

the Briefs

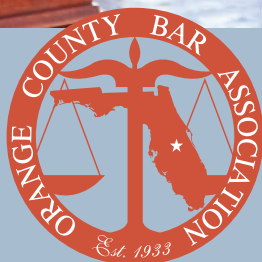
A Publication of the Orange County Bar Association



Frank M. Bedell
2010-2011
OCBA President



Diego "Woody" Rodriguez
2009-2010
OCBA President



May 2010
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David B. King, Commission Chair

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David Fleming and Christopher Roach



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Copy - 15th of the month six weeks prior to the month of publication

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President's Message

May 2010

OCBA President: Experience of a Lifetime



Diego "Woody" Rodriguez

Many past OCBA presidents will tell you that their best day as President was when they finally handed over the gavel to their successor. As much as this position demands of you, I am a bit saddened to step away because for me this has been an experience of a lifetime filled with lasting memories.

Our speakers this year came from all walks of life and told amazing stories about themselves and their experiences. I will never forget **Betty Lowery Martinez's** comments in which she told us that as a young kindergarten student her teachers in Cuba told her she should not have faith in God or her parents but in Fidel Castro for only he could provide for her. I will cherish the all-star luncheons of senior lawyers, featuring **Russell Troutman, Jim Russ, Leon Handley** and my longtime friend **Charlie Abbott** in which they universally spoke with one voice in saying that a truly successful lawyer enjoys getting up in the morning and going to work, a fate that luckily I am very familiar with. **Leon Handley**, of course, could not complete his thoughts in just one luncheon so he gave us an encore performance when he received the OCBA's William Trickle Professionalism Award and reminded us all to enjoy our experiences along whatever path our lives take us and to not be so mindful of what awaits us next.

And then there was the **Warrick Dunn** luncheon. First of all, the luncheon would not have been possible without the help of many of my fellow FSU colleagues who contributed to his Foundation to defer his speaking fees. But what transpired at the luncheon was an open and sincere glimpse of the struggles Warrick has faced in his own life with depression despite the apparent success on the gridiron. Warrick's speech was followed by an even more engaging Q&A session in which he even gave me a short stiff arm to keep the dialogue going with our members.

On the programming side, my year began before I was even installed when I was invited to address the annual Naturalization Ceremony at the Convention Center on behalf of the OCBA. Seeing the faces of so many new and excited U.S. citizens reminded me of my own parents' accomplishments in this country and the sacrifices they endured to see to it that I had an education. It is that constant reminder that always fuels my success and for that I am eternally grateful.

We then set out to create two new major seminars this year, a solo and small firm program to help lawyers better manage the business aspects of their practice and a bench-bar conference to help all lawyers become better attune to the practices in our courtrooms. I can proudly say that thanks to the work of our Committee Chairs **Shane Fischer** for the Solo and Small Firm Committee and **Meena Hirani, Penelope Perez Kelly** and **Debra Botwin** on the Bench-Bar Conference, our programs were a huge success. Of course, it also helps that our OCBA staff is devoted to your ideas and needs, but that was last month's column.

This year I also set out to establish a better reporting of our charitable endeavors and, as I take stock at the end of the year, I think our relations with and promotion of the activities of the OCBA Foundation, led by **Jessica Hew**, and the Legal Aid Society, led by my better half, **Heather Pinder Rodriguez**, could not be any better. Both have done a tremendous job of expand-

ing the awareness of what those two organizations do for our community. And, to all of our lawyers, nothing has given me greater pride than to represent an organization that allowed me to repeatedly boast that every one of our members took on two *pro bono* cases or made an in-lieu

of service contribution. At every gathering of bar leaders, from The Florida Bar meeting in June to the ABA Midyear Meeting which was held this past February in our backyard, I have been able to proudly discuss the great works and the legacy of your OCBA.

I am also very proud to announce that, even though we are in the midst of what history will later tell us was one of the worst economic periods in our nation's history, we managed to not only expand our membership but to gain some invaluable business partners that have helped us stay very much in the black. Many thanks to **M&I Bank, Westlaw, Marsh Global, Curtis Security, Boehm & Boehm** and others for not just sponsoring our events, but for helping us find valuable partners that are willing to assist our members with their business needs. **Brant Bittner**, the OCBA Executive Director, and I spent many a luncheon at Wall Street Cantina this year meeting with and vetting some of these potential sponsorship deals to find the right ones that made sense. And the future is very bright as we continue to work on relationships with such community partners as the **Orlando Business Journal** and the **Orlando Magic**. Without the support of these sponsors we could not provide you, the members, with all of the benefits you receive, including ten free luncheons, a top-notch monthly publication and the utility of a great bar center for the paltry price of just \$125 per year.

Speaking of our publication, *The Briefs*, this year our editors have really taken our publication to new heights. With **LaShawnda Jackson** and **Kim Healy** as Co-Editors, and **Vivian Cocotas** and **Sara Reiner** as Associate Editors, our publication has tried to branch out and give you some fresh articles and concepts, including our first ever themed, which focused on going green. Many thanks to all of you for your tireless efforts to make sure the publication was on track and under budget and for your constant whipping of those that dared delay your publication, including yours truly.

The organization's biggest challenges lay ahead of us as we work through the meaty issues of a new foreclosure mediation program and the ever dwindling budgets and resources for our judiciary. These are problems that cannot be resolved in just one calendar year or through the efforts of just our organization, but they are issues which we will continue to keep in the forefront so that we remain vigilant and watchful of any possible attacks on our judiciary.

We have had lots of fun this year and our Young Lawyers have led the charge behind the leadership of **Ryan Davis**. They have held happy hours and community service projects and pub crawls and their own fantastic speaker's series and did I mention some more happy hours? All of these events plant the leadership seeds for our general organization, and I am proud to say

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Announcing the Formation of the 2010 Ninth Judicial Circuit Civil Courts Commission – We Need The OCBA's Help

David B. King, Commission Chair

In 1998, under the guidance and direction of Chief Judge Belvin Perry, our Ninth Circuit judiciary and the Orange County Bar Association jointly formed the inaugural Ninth Judicial Circuit Civil Courts Commission. The Commission's purpose was to investigate and evaluate the operations of the Orange County civil courts and to make recommendations for improvement. We spent the next several months carrying out our charge and ultimately we were able to make a series of recommendations designed to improve efficiency and service and to promote the fair and orderly resolution of civil disputes. I had the privilege of chairing that inaugural Commission.

Some 12 years have passed since the Commission's initial work. In response to changes and new demands facing our courts system, including the current foreclosure crisis and the challenges of e-filing, Judge Perry once again has asked me to form a new Civil Courts Commission to investigate the civil justice system in both Orange and Osceola counties and to make recommendations for improvement. I am pleased to report that the Commission has been formed with the following 11 members of our bar and judiciary agreeing to serve and to donate their time for this important mission: **Mary Ann Etzler, Ron Gilbert, Don Henderson, Judge John Kest, Judge Fred Lauten, Brian Mark, Ralph Martinez, Nicky Mooney, Diego "Woody" Rodriguez, Jill Schwartz, and Tom Zehnder.**

As part of our work, I am writing to you, as members of the OCBA, to solicit your help in the Commission's latest effort. In the very near future, you will receive a survey prepared by the Commission seeking your input as practitioners in, and the users of, our courts. I call on each of you to take a few moments to participate in this survey. Your input and feedback are critical to helping the Commission formulate its recommendations.

Thank you very much for your participation and cooperation with the Commission's ongoing work. We look forward to receiving your survey results.

A shareholder with King, Blackwell, Downs & Zehnder, P.A., **David B. King** has been a member of the OCBA since 1968. He served as OCBA President in 1980-81.



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The OCBA Foundation, and
The Young Lawyers Section of the OCBA



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Join the Legal Aid Society of the OCBA in presenting its 2009-10 Pro Bono Awards.

With remarks by keynote speaker The Honorable Lawrence R. Kirkwood, Judge of the Ninth Judicial Circuit Court and the third recipient of the Judge James G. Glazebrook Memorial Bar Service Award.

Thursday
May 27, 2010

Please RSVP by May 20, 2010
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Cocktails served from 5:30 p.m. until 6:30 p.m. (cash bar)
Dinner and Program commencing at 6:30 p.m.

Cost is \$10.00 for OCBA members and \$40.00 for non-OCBA members and Guests.

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OCBA Professionalism Awards Luncheon

March 25, 2010  The Ballroom at Church Street



Frank Bedell, OCBA President-elect; Leon H. Handley, William Trickel, Jr. Professionalism Award recipient; Magistrate Howard Friedman, Professionalism Committee Chair



Frank Bedell; Judge Lawrence R. Kirkwood, James G. Glazebrook, Jr. Memorial Bar Service Award recipient; Magistrate Friedman



Leon Handley and OCBA President, Woody Rodriguez

Frank Bedell; Cara M. Dobrev, Lawrence G. Mathews, Jr. Young Lawyers Professionalism Award recipient; Magistrate Friedman



Leon Handley, his wife Mary Virginia, family and friends

Larri Thatcher, Legal Aid Society Intake, Outreach, and Community Education Coordinator



Ryan Davis, Young Lawyers Section President

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Professionalism Committee

Remarks on Receiving the Lawrence G. Mathews, Jr. Young Lawyers Professionalism Award

When the Professionalism Committee called to tell me they had chosen me for the Lawrence G. Mathews award, my primary reaction, besides being incredibly honored, was “but I’m just doing my job.” It’s a thought that has come back to me a lot in the weeks since that call. I finally realized the obvious. The desire to do your job well is at the heart of professionalism, isn’t it? You don’t do your client any favors when you fail to act with honesty and courtesy. Yes, you might gain a short term advantage, but in the end it will be outweighed by what is lost in credibility and cooperation. That’s not to say it’s always easy to meet our own standards. Everyone has that day when they are tired, overly busy or still irritable from last night’s argument over whose turn it was to wash the dishes. But, that’s the other side of the professionalism coin, cutting one another a little slack and not assuming the worst. And that, too, is part of the job.

I’m not exactly the calm and laid-back sort, so for me cutting the other person some slack often means taking a deep breath before I speak. And there are days I take a lot of deep breaths. For the last six years, I’ve been a staff attorney in the Guardian ad Litem program, which means I work directly with the child welfare system. There is no question that most of the people working within that system are there because they believe in

doing what’s best by children and their families. But, it is an under-funded and unwieldy system that in itself creates a lot of potential for misunderstanding and conflict. Add to that the highest of stakes – a child’s life and well-being – and it’s no wonder emotions run high.

I actually became a lawyer because I was a social worker in the child welfare system. I was so frustrated by my inability to get “my” kids what they needed that I decided to go to law school. I wanted more tools I could use, and I wanted to *make* people listen to me. And while that law degree helped, there are plenty of days it’s still a struggle to get “my” kids what they need.

But boy, doing my job and doing it well is so worth it. I’ve stood in the courtroom and watched two twins play gleefully with the microphones while the Judge officially made their foster parents their forever parents. Four years earlier I’d met them as sickly babies who had therapy or a doctor’s appointment nearly every day, and now they were pre-schoolers thriving in a home filled with love. And I’ve celebrated with a teenager as he moved out of foster care and in to his own apartment at 17, a move earned with incredible maturity and the guidance of a wonderful football coach who took him under his wing. I’ve congratulated parents able to take their kids home after reaching out for the help they need, and I’ve thanked grandparents who stepped in to raise their grandkids

when the parents couldn’t accept the help.

I have hundreds of memories like these, and each and every one took the commitment and effort of a great many people. There’s a lot I can do these days to help “my” kids, but none of it can be done alone. So, in the end, my ability to help the kids depends on my ability to find a way to work with others even when it’s hard, and that always starts by showing courtesy and respect.

I didn’t know Larry Mathews, though I certainly know of his reputation, but I do know and greatly admire several of the past award winners. Thanks to your incredible commitment to *pro bono* service and the Legal Aid Society, I’m also fortunate enough to personally know and respect many of the members of the OCBA. I’m proud to be a part of this legal community and incredibly honored that you think I’m good enough at my job to give me this award. But most importantly, I hope it means that I really am doing a

good job and making a difference for kids.

Cara M. Dobrev is the Guardian ad Litem Program Litigation Coordinator at the Legal Aid Society. She has been a member of the OCBA since 2003.



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Criminal Law & Appellate Committee Practice Committee

The Florida Supreme Court has accepted jurisdiction and agreed to conduct oral argument in *Bowers v. State*, Case No. SC09-1971,¹ based on a conflict certified to exist by the Second District Court of Appeal when it issued its decision in *Bowers*.² The Second District concluded that its decision conflicted with the decision of the Fourth District Court of Appeal in *Ferrer v. State*.³

Both *Bowers* and *Ferrer* involved identical factual scenarios. In both cases, a defendant was stopped for a traffic violation by Officer #1. After stopping the defendant's vehicle, Officer #1 contacted Officer #2 to conduct a DUI investigation. Officer #2 subsequently performed that investigation and arrested the defendant for DUI. Thereafter, the defendant filed a motion to suppress evidence, alleging that there was not a lawful basis for Officer #1 to stop the defendant's vehicle.⁴ At the suppression hearing, the State called Officer #2 as its only witness. Officer #2 testified as to what Officer #1 told him was the basis for the traffic stop. In both cases, the defendant raised a hearsay objection to Officer #2's testimony as to the out-of-court statements made to him by Officer #1. In both cases, the State argued that the "fellow officer rule" permitted the hearsay testimony to be admitted.⁵ The trial courts agreed with the State, overruled the defendants' objections, and permitted Officer #2 to testify about the out-of-court statements made by Officer #1.

In *Bowers*, the trial court granted the defendant's motion to suppress evidence. In *Ferrer*, the trial court denied the defendant's motion to suppress. On appeal, however, the circuit courts in both cases issued an opinion in favor of the State, concluding that the hearsay testimony in question was properly admitted into evidence based on the fellow officer rule. Both defendants filed petitions for writs of certiorari in the district court of appeal, seeking review of the decision reached by the respective circuit courts.

