committee**
12:00 p.m. • Bar Center
- OALSS**
5:30 p.m. • Bar Center
- 6 OCBA Committee Chair Workshop**
TBA
- 7 Elder Law Committee**
12:00 p.m. • Bar Center
- OCBA Paralegal Committee**
5:30 p.m. • Bar Center
- 8 Workers' Compensation Committee**
11:45 a.m. • Smokey Bones
E. Colonial Dr.
- 12 Executive Council Meeting**
11:30 a.m. • Bar Center
- 13 Estate Guardianship & Trust Committee**
11:30 a.m. • Bar Center
- International Law Committee**
12:00 p.m. • Bar Center
- 14 Real Property Law Committee**
12:00 p.m. • Bar Center
- CFPA Luncheon**
12:00 p.m. • Café Annie's
- Social Security Committee**
12:00 p.m. • Bar Center
- 15 Family Law Committee**
8:00 a.m. • 425 N. Orange Ave., Rm. 2310

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