

the Briefs

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Tad A. Yates
OCBA President
2008-2009

Diego "Woody" Rodriguez
OCBA President
2009-2010

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Cara M. Dobrev

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Advertising - 10th of the month prior to the month of publication
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The deadline for each edition is the first day of each month. If that day falls on a weekend or holiday, the deadline is the next business day.

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President's Message • Farewell...

May 2009

On May 27, 2009, I will turn over the reins of the OCBA to **Woody Rodriguez**, when he is installed as our next president. The OCBA will be in good hands with Woody. Those of us who have worked with him know that he will be an excellent president – just as he has been an excellent vice-president, treasurer, secretary and YLS president for our organization.

It has been a real honor to serve the OCBA this year. When we meet with leaders of other local bar associations, we learn just how special the OCBA is. Lawyers in other areas of our state and around the country are impressed with the level of participation in our association. They're inspired by the

commitment of our members to *pro bono* service through our Legal Aid Society. They're surprised by the low cost of membership and all that we get for that low price. They're amazed at our facilities, our social calendar and our monthly publication, *The Briefs*. Under next year's leadership, the OCBA's tradition of excellence will continue.

On behalf of the Executive Council, I would like to thank our wonderful staff, our committee chairs and all of our volunteers.

There are many among us who care deeply about the OCBA and recognize its important role in preserving the health of the Central Florida legal community.

It is certainly true that I worked hard this year, but I have been rewarded with great experiences and great friendships. Thanks to **Brant Bittner** and all of the staff at the OCBA and thanks to all of the members of the Executive Council who supported me throughout this year.

Some say that the happiest day in the life of a boat owner isn't the day that he gets the boat, but rather the day that he sells it. I couldn't say for sure. I still own my boat and enjoy it. However, I'm pretty sure I know the happiest day in the life of a bar president. Hope to see you all on May 27, 2009, at our Installation Dinner at The Ballroom at Church Street!

Thank you again for the opportunity to serve!

Tad A. Yates is a partner with Kirkconnell, Lindsey, Snure and Yates, P.A. He has been a member of the OCBA since 1994.



Tad A. Yates



In-coming OCBA President Woody Rodriguez (far left) and OCBA Executive Director Brant Bittner (far right back), along with other Florida representatives, attended the ABA Bar Leadership Institute in Chicago in March. Bar leaders from around the country meet annually to exchange ideas about bar management. Photo by Aminah

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Now more than ever your membership in the OCBA keeps you connected!

Network.

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Membership Renewal Begins June 1st.

***Mitchell v. Metropolitan at
Lake Eola LLC,***

947 So. 2d 1263 (Fla. 5th DCA 2007)
Reduced lis pendens bond from
\$600,000 to \$20,000.

McGhee v. Volusia County,

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

Acadia Partners, L.P. v. Tompkins,

759 So. 2d 732 (Fla. 5th DCA 2000)
Prevented multi-million dollar
judgment addition in complex
business litigation.

Wenzel v. Boyles Galvanizing Co.,

920 F. 2d 779 (11th Cir. 1991)
Affirmed a \$2.75 million dollar
personal injury award.

Boyles v. Mid-Florida Television Corp.,

467 So. 2d 282 (Fla. 1985)
Reversed the dismissal of a libel action
against an Orlando television station.

Hamlet v. Hamlet,

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

***Marriott International, Inc. v. Perez-
Melendez,***

855 So. 2d 624 (Fla. 5th DCA 2003)
Affirmed million dollar personal injury
verdict based on the "two issue rule".

***Lieberman v. Dept. of Professional
Regulations,***

573 So. 2d 349 (Fla. 5th DCA 1990)
Restored a physician's medical license.

Layeni v. Layeni,

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

Thomas v. Fusilier,

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

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OCBA *Officer Installation & Awards Banquet*

Wednesday, May 27, 2009 • 5:30 p.m. - The Ballroom at Church Street

Keynote Speaker

The Honorable Alice L. Blackwell

Judge of the Ninth Judicial Circuit Court

Recipient of the 2009 James G. Glazebrook Memorial Bar Service Award



The Honorable Alice L. Blackwell was raised and educated in South Carolina. She earned her B.A. degree from Furman University and her J.D.

degree from the University of South Carolina School of Law. During law school she served as the managing editor of her Law Review, participated in the American Bar Association Client Counseling Competition and served as a research assistant. After law school graduation she relocated to Florida. She spent the first three years of her legal career with Lowndes, Drosdick, Doster and Kantor, P.A. She also worked at Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A., before joining Broad & Cassel. At Broad & Cassel, she handled complex commercial litigation and became a partner in 1986. In 1991, Judge Blackwell became a Circuit Court Judge for the Ninth Judicial Circuit. Since 1991, she has worked in the Criminal, Family and Domestic Violence divisions of the court. Currently, she serves as an Administrative Judge in the Family and Domestic Violence Divisions.

Interestingly, as a practicing attorney Judge Blackwell did not like the one family law *pro bono* case she handled. Now, however, family law is her passion. In 1990, the Sex Crimes/Child Abuse Unit of the Office of the State Attorney, Ninth Judicial Circuit, presented her with an award "in recognition of exemplary performance and dedication to providing quality services and fair treatment to victims and witnesses of crime" in observance of Victim's Rights Week. Her other awards include the *Pro Bono* Award of Excellence from The Legal Aid Society of Orange County (1990 and 1997), the Outstanding Committee Chair from the OCBA Professionalism Committee (1995), a Trial Judge of the Year Award from the American Board of Trial Advocates, Central Florida Chapter (1998), a Law Enforcement Commendation Medal from the National Society of the Sons of the American Revolution (2000) and an Outstanding Leadership Award presented by the Domestic Violence Task Force of Orange County (2002).

Judge Blackwell has also contributed greatly to various bar organizations and the Central Florida community. She has held offices in several bar organizations, including president of the First Central Florida Family Law American Inn of Court # 384 (2005-06), president of the American Inns of Court # 123 (1995-97), vice president of the Florida Chapter, Association of

Family and Conciliation Courts (2007) and secretary of the Orange County Bar Association (1990-91). Additionally, Judge Blackwell's name can be found on numerous judicial committees, commissions and task forces. In 2008, she chaired the Executive Committee of the Florida Conference of Circuit Judges and the Supreme Court Commission on Trial Court Performance and Accountability. She has also lectured or made presentations at the New Judges College, the Florida Association of Family and Conciliation Courts Fifth Annual Conference, the Unified Judicial Conference of the Florida Conference of Circuit Judges and the Florida Conference of District Court of Appeal Judges, the Advanced Judicial Parent Coordination Training at the University of South Florida and Barry University School of Law, to name a few.

The Ballroom at Church Street

225 S. Garland Avenue
Orlando, FL 32801

Wednesday, May 27, 2009

Cocktails - 5:30 p.m.

Dinner & Program - 6:30 p.m.

Cost:

\$10 for OCBA members

\$40 for non-OCBA members and guests

Please RSVP to reservations@ocbanet.org
by Friday, May 20, 2009

Main Entrance: Garland Avenue between
Church Street and South Street

To ensure proper count, RSVPs and CANCELLATIONS are requested no later than Friday, May 20, 2009. The OCBA is happy to provide 10 luncheons as part of your member benefits, **but no-shows incur additional charges for the Bar and walk-ins cannot be guaranteed a seat.** Please keep us up-to-date on your reservation status.



“The law is a jealous mistress and requires a long and constant courtship.”

– Joseph Story, Harvard University Law School Professor (1829)

As a woman lawyer and the wife of a lawyer, Professor Story’s quote always has a unique and bittersweet meaning to me. Using the professor’s metaphor, I have a mistress that consistently competes with my husband for my affection and time, and I am in constant competition with his mistress too. In our home, like those of other lawyer couples, it often seems like there are two rather demanding mistresses in our marriage – both routinely stomping their feet like petulant children, insisting upon immediate, undivided attention and pouting when they feel neglected.

But why is the practice of law akin to the whims and demands of a jealous mistress? Don’t accountants, ad executives, developers, contractors, and corporate titans have demanding clients, deadlines, and overwhelming work loads? The reality of the current economy aside, of course they do. Does this mean that other professionals have to maintain their little paramours as well? No. Because unlike the accountant processing receivables and calculating a balance sheet, the lawyer’s ultimate calling is not the pleading, the contract, nor the memorandum – it is *justice*. Indeed, with all respect to Professor Story, it is not the law that captures our heart and inspires our passion but, rather, it is the pursuit of justice; and it is justice that ultimately competes with the people we cherish (and even with our own health) for our attention and affection. It is justice that calls to us in the middle of the night and stirs us to action.

Of course, when we toss and turn over deadlines, appellate briefs, and acquisition agreements, it doesn’t seem that it is justice keeping us awake. Instead, it seems like it’s the overflowing inbox, the overbooked Outlook calendar, and overwhelming e-mail mailbox that causes the restless night. In truth, inboxes, calendars, and electronic mailboxes are just reminders that justice requires us to serve our clients well, meet the deadlines and expectations of the court, and zealously uphold and defend the law.

In the same way that our call to pursue justice arouses us from much needed slumber, it can lead us astray. Indeed, justice can be a very naughty mistress. It can make otherwise decent and honorable lawyers behave badly, demean and accuse opposing counsel of misdeeds, and challenge the authority of the court. Of course, as in any relationship, it is often the folly and inexperience of youth that can easily allow our mistresses to misbehave. So for the young lawyer, it is imperative that we learn early in our careers to manage our mistress.

While others may have learned other techniques, these are the ways I have learned to both properly feed and manage the two mistresses of justice that live in our home:

1. Seek out and keep good companions for your mistress.

Surround your mistress with others who embrace the same lofty professional and personal goals as you. Make sure your mistress has a good role model. It is axiomatic that if your mistress is only exposed to the lawyers around us who sell their integrity and reputation to the highest paying client, your mistress will become what she sees. Instead, teach your mistress some manners by being active in the Bar, finding a mentor, and searching for role models.

2. Keep your mistress in the finest of accommodations. We all

intuitively know that a well kept mistress is a happy mistress. For the mistress of justice, this means creating an environment where justice can flourish among other professionals, and not meander in the bedlam of misconduct. If you want to work in a professional legal community, then create one. Do not accept unprofessional behavior as the status quo. Demand more of yourself and of other members of the Bar, and don’t forget to lead by example.

3. Feed your mistress. We all know the insatiable appetite of justice. If you don’t at least occasionally feed the underlying call to fight for justice that made you become a lawyer in the first place, then your mistress will become hungry and grouchy. In such a deprived state, she is more likely to misbehave. If writing a contract for another Fortune 500 company or foreclosing on yet another home doesn’t keep your mistress fulfilled, then take her to a fine dining establishment. (I would highly recommend the five star rated Orange County Bar Association Legal Aid Society.) You will find that when you start using your law degree to fight for the truly defenseless and oppressed, your law degree will have more intrinsic value to you and your mistress will be satisfied and content.

4. Remember, justice is your mistress, not your wife. In marriage, we promise to love, honor, and cherish our spouse through sickness and health, in plenty and want, until death do us part. A mistress, however, does not get the same promise. A mistress can be abandoned for health, economic, or plenty of other reasons. Perhaps this is because a mistress, no matter how enticing, is not the replacement for true love or a soul mate. Indeed, justice, even in the bravest fight, does not replace the need for love and balance in our lives. Perhaps Professor Story knew that if justice was a wife, and not a mistress, the divorce rate would be even higher.

I wish I could tell you that the mistresses in my marriage are always properly behaved and content, but this wouldn’t be accurate. Like our children, both our mistresses make mistakes, become too demanding, and have their share of tantrums. Yet, we never give up trying to rein them in. I surround myself daily with ethical and exceptional lawyers, who are both colleagues and friends; I maintain an active involvement in the Bar and promote professionalism among its members; I accept responsibility and apologize for my mistress when she misbehaves; I routinely accept *pro bono* cases and find it to be some of my most rewarding work, both professional and personally; and I remember that my mistress is my affair, and not my marriage nor the total sum of my life.