In *Ferrer*, the Fourth District denied the defendant's petition for writ of certiorari, holding that the hearsay testimony was admissible pursuant to the fellow officer rule. Based primarily on various decisions reached by federal courts, the Fourth District rejected the defendant's contention that the admission of that evidence

deprived him of his right to confront a critical witness at the suppression hearing. The Fourth District also noted that, in a different factual context, the Florida Supreme Court had previously held that hearsay evidence was admissible in a hearing on a motion to suppress.⁶

In *Bowers*, the Second District reached a conclusion directly contrary to the decision reached by the Fourth District in *Ferrer*. The Second District acknowledged the fellow officer rule, but held that it is neither a rule of evidence nor an exception to the hearsay rule.⁷

Additionally, the Second District held that the fellow officer rule was inapplicable because the issue at the suppression hearing was not whether there was probable cause for Officer #2 to conduct a DUI investigation and make a subsequent arrest of the defendant, but whether there was probable cause for Officer #1 to stop the defendant. The district court held, therefore, that at the time of the traffic stop, there was no investigative chain during which collective knowledge of law enforcement was imputed to Officer #1 to provide the necessary probable cause. At that time, the district court reasoned, Officer #1 was the sole officer with any knowledge concerning the alleged legal basis for that stop, and was not relying on any knowledge or information possessed by any other officer.⁸

The Second District also concluded that the Fourth District's reliance on federal cases to support its decision in *Ferrer* was misplaced because Federal Rule of Evidence 104(a) explicitly authorizes the use of hearsay in suppression hearings. The Second District noted that Section 90.105(1), the Florida counterpart to Rule 104(a), does not contain a similar provision.⁹ The Second District granted the defendant's petition for writ of certiorari, concluded that *Ferrer* was wrongly decided, and certified conflict.¹⁰

Florida Caselaw Prior to *Ferrer* and *Bowers*

The Florida Supreme Court has not specifically addressed the interplay between

Florida Supreme Court Preview: *Bowers v. State*, SC09-1971

The Admissibility of Hearsay Evidence at Pretrial Hearings on Motions to Suppress Evidence

Matthew P. Ferry and William R. Ponall

This article addresses an issue that is routinely confronted by trial court judges in criminal cases: the admissibility of hearsay evidence at pretrial hearings on motions to suppress evidence. This article will discuss how this issue has reached the Florida Supreme Court, the various legal issues underlying the case, and the respective arguments raised by prosecutors and criminal defense attorneys on this issue.

the fellow officer rule and the admissibility of hearsay evidence. The Florida Supreme Court, however, has previously addressed the admissibility of hearsay evidence in a different factual context than the one addressed in *Ferrer* and *Bowers*.

In *Lara v. State*, the issue before the Florida Supreme Court was (1) whether law enforcement had authority to enter an apartment building without a search warrant; and (2) whether the alleged authority to enter the apartment was improperly established by inadmissible hearsay evidence.¹¹ At the suppression hearing, there was evidence that a tenant of an apartment complex called law enforcement in reference to a homicide. Once law enforcement arrived on scene, the tenant who allegedly lived in, and had joint control of the apartment provided consent for law enforcement to search the residence. The tenant, however, was unavailable at the suppression hearing, and thus was not subject to cross-examination concerning the consent to enter he allegedly provided law enforcement. Testimony concerning that consent was provided by the law enforcement officer.¹²

The Supreme Court held that the hearsay evidence of the tenant's alleged consent was properly admitted at the suppression hearing. In support of that conclusion, the Court noted that it had previously held that an affidavit for a search warrant may be based on hearsay information.

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Finch v. Seminole County School Board,
995 So. 2d 1068 (Fla. 5th DCA 2008)
Affirmed denial of taxpayer challenge
to school rezoning plan.

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

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

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

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

Foley v. Foley,
34 Fla. L. Weekly D1943A (Fla. 5th DCA 2009)
Reversed unequal distribution of
marital estate.

***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.

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

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

Chaffin v. Overstreet,
982 So. 2d 11 (Fla. 5th DCA 2008)
Reversed numerous provisions of trust
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● *A Guardian ad Litem Makes* ● *All the Difference*

Cara Dobrev, Esq. and Bethanie Barber, Esq.

At Legal Aid, we're very proud of the amazing work all of our volunteers do every day to protect children and assist those in need. Recently, though, an email came to us that reminded us just what a difference a passionate advocate can make. Gloria Brewer, a Child Welfare Specialist with Family Services of Metro Orlando, wrote to tell us of the outstanding commitment of **Chris Kolos**, a partner at Holland & Knight, and the difference he made in a young man's life. Ms. Brewer writes:

From: Gloria Brewer
Sent: Wednesday, December 16, 2009 12:05 PM
To: Chris Kolos
Cc: E. Dimayuga; C. Dobrev

Mr. Kolos:

You are an amazing man. I am cc the attorneys from the Legal Aid Society on this email to let them know how exceptional you are. I hope that I am not embarrassing you, and it's not my intent to do so either.

Sir, you have gone above and beyond even more so than the direct care staff to ensure that this child's needs are met. You have taken him to doctor's appointments [and] have advocated for him tirelessly at both the school and DJJ level. If there is anything that hasn't been done for this child, it's because it was not humanly possible for you to do so.

Mr. Kolos, thank you so very much for your continued commitment, dedication and advocacy. Any child that has you on their case, can be rest assured that their needs will always be met as you will make him/her feel both validated and appreciated.

Respectfully,

Gloria C. Brewer, MS

Child Welfare Specialist II

The child, "Quincy," had just turned 18 after a tumultuous childhood. Having survived sexual abuse, the drug addiction of his mother and the neglect of relatives, Quincy had little faith in himself and even less faith in the adults in his life. These emotional scars were made even more difficult by intellectual limitations that made it difficult for him to succeed in school and caused him to have low self-esteem. Because his behaviors were often difficult to address, he found him-

self bouncing between group homes and schools, and he was soon entangled in the delinquency system. Ms. Brewer explains that as Quincy's Guardian ad Litem, Chris Kolos, "was the one stability in the child's life. The case worker had changed several times, but he has stayed. Even when the child didn't want to talk to him, he stayed available to him and never gave up."

By being that consistent person looking out for him, Chris ensured that Quincy didn't get lost in the system. He didn't limit his advocacy to the courtroom

either. It was Chris who kept everyone on their toes, prompting them to hold necessary meetings, develop an independent living plan for when Quincy turned 18 and research academic options for Quincy. When Quincy was placed in a group home in Tampa after options in Orlando fell through, it was Chris who drove to Tampa often to be there with him, to support him

and to meet with school officials. There were times, Ms. Brewer admits, when the case management system failed to take care of something needed for Quincy. It was Chris who brought it to their attention, but she emphasizes that he stayed focused on how to fix the problem and was always willing to be part of the solution.

Perhaps most importantly, Chris worked hard to ensure that Quincy would have a support system after the professionals were gone. Ms. Brewer tells us that "if [Quincy] had a family member out there,

Mr. Kolos found them." Most of those family members felt that Quincy couldn't live with them, but Chris was often able to convince them to still be involved in Quincy's life. On the day Quincy turned 18, it was Chris who helped him move his belongings out of the group home. When Quincy's original plans fell through, Chris helped him to find a step-father living in Volusia County who welcomed Quincy into his home and has shown a true commitment to helping Quincy succeed. Quincy has enrolled in a charter school and has a fresh start and a real chance thanks to the tireless advocacy of Chris Kolos.

When a Guardian ad Litem makes a commitment to a child, great things can happen. If you'd like to be part of giving a child a second chance, please consider volunteering as a Guardian ad Litem through the Legal Aid Society of the Orange County Bar Association, Inc. For more information, please contact **Susan Khoury, Esq.**, GAL Program Coordinator at skhoury@legalaidocba.org.



Cara Dobrev, Esq., Legal Aid Society GAL Program Litigation Coordinator at the Legal Aid Society, has been a member of the OCBA since 2003.



Bethanie Barber, Esq., Legal Aid Society GAL Program Transitions Attorney, has been a member of the OCBA since 2006.

Bethanie Barber, a graduate of the University of Florida College of Law, found her “fit” at the Legal Aid Society of the OCBA. Originally thinking she would practice environmental law, she quickly changed her mind as the result of an internship. At Legal Aid, she not only serves as a GAL Program attorney assigned to Magistrate Friedman’s courtroom but is also the GAL program’s Transitions attorney. In that role, she focuses on independent living and youth transitioning out of foster care. In a sense, one might say that she turned out to be something of an environmental lawyer after all, because her GAL work often presents her with the opportunity to help salvage a young person’s life and put them on the road to a new beginning.

Advocating for youth ages thirteen to twenty-three, Bethanie works diligently to help youth become self-sufficient. In order to do that, she must first help them overcome obstacles that lie in their way. Sadly, many children in foster care struggle with issues not of their own making – issues such as poor health (mental and otherwise), lack of structure, educational deficits, and distrust of adults and society. Often, the case plan goal for these youth is “Another Planned Permanent Living Arrangement,” which Bethanie feels can sometimes be the least desirable goal because, she says, “it means conceding, to some extent, that the child is being prepared to live independently, often without a parent or parental substitute.” But when there is no other alternative, a GAL becomes instrumental in helping youth identify and build on their strengths, while also helping them evaluate what obstacles they need to address in order to thrive. The GAL is often the one person the youth looks to as their support in getting through tough times. “Paul” was just such a child.

Paul, one of the youth Bethanie worked with, arrived in the foster care system in February 2008, when he was sheltered from his dad and step-mother as a result of felony child abuse. Paul had been punched in the stomach, tied to a chair, and made to sell narcotics, among other horrible acts. His was a “Cinderella” story of sorts because his step-mother’s three children could do no wrong, running roughshod over Paul and his siblings, while his dad’s four children were disciplined for every supposed rule infraction. Enduring his father’s unending wrath, Paul’s body and mental health were battered, but his charisma and charm were not.

Although he has attended anger management and counseling sessions, Paul has not been challenge-free. Sometimes it takes a thirteen-year-old youngster a summer school session in English to get the grades on track. Other times, taking personal responsibility for one’s actions does the trick. In Paul’s case, he got into a fight at school and thought he was going to be expelled. This scared him. Knowing he would be punished, Paul approached

his teachers and asked for school work and homework assignments in advance of the punishment so he would be able to keep up with classes. Unfortunately, Paul’s show of responsibility wasn’t enough to prevent the school from recommending to the school board that he be expelled. Bethanie worked diligently to keep him in traditional school. Paul was given a second chance and, with the continuation of his anger management classes, was allowed to remain in school. This was not a simple feat to accomplish. But Bethanie, Paul’s foster home, and school system officials worked together to ensure that this child was not left behind. Their faith in Paul was rewarded as he took responsibility for himself and his education. It is an incredible success when foster children, the school, and the legal system come together to create such a positive outcome.

Paul now lives in a foster group home in Oviedo. He looks forward to the time when he can drive his own truck, wear trendy urban clothes, and have his own family. When asked, he envisions a life that includes a wife and two children – a boy and a girl. Paul dreams of becoming a firefighter, is involved in football and weightlifting, and is studying to receive his learner’s permit. He loves saving money and visiting with his siblings, and he is still excited to live his best life. Paul has tough years ahead of him – those character-building years that require special handling. The future Paul looks forward to will only happen if he receives the support and skills he needs to break the habits built on a life that too often taught him the negative. But, attorney Bethanie Barber will be there to ensure he receives the help he needs, and part of that includes helping him find ways to create lasting family connections.

As evidence of their own close ties, Paul asked Bethanie if she would become his foster parent. Although his request filled her heart with pride, she said no. She knew that her efforts as his GAL would best serve him in the long run. In fact, Paul’s father might just be able to step up and be the father Paul needs after all. Paul’s father was incarcerated as a result of his abusive behavior. He has since been released and is now trying to create a positive relationship with Paul and his siblings, who have had no further contact with their step-mother and her children.

When Bethanie speaks about Paul, a light shines in her eyes. He is special to her for many reasons, as she is to him. An attorney, mentor, confidant, and sounding board. Each enriching the others’ life with four simple words: “I believe in you.”

Bethanie Barber has been a member of The Florida Bar since October 2006, and has worked at the Legal Aid Society since February 2008. She may be reached at Bbarber@legalaidocba.org. **Donna A. Graf**, Legal Aid Society Manager of Development, may be reached at dgraf@legalaidocba.org.



Bethanie Barber



Donna A. Graf

Florida Bar Foundation News

The Florida Bar Foundation: Providing access to justice in our community and statewide

Michael Cooper

As lawyers we share a commitment to justice. The Florida Bar Foundation, a 501(c)(3) public charity, turns that commitment into action through its funding of programs that provide access to justice for those who can't afford a private attorney. Through support of The Florida Bar Foundation, we can demonstrate our belief that the justice system works best when it works for everyone – regardless of his or her economic status.

Locally, The Florida Bar Foundation is a vital funding source for the Legal Aid Society of the Orange County Bar Association, as well as Community Legal Services of Mid-Florida, whose service area includes Orange and Seminole counties. Through its Administration of Justice Grant Program, the Foundation also helps fund special projects and initiatives across the state such as the Innocence Project of Florida, which has succeeded in exonerating eleven wrongfully imprisoned Floridians using DNA evidence since 2003.

In addition, the Foundation funds fellowships for young attorneys and law students to foster public service and makes grants to voluntary bar associations for their community service projects. If you visit the Foundation's website at www.floridabarfoundation.org, you will undoubtedly be impressed with the number and diversity of the grantees assisted by the Foundation.

About thirty percent of the total funding for civil legal

aid organizations in Florida comes from The Florida Bar Foundation. Over the past twenty-seven years, Florida's IOTA Program has distributed nearly \$300 million to help hundreds of thousands of people receive critically needed free civil legal assistance throughout Florida. In 2010, our Legal Aid Society received a Foundation general support grant of \$763,294 to provide legal services, as well as a \$138,020 Foundation grant specifically for Children's Legal Services. You will be glad to know that one-hundred percent of your donations to the Lawyers' Challenge for Children on your Florida Bar fee statement go directly to support the Children's Legal Services Grant Program, which focuses on the special legal needs of foster children and low-income children in need of access to medical and special education services required by law. The Legal Aid Society also is engaged in a regional employment law project that is supported by a \$115,500 grant from the Foundation.

To help stabilize the legal aid workforce, the Foundation also funds initiatives such as salary supplementation and loan repayment programs that help attract and retain legal aid attorneys, a Summer Fellows program that places law students at legal aid organizations for eleven weeks each summer, and leadership and substantive law training programs for legal aid staff attorneys. The Legal Aid Society's salary supplementation grant was \$187,000 this year.

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Residential Mortgage Foreclosure: Burdens of Proof, Real Defenses, Blind Alleys, and Recent Developments **Part One**

David Fleming and Christopher Roach¹

Due to space limitations, this article is being printed in two parts. The second part will be printed in the next edition.

I. Introduction

The most prominent political, business, and legal stories of the last several years arise from the bursting of the housing bubble and the massive number of residential foreclosures that have ensued. The foreclosure crisis has affected the states unequally. California, Nevada, Arizona, and Florida have seen the largest proportion of foreclosures. The coming “reset” of Alt-A loans, high unemployment, and the continuing stagnation of the housing market suggest that the high volume of residential foreclosures will continue in the near future.²

The sheer numbers of foreclosure are staggering, and these numbers have strained lenders, courts, clerks of court, law firms, government relief funds, and others necessary for providing lenders and debtors with their day in court. In 2009, more than 500,000 Florida homeowners received a foreclosure notice.³ Florida clerks of court report increases in foreclosure filings of 1,400%.⁴ Foreclosures have become more complicated because of issues arising from poorly documented assignments of mortgage and related standing issues stemming from the trend of securitization of mortgages over the last decade.⁵

Individuals facing foreclosure have many places to turn, but some have been led astray by unscrupulous consultants and bad advice. A number of widely reported decisions have contributed to the myth that minor technicalities would relieve borrowers completely from the burdens of their mortgage, while allowing them to stay in their homes.⁶ Underwater homeowners also have been buoyed by new government programs that incentivize lenders to reduce mortgage payments to make them more affordable. But the slow implementation of these programs, coupled with difficulties of communication between borrowers and lenders, have left many frustrated.⁷ Worse, scam artists have exploited this situation and promised to protect their clients from foreclosure, all the while fleecing borrowers’ of their limited funds.⁸

The authors’ goal is to describe and evaluate various burden of proof and defensive issues in residential foreclosure cases, distinguishing frivolous tactics that provide false hopes and merely delay the inevitable, from the more appropriate and realistic defenses that can provide *bona fide* relief.

II. Issues Surrounding the Lender’s Case in Chief

Many homeowners who default on the mortgage loans secured by their homes are seeking counsel to help them remain in their homes. For those who can afford an attorney, these homeowners rightfully expect that the attorney they hire will be fully versed in foreclosure law and, in particular, the defenses and strategies that give the homeowner an opportunity to avoid or reduce their mortgage indebtedness, whether through modification, a short sale, a “deed in lieu,” or otherwise.

Foreclosure is an equitable remedy.⁹ A foreclosure action in principal is no different from any other equitable matter. Thus, it is the plaintiff mortgagee that bears the burden of proof, and competent defense counsel can be expected to challenge the plaintiff to prove its case. Certain aspects of that burden of proof

can sometimes be challenging for the plaintiff. These hurdles are addressed below.

A. Note Ownership and Conditions Precedent

“To grant a judgment of foreclosure in favor of the [mortgage holder], the trial court would have to find, among other things, that the [mortgage holder] owned the mortgage and had performed all conditions precedent, if any, to enforce the mortgage.”¹⁰ These elements and conditions may seem to be simple enough to prove, but the transformation of the mortgage market (and the sometimes shoddy record-keeping of lenders) have made proof of mortgage ownership a complicated affair. For several decades, originators have been selling mortgages to investors in the secondary market. Once a mortgage is sold, ownership must be proved in a foreclosure through an endorsement of the note and an assignment, which may or may not have been formalized at the time the mortgage was transferred to an assignee.

To further complicate matters, the consolidation of many home mortgages into pools of mortgage-backed-securities has created another level of distance from the plaintiff and the original lender, insofar as the mortgages are often joined with other mortgages held by an institutional trustee for the benefit of a group of investors that own securities issued by the lender-sponsor.¹¹ Many such securities are guaranteed by Fannie Mae or Freddie Mac, both of which mandate servicing requirements for the mortgages they guarantee. In most cases, the servicer is likely to be an institution other than the trustee. Because of the number of parties involved and the separation of the plaintiff from the original lender, both proof of ownership and proof of performance of conditions precedent may be difficult for a plaintiff to prove. Plaintiff’s counsel should ensure that assignments are clear and attached to their complaint, while defense counsel should be prepared to challenge the plaintiff’s standing and right to sue in cases where no such assignment is present or there are unexplained gaps in the chain of assignment.

B. Amount Disputed

If a borrower has accepted money from the lender and has not repaid it, and if there are no affirmative defenses, then the mortgage holder is clearly entitled to receive a foreclosure judgment in order to have the collateral sold and the proceeds applied to the borrower’s outstanding debt. However, the mortgage holder is required to prove the amount owed and its failure to do so will result in denial of judgment.¹² This includes not only the principal and interest owed but also amounts claimed for insurance premiums paid by the lender and other monetary claims, including costs and attorney’s fees. The amount of unpaid principal and interest, as well as the reasonableness of fees and costs, must be established by competent evidence. Issues of fact surrounding each of the foregoing may provide competent defense counsel with an opportunity to delay the foreclosure.

C. Notice of Right to Cure

As in the issue of note ownership, the plaintiff mortgage holder is obligated to prove the performance or occurrence of any conditions precedent. Most mortgages guaranteed or insured by

a government agency or entity backed by the federal government will contain provisions that requires notice of default to the borrower and an opportunity to cure **before** foreclosure can be filed. Such provisions contain specific requirements regarding required notice.

Consider the 2009 case of *Frost v. Regions Bank*, in which the complaint included as an exhibit the mortgage, which stated:

Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument ... The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property.¹³

Because the bank did not meet its burden of refuting the [borrowers'] lack of notice and opportunity to cure affirmative defenses, the bank was not entitled to final summary judgment of foreclosure.

This issue arises in a surprising number of cases, most often because the servicer has no idea what the mortgage requires and will give whatever notice, if any, that is the servicer's standard practice. Thus, competent defense counsel will examine the mortgage's notice provision and determine whether or not it has been followed. Similarly, plaintiff's counsel should advise its client, when possible, to ensure that proper notice mandated by the loan documents is made. Such default notice should be made again by counsel when assigned to the case to cure any possible defects.

III. Available Defenses

As with any other litigation, if the plaintiff mortgage holder can meet its burden of proof, the court must still consider any affirmative defenses asserted by the defendant borrower. In nearly every case, the plaintiff mortgage holder will file a motion for summary judgment. Considering the number of foreclosures that are being filed today, without availability and predictability of summary judgment, it could be years before a final, evidentiary hearing would be obtained. Thus, summary judgment is a critical tool for mortgage holders, and also for courts, to ensure a swift determination of cases where there are no real defenses on the part of the borrower. On the other hand, improvident summary judgment may be a Pyrrhic victory for the lender; it can be reversed on appeal, and the foreclosure sale will be vacated, leading to greater expense and time before a resolution.¹⁴

The standard for reviewing the entry of summary judgment is well established. Rule 1.510(c) of the Florida Rules of Civil Procedure mandates that a party moving for summary judgment must conclusively show the absence of any genuine issue of material fact and obligates the trial court to draw every reasonable inference in favor of the non-moving party.¹⁵

The most important issue in the foreclosure arena is the existence (or not) of affirmative defenses. "A court cannot grant summary judgment where a defendant asserts legally sufficient affirmative defenses that have not been rebutted."¹⁶ When the "non-moving party has raised affirmative defenses, it is incumbent upon the moving party to 'either disprove [those] affirmative defenses or establish their legal insufficiency.'"¹⁷ Various affirmative defenses commonly used in foreclosure defense are discussed below.

A. Estoppel and Cure

There are often direct communications between the lender or servicer and the borrower that occur prior to the referral of the loan to an attorney for foreclosure. Lender assurances to borrowers that rise to the level where borrowers reasonably rely upon them to make additional payments (or otherwise change their position) may impair the acceleration of indebtedness needed for a lender to pursue a foreclosure.

The case of *Knight Energy Services, Inc. v. Amoco* discussed the matter as follows:

Foreclosure on an accelerated basis may be denied when the right to accelerate has been waived or the mortgagee estopped to assert it, because of conduct of the mortgagee from which the mortgagor (or owner holding subject to the mortgage) reasonably could assume that the mortgagee, for or upon a certain default, would not elect to declare the full mortgage indebtedness to be due and payable or foreclose therefore; or where the mortgagee failed to perform some duty upon which the exercise of his right to accelerate was conditioned; or where the mortgagor tenders payment of defaulted items, after the default but before notice of the mortgagee's election to accelerate has been given . . . ; or where there was intent to make timely payment, and it was attempted, or steps taken to accomplish it, but nevertheless the payment was not made due to a misunderstanding or excusable neglect, coupled with some conduct of the mortgagee which in a measure contributed to the failure to pay when due or within the grace period.¹⁸ *continued page 16*

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Residential Mortgage Foreclosure

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As a matter of substantive law, it is a good defense to foreclosure that “the mortgagor tenders payment of defaulted items, after the default but before notice of the mortgagee’s election to accelerate has been given (by actual notice or by filing suit to foreclose for the full amount of the mortgage indebtedness)....”¹⁹ If a good and timely tender of cure has occurred, then the borrower is entitled to have the foreclosure dismissed. Ordinary resumption of payments, however, would not qualify if they are not under the terms of an agreement, proffered as a cure, or are otherwise inadequate to restore the loan from its default condition.

B. Misrepresentation

Misrepresentation made by the lender at the time the mortgage was originated may give rise to a defense.²⁰ However, this defense is problematic for at least two reasons. First, in those instances where the mortgage has been sold or pooled, there are (at least) two arguably innocent parties whose rights the court must consider and try to balance. As an equitable action, the rights of these innocent parties – assignees and stakeholders in pools of mortgage backed securities – will not be completely ignored. Second, even if the original mortgagee is the plaintiff, it is likely that the most this defense will achieve is a rescission, which would require repayment of the funds advanced by the mortgagee. This is often a paper remedy from which insolvent borrowers cannot benefit. This same obstacle exists with respect to claims made under the Truth in Lending Act (“TILA”) and Real Estate Settlement Procedures Act (“RESPA”).²¹

C. Fraud in the Inducement

“It is well established that fraud can be a valid defense in a foreclosure action.”²² If fraud can be alleged in good faith and with the requisite particularity, it can be a strong weapon in the arsenal of the defense attorney, because “[t]he issue of fraud generally should not be disposed of by summary judgment.”²³ Fraud is also a legal action for damages that can be raised as a counterclaim.²⁴

At least in some, if not all, cases, fraud in the inducement of a note or mortgage is a compulsory counterclaim to an action in foreclosure on the note or mortgage, which may entitle the mortgagor to a jury trial.²⁵

Florida Rule of Civil Procedure 1.120(b) mandates that “the circumstances constituting fraud . . . shall be stated with such particularity as the circumstances may permit.” This means that an affirmative defense or claim “must clearly and concisely set out the essential facts of the fraud, and not just legal conclusions.”²⁶

Thus, lender’s counsel will want to move to strike a defense that fails to plead fraud with specificity and use a motion for summary judgment to test the defense’s ability to prove fraud. Likewise, a borrower’s counsel should be wary of raising unfounded or fanciful allegations of fraud. They are difficult to prove, could be met with sanctions, and, in any case, would also open the inquiry into whether the borrower has “clean hands”²⁷ at the time the note originated. That said, insofar as a colorable fraud claim exists, it should be pled because it creates factual issues requiring a trial on the merits, may defeat summary judgment, and may create lender interest in a workout that did not otherwise exist.

This concludes Part One. Part Two will contain discussion of additional Affirmative Defenses and of the Impact of Mandatory Mediation



David L. Fleming of WealthCare International LLC has been an OCBA member since 2006.

Christopher A. Roach, an associate with Ruden, McClosky, Smith, et al., has been an OCBA member since 2008.



¹⁹Mr. Fleming is a Certified Circuit Court Mediator who has over 30 years of experience with business and real estate-related financial transactions and litigation. He participates in the Ninth Circuit’s foreclosure mediation program, established by AO 2009-02.

²⁰Mr. Roach is a litigator at Ruden McClosky in Orlando with ten years of experience, whose practice focuses chiefly on business disputes and lender representation in foreclosures.

²¹Diana Elboghady, *New Round of Foreclosures Looms in U.S.*, HOUSTON CHRONICLE, October 3, 2009.

²²Kimberly Miller, *Half of Homes in South Florida Sell for a Loss*, PALM BEACH POST, February 10, 2010.

²³Gary Blankenship, *Courts strained by foreclosure filings*, FLORIDA BAR NEWS, November 1, 2008.

²⁴Ellen Simon, *Figuring Out Who Owns a Mortgage*, WASHINGTON POST, November 1, 2008.

²⁵Tom Leonard, *Judge wipes out couple’s mortgage after bank’s ‘repulsive’ behavior*, UK TELEGRAPH, November 26, 2009 (discussing *Indymac Bank F.S.B. v Yano-Horaski* 2009 NY Slip Op 52333 (N.Y. Sup. Ct. November 19, 2009)); *Landmark National Bank v. Kesler*, 2009 LEXIS 834 (Kan. August 28, 2009) (holding that Mortgage Electronic Registration System [MERS] lacked standing to prosecute foreclosure when no evidence of assignment from original lender to MERS); *see also In re Wilhelm*, 407 B.R. 392 (Bankr. D. Idaho 2009) (holding that standard mortgage note language does not expressly or implicitly authorize MERS to transfer the note); *In re Vargas*, 396 B.R. 511, 517 (Bankr. C.D. Cal. 2008) (“[I]f FHM has transferred the note, MERS is no longer an authorized agent of the holder unless it has a separate agency contract with the new undisclosed principal. MERS presents no evidence as to who owns the note, or of any authorization to act on behalf of the present owner.”); *Saxon Mortgage Services, Inc. v. Hillery*, 2008 WL 5170180 (N.D. Cal. 2008) (unpublished opinion) (“[F]or there to be a valid assignment, there must be more than just assignment of the deed alone; the note must also be assigned... MERS purportedly assigned both the deed of trust and the promissory note . . . However, there is no evidence of record that establishes that MERS either held the promissory note or was given the authority . . . to assign the note.”).

²⁶*See generally* David Streifeld, *Treasury Streamlines Its Mortgage Program*, NEW YORK TIMES, January 29, 2010; Andrea Fuller, *US Effort Aids Only 9% of Eligible Homeowners*, NEW YORK TIMES, August 5, 2009.

²⁷Federal Trade Commission, *Federal and State Agencies Target Mortgage Relief Scams*, November 24, 2009 available at <http://www.ftc.gov/opa/2009/11/stolenhope.shtm> (last visited February 23, 2010).

²⁸*Singleton v. Greymar Assoc.*, 882 So.2d 1004, 1008 (Fla. 2004).

²⁹*Dykes v. Trustbank Savings, F.S.B.*, 567 So.2d 958 (Fla. 2d DCA 1990).

³⁰FRANK J. FABOZZI, THE HANDBOOK OF MORTGAGE BACKED SECURITIES (5th ed. 2001).

³¹*Douglas v. Deutsche Bank Trust Co.*, 995 So.2d 1144 (5th DCA 2008) (summary judgment reversed).

³²*Frost v. Regions Bank*, 15 So.3d 905 (4th DCA 2009).

³³*See O’Brien v. VFederal Trust Bank*, 727 So.2d 296 (Fla. 5th DCA 1999).

³⁴*Holl v. Talcott*, 191 So.2d 40 (Fla. 1966).