Now the mistress of *liberty*, that may be another issue...

Liberty is the most jealous and exacting mistress that can beguile the brain and soul of man. She will have nothing from him who will not give her all. She knows that his pretended love serves but to betray. But when once the fierce heat of her quenchless, lustrous eyes has burned into the victim’s heart, he will know no other smile but hers. – Clarence Darrow

Heather Pinder Rodriguez is Senior Counsel with Holland & Knight LLP. Heather is the 2009 Lawrence G. Mathews, Jr. Young Lawyers Professionalism recipient. She has been a member of the OCBA since 1999.

OCBA 2009 Professionalism Awards Luncheon - March 26, 2009



Judge Alice Blackwell receives the 2009 Judge James G. Glazebrook Memorial Bar Service Award from Magistrate Friedman



Magistrate Friedman and Mary Anne De Petrillo, recipient of the 2009 William Trickett, Jr. Professionalism Award



Heather Pinder Rodriguez, recipient of the 2009 Lawrence G. Mathews, Jr. Young Lawyer Professionalism Award and Magistrate Friedman



Mandy Silvestris and Mary Anne De Petrillo



Judge Alice Blackwell and sons Reece and John



Mary Anne and her husband John De Petrillo

Heather and Woody Rodriguez



Judge Alice Blackwell, N. Diane Holmes, Judge Emerson R. Thompson, Jr.

Legal Aid Society attorneys and staff



Electronic Discovery in Central Florida

Ralph C. Losey

Lock the doors, hide the children, electronic discovery has come to town! It had to happen sooner or later. After all, 98% of the documents underlying litigation are created on computers. In fact, paper letters have become a novelty. These days it's all email and other forms of electronic communications or social media. You know the list: instant messages, text messages, Facebook, MySpace, Second Life, blogs, and the latest thing, which I took up myself a few months ago - Twitter. That is a kind of haiku blog where you cannot write more than 140 characters. These electronic communications should be important to all litigators because you would not believe the kind of things people put in email and the rest. People do not seem to know that the "e" in "email" stands for "evidence."

Bottom line, the information you want and need to discover to win your case now lies in computers, not filing cabinets. It is what the new federal rules of civil procedure call "electronically stored information" or ESI for short. Since the key evidence is now almost electronic, the appearance of e-discovery in Central Florida was inevitable, and indeed it has now arrived, big time, as a series of recent opinion illustrates.

In Re Seroquel

One Orlando opinion has already become famous and is widely cited around the country. *In Re Seroquel Products Liability Litigation*.¹ It was written by Magistrate Judge David Baker, the only Orange County Bar Association member I know who has been using computers longer than I have. *In Re Seroquel* is one of those gigantic, consolidated, multi-district products liability cases that ended up in Orlando. The plaintiffs all took an anti-psychotic medication that allegedly caused them diabetes and related disorders. You can image what a difficult case this is, with multiple attorneys appearing around the country.

The e-discovery issues arose out of the plaintiffs' motion for sanctions against the drug manufacturer for its alleged failure to timely or properly comply with e-discovery requests. Judge Baker granted the motion in part, and imposed the sanctions, even though there was no showing of willfulness or bad faith and no preceding motion to compel. He did so because the record demonstrated massive discovery negligence bordering on bad faith, which caused unnecessary expenses and delays. Judge Baker characterized the defendants' response to e-discovery as "purposeful sluggishness." As to the negligence, al-

though 25 million pages of electronically stored information were eventually produced, over 10 million pages of this production were inaccessible, unsearchable, and unusable.

This was not only a document dump of massive proportions, it was *trash dump*. Much of the ESI produced was worthless because it could no longer be searched. The search index files and important metadata had been removed and withheld from production. The manufacturer defendants instead produced what are called flat image Tiff files. That's like taking a video game, printing out screen shots of the game, and then giving the paper to your kid to play with. To make matters worse, some of the Tiff file pictures of documents and emails were over 20,000 pages in length, with no page breaks. When plaintiffs' counsel suggested the inclusion of page breaks, defense counsel called it "ingenious," a fact that Judge Baker pointedly noted in the sanctions opinion.

Although Judge Baker criticized both sides for their lack of professionalism and over-argumentative approach to electronic discovery, he placed primary responsibility for the breakdown in communication and cooperation on the defendants, whose records were at issue. The following quotes from *In re Seroquel* are of particular importance and frequently quoted in other decisions nationwide:²

While keyword searching is a recognized method to winnow relevant documents from large repositories, use of this technique must be a cooperative and informed process. Rather than working with Plaintiffs from the outset to reach agreement on appropriate and comprehensive search

terms and methods, AZ undertook the task in secret.

Common sense dictates that sampling and other quality assurance techniques must be employed to meet requirements of completeness. If AZ took such steps, it has not identified or validated them.

The use of sampling and other quality assurance techniques is the best way to keep down the expenses of e-discovery in large document cases. They can greatly help in the often daunting task of searching for a few needles of relevant evidence in an enormous electronic haystack.

Bray & Gillespie Mgmt. v. Lexington Ins.

Another Orlando decision just issued in March 2009 is already making e-discovery headlines around the country. *Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co.*³ This 51-page opinion by Magistrate Judge Karla Spaulding exposes and sanctions several over-adversarial tactics employed by plaintiffs' counsel. The net result that has everyone talking is the imposition of sanctions against a large national law firm that represented the plaintiffs in this case and two of its attorneys.

What did they do wrong? In a new variation of hide-the-ball, they hid-the-metadata. This may not sound serious, but in fact it is a form of alteration of evidence. Counsel here stripped the ESI of *metadata* before making production, once again rendering the electronic production nearly useless, much like the defendants did in *Seroquel*.⁴ As a result, the plaintiffs here produced 200,000 pages of Tiff images, about half of which were email. There was no way to know what documents were attached to what emails because that important metadata had been withheld. Even worse, the whole thing was not indexed and so could not be computer searched. In other words, this was another *trash dump*.

The defendants' insurance company here had specifically requested the original computer files, not pictures of printouts of the files. They had asked for what is called a "native" form of ESI production under new Federal Rule 34(b)(2)(C).⁵ The plaintiffs collected and gave the files to their attorneys as requested in their original native form. But then its lawyers

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Electronic Discovery

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converted the files to what is called "Tiff and load" files. They did that so they could review the files for privilege and relevance before production. The load files they used for their review had all metadata and the Tiff images were fully searchable. So far, so good. But after the attorneys had completed the review and culled the files, they did not produce the originals, as requested. They also did not produce the fully loaded Tiff files they had been using. Instead, they made a trash dump production and kept all of the good metadata for themselves.

This led to the defendant's motion for sanctions. The plaintiffs' defense counsel attorney responded by claiming that defense counsel had agreed to accept production of the ESI in the flat image format and had not requested a native file production. This argument also involved an interpretation of new Rule 34(b)(2)(E) and what is needed for an ESI production format to be "reasonably usable." To make a long story short, this led to two evidentiary hearings before Judge Conway concerning who said what at the Rule 26(f) meet and greet conference, along with expert testimony on metadata and the flat file productions. Judge Spaulding did not believe the testimony of one set of plaintiffs' attorneys and ruled that the stripped down Tiff file production violated the reasonably usable rule requirement. Further discovery was compelled and sanctions were awarded in the form of fees and costs, with the amount to be determined at a later date.

The *Bray & Gillespie* opinion is informative for a number of reasons and I would commend everyone to read it. Suffice it to say that Judge Spaulding did not mince words about the conduct of certain of plaintiffs' lawyers here. This case,

including as it imposes personal sanctions against a law firm, should serve as a wakeup call for the whole profession. Litigators need to be educated about e-discovery and the need for candor and honest dealing, otherwise their firms may face stiff sanctions for negligent practice.⁶

A Few More Favorites

There have been several more cases in Central Florida with important e-discovery rulings, but here are four more that I especially like. The first you should know about, especially if you practice criminal law, is the Wesley Snipes tax case in Ocala. *U.S. v. Snipes*.⁷ Just before trial, the government produced an electronic database containing the equivalent of 1.6 million pages of documents. Wesley Snipes and his co-defendants moved for a three-month continuance of trial to have time to sort through the database. The request was denied.⁸

Another of my favorites is a sanctions case leading to an adverse inference that proved key to the plaintiff prevailing in a UCC case. *Optowave Co. Ltd. v. Nitikin*.⁹ This is a favorite war story, which we refer to as the *Case of the Midnight Hacker*. The defendant claimed his email was destroyed by a hacker who snuck into his computer systems in the middle of the night and erased his hard-drives.¹⁰ Judge Baker did not believe this new variation of the "dog ate my homework" story and entered sanctions for defendant's intentional, bad faith spoliation.

My last two favorite local cases come from Tampa. In the first, Magistrate Judge Pizzo rejected an attorney's excuse of "computer illiteracy" for not finding and producing his client's computer files as "frankly ludicrous." *Martin v. Northwestern Mutual Life Insurance Company*.¹¹ In the second, sanctions in the form of fees and a forensic examination were awarded against the plaintiff for

a series of e-discovery abuses that caused unnecessary expenses and delays. *U & I Corporation v. Advanced Medical Design, Inc.*¹² These delays could all have been avoided if counsel had, in the words of Magistrate Judge Jenkins:

... been familiar with U&I's document retention policy and computer systems prior to conferring with AMD regarding discovery. At the outset of the litigation, U&I and its counsel had the responsibility to take affirmative steps to ensure that all sources of discoverable information were identified, searched, and reviewed so that complete and timely responses to discovery requests could be provided.

This points to an important new duty imposed upon trial counsel by the technical complexities of modern day document storage systems. I call this the *Zubulake* duty because it was first articulated by Judge Scheindlin in the well known case of *Zubulake v. UBS*.¹³ Among other things, this duty requires outside counsel "to make certain that all potentially relevant information are identified and placed on hold."¹⁴ This can be challenging, but is a new imperative of competence demanded of all litigators today.¹⁵

Dealing with e-discovery can be a difficult, but at least we have several good decisions from our local federal magistrates to help guide us along the way.

Ralph C. Losey © 2009

Ralph Losey is a shareholder with Akerman Senterfitt and an adjunct professor at the University of Florida School of Law. He has been an OCBA member since 1980.

¹244 F.R.D. 650 (M.D. Fla. Aug. 21, 2007).

²See eg. *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 2008 WL 2221841 (D. Md., May 29, 2008).

³2009 WL 546429 (M.D. Fla. Mar. 4, 2009).

⁴See Losey, Ralph, *e-Discovery: Current Trends and Cases* (Ch. 5- Metadata) (ABA 2008).

⁵*Id.* at Ch. 3 (New Rules for e-Discovery).

⁶Also see: *Qualcomm, Inc. v. Broadcom Corp.*, 2008 WL 66932 (S.D. Cal. Jan. 7, 2008) where attorneys were sanctioned and referred for Bar investigation for e-discovery misconduct; and, Losey, Ralph, *Introduction to e-Discovery*, (Ch. 6 - e-Discovery and the Qualcomm Case) (ABA 2009).

⁷2007 WL 5041892 (M.D. Fla. Dec. 24, 2007).

⁸See: *Introduction to e-Discovery*, *supra* at pg. 493.

⁹2006 WL 3231422 (M.D. Fla. November 7, 2006).

¹⁰*Id.* at pg. 440.

¹¹2006 WL 148991 (M.D. Fla. Jan. 19, 2006).

¹²2008 WL 821993 (M.D. Fla. March 26, 2008).

¹³229 F.R.D. 422 (S.D.N.Y. 2004).

¹⁴*Id.*

¹⁵See *e-Discovery: Current Trends and Cases*, *supra* at Chapter 2 (New Ethical Standards for e-Discovery).