³⁵*Winter Haven Federal Savings & Loan Assoc. v. Kirian*, 579 So.2d 730 (Fla. 1991).

³⁶*Johnson v. Claims Prevention & Management Serv., Inc.*, 673 So.2d 558 (Fla. 1st DCA 1996).

³⁷*Knight Energy Services, Inc. v. Amoco Oil Co.*, 660 So.2d 786 (Fla. 4th DCA 1995).

³⁸*DeLandro v. America’s Mortgage Servicing, Inc.*, 674 So.2d 184 (Fla. 3rd DCA 1996).

³⁹*Profitable Princess Properties, Inc. v. Rodriguez*, 523 So.2d 751 (Fla. 2^d DCA 1988); *Lake Region Hotel Co. v. Gollick*, 110 Fla. 324, 149 So. 204 (1933) (misrepresentation of size of acreage).

⁴⁰TILA, 15 USC §1601 *et seq.*; RESPA, 12 USC § 1201 *et seq.*

⁴¹*Norris v. Paps*, 615 So.2d 735 (Fla. 2d DCA 1993).

⁴²*Barrios v. Duran*, 496 So.2d 239 (Fla. 3d DCA 1986), *cited in Sunchase Apartments v. Sunbelt Service Corp.*, 596 So.2d 119 (Fla. 1st DCA 1992).

⁴³*Spring v. Ronel Refining, Inc.*, 421 So.2d 46 (Fla. 3d DCA 1982).

⁴⁴*Yost v. American Nat’l Bank*, 570 So.2d 350 (Fla. 1st DCA 1990).

⁴⁵*Flemenbaum v. Flemenbaum*, 636 So. 2d 579, 580 (Fla. 4th DCA 1994).

⁴⁶*Yost v. Rieve Enters., Inc.*, 461 So. 2d 178 (Fla. 1st DCA 1984).

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Robert L. Dietz Receives The Florida Bar President's *Pro Bono* Service Award

Robert L. Dietz of the Orlando law firm Zimmerman, Kiser & Sutcliffe has been selected as the recipient of The Florida Bar President's *Pro Bono* Service Award for 2010 from the Ninth Judicial Circuit. The Supreme Court of Florida hosted a ceremony honoring this year's recipients on January 28, 2010, at the Florida Supreme Court Building in Tallahassee.

Dietz began serving as a Guardian ad Litem in 1986 and has represented over 100 children in cases involving more than 1,100 hours of work. The cases have often involved medical issues as complex as Munchausen Syndrome by Proxy, shaken baby syndrome, cocaine babies, and injuries including spiral fractures and severe burns. In addition to abuse cases, he has had abandonment, child development, failure to thrive, and parental endangerment cases.

Dietz has been Board Certified in Workers' Compensation Law since 1992 and became a Supreme Court Certified Circuit Civil Mediator in 1995. He has served as National Chair of the ABA TIPS Workers' Compensation & Employer Liability Committee and President of the Florida Defense Lawyers' Association (the only workers' compensation practitioner ever elected). His induction as a Fellow of the College of Workers' Compensation Lawyers in 2008 made him only the second Floridian ever selected. Dietz was also the first Floridian elected to the national board of directors of the Association of Attorney-Mediators. He was also the 2008 recipient of the FDLA's Doug Lawless Mediation Award, and he currently serves as the State Representative for the Defense Research Institute.

Dietz received his BA with honors from Eckerd College in 1979, and his JD from Vanderbilt Law School in 1982.

Robert L. Deitz is a shareholder with Zimmerman, Kiser & Sutcliffe, P.A.. He has been a member of the OCBA since 1991.



The Florida Bar President, Jesse H. Diner; and The Florida Bar President's *Pro Bono* Service Award recipient, Robert L. Dietz.

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Additionally, the Court noted that the United States Supreme Court had previously held that a law enforcement officer may act upon probable cause without a warrant even if the only incriminating evidence in possession of the officer is hearsay.¹³

Following the Florida Supreme Court's decision in *Lara*, several district courts of appeal have concluded that hearsay evidence is admissible at a hearing on a pretrial motion to suppress.¹⁴ These cases provide no real analysis of the issue, but simply cite *Lara* for that proposition of law.¹⁵

It appears that the issue before the Florida Supreme Court in *Bowers* is ripe for review. Both the clear factual distinction between the situation before the courts in *Ferrer* and *Bowers* and the situation before the Court in *Lara*, and the more detailed analysis provided by the district courts, suggest that the Supreme Court could decide to revisit the decision it reached in *Lara*.

Constitutional Implications of Bowers

In reaching its ultimate decision in *Bowers*, the Florida Supreme Court should examine how that decision would impact a defendant's Sixth Amendment right to confront and cross examine witnesses. The Sixth Amendment to the United States Constitution, made applicable to the States via the Fourteenth Amendment, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right... to be confronted with witnesses against him."

In *State v. Sigerson*, the Second District Court of Appeal held that a hearing on a motion to suppress is a critical stage of a criminal prosecution at which the Confrontation Clause of the Sixth Amendment applies. The district court held, therefore, that a defendant is guaranteed the right to confront the witnesses against him at such a hearing.¹⁶

Although it has never been explicitly overruled, the district court's decision in *Sigerson* appears to be in conflict with the Florida Supreme Court's subsequent decision in *Lara* and the other district court decisions concluding that hearsay is admissible at hearings on motions to suppress, including the Fourth District's decision in *Ferrer*. Recent decisions of the United States Supreme Court, however, suggest that the courts may be interpreting the Confrontation Clause more

broadly and may be inclined to apply it to hearings on pretrial motions to suppress in the future.

In *Crawford v. Washington*,¹⁷ the United States Supreme Court reversed course and abandoned years of jurisprudence when it receded from its prior decision in *Ohio v. Roberts*.¹⁸ Pursuant to *Roberts*, out-of-court hearsay statements of witnesses were generally admissible at trial, even in face of an objection based on the Sixth Amendment, if the statement was found to be trustworthy by the trial judge. In *Crawford*, the U.S. Supreme Court receded from that rule and held that the Sixth Amendment's Confrontation Clause requires that reliability be assessed through cross-examination of the witness at trial. The Court held, therefore, that notwithstanding a finding of reliability by a trial judge, out-of-court statements of witnesses that are testimonial in nature are inadmissible unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine the witness. Subsequent decisions of the United States Supreme Court, including *Davis v. Washington*¹⁹ and *Melendez-Diaz v. Massachusetts*, provide further support for the belief that the Confrontation Clause may be given broader application by the courts in the future.

However, the State, in its Initial Brief on the Merits filed in the Florida Supreme Court in *Bowers*, correctly notes that a majority of the courts around the country still hold that the Confrontation Clause does not apply at pretrial hearings on motions to suppress evidence. Whether that position continues to remain the majority rule in the future could be impacted by the decision reached by the Florida Supreme Court in *Bowers*.

Arguments on Both Sides

Attorneys representing criminal defendants could argue that neither the plain language of the Sixth Amendment's Confrontation Clause nor the Florida rules of evidence concerning the prohibition on the admissibility of hearsay limit those rules solely to trials.²⁰ They could contend, therefore, that there is no legal basis to admit hearsay evidence at suppression hearings unless the testimony in question falls into one of the recognized hearsay exceptions and does not deprive a defendant of his Sixth Amendment right to confront the witnesses against him.

In response, however, prosecutors could argue that the out-of-court statements sought to be admitted at pretrial hearings on motions to suppress do not actually

constitute hearsay, because those statements are not offered to prove the truth of the matter asserted.²¹ Prosecutors could contend that the statements are not offered to establish the defendant actually committed the conduct in question, but simply to establish that the law enforcement officer involved in the case has the necessary probable cause or reasonable suspicion to justify the stop, search, seizure, or arrest in question.

The potential response of defense attorneys is that both probable cause and reasonable suspicion are found to exist when there are sufficient facts within an officer's knowledge which provide an objectively reasonable officer with the necessary belief that a crime or traffic infraction is being committed.²² Thus, the attorneys can contend that, based on this objective test, the facts offered by the State to support an officer's alleged probable cause or reasonable suspicion are offered for their truthfulness, and thus, should be subject to the prohibition against the admissibility of hearsay evidence.²³

Practical Implications of Bowers

A brief summary of the applicable law concerning hearings on motions to suppress evidence is necessary to understand the importance of the issue before the Florida Supreme Court in *Bowers*. Pursuant to the Fourth Amendment to the United States Constitution, warrantless stops, searches, and seizures are considered presumptively unreasonable.²⁴ Thus, in a case where a search or arrest warrant was not issued by a neutral magistrate prior to the stop, search, seizure, or arrest in question, the burden is on the State to establish its validity.²⁵ If the State fails to do so, the evidence which was obtained as a result of the warrantless stop, search, seizure, or arrest is subject to suppression.²⁶

In the event the Supreme Court concludes that either the Florida rules of evidence or the constitutional rights of defendants to confrontation preclude the admission of hearsay evidence at hearings on motions to suppress evidence, prosecutors may find it more difficult to meet their burden of proof at those hearings. The task may be most difficult in cases involving traffic accidents or informants, where prosecutors need to rely on information supplied by civilian witnesses to establish the probable cause or reasonable suspicion required to validate warrantless stops, searches, seizures, and arrests. In those cases, prosecutors will be required to have both the civilian witnesses and law enforcement

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officers available to testify at pretrial hearings on motions to suppress.

Thus, the decision of the Florida Supreme Court on the issue before it in *Bowers* could have far-reaching implications for criminal defendants, criminal defense attorneys, and prosecutors. As noted in this article, the seemingly simple issue before the Florida Supreme Court actually becomes far more complicated when the

relevant statutory, constitutional, and judicial concepts are considered.

Matthew P. Ferry is an associate at Kirkconnell, Lindsey, Snure, Yates & Ponall, PA. He is the current chair of the Orange County Bar Criminal Law Committee and has been an OCBA member since 2006.



William R. Ponall is a partner at Kirkconnell, Lindsey, Snure, Yates & Ponall, PA. He is Board Certified by The Florida Bar in Criminal Appellate Law and has been a member of the OCBA Appellate Practice Committee since its inception in 2007. He has been an OCBA member since 2002.



This article is written on behalf of the OCBA Appellate Practice, Committee, Barbara A. Eagan, Chair, and the OCBA Criminal Law Committee, Matthew P. Ferry, Chair.

¹2009 WL 4798388 (Fla. Nov. 30, 2009).

²Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure, provides the Florida Supreme Court with discretionary jurisdiction where a district court certifies that its decision is in direct conflict with a decision of another district court of appeal.

³See *Bowers v. State*, 23 So.3d 767 (Fla. 2d DCA 2009); *Ferrer v. State*, 785 So.2d 709 (Fla. 4th DCA 2001).

⁴A law enforcement officer may lawfully stop a defendant's vehicle pursuant to the Fourth Amendment if the officer has probable cause to believe the defendant committed a traffic violation or reasonable suspicion that the defendant is involved in criminal activity. See *State v. Wimberly*, 988 So.2d 116 (Fla. 5th DCA 2008); *Jones v. State*, 842 So.2d 889 (Fla. 2d DCA 2003).

⁵"The fellow officer rule, which is sometimes referred to as the collective knowledge doctrine, is premised on the theory that the collective knowledge of police investigating a crime is imputed to each member of the investigation. An 'arresting officer' is not required to have sufficient firsthand knowledge to constitute probable cause. It is sufficient if the police officer initiating the chain of communication . . . had sufficient firsthand knowledge." *Bowers*, 23 So.3d at 770 (citing *Ferrer*, 785 So.2d at 711) (internal quotations omitted).

⁶785 So.2d at 711-12.

⁷23 So.3d at 769-70.

⁸*Id.* at 770.

⁹*Id.* at 771 n.1.

¹⁰*Id.* at 769, 771.

¹¹464 So.2d 1173 (Fla. 1985).

¹²*Id.* at 1175, 1177.

¹³*Id.* at 1177.

¹⁴See *J.D. v. State*, 920 So.2d 117, 118 (Fla. 4th DCA 2006); *Harris v. State*, 826 So.2d 340, 341 (Fla. 2d DCA 2002); *State v. Cortez*, 705 So.2d 676, 679 (Fla. 3d DCA 1998); *Bauer v. State*, 528 So.2d 6, 10 (Fla. 2d DCA 1988).

¹⁵See *id.*

¹⁶282 So.2d 649, 651 (Fla. 2d DCA 1973).

¹⁷541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

¹⁸448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed. 597 (1980).

¹⁹547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).

²⁰"Except as otherwise provided by statute, hearsay evidence is inadmissible." Section 90.802, Florida Statutes.

²¹"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Section 90.801(1)(c), Florida Statutes.

²²See e.g. *State v. Williams*, 967 So.2d 941, 942 (Fla. 1st DCA 2007); *Woods v. State*, 890 So.2d 559, 561 (Fla. 5th DCA 2005).

²³See e.g. *Keen v. State*, 775 So.2d 263, 270-74 (Fla. 2000); *Tillman v. State*, 961 So.2d 785, 788-89 (Fla. 4th DCA 2007); *Saintilus v. State*, 869 So.2d 1280 (Fla. 4th DCA 2004).

²⁴*Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S.Ct. 2022, 2032, 29 L.Ed. 2d 564 (1971); *Hardin v. State*, 18 So.3d 1246, 1248 (Fla. 2d DCA 2009).

²⁵See e.g. *Nettles v. State*, 957 So. 2d 689 (Fla. 5th DCA 2007); *State v. Ragas*, 13 Fla. L. Weekly Supp. 530a (Fla. 9th Cir. Ct. 2005).

²⁶See *id.*

How to Deal With an IRS Determination of Employees v. Independent Contractors

John G. DeLancett

You arrive at your office and your assistant tells you that one of your clients has called with a problem. Apparently, a former worker did not file his tax returns for several years and now contends that it is the client's fault that he owes taxes. The former worker filed a Form-SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding with the IRS, claiming that he was an employee and that your client should have withheld his taxes. The client aptly reminds your assistant that you drafted independent contractor agreements for their workers.

Practitioners are often requested to prepare such independent contractor agreements. However, unless the client was informed of the risks of treating the worker as an independent contractor, the attorney may have a problem. This is because a written contract will not have much impact in any subsequent dispute with the IRS.¹

You call the client and ask him to forward the paperwork received from the IRS. The package from the IRS will include a Form SS-8 and a letter asking your client to answer a number of questions and to provide a number of documents. Among the documents requested will be any written agreements with the worker, all 1099 forms filed for the worker, and any other written documents pertinent to the issue. In the questionnaire, you will find the questions phrased in such a way as to prompt your client to hang himself. Questions like "how many other individuals do you have working with you that fall into this same category and for how many years?" suggest that the IRS' inquiry may just be the tip of the iceberg.

An IRS redetermination of a worker's status could have far-reaching consequences for your client. In addition to owing unpaid withholding and other employment taxes, perhaps for more than just the one individual, a redetermination may bring into question whether your client is also liable for those benefits typically made available to employees, such as health insurance coverage, vacation time, retirement plan participation (and possibly disqualification), employee stock options, along with any other benefits typically provided to individuals who are employees.

In response to the IRS inquiry, a detailed interview must be conducted with the client and those individuals who have knowledge concerning the facts. Clients often do not want to spend the time necessary to answer the IRS' questions in detail, but it is critical that you do so. Rarely will you want to answer questions in exactly the fashion phrased by the IRS. Additionally, all documents that support your client's claim that the worker was indeed an independent contractor must be gathered and provided to the IRS.

Those of you who have experience in this area may well be familiar with the old twenty questions set forth in Revenue Ruling 87-41, 1987-1 C.B. 296. These questions were designed to ferret out the details of the working relationship in an effort to determine how much control the client exercised over the worker. More control means the worker will be considered an employee. Less control could result in a determination that the worker



functioned as an independent contractor. No one factor by itself is controlling, and the IRS now gives a number of these factors less importance in light of modern business technology and practices.²

Both the IRS and the courts have been moving away from traditional areas of inquiry into so-called primary categories of evidence.

These categories include: (1) Behavioral Control, (2) Financial Control, and (3) Relationship of the Parties. These are further broken down into zones described as (1) Details of Work Performance, (2) Expenses, (3) Compensation for Work Performance, (4) Benefits, (5) Duration of Work, and (6) Location of the Work. These zones are then further broken down into additional sub-categories that, in many instances, very closely resemble the so-called twenty questions.³

Many times, after careful inquiry, the facts simply demonstrate that the worker was an employee. In these circumstances, the client and the attorney should consider pursuing alternatives for avoiding or minimizing tax penalties by preparing for a Section 530 presentation to the IRS and/or applying for settlement under the IRS' Classification Settlement Program, or "CSP" set forth in the Internal Revenue Manual, Sections 4.23.6.10 et seq.

The true lesson to business clients is that issues relating to worker classifications should be thoroughly explored when the client requests your services to draft an independent contractor agreement for its workers.



John G. DeLancett, Law Offices of John DeLancett, PL, has been an OCBA member since 1992.



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¹IRS Reg. Section 31.340 (c) -1(e)

²IRS Training Manual 3320-102 (October, 1996)

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Florida Bar Foundation News

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In addition, the Foundation has provided matching grants for two-year fellowships through the Washington, DC-based Equal Justice Works to place attorneys at the Legal Aid Society to work on special projects. Currently, EJW Fellow **Ericka Garcia** is at the Legal Aid Society advocating for services on behalf of the most vulnerable foster youth, those with development disabilities that will limit their ability to live independently when they out age out of foster care. Over the years, some of the Foundation's Summer Fellows and EJW Fellows have gone on to become staff attorneys at the Legal Aid Society. Among them are current staff attorneys **Cara Dobrev, Kira Romero-Craft** and **Tenesia Connelly-Hall**.

The Foundation also gives back to local bar associations in support of their service projects. In 2007-08, the Foundation provided a \$10,000 grant to the Orange County Bar Association for the development of a model program for people of modest means to pay a reduced fee for legal services, as well as a \$4,000 grant from its Voluntary Bar Association Community Service Grant Program to an Orange

County Bar Association project focused on crime prevention for children living in a high-risk area.

Unfortunately, over the past two years IOTA revenue has plummeted, mostly due to unprecedented low interest rates. The numbers are staggering. In 2006-07, IOTA revenue was \$44 million. Last year it fell to just under \$11.5 million, and this year IOTA revenue is projected to drop under half of that. Now, consider that the Foundation gives out more than \$33 million in grants each year and that the majority of that is funding on which legal aid organizations all over Florida are depending to sustain their work.

For the sake of those throughout Florida with nowhere else to turn to for civil legal assistance but legal aid, it is essential to mitigate the impact of the fluctuation of IOTA revenue. The most effective way to do that is to build The Florida Bar Foundation's endowment through donations and planned gifts, which provide the Foundation with the means to supplement IOTA revenue in a substantial way during lean years such as this one.

I hope The Florida Bar Foundation comes to mind the next time you consider making a charitable donation. It's truly an organization in which all of us, as Florida attorneys, can take tremendous pride, and one that brings critical resources back to our community.

In particular, I hope you will consider becoming a Fellow of the Foundation, if you are not already. Fellows are lifetime members of the Foundation, and it's easy to become one. Becoming a Fellow involves making a \$1,000 pledge, payable over five years (or ten years for young, nonprofit or government lawyers). Pledging is easy at www.floridabarfoundation.org.

Michael Cooper is the Annual Giving Manager of The Florida Bar Foundation. Michael is a member of the OCBA.





YLS *on the move*

Activities and Events

Sunny A. Hillary



Did you know that the Kentucky Derby is the oldest, continuous sporting event in the United States? The track, Churchill Downs, officially opened on May 17, 1875, but this isn't what our revelers were thinking about as they watched the race, pranced around in their Derby finery, enjoyed mint juleps and delicious edibles on the poolside deck of 55 West at this year's mini-Gala, the **Kentucky Derby Party** on May 1, 2010. There were other goodies, too, such as hand-rolled cigars, mint julep souvenir glasses (and gag-gift plastic ones, too), a "best dressed" contest, great music and dancing, and raffles galore. It couldn't have been more successful, and we owe a hearty thanks to the event chair, **Kim Webb**, and her busy cohorts, including **Jacquelynne Regan**, **Woody Rodriguez**, **Nick Shannin**, and many others. It was a fantastic way to support the OCBA Foundation and have fun. And let's not forget the YLS after party - always a blast! Many thanks to the organizers. You did a great job of extending the fun into the wee hours!

On April 15, 2010, the YLS was pleased to welcome to the YLS luncheon the recipient of the **2010 Lawrence G. Mathews, Jr., Young Lawyers Professionalism Award**, **Cara Dobrev**, GAL Litigation Director, Transitions Program of the Legal Aid Society. The OCBA 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, Cara shared her experiences as a lawyer in the Orlando legal community in the past years.

On April 30, 2010, the YLS joined the fight against cancer by sponsoring a team for the annual **Relay for Life®** event. The American Cancer Society Relay for Life is a life-changing event that gives everyone in communities across the globe a chance to celebrate the lives of people who have battled cancer, remember loved ones lost, and fight back against the disease. At Relay for Life®, teams of people camp out

at a local high school, park, or fairground and take turns walking or running around a track or path. This year, the YLS team camped out at Glenridge Middle School in Baldwin Park and took turns around the track from 6:00 p.m. until 12:00 p.m. the following day. On April 27, 2010, the YLS held a happy hour at Urban Flats and raised funds in support of the American Cancer Society. Special thanks to **Lisa Gong** for leading the YLS team and supporting this important cause.

And, many of you may have heard that the YLS is launching a **Law School Mentoring Program** with Barry Law School. This program will match YLS members with second- and third-year law students for one academic year beginning fall 2010. CLE credit may be available. As of press time, the dedicated email address for the YLS-Law School Mentoring program has not been posted on the OCBA website, but keep an eye out for that and other information in future email blasts and *The Briefs*. In the meantime, please contact **Kristopher Kest** at kristopher.kest@lowndes-law.com or 407-418-6285 if you are interested in serving as a mentor or participating as a law student mentee.

Speaking of matters of education, **Judge John Marshall Kest** is presenting a monthly series of informative **Brown Bag Lunch** meetings. The series has been developed particularly to fulfill the needs of young lawyers and be of assistance to them. The next meeting is scheduled for May 13, 2010, from 12:00 p.m. to 1:15 p.m. in the 23rd floor Judicial Conference room at the Courthouse. May's topic will be *The Use of Evidence and Demonstrative Aids in the Courtroom*. Attendees should RSVP to Judge Kest's Judicial Assistant, Diane, at ctjadi1@ocnjcc.org. If you plan to attend, you are encouraged to submit questions in advance to Diane under your signature or anonymously. Look for more information in upcoming email blasts and on the OCBA website.

This is the season for "seasoning" young lawyers as well as those who might need a brush up. The YLS will hold its

annual **An Afternoon at the State**

Courthouse on Friday, June 11, 2010. The seminar is intended to provide insight into local judicial practices and procedures and has been designed for attorneys, law students, paralegals, other legal professionals, and the public. The fee is \$10. The RSVP and payment deadline is June 4, 2010. Checks should be made payable to the OCBA and sent to Mike Remensnyder at the OCBA offices. For more information, feel free to contact **Jonathan Stimler** at jstimler@lseblas.com or 407-481-5835.

The upcoming summer is the time to begin preparing for the 2010-2011 school year. For the past several years, the YLS has sponsored the **Back Pack Project** for the students of Rock Lake Elementary School. Keep an eye out for your chance to donate needed school supplies to Rock Lake Elementary School, including crayons, pens, pencils, markers, notebook paper, sets of beginning word flashcards, construction paper, binders, scissors, protractors, tissues, notebook pencil pouches, backpacks, and more. Thanks in part to the Backpack Project and the continuous support of the YLS in past years, Rock Lake has risen from an "F" school to an "A" school. Let's help the students of Rock Lake continue to succeed in the 2010-2011 school year!

Please join us on May 15, 2010, for an afternoon of fun and games and lunch with the kids at the **Great Oaks Village!** Since 1924, Great Oaks Village has been home to thousands of children between the ages of six and eighteen who were removed from their homes due to abuse, neglect or abandonment. Great Oaks Village is a wonderful campus that offers educational services, counseling services, recreational services, and independent living preparation to the children. For more information, please contact **LaShawnda Jackson** at ljackson@rumberger.com.

The **OCBA's 6th Annual Texas Hold 'Em Charity Poker Tournament &**

Happy Hour will take place on May 13, 2010, at Slingapours! Registration begins at 5:30 p.m., the tournament begins at 6:00 p.m., and the entry fees are \$25 for players - advance registration, \$35 for players - at the door, and \$15 for non-players. Come and enjoy complimentary beer and food provided by event sponsor, M&I Bank. For more information and to RSVP, please contact **Bill Umansky** at bill@thelawman.net.

Finally, on May 20, 2010, we will have our annual **"Passing of the Gavel"** ceremony, where **Ryan Davis**, President of the YLS, will hand over the gavel to **Eric Reed**, President-Elect of the YLS. This luncheon is always a memorable one as the President reviews the events that the YLS has participated in over the course of the past year, and past Presidents of the YLS attend to offer their invaluable advice to the President-Elect. Please email your RSVP to ocbayls@gmail.com.

The **YLS June Luncheon** will take place on **June 17, 2010**, at 11:45 a.m. at the Citrus Club. Please email your RSVP to ocbayls@gmail.com. If you RSVP before June 14, 2010, the cost is \$20 for lawyers and \$12 for law students, government attorneys, solo attorneys, and judges; a late charge of \$2.00 will be added if you do not RSVP.

If you want to find out more about our section and its committees and events, please 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, P.A. She has been a member of the OCBA since 2005.

The Young Lawyers Section of the Orange County Bar Association Presents *An Afternoon at the State Courthouse*



This seminar provides helpful hints for area attorneys as they practice before the Circuit and County Judges of the Ninth Judicial Circuit. It is also intended to provide insight into local judicial practices and procedures, and is designed for attorneys, law students, paralegals, and other legal professionals. The seminar is open to the public.

Friday, June 11, 2010

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The Orange County Bar Association is pleased to provide you with a list of 2010 Preferred Vendors – a variety of businesses that have provided Central Floridians with time-tested, quality products and services, and are supporters of the Orange County Bar Association. We encourage you to take advantage of the products and services offered by these establishments. Many businesses on the list offer special promotions or discounts to help you continue to grow your practice and be successful both in the legal field and in the community.

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RECENT SUPREME COURT CASES Will Jay

***Bobby v. Van Hook*, 130 S. Ct. 13 (2009) (decided 11/09/09)**

A unanimous Court sided with the state of Ohio that Mr. Van Hook did receive effective assistance of counsel during the penalty phase of his trial in wherein he received the death penalty. This case includes an interesting discussion on the evolution of the ABA guidelines for effective assistance of counsel in capital cases and what role those guidelines should play in setting the bar for what is effective assistance of counsel.

***Wong v. Belmontes*, 130 S. Ct. 383 (2009) (decided 11/16/09)**

A another unanimous Court sided with the state of California that Mr. Belmontes did receive effective assistance of counsel during the penalty phase of his trial wherein he received the death penalty. Defense counsel had presented a limited amount of mitigation evidence because there was a risk of opening the door to evidence that Belmontes had committed a prior murder. Avoiding the discussion of whether the attorney had deviated from what was reasonably expected in an attorney's performance, the Court sided with California that the decision did not prejudice the outcome of the penalty phase. The additional mitigation evidence that was proposed would have opened the door to the prior murder. Considering this new aggravating evidence in the context of the new mitigating evidence, the Court held that it could not be said that the outcome of the penalty phase would have been any different.

***Porter v. McCollum*, 130 S. Ct. 447 (2009) (decided 11/30/09)**

In *Porter v. McCollum*, a unanimous Supreme Court chastised the Florida Supreme Court for its unreasonable application of *Strickland* to Mr. Porter's claim of ineffective assistance of counsel during his death penalty sentencing proceedings. His attorney failed to interview family members, failed to attempt to

secure school and military records, and failed to present mental health mitigation. While the Florida Supreme Court did not find that the two days of mitigation evidence unearthed during Mr. Porter's habeas proceedings would have had a reasonable chance of changing the outcome of the sentencing hearing, the entire Supreme Court disagreed. Some of the facts not presented at the original sentencing included an abusive childhood at the hands of his father and heroic performances during two particularly viscous battles in the Korean War that likely left him diagnosed with post traumatic stress disorder (PTSD).

***Michigan v. Fisher*, 130 S. Ct. 546 (2009) (decided 12/07/09)**

The application of the "exigent circumstances" exception to the warrant requirement was at issue in *Michigan v. Fisher*. Officers responded to a call regarding a disturbance and found a car with damage to it, along with property damage apparently caused by the car

and a blood trail leading from the hood of the car to the house. Inside they saw an apparently very agitated Mr. Fisher throwing things presumably at someone else, and he was apparently the source of the blood trail. He had also barricaded himself inside with a couch. When an officer pushed the door ajar to come inside, Mr. Porter responded by aiming a long barreled gun at the officer which resulted in a criminal charge being filed against him. At issue was whether the officer's observation of the gun being pointed at him should be suppressed as the result of an unlawful entry into the home without a warrant. The Court decided that it was a rather straight forward application of the "exigent circumstances" exception recently addressed in *Brigham City v. Stuart*, 547 U.S. 398 (2006) (emergency aid exception). Justice Stevens, joined by Justice Sotomayor, dissented primarily under the reasoning that it was a factually intensive analysis which the trial court had to engage in and that the evidence was not compelling enough to show that the lower court's decision was unreasonable.