Did Ironsides entertain any doubts?



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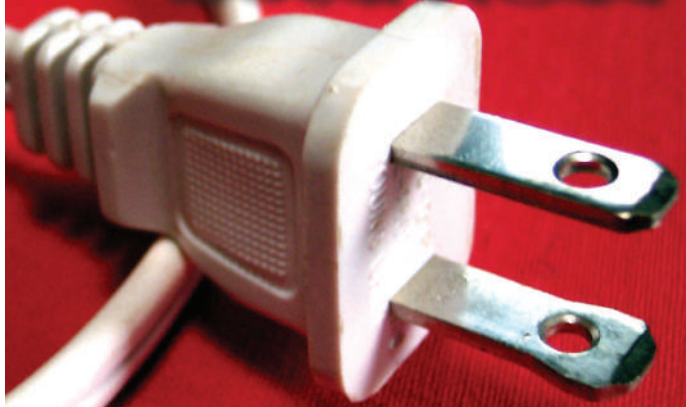
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Marital Appreciation of Non-Marital Stock:

Fish or Foul PART 1 Nicole Park, Stephanie Vanos, Rebecca Palmer & Terry Young

Understanding the Classification of Non-Marital Stock in a Closely-Held Family Corporation

I. Introduction

The title and two-part article suggest that nonmarital stock may be converted to a marital asset. More specifically, this article will discuss and analyze the necessary steps for practitioners to consider when representing either a “non-shareholder spouse” or “shareholder spouse” of nonmarital stock held in a closely-held family corporation. The second portion of this article (in next month’s edition) will discuss whether there is a marital component to “phantom income” from nonmarital stock in a closely-held family subchapter S-corporation.

The key question for a practitioner is to determine whether there is appreciation in closely-held stock. This article delineates the appropriate exercise practitioners should employ in determining whether

stock in a closely-held corporation has appreciated during the parties’ marriage. If appreciation is confirmed, the issue then becomes whether the appreciation may be properly classified as a marital or nonmarital asset such that the former would be subject to equitable distribution under section 61.075, *Florida Statutes* (2008).

Appreciation of nonmarital stock occurs in one of two ways: i) expending marital labor or effort on part of a non-shareholder spouse; or ii) providing some investment of marital funds (e.g. a contribution of capital). Counsel representing a shareholder spouse must concentrate on these two themes and demonstrate that the non-shareholder spouse did not exert labor, nor were marital funds expended, to effectively negate appreciation. If the appreciation results from causes other than a non-shareholder spouse’s efforts or expenditure of marital funds, but rather the result of passive market forces, then the appreciation is properly classified as nonmarital.¹ As a result of such characterization, the stock is removed from the equitable distribution scheme.² While counsel for a shareholder spouse should analyze whether labor or funds were expended to enhance the closely-held stock, counsel can often relax and breathe easily since the opposition bears the initial burden of proof to demonstrate that such actions occurred.

II. Who Carries the Burden of Proof?

The non-shareholder spouse bears the burden of proof to establish enhancement in value or appreciation of a nonmarital asset so that it may be equitably distributed.³ Further, the non-shareholder spouse must establish not only that a nonmarital asset increased in value during the marriage, but that the increase in value was the result of marital funds or labor.⁴ The burden then shifts to the shareholder spouse to show that any or all of the en-

hanced value should be exempt from equitable distribution.⁵

In *O’Neil v. O’Neil*, 868 So. 2d 3, 4 (Fla. 4th DCA 2004), the husband appealed the trial court’s factual finding that he actively managed the retirement account at issue. The husband argued irrespective of the marital effort contributed, such efforts should not serve to deprive him of his passive earnings accumulated within the nonmarital retirement account.⁶ Essentially, the husband argued that any increase in value of the retirement account “should be apportioned between the increase due to marital labor and the increase due to time and market conditions, with the latter being designated a nonmarital asset that is not subject to equitable distribution.”⁷

The Fourth District Court of Appeal affirmed the trial court’s ruling that the husband failed to meet his burden of proof.⁸ Once the wife established that marital labor was exerted, the burden then shifted to the husband to establish whether any part of the appreciation was a result of passive market conditions and therefore exempt from equitable distribution.⁹ The husband failed to demonstrate that an apportionment of the appreciation was purely attributed to time and market conditions, resulting in the entire increase of this asset becoming subject to equitable distribution.¹⁰

III. Exerting Marital Labor: Fish or Foul

In the case of a family-owned company, appreciation during the marriage of an owner spouse’s nonmarital shares may not be classified as marital unless there is “substantial evidence” that his or her efforts “contributed significantly” to either the establishment of the family business or its appreciation in value.”¹¹ Florida courts have held that even though an owner spouse may work for a family-owned company during the marriage, this, by itself, does not render the appreciation of the business a marital asset.¹² Florida courts look to the actual work performed by the owner spouse in determining whether the marital effort performed by the owner spouse was such that it “contributed significantly” to the appreciation of the company.

In *Oxley v. Oxley*, 695 So. 2d 364 (Fla. 4th DCA 1997), the husband was president of his family business of which he acquired a fifty percent (50%) interest prior to his marriage. The court found that even as president, his activities were “largely ministerial and ceremonial” and included “various non-essential (from an income and asset management perspective) functions.”¹³ Further, the Court held that while some of the increase in the value of the corporation was a result of passive market forces, other aspects resulted “from selling off property and manage-

continued page 14

Marital Appreciation of Non-Marital Stock

continued from page 13

ment activity performed by others, for the husband's benefit and with his consent, conduct that might have supported a conclusion that a significant portion of the increase in value was due to marital effort."¹⁴

The court in *Oxley* ultimately held that the husband's delegation of decision-making and management activities to agents insulated the increase in value of the company at issue, making equitable distribution of same improper, because there was "the absence of any individual effort by the husband, within the ordinary meaning of the term 'effort' (or 'labor') as used in the statute and existing case law."¹⁵ "To hold otherwise would effectively make all spouses partners in the increased value of all nonmarital assets that does not result from passive appreciation, ignoring the balance of the statutory criteria."¹⁶

The Wife's Foul Smell of the Court's Ruling. In *Macaluso v. Macaluso*, 523 So. 2d 615 (Fla. 2d DCA 1988), the husband worked primarily as a garbage truck driver for his family's sanitation business. Prior to the parties' marriage, the husband was gifted stock in his family's corporation, and he was subsequently named as a corporate officer.¹⁷ The business was sold, and the husband received substantial proceeds as a result, a portion of which was deemed marital and distributed to the wife.¹⁸ The wife's complaint concerning equitable distribution was directed at the trial court's classification of the husband's remaining property as a nonmarital asset.¹⁹

Similar to *Oxley*, the Second District Court of Appeal affirmed the lower court's finding that these remaining assets were "directly traceable" to the husband's business and had not appreciated in value because of husband's efforts, and therefore, were properly classified as nonmarital assets exempt from equitable distribution.²⁰

Big Fish in a Little Sea. Conversely, in *Robbie v. Robbie*, 654 So. 2d 616 (Fla. 4th DCA 1995), the court found the husband's efforts contributed to the family business and thus its overall success and found a portion of the appreciation of the family business to be a marital asset. In *Robbie*, the husband was gifted

a share of the Miami Sports Corporation by his father prior to the parties' marriage.²¹ Miami Sports Corporation owed several entities, including the Miami Dolphins.²² The husband was employed as the general manager and executive vice president of the Miami Dolphins "and as officer and director of virtually all of the Robbie family entities."²³

The court found that section 61.075, *Florida Statutes*, "should not be construed so narrowly as to preclude an interest in a closely held family corporation from being considered a marital asset, where the spouse is employed full-time in its endeavors, but is not the key decision-maker."²⁴ Although the husband, as general manager, did not make command decisions, the court held that he "contributed by carrying out the decisions made by oth-



ers."²⁵ Therefore, the appreciation of value in the Miami Sports Corporation during the marriage was marital property subject to equitable distribution.²⁶

IV: Conclusion

The classification of nonmarital stock in a closely held family corporation involves a multi-step process, with the initial burden on a non-shareholder spouse to establish that the stock has

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increased in value and that such increase is the result of marital funds or labor. Florida law requires that there be "substantial evidence" that the owner spouse's labor "contributed significantly" to either the establishment of the family business or its appreciation in value.

The second part of this article will be published in next month's edition and will examine whether the appreciation of a closely held family S corporation is marital based on the theory that corporate income that passes through to the shareholder spouse for income tax purposes, but remains undistributed and is reinvested in the corporation, constitutes marital income.

The authors are with Lowndes, Drosdick, Doster, Kantor & Reed, P.A. **Nicole Park**, an associate, has been an OCBA member since 2005; **Stephanie Vanos**, a senior associate, has been an OCBA member since 2004; **Rebecca Palmer**, a partner, has been an OCBA member since 1994; and **Terry Young**, a partner, has been an OCBA member since 1976.



Nicole Park



Stephanie Vanos



Rebecca Palmer



Terry Young

¹See *Oxley v. Oxley*, 695 So. 2d 364 (Fla. 4th DCA 1997); see also *Turner v. Turner*, 529 So. 2d 1138 (Fla. 1st DCA 1988).

²See *id.*

³*Pereboom v. Pereboom*, 959 So. 2d 1205, 1206 (Fla. 4th DCA 2007).

⁴*Id.*; see also *Yitzhary v. Yitzhary*, 906 So. 2d 1250, 1254 (Fla. 3d D.C.A. 2005).

⁵*Yitzhary*, 906 So. 2d at 1254 (citing *Gaetani-Slade v. Slade*, 852 So. 2d 343, 347 (Fla. 1st D.C.A. 2003)).

⁶*O'Neil*, 868 So. 2d at 4.

⁷*O'Neil*, 868 So. 2d at 4-5 (citing *Young v. Young*, 606 So. 2d 1267 (Fla. 1st DCA 1992)).

⁸*Id.* at 5.

⁹*Id.*

¹⁰*Id.*

¹¹*Macaluso v. Macaluso*, 523 So. 2d 615, 616 (Fla. 2d DCA 1988) (emphasis added).

¹²*Id.*

¹³*Oxley*, 695 So. 2d at 365, 367 (emphasis added).

¹⁴*Id.* at 367 (emphasis added).

¹⁵*Id.* at 368.

¹⁶*Id.* (emphasis added).

¹⁷*Macaluso*, 523 So. 2d at 616.

¹⁸*Id.* at 616-617.

¹⁹*Id.* at 617.

²⁰*Id.*

²¹*Robbie*, 654 So. 2d at 617.

²²*Id.*

²³*Id.*

²⁴*Id.*

²⁵*Id.*

²⁶*Robbie*, 654 So. 2d at 617.

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"The only two certainties in life are death and taxes."

-1789 letter from Benjamin Franklin to Jean-Baptiste Leroy. *Wikipedia, the free encyclopedia*

There is another certainty during each tax season - OCBA *pro bono* attorneys will help low-income residents prepare their taxes. It is Friday lunchtime in the backroom of the Goodwill Self-Sufficiency Center on Central in Orlando. **Alana Brenner, Jeremy Sloane** and **Jane Callahan** are preparing returns for working people at the site, as they have for the past six weeks of the tax clinic. They are examples of some of the local attorneys who volunteer their time to help low-income taxpayers. On six Fridays in February and March, you will find them changing the world.

Jeremy S. Sloane of Akerman, Senterfitt works with "Linda," a taxpayer who said that if her taxes were not done for free, they would not be done. She knew that not doing taxes brought on additional fees and penalties, but could not worry about that because "if you don't have it, you don't have it." Fortunately, Jeremy Sloane was willing to give up his lunch hour (plus some additional time) and assist Linda, a low-income mother. Linda has some educational expenses because she is trying to study to become a medical lab technician and eventually continue her studies to become a nurse practitioner. When she is told she will be receiving a refund, she worries that educational expenses she owes will be deducted from her tax refund. Jeremy was able to complete her tax return, reassure her and explain what is and is not deductible from her refund.

Jane Callahan with Dean Mead explains head of household, the tax credit worksheet and basic tax return information, to "Laura." Her W-2 did not have any withholding and Jane explained how taxes are properly withheld and the questions Laura should ask her next employer regarding the W-4 form to have the correct amount withheld from her wages. Employment is also part of Laura's dilemma. She has been unable to locate a job, and she and her 20-month-old daughter are living at a transition home for homeless mothers and children. In the process of applying for school, Laura has other questions. Seeking additional education and job skills, Laura needed help with tax forms prepared with her education assistance. Laura realizes that a minimum wage job will not be enough to pay for day care, rent, medical insurance and life's basic necessities; she simply wants something that will allow her to pay for food and the luxury of a small apartment. "I'm so thankful [for the attorney's help]; it allows me to start my life over! Because the attorney did my taxes for free, I get money back, I can use that money to pay for daycare at the transition home, and I can get a job. Everything changes from that." A \$1,600 refund? Change a life? For many of us, this is saving a few hundred dollars in tax preparation fees. For Laura it is the start of a new life with her daughter.

Alana Brenner, the Clerk for the City of Orlando, continues to work on the program that she created more than 15 years ago. The Center for Budget and Policy conducted a national recruit-

ment effort to increase awareness of the Earned Income Tax Credit (EITC). The refundable credit is directed to low-income wage earners. Legal Aid's project was begun by Alana when she was a staff attorney in response to this recruitment and Legal Aid continues an IRS Volunteer Income Tax Assistance Program (VITA) site today.



In Orange County, a group of local agencies and programs that are VITA and AARP-Tax Counseling for the Elderly (TCE) sites are coordinated by Heart of Florida United Way and work as Community Partners to offer free tax preparation services to our community. The IRS provides training, support and use of software for e-filing returns.

Alana Brenner has continued with the project under its different configurations. As Ms. Brenner states, "The idea is to not leave government dollars on the table, which our clients are entitled to and need badly." One client she recalls filed back taxes with Ms. Brenner's help and received an earned income credit of over \$5,000.00. The young woman had tears streaming down her face when Alana told her the news - it meant a family could be lifted out of homelessness.

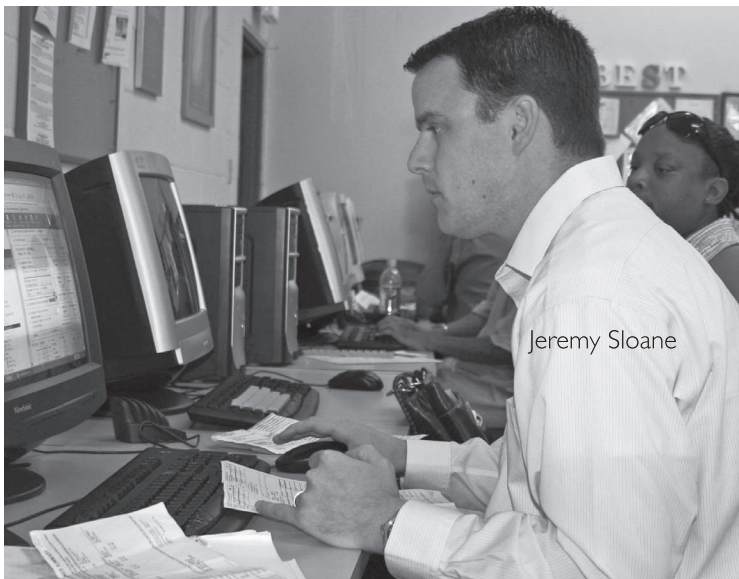
A recent article in the *Orlando Sentinel* written by Kate Santich indicated that Florida has one of the highest rates of homeless children in the nation, with as many of 50,000 children living in shelters, motels, cars or doubled up with another family. The National Center of Family Homelessness found Florida ranked 46th out of 50 (50 being the worst) for its sheer number of homeless children. As Laura and Linda know firsthand, so have researchers noted the income gap between the state's largely minimum wage economy and the income needed to cover a basic two-bedroom apartment. Florida also has long waiting lists for subsidized or public housing, and low welfare benefits. Lifting a child out of poverty means the child gets to go to school and have mom come home from work and cook dinner - basic things that most children take for granted. As Alana Brenner states, "this is the

federal program that lifts the most children out of homelessness.”

Congratulations to Alana Brenner, Jane Callahan, Jeremy Sloan and all the *pro bono* attorneys who have made the Legal Aid Society of the Orange County Bar Association's Tax Clinics successful! You have turned tax season into a way out of homelessness for some.

For more information on *pro bono* Legal Services contact **Cathy Tucker** at ctucker@legalaidocba.org; (housing/ homeless issues) **Mike Resnick** at mresnick@legalaidocba.org or development issues contact **Donna Graf** at dgraf@legalaidocba.org.

Donna Graf, Manager of Development at the Legal Aid Society, has been a member of the OCBA since 2008.



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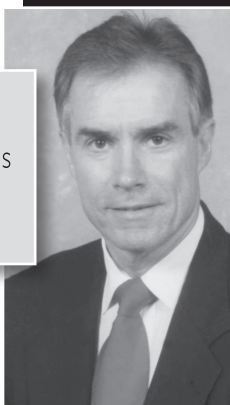
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For a *pro bono* attorney, serving as a Guardian ad Litem for dependent children can come with a lot of questions. It's a new area of law, an unfamiliar role, and the hearings are even held in a different courthouse. When you filled out your *pro bono* preference form, you were making sure someone is always there to speak up for a child who has been abandoned, abused or neglected, but now you're figuring out the mechanics of being that person. The good news is, you're not the first person to have these questions, and the staff at the Guardian ad Litem program probably have an answer. This article covers just a few examples of the most common questions we hear.

Do I have standing to ask for this in court?

As a Guardian ad Litem, you are actually a party to the dependency case. (Fla. Stat. 39.820(1)). So, the answer to this question is almost always "yes." If you believe an order of the court is necessary to ensure the safety or well-being of the child, you should ask for it. In fact, Florida Statute explicitly permits you to be the one to file a Termination of Parental Rights Petition if you feel you need to. (Fla. Stat. 39.802(1)). GAL staff attorneys can assist you with the mechanics or assessing the likelihood the court will grant your request, but you are well within your rights and responsibilities to advocate for anything you believe the child needs.

Who can I talk to?

Your role is to be a representative of the child and to gather information about any matters in the case so that you can make informed recommendations to the court. (Fla. Stat. 39.822 and Fla. R. Juv. P. 8.215). Generally speaking, you can talk to anyone that you believe has information you need. Both the statute and your Order of Appointment authorize that information be released to you, even if it is otherwise confidential. (Fla. Stat. 39.822(3)). Obviously, as an attorney, you can't speak to a represented party without the agreement of his or her attorney. However, because the GAL's role is well understood, the parent's attorney will work with you to make arrangements for you to speak with his client in a manner that still protects the client's rights.

Who should I definitely be talking to?

The child – you should be talking to the child first and foremost. Even though the child is not your client, you are the child's voice and the person formally entrusted with alerting the court to his or her needs and wishes. (Fla. R. Juv. P. 8.215). The child and his or her caregiver are also your best sources of information about the day to day experiences and needs of the child.

The family case manager is the professional working directly with the family and the person who can keep you up to date on the case or direct you to others who may have information you need. A strong working relationship between the GAL and the family case manager results in strong advocacy for the child. We recommend that you discuss with the family case manager at the start of the case how you will share information. Will you communicate by email, phone or both? Will you be periodically asking how things are going or will you just call each other when something happens?

You will also need to speak with the parents and their counsel. They have "the other side of the story" that you need to know. It may also be necessary to advocate for services or assistance for the parents in order to reach the best outcome for the child.

From there, the cast of caretakers in a dependency case is vast and varied. You'll want to look at the facts and decide who else has information you may need. Trust your instincts and feel free to call one of the GAL Program staff.

Dependency cases have a lot of hearings at the beginning. What should I do if I can't personally attend a hearing?

Because they recognize that *pro bono* GALs can run in to scheduling conflicts, the dependency judges do allow telephonic appearance. However, they ask

that you contact their judicial assistant and make arrangements in advance. You can also ask someone from your firm to attend on your behalf, or a GAL program attorney can attend for you if you provide us information beforehand. If you're confident the hearing is not one at which advocacy is needed, you may ask the court to excuse you from the hearing and file a written report instead. (Fla. Stat. 39.822(4)).

I heard that I have to personally attend the Termination of Parental Rights Advisory and the Termination of Parental Rights trial. Is that true? Even if the parents plan to consent?

Yes. Not only can the GAL, as a party to the case and an attorney, participate in the litigation of the case, but the GAL is required to provide a recommendation to the court as to whether the Termination of Parental Rights is in the best interest of the child. The GAL recommendation is one of the factors that the court must consider when determining manifest best interest, and so the testimony of the GAL is a critical factor in the trial. (Fla. Stat. 39.810(11)).

A GAL is required to file a report with recommendations regarding the termination of parental rights 72 hours before the disposition hearing, which is usually conducted immediately following the trial. (Fla. Stat. 39.807(b)1). The parents have the right to cross-examine a

witness, so the GAL must be present to testify to the recommendation and take questions from the parents' counsel. If the GAL is not physically present at the trial, then the trial will have to be continued and permanency for the child will be delayed. Of course, when the parents consent to the termination, all parties can agree to rely on the GAL's report in lieu of testimony or to allow the GAL to testify by phone.

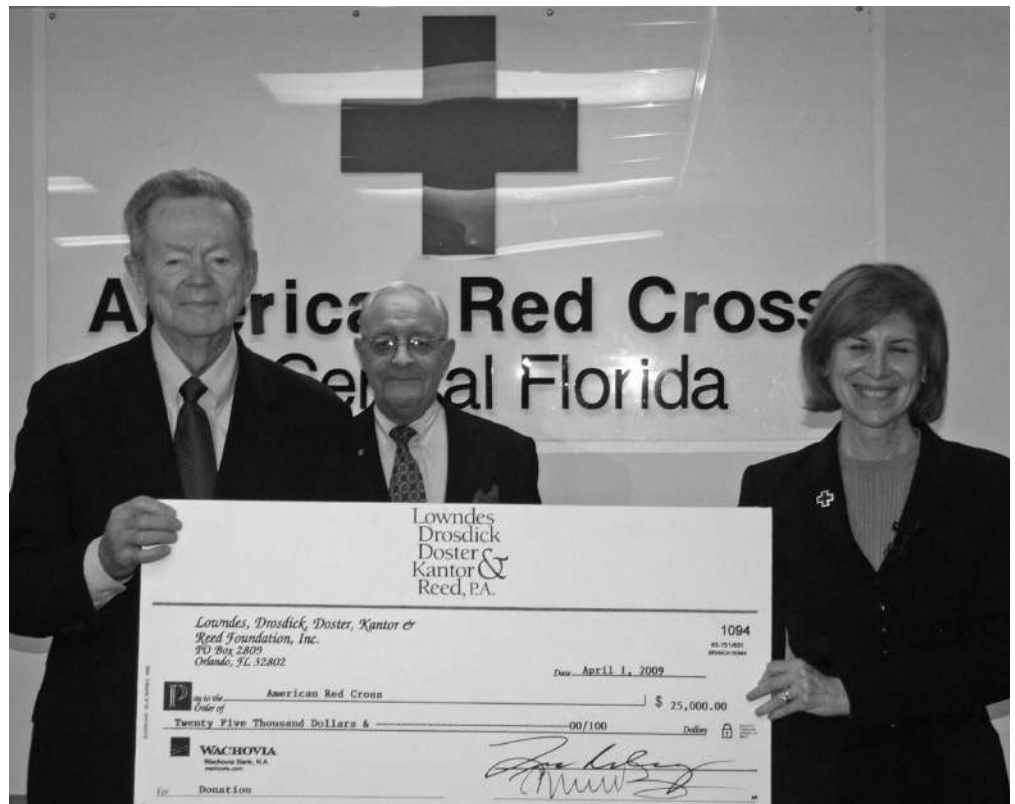
The Advisory Hearing is where the trial date is set and the parents are advised of their rights. (Fla. Stat. 39.808). GALs are strongly encouraged to personally attend the Advisory, even though it is primarily a scheduling hearing. If the parents have decided to enter a consent to the



Termination of Parental Rights petition, the prima facie trial will often be conducted at that time and the GAL's testimony is required. Being able to immediately proceed to the adjudication reduces the child's wait for permanency. If the parents do not consent to the termination, the attorneys will be coordinating the trial date at that hearing. The GAL needs to be present to immediately alert the Court to any scheduling conflicts and avoid the need to re-schedule the trial, which will inevitably delay permanency for the child. Judicial economy and the child's need for permanency as expeditiously as possible are both best served by the GAL's personal attendance at the Advisory.