***Beard v. Kindler*, 130 S. Ct. 612 (2009) (decided 12/08/09)**

A t issue in *Beard v. Kindler* was whether a Pennsylvania state law which allowed a trial court discretion to dismiss a capital murder defendant's post-conviction claims because he escaped from custody was an adequate state ground to prevent a federal court from entertaining a federal petition for habeas corpus. Both parties agreed that discretionary state statutes such as Pennsylvania's do not automatically make the statute inadequate under the "adequate state ground doctrine." So, without dissent, Chief Justice Roberts delivered the Court's opinion that the state law properly granted the state court such discretion. Justice Kennedy wrote a separate concurring opinion to which Justice Thomas joined. The main rationale was that judicial discretion is a good thing in these areas and that a contrary holding would encourage state legislatures to take away such judicial discretion.

***McDaniel v. Brown*, 130 S. Ct. 66 (2010) (decided 01/10/10)**

A unanimous Court reversed the Ninth Circuit Court of Appeals which had held that no rational trier of fact could have found proof of Brown's guilt beyond a reasonable doubt. Mr. Brown had been convicted of raping a nine-year-old neighbor. There were some conflicts in the testimony, but there was also DNA evidence that matched Mr. Brown's DNA profile (to some extent). Complaints about the reliability of the DNA evidence began with his post-conviction attack on his attorney's effectiveness, rather than at trial. When those attacks failed, he turned to the federal courts and, rather than making the typical insufficiency of evidence arguments, he again argued that Nevada's DNA evidence was unreliable and should not be included in the analysis of whether what the jury heard was sufficient to convict him. The District Court accepted his arguments, as well as a new defense DNA expert report (Mueller report) generated eleven years after his trial, and granted habeas relief. In turn, the Ninth Circuit Court of Appeals affirmed and held that the admission of the government's DNA results violated his right to due process and that when considering the remaining evidence against Mr. Brown, the evidence was insufficient for a conviction. The Supreme Court held that while parts of the statistical portion of the government's DNA expert's testimony may have been misleading, the evidence was still sufficient when held under the proper light of evaluating the evidence in a light most favorable to the government. Justice



Thomas wrote a concurring opinion, joined by Justice Scalia, which that the Court wasted its energy spending so much time arguing “even if” Mr. Brown had presented his defense expert at trial it wouldn’t have mattered because the proper standard was simply to evaluate whether what was presented at trial was sufficient or not. This case is a must read for people handling DNA in criminal cases, particularly the part about the “prosecutor’s fallacy.”

***Smith v. Spisak*, 130 S. Ct. 676 (2010) (decided 01/12/10)**

In another death penalty case, the Court addressed whether the jury instructions unconstitutionally required the jury to be unanimous about a mitigating factor before considering it in its analysis versus the aggravating factors in favor of the death penalty. Only Justice Stevens disagreed with Justice Breyer’s opinion for the Court that the instructions given did not make the jury believe that was what was required. In his concurring opinion, however, Justice Stevens viewed the error as harmless given the entire context of the record. In Mr. Spisak’s second claim, that his counsel was ineffective during his penalty phase closing argument, the entire Court agreed that no matter how bad the argument was, and the portions recounted are very bad, it would not have had any reasonable probability of affecting the outcome

of the sentencing proceeding. Unfortunately for Mr. Spisak, the only thing worse than his attorney’s sentencing phase argument were the facts, most of which came from his own mouth.

***Presley v. Georgia*, 130 S. Ct. 721 (2010) (decided 01/19/10)**

The Court granted a petition for writ of certiorari and reversed the Supreme Court of Georgia. Mr. Presley’s uncle was in the courtroom during “trial call” and was asked to leave by the trial judge to make room for potential jurors for jury selection. Apparently jury selection in DeKalb County, Georgia, is performed like it is here in the Ninth Circuit – the gallery for the public is turned into the group *voir dire* seating section. Mr. Presley objected and did not offer any alternative to the judge closing the courtroom to the public. While the Supreme Court of Georgia found fault with him for not providing the trial court

alternatives, the United States Supreme Court did not. A trial court must consider all reasonable alternatives to closure even if there is an overriding interest in closing *voir dire* to the public, which the Court was far from being convinced of as well. Justice Thomas dissented from the opinion, joined by Justice Scalia, writing that the case should not have been summarily disposed of in the Court’s granting of certiorari. They questioned whether it is so firmly established that jury selection is a part of the Sixth Amendment’s “public trial.”

***Wellons v. Hall*, 130 S. Ct. 727 (2010) (decided 01/19/10)**

Easily the most curious of the death penalty cases this term, this case has at the center of its controversy some chocolate

covered genitalia being exchanged between the judge, bailiff, and jury. The Georgia Supreme Court affirmed his conviction and death sentence. His counsel had only learned of the gift exchange after the trial and had no record to present to the Georgia Supreme Court on the issue. He sought habeas relief in state court and moved to develop evidence, but his request was denied under the principle of *res judicata*. The Federal District Court and the Eleventh Circuit Court of Appeals subsequently ruled his federal habeas requests for relief were procedurally barred. The Supreme Court granted certiorari, vacated the judgment, and remanded the case on the belief that it was reasonable to think that the lower court would reach a different decision based upon a recently decided case, *Cone v. Bell*. *Cone* held that federal courts are not procedurally barred from hearing habeas petitions just because a state court denies relief on the grounds of *res judicata*. Justice Scalia’s dissent, in which Justice Thomas joined, urges that because the lower court also decided the case on the merits that Wellons was not entitled to habeas relief. Justice Alito, joined by Chief Justice Roberts, filed a separate dissent but also stressed that the Eleventh Circuit was explicit in stating that it found no merit to the habeas claims and that “GVR,” granting certiorari, vacating the judgment, and remanding was the inappropriate thing to do. The Court’s counter to the dissent was that because the lower court felt it was procedurally barred from granting relief, perhaps it had not considered that while granting habeas based on the limited record and that maybe it should have granted an evidentiary hearing to allow Wellons to develop a record for habeas relief.

***Wood v. Allen*, 2010 WL 1006147 (U.S. 2010) (decided 01/10/10)**

Wood v. Allen involved the relationship between 28 U.S.C. 2254(d)(2) and 28 U.S.C. 2254(e)(1), two sections of a statute regarding the federal standard of review for factual determinations made in State habeas corpus proceedings. However, Justice Sotomayor, writing for the Court, held that the Court need not reach the issue of the relationship of those two sections because even under the lesser burden presented by section (d)(2) the record did not support that the state court’s decision to reject his habeas claim had been “based on an unreasonable determination of the facts.” At issue was the state court’s decision that trial counsel’s decision not to present mental health mitigation evidence during the penalty phase of a death penalty case was a strategic choice. Justice Sotomayor, as well as the Chief Justice and Justices Scalia, Thomas, Ginsburg, Breyer and Alito, decided that the state court’s decision had not been unreasonable. The Court also found that Wood’s petition for certiorari did not raise the issue of whether this strategic decision was reasonable, so they did not address that issue. Justice Stevens, writing for himself and Justice Kennedy, dissented, arguing that the record did not support an adequate enough investigation into Mr. Wood’s mental health mitigation issues to reasonably conclude that his counsel made a strategic choice to not use it.

***Wilkins v. Gaddy*, 130 S. Ct. 1175 (2010) (decided 02/22/10)**

In another *per curiam* opinion, the Supreme Court granted certiorari and reversed the lower appeals court in *Wilkins v. Gaddy*. Mr. Wilkins had filed a claim against a corrections officer, Mr. Gaddy, under 42 U.S.C. 1983, claiming his civil rights were violated by the beating he received from Mr. Gaddy while he was working as a corrections officer. The U.S. District Court had dismissed his claim because his injuries were “de minimis.” However, the Court held that under *Hudson v.*

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Supreme Court

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McMillian, 503 U.S. 1 (1992), the issue was not the extent of the injury but rather the nature of the force used. Justice Thomas, joined by Justice Scalia, concurred in the decision but expressed that they felt *Hudson* should be overturned.

***Thaler v. Haynes*, 130 S. Ct. 1171 (2010) (decided 02/22/10)**

In still another *per curiam* decision, the Court held that *Batson*

does not require a trial judge to personally observe the demeanor an attorney describes when offering a race/gender neutral explanation for his or her peremptory challenge. In this particular case, one trial judge had presided over the actual *voir dire*, and then a second presided over the jury selection process after questioning was completed.

***Florida v. Powell*, 130 S. Ct. 1195 (2010) (decided 02/23/10)**

In 2008, the Florida Supreme Court held that telling a suspect that he had the right to consult with a lawyer “before” questioning and he could invoke that right, among the other *Miranda* rights, at any time “during” questioning was not adequate enough under *Miranda* for conveying that a suspect has the right to consult with a lawyer “during” questioning. Justice Ginsburg wrote for the Court that the warnings given to Mr. Powell were adequate enough for conveying the *Miranda* right to consult with a lawyer during questioning and that it was not misleading to tell a suspect that he

had the right to consult with a lawyer prior to questioning and that he could exercise that right later during questioning. She was joined by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Alito, and Sotomayor. The Court also held that the Florida Supreme Court’s decision did not rest independently on a similar provision in our state constitution, Article I, Section 9. Justice Breyer agreed with the Court on that point, but disagreed on the merits of whether the *Miranda* warnings were adequate. Justice Stevens dissented on both the question of whether there were independent state grounds and on the merits of the *Miranda* warnings.

This is what Mr. Powell was informed of prior to questioning:

You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview.

Therefore, law enforcement and defense attorneys should still be prepared to see whether the Florida Supreme Court will return to the issue of whether *Miranda* warnings like the one above meet the standards of the Florida Constitution at Article I, Section 9.

***Maryland v. Shatzer*, 130 S. Ct. 1213 (2010) (decided 02/24/10)**

The issue in *Maryland v. Shatzer* was whether or not a suspect being “released” back to the general prison population after an attempted interrogation qualifies as a break in custody under *Edwards* thereby allowing the government to reinitiate questioning at a later time without violating *Miranda*. The Court, in an opinion written by Justice Scalia, held that being released back into “general population” is a break in “*Miranda* custody” as long as the incarceration is the punitive portion of a sentence as opposed to pre-trial detention. The Court further held that fourteen days is the black and white line for how long this break in “*Miranda* custody” must be before the government may reinitiate questioning after someone invokes his *Miranda* rights. Justice Thomas concurred with the decision, but disagreed with the arbitrary fourteen-day rule imposed by the Court. Justice Stevens also concurred in the judgment, but he rejected the fourteen-day rule on different grounds. He felt as though it ignored other important factors such as whether or not an indigent defendant, who was promised a lawyer in his first round of *Miranda* warnings, may feel that he was lied to if questioning resumes fourteen days later without having been given a lawyer. In explaining his rationale for agreeing with the decision, he points out that surely after two and a half years, the length of time between interrogations in this case, that Mr. Shatzer had to realize that an attorney was not coming.

***Johnson v. United States*, 130 S. Ct. 1265 (2010) (decided 03/2/10)**

Mr. Johnson was subjected to enhanced sentencing in federal court for having been previously convicted of three “violent” felonies. At issue was whether or not a conviction under Florida law for the felony of battery with a previous battery conviction is a “violent” felony under federal law. Since nothing in the record indicated whether the felony battery was based upon intentionally causing bodily harm to another person or intentionally striking another person against his or her will or intentionally touching another person against his or her will, the Court assumed the last, least violent, option under the disjunctive language in the statute. Justice Scalia, again writing for the Court, held that touching another person against his will did not meet the definition of “physical force” for making a prior conviction a violent felony. Interestingly, the dissent came from two of the other more conservative members of the Court, Justices Alito and Thomas, who disagreed with the Court’s exclusion of the typical common law meaning of misdemeanor battery from the meaning of “physical force.” They took the position that the Court had unjustifiably read into the statute a requirement of “violent force.”

***Bloate v. United States*, 2010 WL 757660 (U.S. 2010) (decided 03/8/10)**

Statutory interpretation was at issue in *Bloate v. United States*. Specifically, the question was whether or not the defendant’s request for more time to file pretrial motions triggered an



PHOTO: Supreme Court Building, Krista Bartholomew

automatic extension of time under one part of the statute or if the defendant's request for more time could only extend the time for a speedy trial if the district court made specific findings as required by another portion of the statute. Justice Thomas, joined by Chief Justice Roberts and Justices Stevens, Scalia, Kennedy, Ginsburg and Sotomayor, made up the majority. They held that a defendant's request for more time to file pretrial motions does not trigger an automatic extension of time under the act (18 U.S.C. 3161(h)(1)), but rather, the

district court must make specific findings as required by a separate portion of the act (18 U.S.C. 3161(h)(7)). If you are not familiar with the differences between the federal speedy trial rules and Florida's, this case is very illustrative of the differences. Part of the Court's holding relies on the fact that it is not just the defendant's right to speedy trial, but also the government's and the public's. According to the Court, by automatically counting a defendant's request for more time to file pretrial motions, a defendant could frustrate the government's and public's right to

a speedy trial on the merits. Justice Ginsburg filed a separate concurring



opinion highlighting yet another interesting division in the Court this term. Justice Alito was joined by Justice Breyer in his dissent.

Will Jay is a Board Certified Criminal Trial Attorney with Carsten & Ladan, P.A. He has been a member of the OCBA since 1996.

President's Message

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that the future and continued success of the OCBA is in good hands. I have also experienced three outstanding social events presented by our sponsors and organized by our Social Committee Co-Chairs, **Bill Umansky** and **Shayne Thomas**, with the fourth event, the annual Poker Tournament, yet to come. Each event has drawn a different group of OCBA members, but those that have attended have enjoyed a great night of fellowship. And then there was this past month's Kentucky Derby Party, which was not the OCBA Gala. While it took a great amount of courage to depart from the annual theme for just one year and an even greater amount of work to organize, our Committee Chair **Kim Webb** and her sidekick **Jacquelynne Regan** both pulled off an incredible event that was truly memorable and unique. Given the state of our economy the turnout and response was fantastic as we raised some funds for the OCBA Foundation.

Finally, I could not have accomplished any of the things I set out to accomplish this year without an abundance of faith: faith in God that my commitment to the organization would lead to a greater good. Faith in my fellow colleagues that they would continue to represent us well and defend and prosecute their client's matters with professionalism and dignity; faith in the judges that administer our overburdened judicial system and faith that they would dispense justice without prejudice or malice; faith in my partners at Marchena & Graham that they would continue to support me in this enduring endeavor; faith in my friends and fellow members on the **Executive Council** that they would contribute whenever I needed their assistance; and, above all else, faith in the support and love from my family regardless of the number of e-mails or

phone calls that had to be made to get the job done. I thank you once again for giving me the opportunity of a lifetime and I wish our incoming OCBA President, **Frank Bedell**, continued success in the coming year.

A Few Final Announcements

This past year I have been invited to participate in the 2010 Commission to Improve the Civil Justice System led by past OCBA President **David King**. The work of this committee, I feel, will be vital to helping streamline some efficiencies in our courtrooms and to provide some invaluable input to the system. Much like the Bench-Bar Conference this year brought our judiciary and the OCBA a little closer together, this Commission will also help us bridge that gap by voicing our recommendations which will hopefully result in some meaningful changes. But, we need your input. In the coming weeks please take about ten minutes to complete a survey that will be sent to you and give us your opinions on the state of the judiciary and the clerk's system. Without your input, change will not be as effective. Please take a short break and complete that survey when it comes in.

Also, this year the Florida Bar Foundation is renewing its Fellows Campaign in Orange County. The Fellows program is

one which asks our Florida Bar members to make a modest \$1,000 contribution over a five-year period or less and for young lawyers over a ten-year period or less. The Florida Bar Foundation is the steady source of income that supplies the Legal Aid Society with a good portion of the funds not generated from our in-lieu of service fees so that our full-time *pro bono* attorneys can do great things in our community. The Foundation provides the auditing and evaluation of legal aid organizations statewide so that they can be accountable and efficient in the eyes of their members. Moreover, the Foundation serves the entire state but is headquartered here in Orlando not in Tallahassee. Surprisingly, out of the nearly 3,000 OCBA members only 119 are currently Fellows. As we welcome in a new Florida Bar President in the next month, **Mayanne Downs**, and only the fourth from Central Florida, I would encourage you to attend our reception to be held on June 16, 2010, at 5:30 p.m. at the OCBA Offices and support our Florida Bar Foundation. For more information, you can contact me even after I become a Past President at woodyocba@aol.com.

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

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Guidelines for Lawyer and Law Firm

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Approved by The Standing Committee on Advertising (January 1, 2010)

Effective July 1, 2010, lawyer and law firm websites must comply with the general lawyer advertising requirements set forth in Rule 4-7.2, Rules Regulating The Florida Bar. Although websites must comply with these requirements, they are not required to be filed with The Florida Bar for review. Rule 4-7.8(f), Rules Regulating The Florida Bar. The Florida Bar Board of Governors has adopted a policy that The Florida Bar will not accept voluntary filings of the entire contents of a lawyer or law firm website, although staff of the Ethics and Advertising Department will respond to specific questions involving a specific phrase or image to be included on a website. To make such an inquiry, please call the Ethics and Advertising Department at (800) 235-8619.

Many law firm websites may contain information that is prohibited by the lawyer advertising rules, such as testimonials or endorsements from clients and others, past results of the law firm, and statements characterizing the quality of legal services (for example, the firm offers high quality legal services, or excellent legal services).

The Standing Committee on Advertising has determined that a lawyer or law firm can create a portion of the website which contains information that can be provided only at the request of a prospective client, and is therefore not subject to the lawyer advertising rules under Rule 4-7.1(f). Testimonials and endorsements, past results, and statements characterizing the quality of legal services may be included in such a section if the information provided is truthful and not misleading, either by itself or in the context in which it is given. If testimonials or past results are provided, sufficient information about the matter also must be provided to allow the consumer to evaluate the testimonials or results. Testimonials and past results may be included only with the informed consent of the client to which the matter relates (see Rule 4-1.6(a), Rules Regulating The Florida Bar). In order to be considered information that is given at the request of a prospective client, the information must be accessible **only** after viewing a disclaimer page and making an affirmative acceptance that the viewer has received the disclaimers provided below.

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[Revised: 03-11-2010]

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Anita L. Lohman, CFA

Anita Lohman recently joined PNC Wealth Management as a Vice President and Senior Investment Advisor. She has spent almost 30 years working in the financial services industry and the past 20 years managing stock and bond portfolios for clients. She has helped both high-net-worth clients and institutions achieve their financial goals.

Prior to joining PNC, Anita was a Senior Portfolio Manager and Principal of Capital Management Associates, and the Regional Managing Director for SunTrust Personal Asset Management, where she managed the investment staff in the North and Central Florida regions with approximately \$4 billion in assets under management. During this time, she personally managed approximately \$200 million for individual clients.

Anita received her BA in Economics from Rollins College and earned the Chartered Financial Analyst designation in 1995. She is a member of the CFA Institute and is a past president of the CFA Society of Orlando.



On March 30, the Solo & Small Firm Committee presented "What Every Attorney Needs to Know: Marketing to Maintain Trust Accounts," sponsored by M&I Bank and Westlaw.



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OCBA Membership Directory



RCL Portrait Design will be at the OCBA from June 14, 2010 through June 25, 2010 to take your free professional portrait for publication in the OCBA Membership Directory.

The Directory is one of our most valued member benefits. In fact, many members use the Directory daily to locate colleagues, put a "face to a name," and conduct business. Publishing a current photo, along with your name, firm name, address and contact information will make the Directory more valuable than ever.

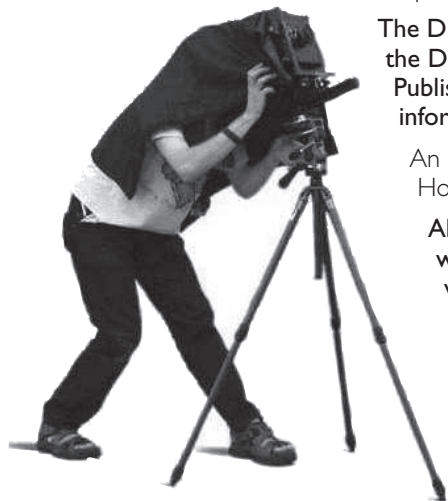
An RCL representative will contact you in the near future to schedule an appointment. However, feel free to contact RCL directly at 800-580-5562 to schedule your sitting.

All sittings are free of charge, and the photo you select for the Membership Directory will be published at no charge. RCL will also take additional shots and provide you with an opportunity to purchase a photo package for your professional or personal use.

We are pleased to bring you this free member service. RCL has produced professional portraits for more than 21 state and local bar associations and 22 medical facilities across the nation.

We look forward to seeing you at the OCBA Center in June.

(For professional photos, appropriate dress is suggested. Ladies: a bold or bright colored long sleeved outfit. Gentlemen: a dark jacket and tie.)



Rainmaking 101 Referral Source Interview

Think about this: many of your referral sources are sending business to other attorneys in addition to what they send you. They may like you, but for whatever reason, they are spreading the work out to two or three other attorneys, so you only receive 25% or 30% of their work. In some cases, this is an appropriate allotment due to your limited areas of specialization – **but in some cases the work is spread out due to other factors.**

Unfortunately, they may never tell you about these other factors that influence to whom they'll send work. Perhaps your turn-around time is too slow. Or maybe you don't keep them informed well enough. It could be you haven't treated their referrals the way they think you should and they've gotten negative feedback about your office. Or maybe you take your referral sources for granted and haven't thanked them lately for the clients they send.

A great many attorneys make this same mistake: they ignore the substantial revenue that their referral sources provide and are caught off guard when one defects. Have you ever had a referral source just drop off the radar screen? Someone who used to send a lot of business, then stopped for some reason? They haven't moved, died or changed their business model and you don't know why the referrals just stopped.

Find out.

And don't wait until something negative happens. Here's more bad news: If you don't take very good care of your referral sources, someone else will. Competition for referral sources is on the increase. If you haven't thought about your referral sources as the valuable asset that they are, calculate their worth to you, not just over the course of one year, but over the lifetime of your practice. One good referral source can send many thousands of dollars worth of business, sometimes hundreds of thousands of dollars. If you want them to feel as important as they are, ask their opinions on your practice and how it serves the people they send.

Interestingly enough, an opinion-gathering conversation like this is useful for far more than just gathering information. It builds rapport and intimacy. Why? Because, as with all of our strategic interviews, the individuals you ask questions of will come away complimented that you asked their opinions. From their perspective, it means you care about them, and value what they think. It signals that you are paying attention to their needs and those of their clients. It indicates you are not just taking their referrals for granted but recognize their importance to your success.

To try this for yourself, go out and interview three to five people who have referred you business in the past. Start out with the ones you are most comfortable with, just to get your feet wet. Then specifically target those you'd like to receive more business from in the future. Lead off the conversation with your version of the following statement:

"I admire and respect the way you do business (or, I'm always trying to improve the level of service to our clients) and I'd like to ask your opinion on something. Is

there anything I can do to improve how I handle the clients you send me?"

The referral source may initially refuse to say anything negative in response to this question. Press them gently by asking first a more positive question, then moving to more pointed questions:

"OK. What do you think we do well?" Wait for the response, then, "Could we improve on any of those aspects of the practice?"

Then move to, "Is there anything you suggest I stop doing, or change completely, about how we deal with clients?"

Alternately, "What are three things you'd suggest I could do better?"

It is of paramount importance that you not go into a defensive posture if any negative comments are made. This will shut down the flow of information and indicate that you really weren't open to constructive suggestions. View any nuggets of information gleaned from the conversation, whether they be positive or negative, as very valuable and thank the person for their opinions. Don't provide excuses, don't accuse the referral source of having impossible standards, just thank them and say that you'll use everything they mention to enhance the level of service you provide to clients. Nine times out of ten the referral source won't have anything substantially negative to say, but will just be complimented that you've asked them. This conversation opens the door to more referrals from that referral source who could be spreading the work around to other attorneys. Why? Because you cared enough about their clients to ask these kinds of questions. And we guarantee you – most of the other attorneys they may be sending work to, do not.

The power of this strategic conversation lies in the unique advantage it creates – it sets you apart from your competition and increases the likelihood that when that referral source has a client to send, they think of you. We call it "Top of Mind Awareness," and you can't succeed without it. Test this theory for yourself and schedule an interview as a client development experiment– what do you have to lose?

Mark Powers, President of Atticus, Inc., and **Shawn McNalis**, co-authored the recently published *How Good Attorneys Become Great Rainmakers* 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.



Mark Powers



Shawn McNalis

Presentation Skills for Lawyers

Are you Memorable?



Elliott Wilcox

The next time you speak to an audience, what do you want them to remember about your presentation? * Do you want them to remember two or three simple things that will change their future legal situation? * Do you want them to remember some simple changes they can make in their employment policies to help avoid needless litigation? * Or maybe you just want them to remember who you are so that they can retain your legal services in the future?

Regardless of how valuable your information is or how exciting your presentation is, you might have some difficulties getting your audience to remember everything you say. According to a recently released report by the Bureau of Conveniently Made Up Statistics (B.O.C.M.U.S.), after 24 hours, your audience will remember less than a third of what you said, no matter how well you deliver your presentation. Within 72 hours, they'll forget that you even spoke to them, and after a week, they'll have no memory of ever going to the meeting, luncheon, or conference at which you spoke. Your personal experiences probably backup these made-up statistics. For example, think back to the last bar luncheon you attended. Do you remember how many points the speaker presented? Can you remember the main point of the speaker's presentation? *Do you even remember the speaker's name?*

Imagine all the hard work that they invested in crafting their presentation. Yet, you scarcely remember what they talked about. Now here's the scary question: How are you going to prevent your presentation from falling into a similar mental black hole and vanishing from your audience's memory as soon as you walk out of the room?

The harsh reality is that your audience *will* forget almost everything that you say. Even if you karate chop your way through flaming blocks of ice and juggle chainsaws to back up your main points, your audience still won't remember *everything* that you say. You can deliver the most phenomenal presentation they've ever seen, and at most, they'll only remember two or three major points. This isn't a problem with your audience's intelligence: You'll face the same limitation regardless of whether you're speaking to a group of high school dropouts or a group of PhD's. That's because we all have a very limited amount of mindspace to invest in a speaker's presentation. Everyone's minds are already cluttered with "To Do" lists, problems at work, and who to vote for on *American Idol*. At any given moment, our minds are awash with hundreds, possibly thousands, of competing thoughts, images, and deadlines.

All of those competing thoughts make it difficult for you to capture a significant portion of their minds, so rather than fighting against your audience's mental programming, why not adapt your presentation to match their expected behavior? Rather than trying to cram ten or fifteen points into your presentation or asking your audience to remember a half dozen new techniques, narrow the focus of your presentation.

A good start would be to limit your presentation to three solid, memorable points. Rather than spending three minutes on fifteen different topics, you could invest fifteen minutes on each of your three most valuable points by reinforcing each major point with examples, visual aids, and (best of all) – stories. By reducing the breadth of your presentation and repeating each point several times (in different ways, to avoid redundancy), you play into your audience's mental programming. This helps them re-

member the main topics of your presentation and makes it easier for them to remember what you said.

Limiting the scope of your presentation is helpful, but it's not enough to guarantee that your audience remembers what you said. If you *really* want your audience to remember (and act upon) what you said, you need to go one step further and give them a task to accomplish before the end of the day.

For example, let's say that you're a tax lawyer speaking to the Rotary group and you want to help your audience lower their tax burden next year. Even though this is information that your audience is probably desperate to hear, the reality of the situation is that most of them won't do *anything* with the information, because they'll file it away in the back of their heads and then forget about it. If they're going to remember what you said *and* do something with the information, you need to get them to take an action step before they go to bed tonight. The action step should be easy to remember and simple to complete, such as:

- "When you get out to the parking lot, pick up your cell phone and call your accountant to set up an appointment by week's end to review your current tax situation and see how these three tips I've discussed can improve things for next year."
- "Before you walk out of this room, put a reminder in your phone's calendar or in your daily planner to set aside one day next month to clean out your closet and donate clothes to Goodwill for a treasure chest of tax deductions."
- "As soon as you get back to your office, get on your computer and go to my website to download the free special report, *10 Tax Saving Tips That Most Professionals Overlook*. You'll see all of the strategies I discussed today, as well as three others that you can apply to this year's tax return."

By giving them a compelling assignment to complete before the end of the day, you'll prod your audience to take action, which is the best possible way to reinforce your message in their minds. According to the B.O.C.M.U.S. report, when your audience members take action, they're 412% more likely to remember your presentation, and will remember it 174% longer than normal. If you can get them to take action, your message will be burned into their brains. And that's exactly why you need to take action *right now*. Before you turn this page, take out a sheet of paper and write down, word-for-word, the specific task that you'll ask your audience to perform in your next presentation. Congratulations on becoming a better presenter – you just gave everyone a reason to remember what you'll say.