Do you have a question we haven't answered yet? Please feel free to contact the staff at the Guardian ad Litem program, and we will be glad to speak with you. 407-841-8310.

Cara M. Dobrev is the GAL Litigation Director at the Legal Aid Society. She has been a member of the OCBA since 2003.



John F. Lowndes, founder of Lowndes, Drosdick, Doster, Kantor & Reed (l) presents a check for \$25,000 to American Red Cross Central Florida chapter. On hand to accept the donation is national Red Cross President Gail McGovern (r), while Regional CEO of Central Florida Joel Hass looks on. The donation is payment toward a \$100,000 pledge by the law firm for the Central Florida chapter's "Help Fill in the Red" fundraising campaign.

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Appellate Practice Committee

When it Counts: Taking an Immediate Appeal of an Order Regarding Immediate Possession of Property

Stacy Borisov Ford, Esq.

Your case has only just begun, you have prepared your client for the long litigation road ahead, and an appeal is nowhere on your radar screen when suddenly the court issues a non-final order that denies your client immediate possession of the property at issue. Your client certainly does not want to wait until the end of an eventual trial to get it back.

What can you do now, when it counts the most?

This is the third in a series of articles brought to you by members of the OCBA's Appellate Practice Committee regarding appeals of interlocutory orders under Florida Rule of Appellate Procedure 9.130(a)(3). This installment regards item (C)(ii) of that Rule, which permits an interlocutory appeal of a non-final order determining "the right to immediate possession of property." Given that this provision regards immediate possession of property, any situation in which it may apply is sure to be significant to your client, who likely cares very little about rules of appellate procedure but a great deal about whether he or his opponent has possession of the property at issue during the balance of the litigation.

Criminal and Civil Law Applications

Although Rule 9.310(a)(2) provides that appeals of non-final orders in criminal cases are addressed in Rule 9.140, it should be quickly noted, before we lose the attention of our criminal law brethren, that there are potential applications of item (C)(ii) under Rule 9.130(a)(3) in the criminal law context. To be sure, the Committee Notes to Rule 9.130 specifically advise that "because this rule only applies to civil cases, item (C)(ii) does not include within its ambit rulings on motions to suppress seized evidence in criminal cases." However, there are examples of its permitted use by criminal defendants, such as in appeals of orders on a motion for return of an arrestee's property taken upon arrest¹ and a motion for return of seized property subsequent to an acquittal of criminal charges.² There is also a potential use by the State in seeking release of evidence as contraband, title to which vests in the seizing agency.³

Turning next to our civil litigators, the first question you might ask is: what is the meaning of "property"? (You are an attorney, of course, so you must ask such profound questions even in the face of a client who *just* wants to know if he can

keep his land, car, bank account, whatever.) Again, the Committee Notes provide guidance: "Item (C)(ii) is intended to apply whether the property involved is real or personal." In fact, it applies to real property, personal property, and even money.⁴

Item (C)(ii) also provides express examples of its application. It states that it includes, but is not limited to, "orders that grant, modify, dissolve or refuse to grant, modify, or dissolve writs of replevin, garnishment, or attachment." These prejudgment forms of relief can be very attractive to a client seeking an immediate result, but due to the existence of item (C)(ii), you may wish to caution your client that he or she could be inviting an interlocutory appeal by seeking the same.

Some additional examples of the application of item (C)(ii) are appeals of an order providing for a judicial sale of property,⁵ an order vacating a certificate of title issued in a foreclosure sale,⁶ and an order of taking entered in an eminent domain/condemnation proceeding permitting a condemnor to take possession and title to real property in advance of a final judgment.⁷ Landlord-tenant disputes are also ripe for application of this Rule. Of course, an order of eviction from real property counts.⁸ Interestingly, so does an order regarding whether the tenant must pay rent into the court registry.⁹ Similarly, an order granting a mortgagee's request that a defaulted mortgagor be required to pay collected rents into the court registry is also immediately appealable.¹⁰

As a result of a split of authority regarding whether orders *denying* a request for the appointment of a receiver were appealable under item (C)(ii), a new item (D) was added to Rule 9.130(a)(3) in 1992, which specifically provides that orders granting or denying the appointment or termination of a receiver are appealable non-final orders.¹¹ Thus, earlier case law addressing the application of item (C)(ii) to receiver-ship issues are now moot.

Another interesting application of this appellate rule is to orders authorizing or denying payment of an attorney's retaining or charging lien.¹²

Finally, trust and estate practitioners may be interested to note a number of cases in which orders addressing trust or estate assets have been held immediately appealable under item (C)(ii). Examples include an order granting the beneficiary of a trust an immediate right of possession of an automobile,¹³ an order permitting attorney's fees and witness fees to be paid from trust assets in order to fund the defense of a challenged trust,¹⁴ and an order determining homestead property and authorizing the personal representative to take possession where the devise was by way of the residuary clause in the will.¹⁵

When Possession Is Not Really the Point

An appeal of an order determining an immediate right to possession need not solely involve a challenge to the existence of that right, but rather could regard the details of an order to transfer. For example, it was held that the question of the proper *date* of a taking in an inverse condemnation action is an integral part of a determination of the right to immediate possession of property and, therefore, can be raised through an interlocutory appeal under item (C)(ii).¹⁶ Similarly, item (C)(ii) was relied upon in an eminent domain proceeding to support jurisdiction over an appeal of the *amount* of court registry monies to be allocated to a tenant for its interest in property.¹⁷

When a "Partial Final Judgment" Is No Such Thing

Under Florida Rule of Appellate Procedure 9.110(k), partial final judgments are reviewable either on immediate appeal or subsequently on appeal from the final judgment. But looks can be deceiving, and while an order may be titled a "Partial Final Judgment," an appellate court may dismiss an immediate appeal taken under Rule 9.110(k) if the



substance of the order reveals that it, in fact, is not final. However, even if you have determined that your order is inappropriately titled, your analysis should not stop there because that same order, or a portion thereof, may be appealable

under Rule 9.130(a)(3)(C)(ii).

For example, in a case where an order titled "Partial Final Judgment" disposed of all counterclaims but reserved ruling on a count within the complaint, the Fifth District held that the order was not final, even in a partial sense, because it neither disposed of "an entire case as to any party" nor resolved matters that were independent of the matters left to be resolved.¹⁸ Nonetheless, the Fifth District noted that, in part, the order determined the right to immediate possession of property because it ordered a judicial sale of real property, and therefore, the Court had jurisdiction to address the singular question of whether the ordered sale was proper.¹⁹ Unfortunately for the Appellant, the multiple other issues raised and argued on appeal were left unaddressed by the Court.

What about a Summary Judgment?

Let's say your opponent was granted summary judgment on a single count, while other counts remain pending. The order is unlikely to be an appealable "partial final judgment," but, as in the above example, it may determine an immediate right to possession of some property, such that Rule 9.130(a)(3)(C)(ii) would provide immediate appellate jurisdiction.

On the other hand, what if you have moved for summary judgment on a count seeking recovery of property and your motion was denied? So long as your opponent was not granted a cross-motion, you likely cannot appeal immediately because the effect of the order "was simply to deny summary disposition of the parties' respective claims to immediate pos-

session – not to determine those claims. The claims remain subject to determination at trial."²⁰

When It Does Not Count

Although item (C)(ii) is applicable to many situations, it does have its limits. As the Third District has noted, the mandate from the Florida Supreme Court is to narrowly interpret Rule 9.130 so as to "restrict the number of appealable non-final orders."²¹ Thus, that Court found that an order denying a lessor's motion for summary judgment in a declaratory relief action brought by a lessee regarding its right to extend the lease was not immediately appealable because item (C)(ii) "allow[s] appeals only of orders which more directly determine the immediate right to possession."²² The Court noted that it would not have had jurisdiction even if the lessor's motion had been granted, because the order would only have involved a determination that the lessee could not exercise the option to extend, rather than that the lessor was entitled to "immediate possession."²³ Similarly, no jurisdiction existed to immediately review an order denying a motion to recover possession of property where the order determined neither the movant's claims of beneficial ownership, nor the record owner's entitlement to possession.²⁴ And, in another case, the court found item (C)(ii) inapplicable to an order determining that the appellant's tax deed was invalid and of no legal effect, because the order did not "directly" determine the immediate right to possession of property.²⁵

Conclusion

So what if you find yourself with an appealable order determining an immediate right to possession of property? Although you have 30 days from rendition of the order in which to file your Notice of Appeal, there is a relatively short deadline of 15 days after that in which to serve your Initial Brief. And, the Clerk's Office will not be preparing a record for you; You will need to put together an appendix of the relevant records as well. If you are still involved in trial level proceedings at the same time, this two-front war, not to mention the rules of appellate procedure with which you may be unfamiliar, may be more than you want to take on alone. Thus, it may be time to call in an appellate attorney to help lighten the load and ensure a more efficient handling of the appeal, which will certainly make you and your client rest easier. Good luck!



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¹*Dismuke v. Office of State Attorney*, 948 So. 2d 1039 (Fla. 5th DCA 2007) (acknowledging jurisdiction but affirming denial of motion due to failure to allege property was not the fruit of criminal activity).

²*Eight Hundred, Inc., v. State*, 781 So. 2d 1187 (Fla. 5th DCA 2001) (noting other courts treat these orders as final post-judgment orders).

³*Kern v. State*, 706 So. 2d 1366 (Fla. 5th DCA 1998) (also noting other courts treat these orders as final post-judgment orders).

⁴*See, e.g., Termaforosh v. Wash*, 952 So. 2d 1247 (Fla. 5th DCA 2007) (finding jurisdiction over appeal of partial final summary judgment regarding contract for sale because it granted to sellers the right to immediate possession of \$10,000 deposit).

⁵*Shepherd v. Ouellete*, 854 So. 2d 251 (Fla. 5th DCA 2003).

⁶*Household Finance and Mortgage Co. v. Osta*, 862 So. 2d 885 (Fla. 5th DCA 2003).

⁷*Niles v. Volusia County*, 405 So. 2d 1046 (Fla. 5th DCA 1981).

⁸*E.g., Herrell v. Seyfarth, Shaw, Fairweather & Geraldson*, 491 So. 2d 1173 (Fla. 1st DCA 1986) (order granting eviction); *First Hanover v. Vazquez*, 848 So. 2d 1188 (Fla. 3d DCA 2003) (order denying a writ of possession for non-payment of rent).

⁹*Florida Discount Properties, Inc. v. Windermere Condominium, Inc.*, 763 So. 2d 1084 (Fla. 4th DCA 1999) (order denying motion for payment of rent into court registry).

¹⁰*Federal Home Loan Mortgage Corp. v. Molko*, 584 So. 2d 76 (Fla. 3d DCA 1991).

¹¹*See Fla. R. App. Pro. 9.130 committee notes 1992 amendment.*

¹²*Ulrich & Shenkman, P.A., v. Horizon Ins. Co.*, 491 So. 2d 1195 (Fla. 1st DCA 1986); *Smith v. Daniel Mones, P.A.*, 458 So. 2d 796 (Fla. 3d DCA 1984), quashed in part on other grounds by *Daniel Mones, P.A., v. Smith*, 486 So. 2d 559 (Fla. 1986).

¹³*Boalt v. Hanson*, 412 So. 2d 880 (Fla. 3d DCA 1982).

¹⁴*Greene v. Borsky*, 961 So. 2d 1057 (Fla. 4th DCA 2007).

¹⁵*Harrell v. Snyder*, 913 So. 2d 749 (Fla. 5th DCA 2005).

¹⁶*Crigger v. Florida Power Corp.*, 469 So. 2d 941 (Fla. 5th DCA 1985).

¹⁷*Studiale v. Towne*, 664 So. 2d 1157 (Fla. 4th DCA 1995).

¹⁸*Shepherd v. Ouellete*, 854 So. 2d 251 (Fla. 5th DCA 2003).

¹⁹*Id.*

²⁰*Miami-Dade County v. Perez*, 988 So. 2d 40 (Fla. 3d DCA 2008) (holding no jurisdiction to review order denying motion for summary judgment on quiet title claim).

²¹*Marina Bay Hotel and Club, Inc., v. McCallum*, 733 So. 2d 1133 (Fla. 4th DCA 1999).

²²*Id.*

²³*Id.*

²⁴*Corzo v. Pineiro*, 990 So. 2d 1177 (Fla. 3d DCA 2008).

²⁵*Profile Investments, Inc., v. Delta Property Management, Inc.*, 957 So. 2d 70 (Fla. 1st DCA 2007).

Hearsay

NICK SHANNIN is typing his "Hearsay" column for the OCBA Briefs.



Nicholas A. Shannin

The preceding is what is known in the world of Facebook as a "status update." These updates can be informative ("Mayanne is so proud of her son – he just got admitted to the Berklee School of Music!") or provocative ("Andrew is bow chicka bow wow."). Interesting stuff – and, admittedly, it can be a rather addictive hobby to keep up with it all. But with the addiction comes the access to information and – in my case – Grade A hearsay that would be absolutely unattainable anywhere else!

By far the best case in point, both demonstrating the opportunity for me to obtain choice hearsay and the awesome power of Facebook to bring an otherwise random and diverse group of people together is the soon-to-be-Internet-meme Facebook group called "Bring Back Mark Conan's Purple Suit." The administrator for this Facebook group is the fun-loving and rather mischievous attorney-spouse of local criminal defense attorney **Mark** "The Barbarian" **Conan**, who, apparently, has been known in times gone by to go forth into court wearing a sartorially



Pictured with Mark Conan (um, can't miss him) and Judge Mike Murphy (can't miss him either!) is OCBA member and innocent bystander State Attorney Michelle Latham.

splendid shade of purple. As the saga goes, explained when the nascent Facebook group was in formation, our daring defense attorney had his famed purple attire in regular rotation until he faced a sitting judge who went Joan Rivers fashion police on him, administering a lecture akin to Judge Haller of *My Cousin Vinny*: "The next time you appear in my Court, you will look lawyerly." As a result, the purple suit was apparently moth-balled and stored without seeing the light of day for a decade or so. That is, until wife Elizabeth, using the power of Facebook, summoned together over 90 friends and colleagues who were more than happy to cajole Mark into reawakening the Power of Purple. Succumbing to the peer pressure possible only through the Net, the picture positively places our Purple Power suit wearer in the courtroom of the lucky **Judge Michael Murphy**, who not only was willing to overlook the alleged breach of courtroom decorum, but was even willing to pose for pictures afterwards. Be warned, **Bill** "Kojak" **Vose** and company: the Purple Suit has been unleashed, so prepare your state attorneys with sunglasses as necessary!

Segueing from the Facebook theme for a moment, the prior sub-

ject matter dealt with the most interesting of marital formations: the lawyer-lawyer marriage. I can write knowledgeably about this subject matter, since I, too, am married to an attorney, even if Mrs. Hearsay's clientele is presently limited to two clients (ages 8 and 5). There are other lawyer-lawyer marriages within the OCBA, however, where each

Adam's Rib member is not just actively engaged in the practice of law, but is to be considered a "power player" in our legal community. Pondering the existence of a number of these couples, I have arbitrarily decided that the void of not having those couples listed needs to end, and will do so presently. While I will rely on my faithful readers to supply me with suggestions for others to fill out the Top Ten, I provide you here with a temporary and arbitrary Top Three. I have assigned the #3 spot to "Hearsay" favorite, Chief Clerk of the City **Alana Brenner** and her spouse, Lowndes Drosdick attorney and frequent Legal Aid spokesperson, **Matt "Yul" Brenner**. Rocketing up the charts several places to #2 has to be our new power tandem, "Sheriff" **Woody Rodriguez** (president-elect of the OCBA) and **Heather** "Better Half" **Rodriguez** (president-elect of the Legal Aid Society). Our Bar has been blessed to have enjoyed several years of a harmonious working relationship between the Boards of the OCBA and the LAS, but never have we been guaranteed daily breakfast and dinner meetings between their two presidents! Good luck to the amazing **Rodrigii** for the busy, busy year that commences for them on June 1.

And that leaves us with couple #1. Who will get the vaunted, coveted spot atop Hearsay's power couple poll? Surely you already knew the answer, for even the dual presidencies of our penultimate spot holders above cannot challenge the #1-with-a-bullet standing of **The Judges Kest**. The **Honorable John Kest** is a past-president of the OCBA and the LAS. The **Honorable Sally Kest** is the past-president of the LAS – twice. Both gave up super-successful careers as attorneys to take on super-successful careers as jurists. But none of that is what rockets them to the top of the 2009 chart. What does is the fact that they were both willing to invite the press to an early morning home visit, profiled in a large picture placed squarely on the front of the local and state section of the *Orlando Sentinel*, Judge John having yet to find his morning bar of Zest, and Judge Sally still adorned in her blue bathrobe. I ask you, if the willingness to be that natural with one another in front of the whole of Central Florida doesn't speak to how comfortable they are (both as spouses and as ambassadors of our legal community), I don't know what does. Adding to their resumes is the fact that they are now also grandparents twice over, including the recent birth of **Kristopher** "Kristopherson" **Kest's** beautiful girl, Savannah. Congratulations to the Family Kest for this success as well!

But wait, we are not quite done with the Judges Kest just yet. Following what will be termed as the "Bathrobe Incident" forever more, a gathering of CFAWL alumni convened to hike about in the great outdoors. Unfortunately, what the picture does not reveal is what the assembled group of intrepid lawyers wore to greet Judge Sally Kest when she arrived to the proceeding. (Give yourself 5 points if you guessed "blue bathrobes.") Kudos to the



CFAWL's Table for 8

CFAWL-8 for both their humor and their amazing ability to locate eight blue bathrobes for the occasion.

A couple more tidbits to squeeze into this month's "Hearsay" column. First, "Hearsay" congratulates **John Hamilton**, Esquire on his much-acclaimed victory as Esquire for Master Shylock, the Merchant of Venice, at the recent production of Orlando's first ever Shakespearian mock appeal. Verily, it has been reported to me this day that barristers gathered upon the olde courthouse such that no space was left for even the most minute of counsel, that the crowded hall was treated to witness legal argument like none hath seen

before or since. Wigs off to the panel, which included appellate **Judges Alan Lawson** and **Jay Cohen** and 18th Circuit **Judge Donna McIntosh** as well as law professors volunteering as judges, each of whom provided a quality of mercy that was not strained – though perhaps shaken – and to **Kim Ashby** for attempting to defend Antonio's "get out of debtor's prison free" card obtained four centuries ago. Will this go to Mr. Hamilton's head? Well, one glance at the photo

and I'll let you be the judge! Kudos to the Orlando Shakespeare Theater for donating a Shylock, an Antonio, a Portia, and others to let the lawyers party like it was 1599.



John Hamilton (left)

Photos courtesy of Orlando Shakespeare Theater in Partnership with UCF



Shylock and Judges Jay Cohen, Alan Lawson and Donna McIntosh

Kimberly Ashby (right)



Back to modern times. The times are presently good for our friends in the **Worker's Compensation Section**. For perhaps a period this brief, fees are back in the world of worker's compensation, which is good news for the claimant's bar, and really for any defense bar members who are not in the presence of an insurance adjuster when speaking. Regardless of which side of the line you are on, however, the "we're-on-Facebook-too" group "Friends of 440" is organizing a Charity Casino Night at Bliss, **May 13, 2009**. For more information, contact OCBA member **Rex Hurley** at rhurley@hrmcw.com.

We'll stick with the Facebook theme for our trivia contest. A common sight on Facebook pages is the existence of "flair" (witty or iconic buttons). This month's trivia question: From which movie does Facebook borrow the theme of "flair," and how many pieces are necessary for a complete uniform to be maintained? Also, kudos to my two correct trivia answers from the last contest, the repeat dynamic duo of **Jamie Moses** and **Bill Davis**, who both correctly answered that the assemblage of various "hearts" (Blackheart, Braveheart, etc.) would prevail over the straight referenced in February's "Hearsay." Well played!

I will close with one final Facebook reference. If you are a member or intend to join, when you do so, be sure to join the group "Orange County Bar Association."

This handy extra lawyer-to-lawyer resource can prove very useful when quickly searching for a particular attorney in Orange County, and it's also a great way to remain notified about upcoming events, such as the **May 27, 2009** OCBA and LAS Board **Installation Dinner**. Just type Orange County Bar into the search box and you'll find the group real quick! Whether or not you elect to communicate via this new fangled internet tool or want to send your "Hearsay" by good old fashioned e-mail, please continue to send me your news of note to nshannin@floridalawonline.com and we'll be sure to profile your colleagues soon, whether or not they are pictured in a bathrobe. Enjoy your May and I'll see you back here in June!

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

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YLS *on the move*

What's Happening

Sunny Hillary

By now, the little guy has made his "grand entrance" into this world and changed the life of Bridget Heffernen Labutta. Does she wish she could go back to the good old days of writing this column? Hopefully, if and when she finds the time to read this month's piece, Bridget will be pleased to know that the time she took to train me on the ins and outs of managing this column paid off. Thank you, Bridget! We miss you, and we congratulate you on the new addition to the family!

Now, what has the YLS been up to in the past month?

On April 1, 2009, young lawyers participated in the **5th Annual Texas Hold 'Em Charity Poker Tournament and Happy Hour** at Slingapours on Wall Street. Thank you to the event chair, **Shayne Thomas**, and the event sponsor, FindLaw, for organizing another fun night!

On April 16, 2009, the YLS was pleased to welcome to the luncheon **Heather Pinder Rodriguez** of Holland & Knight, LLP, the recipient of the **2009 Lawrence G. Mathews, Jr., Young Lawyers Professionalism Award**.

The Orange County Bar Association presents this award to a young lawyer who has been practicing less than 15 years and who has demonstrated professionalism in his or her career and community. At the luncheon, Ms. Rodriguez shared her experiences as a lawyer in the Orlando legal community throughout the years.

On April 18, 2009, YLS members participated in the **12th Annual Orange County Bar Association Gala** at the luxurious Gaylord Palms Resort & Convention Center. The YLS and other members of the Orange County Bar Association dressed up to the nines to enjoy the elegant evening filled with award-winning cuisine, a premium

open bar, and entertainment by the Tremors. Thank you to **Kristen Cox** and **Vivian Cocotas** for organizing another fantastic Gala!

This month, YLS joined in the fight against cancer by sponsoring a team for the Annual **Relay for Life®** event. Co-chairs **Amber Neilson** and **Samantha Powers** organized an 80s-themed happy hour at Scruffy Murphy's in College Park on May 1, 2009, followed by the walk at Lake Island Park in Winter Park on May 2, 2009.



The team showed their support by camping out at the park, selling food and beverages to the local

participants of the event, and walking around the track. All proceeds from the contributions at the door and from the food and beverage sales were donated to the American Cancer Society. Thank you to the co-chairs, to the team, and to all of the donors for another successful event!

Finally, as you all know, YLS has sponsored the **Back Pack Project** for the students of Rock Lake Elementary School for the past several years. Thanks, in part, to the steady support of the YLS, Rock Lake Elementary School recently received the National Title I Distinguished School Award Category I, which is an academic achievement awarded to 1 out of 16,000 schools in the State of Florida. Thank you to **Melanie Shoemaker Griffin** and past chairs for bringing young lawyers together to provide the students of Rock Lake Elementary School with the supplies and the support they need to succeed in school.

The YLS **May Luncheon** will take place on **May 21, 2009** at 11:45 a.m. Email your RSVP to ocbayls@gmail.com. The cost is \$18 if you RSVP on or before May 18, 2009, or \$20 at the door; \$10 for sole practitioners, law students, government attorneys, and judges.

If you want to find out more about our section and its committees and events, please call me at 407-388-1900 or email me at sunny@brownstonelaw.com. If you are not receiving the YLS email blasts, send an email to me or ocbayls@gmail.com to sign up.

Sunny A. Hillary

is an attorney with Brownstone Associates, P.A. She has been a member of the OCBA since 2005.



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Side Bar



Jessica K. Hew

We're continuing with the "unity" theme of our local bar associations! Symbiotic relationships - you have got to love it!



The Central Florida Gay and Lesbian Law Association (CFGLLA) was a Silver Sponsor of the **Central Florida Association for Women Lawyers** (CFAWL)'s recent Annual Judicial Reception. CFGLLA also recently "Fringed" - participating in the Orlando Fringe Festival! CFGLLA held social events and attended various shows through-

out the Festival. On a substantive note, CFGLLA has also continued its participation in working against Amendment 2 with other legal organizations throughout the state, most recently at a Legal Roundtable in Miami.

CFAWL, in addition to its Judicial Reception, recently volunteered to serve dinner to the Ronald McDonald House residents. CFAWL also held its Annual Legal Assistant's Day luncheon.

The Hispanic Bar Association (HBA) also joined the OCBA Law Week *Pathways in Law Program*, co-chaired by **Judges Faye Allen** and **Bob**

LeBlanc. The mock trial, presented to the Apopka Farmworkers' Ministry, is designed to encourage critical thinking and awareness by the participants about the consequences of their choices. The OCBA

thanks HBA members **Judges Jose Rodriguez** and **Wilfredo Martinez**, Anna Rodriguez, **Gisela Then-Laurent**, Jose Garcia, **Laura Pichardo**, **JoAnn Guerrero**, **Corina Castillo-Johnson**, Karla Valladares, **Cindy Duque**, **Erick Trivedi**, **Alice Miller** and Olga Khoudmi for their assistance with the program; bilingual (English and Spanish speaking) attorneys were much needed for this Law Week program's success. The OCBA would also like to thank the HBA for returning its general membership meetings to the OCBA building's meeting rooms, which are available for rental.

The HBA also announces a **date change from May 2 to May 9** for its Annual Domino Tournament. The event will start at 4:00 p.m. at Cheviche on Church Street.

If you have any legal organizational news to share, please email me at jessica.hew@burr.com.

Jessica K. Hew is a partner with Burr & Forman LLP. She has been a member of the OCBA since 1995.

The Hispanic Bar Association's March meeting at the OCBA Center



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Presentation Skills for Lawyers

How to Testify

How many times did you testify during your last trial?

According to the Federal Rules of Evidence definition of “testimony,” your official answer should be zero. Unless something bizarre and unexpected arose, you probably didn’t find yourself raising your right hand, swearing or affirming to tell the truth, sitting in the witness box, and then telling “the truth, the whole truth, and nothing but the truth.”

But that doesn’t mean you didn’t testify. In fact, you probably testified more than anyone else in your case, because each time you arose from your seat and spoke to the jury, you were “testifying” and giving the jurors a chance to assess your credibility and your belief in the case.

So, with that new definition in mind, how many times did you testify during your last trial?

If you’re like many lawyers, your answer is probably “twice”: Once during opening statement, and again during closing argument.

But think again. When you stood before the potential jurors during jury selection, you were testifying there, too. In fact, that was the first time they got a chance to see you and evaluate how you felt about the case, so it might have been one of the most important times you “testified.” So, the correct answer is three times, right?

Not quite. If you did a good job of trying your case, the correct answer should be that you testified **four** times during your last trial. The fourth time that you testified, and the time that most lawyers forget about, is during cross-examination. (Why isn’t the correct answer **five** times, once for each portion of the trial? Because hopefully the jury was so attuned to what your witness said during direct examination that they didn’t even notice you were there.)

The great thing about cross-examination is that it allows you to testify during your *opponent’s* case. Although many lawyers think that the person in the witness stand is the one testifying during cross-examination, that’s not true. If you’re doing it correctly, it should be **you** “testifying” to each factual statement, while the witness merely nods his head in agreement with what you’ve said.

The reason you get to testify during cross-examination is because you’re allowed to ask leading questions. The leading question is the only tool that the Rules of Evidence provide you for controlling the witness and discovering the truth.

Unfortunately, many of us don’t wield that tool as effectively as we could.

If you were prepping an important witness for trial, you’d help them to ensure they testified powerfully and persuasively, right? Well, it’s just as important to maximize the effectiveness of **your** testimony during cross-examination. One of the easiest ways to improve your testimony during cross is to eliminate any surplusage in your questions. These irrelevant words and phrases can dilute the power of your cross-examinations, create confusion, or give the witness an opportunity to wiggle out from under your control. If you’ll make an effort to reduce their use, your

testimony will become more persuasive. Here are three examples of surplusage, and tips for eliminating them from your testimony:

Surplusage #1: Adverbs

Adverbs dilute the power of your cross because they provide the witness opportunities to disagree with your questions. For example, if you tell the witness, “You walked south on Elm St., away from the crash scene,” there’s not much room for disagreement. He either did, or he didn’t. But, if you add an adverb to the statement (“You *quickly* walked south on Elm St., away from the crash scene.”) the witness gets a chance to fight you, because now the question asks for a subjective interpretation, rather than asking for strictly objective information.

Read through your list of cross-examination questions and look for any words ending in “-ly.” When you find them, strike them from the page. By eliminating these quibble words, you’ll make it more difficult for the witness to disagree with you.

Surplusage #2: Perceptions

Many lawyers will ask the witness what they perceived, rather than what happened. Here’s an example:

- “You saw the tall man pull out a handgun?”
- “You saw him point the gun at the shorter man?”
- “You didn’t see anything in the shorter man’s hands?”
- “You saw him pull the trigger?”
- “You heard a single gunshot?”
- “You saw the shorter man fall to the ground?”

The most important part of those questions isn’t what this witness *saw*, it’s what the tall man *did*. Strengthen the imagery in your testimony by focusing on the events, rather than the witness’s perception of the events. Instead of asking how the witness observed the event (“You saw Johnny walk into the bedroom?”), remove the “you saw” elements from your questions and go directly to the facts: “Johnny walked into the bedroom.”

Notice how much removing the surplusage makes it easier to follow the story:

- “The tall man pulled out a handgun?”
- “He pointed the gun at the shorter man?”
- “The shorter man didn’t have anything in his hands?”
- “He pulled the trigger?”
- “A single gunshot rang out?”
- “The shorter man fell to the ground?”

Surplusage #3: Taglines

Taglines can be an effective tool for helping you ask leading questions:

- “You own 30,000,000 shares of SuperMegaCompany stock, *correct?*”
- “Your best friend is the president of that company, *isn’t that true?*”
- “He told you to sell all of your shares on October 2nd, *right?*”
- “You sold every share you owned, *didn’t you?*”



Elliott Wilcox



Mark Powers



Shawn McNalis

“Why take the time to have a marketing retreat? Aren't there are more important things to do... like actually marketing?” This is the sentiment expressed to us by partners who dislike setting aside a chunk of good, billable time to focus on discussing client development. Usually one of their partners has come to us with the idea of having a marketing retreat and they want us to help convince the reluctant one it's a good idea. Sometimes we're successful in this effort, and sometimes we're not. When we're not, the resistant ones show up clutching their files in one hand and cell phone in the other, ready to dash out the door at the first remotely legitimate interruption.

But at least they show up. Because for the most part, once they're in the room exposed to new ideas for client development and hearing how some small shifts in their marketing strategies can make a huge difference, they're sold on the idea. By being forced to step off their treadmill for a few hours, they begin to understand that taking time to focus their scattershot marketing efforts can lead to the kind of results that they want for their firm. Granted, there are always a group of curmudgeons (young or old) who never see the value in planning and don't understand strategic marketing but, fortunately for them, others do and are willing to invest the time.

Many of the top producing attorneys we work with meet regularly with their partners to check the relevancy of their goals, inspire and challenge each other. A tax attorney we work with in the Chicago area, for example, heads up a rapidly growing tax assessment firm. In spite of a crushing schedule, he stops once a year, gathers up his team and talks about which marketing strategies worked and which didn't in the previous year. For the first time, his firm had hired a marketing director and charged her with not only re-energizing all of their marketing efforts, but cultivating new hotel and condominium business. Determined to look back before he stepped forward, our client wanted to see if this new approach was working. His analysis showed in no uncertain terms that the investment in a marketing director and focus on new business was indeed paying off. His business from hotels and condominiums showed record highs. He was able to attribute over \$150,000 worth of new business to the efforts of the marketing director in conjunction with his own.

Beyond looking at these results, he also decided to analyze all marketing efforts made the prior year prior. He made a list of all of their different client development activities and scored each category on (1) whether or not it deepened his relationships with his referral sources and (2) whether or not it directly brought in new business. His categories included the following: having what he calls “lunches with lawyers” (he receives a great many referrals from his colleagues); giving small gifts over the

holidays; doing activities such as outings with various property management companies; presenting educational seminars directed at decision makers within targeted groups; staffing a trade show booth at an industry conference and sending out his annual newsletter.

After scoring each of these efforts, he discovered that generally the *face-to-face* activities garnered him the most direct business (with the exception of the trade show booth, which produced no real results). The response to his newsletter, on which he spends a great deal of time, offered the biggest surprise as it stimulated substantial interest (he received over 100 calls responding to what he had written – an extraordinary result and not one easily duplicated by other law firms). Given this, in the coming year he plans to increase the number of issues that he produces (in order to have one such piece in front of his referral sources per quarter) and schedule more one-on-one activities for himself and his marketing director.

Because he held a marketing retreat, he was able to make informed decisions on the strategies he will carry forward and the ones best left as interesting experiments. Consequently, he will move into the coming year armed with accurate data and specifically targeted goals.

Like this attorney, the legal landscape in which you live is not static. Change is ever present: referral sources dry up, die or move away; you are joined by a new partner; legislation changes the services you provide; you take on a newsworthy case; or you decide to launch a new practice area. These are just a few of the many changes that can occur over the course of a year in your career.

Fortunately, changes like these are fodder for the creative marketer. Often what appears to be stressful or dramatic change can be spun in a positive way. Depending on what's happened in your year, you may need to adjust your marketing goals to compensate for a reduction in referral sources, to feature a change in the services you offer, or to publicize a new partner.

For most firms, the annual marketing retreat is a chance to:

- review last year's or year-to-date marketing results
- focus on marketing successes and acknowledge team members
- educate other partners or team members on marketing strategies
- establish next year's marketing targets: important for capacity planning and budgeting (it's hard to get where you are going if you don't know where you want to go)
- establish accountability systems or quarterly checkpoints for your goals
- assess the cost effectiveness of using the Yellow Pages or other advertising vehicles

If your firm conducts seminars and workshops as part of its marketing plan or works strategically with other organizations, the annual marketing retreat is a good time to establish dates for upcoming events such as co-sponsored seminars or signature events.

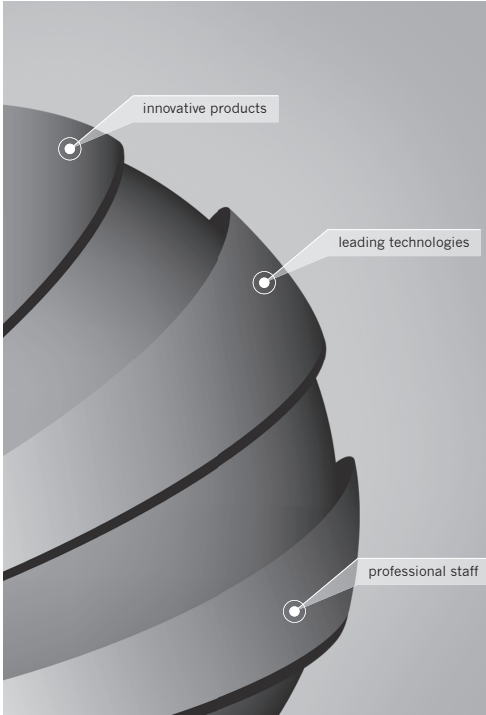
Who Should Attend?

Senior partners should be the first on the roster to attend any meetings about marketing. If there are associates who are being trained to market themselves, they should also attend. If the firm has a marketing director or assistant, they should not only attend, but also set up the meeting for the participants. A gathering like this is even useful for those staff members who are often in a position to cultivate more business than they realize. Whatever group is selected to attend, the retreat facilitator and firm management should place on the agenda exercises and discussions which allow for the team to contribute their ideas on client development. The more contributions seem to come from the team – the greater their buy-in will be.

Regardless of the size of your firm, an annual retreat in which marketing objectives are discussed and established helps keep the focus on the most important strategies for growing the firm. The marketing retreat is a time to assess your client mix, your firm's image, new opportunities for business, and determine who will carry out each of the responsibilities. Taking the opportunity to examine and retool your marketing efforts at least once a year may significantly accelerate your firm's growth.

In part two of this series, we'll discuss how to ensure the retreat happens, how to find the right facilitator and what to do to prepare for a retreat. Keep in mind that in an uncertain economy it is even more important to try to forecast trends and project results. To paraphrase Winston Churchill, when all is said and done – even if you don't achieve all of your objectives – it's the mental exercise of planning that makes all the difference.

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



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Presentation Skills

continued from page 33

- “The company declared bankruptcy three days later, *didn't they?*”

Used occasionally, taglines can add dramatic impact to your most important questions. However, used to excess, these taglines can distract from your cross-examination, especially if you repeat the same tagline over and over. (“Correct?” “Correct?” “Correct?” You'll sound like a broken recording!) By eliminating taglines, you can streamline your cross-examination into a series of back-to-back factual statements that tell a persuasive story, punctuated only by the witness's “Yes” response to each statement:

- “You own 30,000,000 shares of SuperMegaCompany stock?”
- “Your best friend is the president of that company?”
- “He told you to sell all of your shares on October 2nd?”
- “You sold every share you owned.”
- “The company declared bankruptcy three days later.”

If you practice before one of those judges who refuses to believe that voice inflection alone is insufficient to turn a statement into a question, you may feel forced to add taglines to all of your questions. However, if you find yourself in that predicament, try using taglines on the first few questions, and then

dropping them. Having set the tone with your first few questions, the witness will be trained to say “Yes” to your statements, and no one will notice that you've dropped the taglines:

- “You own 30,000,000 shares of SuperMegaCompany stock, *correct?*”
- “Your best friend is the president of that company, *isn't that true?*”
- “He told you to sell all of your shares on October 2nd, *right?*”
- “You sold every share you owned.”
- “The company declared bankruptcy three days later.”

You probably can't eliminate *all* surplusage from your questions (nor should you try), but once you're aware of how it detracts from the strength of your testimony, you'll want to make efforts to reduce it. Invest the effort to properly prep yourself for trial, and your “testimony” may make the difference between winning or losing the case.

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Elliott Wilcox is the editor of *Trial Tips Newsletter*. To get a free copy of his special report, “The Ten Critical Mistakes Trial Lawyers Make (and How to Avoid Them),” visit www.TrialTheater.com.

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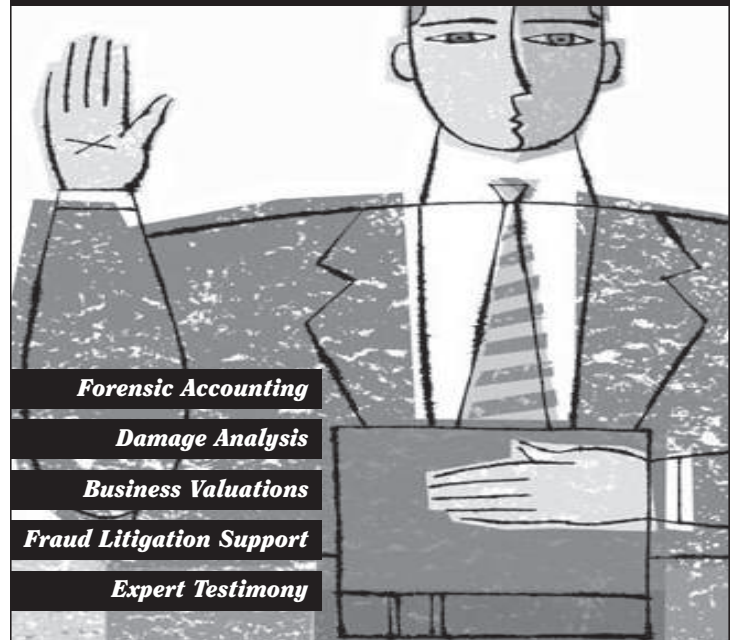
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Speaking Engagements

Gregory A. Chaires, managing partner of Chaires, Brooderson & Guerrero, P.L., presented *Recovery Audit Contractors and Medicare Audits* at the Space Coast MGMA meeting on March 19, 2009. His session emphasized recent changes involving RACs, the audit and appeals process, and tactics to reduce exposure to audits.

Ian L. Gilden, Esquire of Ian L. Gilden, P.A., recently presented an *Introduction to Guardianship* to the Central Florida Guardianship Association.

Richard B. Webber II, a shareholder at Zimmerman Kiser Sutcliffe, recently spoke at the Central Florida Real Estate Council. The seminar was entitled *Navigating the Bankruptcy Maze: A Practical Guide for the Real Property Practitioner*.

Upcoming Seminars

May 1 - *Child Support*. Association of Court Clerks. 10:00 a.m.-3:00 p.m. OCBA Center. 5.0 CLE pending. Fee: \$50. RSVP: Marie at marieb@ocbanet.org.

May 5 - *Preserving Income for Low Income Clients*. LAS Lunchtime Training. 12:00 p.m.-1:30 p.m.; First Presbyterian Church, Orlando. CLE pending. Details: ctucker@legalaidocba.org or mcarbo@legalaidocba.org.

May 19 - *Handling an Appeal in GAL Cases*. LAS GAL Lunchtime Training. 12:00 p.m.-1:30 p.m. First Presbyterian Church, Orlando. Details: Susan Khoury at skhoury@legalaidocba.org.

May 20 - *Mediation: From Defense and Others' Perspective* (Part 2). OCBA Insurance Law Committee. 12:00 p.m.-1:00 p.m. OCBA Center. 1.0 CLE pending. RSVP: Marie at marieb@ocbanet.org.

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OCBA CALENDAR

MAY - JUNE 2009

OCBA Installation of Officers Banquet

Wednesday, May 27, 2009

The Hon. Alice L. Blackwell
5:30 p.m. - The Ballroom at Church Street

RSVP by May 20 to:
reservations@ocbanet.org

May

- 1 Child Support Seminar**
Florida Association of Court Clerks
10:00 a.m. • Bar Center.
- 5 Legal Aid Society Lunchtime Training**
Preserving Income for Low Income Clients
12:00 p.m. • First Presbyterian Church
- 6 Criminal Law Committee**
12:00 p.m. • Courthouse
23rd Flr. Judges' Conference Rm.
- 7 Federal Judicial Relations Committee**
12:00 p.m. • Judge Conway's Chambers
- 8 FindLaw Seminar**
Beyond the Basics – Standing out from the Crowd (Part 2)
11:30 a.m. • Bar Center
- Workers' Compensation Committee**
11:45 a.m. • Smokey Bones
- Family Law Committee**
Executive Meeting
11:45 a.m. • Houlihan's
- 12 Executive Council Meeting**
4:30 p.m. • Bar Center
- 13 Estate Guardianship & Trust Committee**
12:00 p.m. • Bar Center
- Judicial Relations Committee**
12:15 p.m. • Courthouse 21st Flr. Conference Rm.
- 14 Real Property Law Committee**
12:00 p.m. • Bar Center
- Social Security Committee**
12:00 p.m. • Bar Center
- OCBA Paralegal Committee**
5:30 p.m. • Bar Center
- 15 Family Law Committee**
12:00 p.m. • 425 N. Orange Ave., #2310
- 19 Professionalism Committee**
8:00 a.m. • Bar Center
- LAS GAL Lunchtime Training**
Handling an Appeal in GAL Cases
12:00 p.m. • First Presbyterian Church
- Social Committee**
6:00 p.m. • TBA
- 20 Insurance Law Committee Seminar**
Mediation From Defense and Others' Perspective (Part 2)
12:00 p.m. • Bar Center
- 21 YLS Luncheon**
11:45 a.m. • Citrus Club
- Appellate Practice Committee**
12:00 p.m. • Bar Center
- 25 Memorial Day - Bar Closed**
- 27 Business Law Committee**
1:00 p.m. • Location varies.
Contact Chairperson
- OCBA Installation Banquet**
The Hon. Alice L. Blackwell
5:30 p.m. • The Ballroom at Church St.
- 29 Bankruptcy Law Committee**
12:00 p.m. • Bar Center
- Workers' Compensation Committee**
11:45 a.m. • Smokey Bones
- 16 Professionalism Committee**
8:00 a.m. • Bar Center
- Social Security Committee**
12:00 p.m. • Bar Center
- 17 Insurance Law Committee**
12:00 p.m. • Bar Center
- 18 YLS Luncheon**
11:45 a.m. • Citrus Club
- Appellate Practice Committee**
12:00 p.m. • Bar Center
- 19 Family Law Committee**
12:00 p.m. • 425 N. Orange Ave., #2310
- 24 Business Law Committee**
1:00 p.m. • Location varies.
Contact Chairperson
- Labor & Employment Law Committee**
12:00 p.m. • Bar Center
- 26 Bankruptcy Law Committee**
12:00 p.m. • Bar Center
- 30 Solo & Small Firm Committee Seminar**
12:00 p.m. • Bar Center

June

- 3 Criminal Law Committee**
12:00 p.m. • Courthouse
23rd Flr. Judges' Conference Rm.
- 9 Executive Council Meeting**
4:30 p.m. • Bar Center
- 10 Estate Guardianship & Trust Committee**
12:00 p.m. • Bar Center
- 11 Real Property Law (Cancelled)**
12:00 p.m. • Bar Center
- Social Security Committee**
12:00 p.m. • Bar Center
- OCBA Paralegal Committee**
5:30 p.m. • Bar Center
- 12 Family Law Committee**
Executive Meeting
11:45 a.m. • Houlihan's

There will be no OCBA Luncheon in June.

The next regular luncheon will be held on July 23, 2009.

Visit the OCBA website at www.orangecountybar.org for updates on committee meetings, seminars and events.



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