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Elliott Wilcox is the editor of **Trial Tips Newsletter**. To get your free copy of his special report, "How to Successfully Make & Meet Objections," visit www.TrialTheater.com

PARALEGAL *post*

Hon. Faye L. Allen



resources to the success of the Pathways In Law Program in recognition of Law Week.

A critical mission of the legal profession is to provide legal education and awareness to our citizenry. Legal education is especially vital to our youth. The Pathways in Law Program, Co-chaired by Circuit **Judge Bob LeBlanc** and County **Judge Faye Allen**, provides a forum for legal education to a wide cross section of youth in our community. This program gives teens an opportunity to learn about the legal system, and the various professionals within the system, in a positive manner. An important component of the program includes a legal presentation by the judges which provides an overview of various career paths in the legal profession.

This year the Pathways Law Week event hosted students from three community centers, including Hope Community Center in Apopka, Rosemont Community Center and the Parramore Kidz Zone. On March 30, 2010, approxi-

mately 20 students from each center were transported to the Courthouse for a full day of learning about the legal system. The students participated in a mock trial and were greeted by special guest, **Mayor Buddy Dyer**, who has supported this program since its inception. **Judge Wilfredo Martinez** served as the Presiding Mock Trial Judge in a realistic version of a trial that showed the students the dangers of associating with friends who do drugs. The program included a jail visit and the students and chaperones were treated to a luncheon at the courthouse.

The OCBA Paralegal Section, with the enthusiastic support of President, **Lori Spangler**, as well as a number of paralegals affiliated with the Central Florida Paralegal Association (CFPA) including President, **Nikki Rodeman** and Vice-President and President Elect, **Natalie Colon**, assisted in chaperoning, serving lunch and escorting the students during the jail visit. The students were thrilled when the parale-

gals presented each participant with a goody bag, making for a very memorable event. This involvement is certainly notable and reinforces the mission that paralegals have for community outreach and professional development.

For the past three years the Pathways In Law Program has enjoyed the support of many organizations and individuals. The generosity and support of others is critical to the educational initiatives of the Pathways Program. Our partners have included, Judges of the 9th Judicial Circuit, The City of Orlando, The Orange County Bar Association, The OCBA Foundation, Hispanic Bar Association of Central Florida, Paul C. Perkins Bar Association, The League of Women Voters and a host of individuals who volunteer to staff events and counsel the students. We look forward to the OCBA Paralegal Section and other paralegals partnering in future Pathways events.

The Orange County Bar Association (OCBA) Paralegal Section is comprised of paralegals and legal assistants. This Section has as its stated mission, "to provide leadership, promote the professionalism and certification of paralegals, encourage and acknowledge professional development, promote global affiliations with other professional associations, and provide enriching networking opportunities." The OCBA Paralegal Section recently exhibited its strong commitment to professionalism by giving very generously of its time and

The OCBA Paralegal Section held a safety instruction workshop at the OCBA in March. Training was presented courtesy of the Orlando Police Department, and Curtis Protective Services donated pepper spray to attendees.





Mock Trial with Judge Faye Allen, presiding Judge Wilfredo Martinez, Mayor Buddy Dyer, and Judge Bob LeBlanc.

pathways in law

Youth from Parramore Kid Zone, Hope Community Center in Apopka, and Rosemont Community Center participated in the third annual Pathways in Law program mock trial on March 30, 2010.



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The OCBA's 6th Annual

Texas Hold 'Em Charity Poker Tournament & Happy Hour

Thursday, May 13, 2010

Slingapours at 18 Wall Street in downtown Orlando

Registration: 5:30 pm (tournament begins: 6:00 pm)

**Look for your pals at Slingapours and
enjoy free beer, food, and fast cards!**

Individuals:

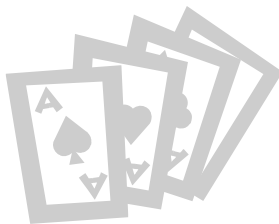
- ♣ Tournament registration fee: \$25 per player in advance (\$35 per player at the door)
- ♥ Admission only (non-player): \$15 per person



Space is limited so RSVP before the event sells out!

RSVP to bill@thelawman.net.

For more information, contact Bill Umansky.



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Published

Norma Stanley, a partner with Lowndes, Drosdick, Doster, Kantor & Reed, P.A., recently authored *Helping Clients Achieve their Estate Planning Goals* in a book titled: *Strategies for Trusts and Estates in Florida*.

Dennis Wall's article outlining *Construction-Defect Claims, A Step-By-Step Guide for Handling a Typical Loss*, co-authored with Mike Latzo of Generali USA, has just been published in *Claims Magazine*. He also has published *The Era of Initiating Settlement Negotiations: What Is A Liability Insurer to Do?* published in *Insurance Litigation Reporter*.

Speaking Engagements

Jacqueline Bozzuto, a partner with Lowndes, Drosdick, Doster, Kantor & Reed, P.A., recently presented *Leasing For Your Entrepreneurial Clients* in a community economic development clinic at Florida A&M University (FAMU) College of Law.

Ian L. Gilden, of Ian L. Gilden, P.A., was a requested speaker on the topic *Exploring Legal Issues* as part of a comprehensive program, *As Families Grow Older*, at Annunciation Catholic Church in Altamonte Springs.

Melody James, Brendan Lynch, and Crystal Espinosa Built, associates with Lowndes, Drosdick, Doster, Kantor & Reed, P.A., participated in a law review seminar titled *Where Do We Go From Here? Law in the Instant Media Age* at Barry University Dwayne O. Andreas School of Law in Orlando, Florida on April 10th. The three associates focused on the burgeoning laws of eDiscovery and Technology.

Drew Sorrell, a partner with Lowndes, Drosdick, Doster, Kantor & Reed, P.A., recently presented *Rules of the Internet Road* at Rollins College, Crummer Graduate School of Business.

Norma Stanley, a partner with Lowndes, Drosdick, Doster, Kantor & Reed, P.A., recently participated in *Women: The Leading Edge of Philanthropy* for the Center for Women's Philanthropy (CWP) on April 9, 2010, at the at Sonesta Hotel Orlando Downtown. The educational forum was hosted by CWP, in partnership with Rollins College Philanthropy & Nonprofit Leadership Center and the Edyth Bush Charitable Foundation.

Social Events

May 13 – *6th Annual Texas Hold 'Em Charity Poker Tournament*. 5:30 p.m. Slingapours on Wall street in downtown Orlando. Advance RSVP: \$25 (to play); \$35 (at the door). Non-players: \$15. To RSVP, contact Bill Umansky at bill@thelawman.net. Sponsored by M&I Bank. Sponsored by M&I Bank.

Upcoming Seminars

May 7 – *Importing Case Data & Performing Keyword Searches*. Paralegal Section Seminar. 12:00 p.m. OCBA Center. CLE: 2.0. Speaker: Steve Reynolds, Digital Legal. Contact Lori

Spangler at lspangler@ralaw.com. Sponsored by Digital Legal.

May 11 – *Making the Forever Family: Adoption Finalization in Dependency Cases*. LAS Lunchtime Training. 12:00 p.m.-1:30 p.m. Comerica Bank, 111 N. Magnolia Ave., Ste. 1000, Orlando, FL 32810. CLE: pending. Speaker: Stephanie Stewart, Esq. For more information, please email ctucker@legalaiddocba.org or mcarbo@legalaiddocba.org.

May 25 – *Identifying & Serving Children with Developmental Disabilities*. LAS Lunchtime Training. 12:00 p.m.-1:30 p.m. Comerica Bank, 111 N. Magnolia Ave., Ste. 1000, Orlando, FL 32810. CLE: pending. Speaker: Ericka Garcia, Esq. For more information, please email ctucker@legalaiddocba.org or mcarbo@legalaiddocba.org.

May 25 – *Proper Payroll Procedures*. Solo & Small Firm Committee Seminar. 12:00 p.m. OCBA Center. CLE: 1.0 (pending). Speaker: Donna Sonntag, Master Pay USA. For more information, contact Marie at marieb@ocbanet.org.

May 26 – *Insurance Rescission: The Ethics and Mechanics Behind the Florida Rescission Statute*. Insurance Law Committee Seminar. 12:00 p.m. Bar Center. CLE: 1.0, including 1.0 Ethics (pending). For more information, contact Marie at marieb@ocbanet.org.

June 2 – Topic TBA. Business Law Committee Seminar. 12:00 p.m. OCBA Center. CLE: 1.0 (pending). For more information, contact Marie at marieb@ocbanet.org.

June 4 – *Working w/Summation Search Results & Saving Searches*. Paralegal Section Seminar 12:00 p.m. OCBA Center. CLE: 2.0. Speaker: Steve Reynolds, Digital Legal. Contact Lori Spangler at lspangler@ralaw.com. Sponsored by Digital Legal.

June 8 – *Guardianship of an Adult, No Property*. LAS Lunchtime Training. 12:00 p.m.-1:30 p.m. Comerica Bank, 111 N. Magnolia Ave., Ste. 1000, Orlando, FL 32810. CLE: pending. Speaker: David Yergy, Esq. For more information, please email ctucker@legalaiddocba.org or mcarbo@legalaiddocba.org.

June 11 – *Immigration*. LAS Lunchtime Training. 12:00 p.m.-1:30 p.m. Comerica Bank, 111 N. Magnolia Ave., Ste. 1000, Orlando, FL 32810. Speaker: Kira Romero Craft, Esq. For more information, please email ctucker@legalaiddocba.org or mcarbo@legalaiddocba.org.

June 11 – *An Afternoon at the State Courthouse*. YLS. Registration: 1:00 p.m.-4:00 p.m. Orange County Courthouse, Jury Assembly Room – 1st Floor. CLE: including Ethics (pending). Fee: \$10. Send RSVP and payment to Mike Remensnyder by Friday, June 4, 2010, OCBA, 880 N. Orange Ave., Orlando, FL 32801. For more information, please contact Jonathan Stimler at jstimler@lseblaw.com.

June 22 – *Children's Issues Legislative Update*. LAS Lunchtime Training. 12:00 p.m.-1:30 p.m. Comerica Bank, 111 N. Magnolia Ave., Ste. 1000, Orlando, FL 32810. CLE: pending. Speaker: Cara Dobrev, Esq. For more information, please email ctucker@legalaiddocba.org or mcarbo@legalaiddocba.org.

June 25 – *To Litigate or Mitigate – That is the Question*. Solo & Small Firm Committee Seminar. 12:00 p.m. OCBA Center. CLE: 1.0 (pending). Speaker: Anthony J. Diaz, Esq. For more information, contact Marie at marieb@ocbanet.org.

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Announcements

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Other News

May (throughout the month) – *The 100-day Medicare Myth: Exploring Ways to Pay for Long-Term Care*. Elder Law Committee Series of Public Service Seminars. Attorneys from the Elder Law Committee will present answers to the questions they are most frequently asked concerning long-term care. Free seminars for the public. Dates/Times/ Locations: **5/4** – 6:30 p.m. Crosby

Wellness Center; **5/6** – 11:00 a.m. Crosby Wellness Center; **5/10** – 6:30 p.m. Dr. Phillips Library; **5/11** – 6:30 p.m. Orange County Elections Office; **5/11** – 6:30 p.m. Oakmont Village; **5/14** – 10:45 a.m. Lake Mary Senior Center; **5/18** – 6:30 p.m. West Oaks Library; **5/18** – 6:30 p.m. Oakmonte Village; **5/25** – 6:30 p.m. Orange County Elections Office. Please see the OCBA website for additional details and location addresses.

May 13, June 10, July 16, Aug. 23 – *Brown Bag Lunch with Judge John Marshall Kest*. This series of talks has

been developed particularly to fulfill the needs of the young lawyers and to be of assistance to them. 12:00 p.m. to 1:15 p.m. Orange County Courthouse, Judicial Conference Room, 23rd floor (unless otherwise notified). Topic for May: *The Use of Evidence and Demonstrative Aids in the Courtroom*. Future topics TBA. Attendees should RSVP to Judge Kest's Judicial Assistant, Diane, at ctjadi1@ocnjcc.org. Attendees also are encouraged to submit questions in advance to Diane under their signature or anonymously.

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OCBA CALENDAR

May - June 2010

OCBA Installation of Officers Dinner

Thursday, May 27, 2010

The Hon. Lawrence R. Kirkwood

RSVP by Friday, May 20, 2010 to:

reservations@ocbanet.org

May

- 1 Kentucky Derby Party**
To benefit the OCBA Foundation
5:00 p.m. • 55 West (Downtown Orlando)
- 4 Intellectual Property Committee**
12:00 p.m. • Bar Center
- 5 Criminal Law Committee**
12:00 p.m. • Courthouse
23rd Flr. Judge's Conference Rm.
- 6 Federal Judicial Relations**
12:00 p.m. • Judge Conway's Chambers
- 7 Paralegal Section Seminar**
*Importing Case Data &
Performing Keyword Searches*
12:00 p.m. • Bar Center
Sponsored by Digital Legal
- 11 LAS Lunchtime Training**
*Making the Forever Family: Adoption
Finalization in Dependency Cases*
12:00 p.m. • Comerica Bank
- Executive Council Meeting**
4:00 p.m. • Tad Yates' Residence
- 12 Estate Guardianship & Trust Committee**
12:00 p.m. • Bar Center
- Judicial Relations Committee**
12:15 p.m. • Courthouse
21st Flr. Conference Rm.
Sponsored by M&I Bank
- 13 Social Security Committee**
12:00 p.m. • Bar Center
- Texas Hold 'Em Poker Tournament**
5:30 p.m. • Wall Street Cantina
- 14 Family Law Executive Committee**
Cancelled
- Workers' Compensation Committee**
11:45 a.m. • Smokey Bones
- 18 Professionalism Committee**
12:00 p.m. • Bar Center
- 20 YLS Luncheon**
11:45 a.m. • Citrus Club
- Appellate Practice Committee**
12:00 p.m. • Bar Center

- 21 Family Law Committee**
Cancelled
- 25 LAS Lunchtime Training**
*Identifying & Serving Children With
Developmental Disabilities*
12:00 p.m. • Comerica Bank
- Solo & Small Firm Committee Seminar**
Proper Payroll Procedures
12:00 p.m. • Bar Center
- 26 Insurance Law Committee Seminar**
*Insurance Rescission: The Ethics and
Mechanics Behind the Florida Rescission
Statute*
12:00 p.m. • Bar Center
- 27 OCBA Installation of Officers Dinner**
The Hon. Lawrence R. Kirkwood
5:30 p.m. • Church Street Ballroom

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

- 31 Office Closed / Holiday**

June

- 2 Business Law Committee Seminar**
12:00 p.m. • Bar Center
- Criminal Law Committee**
12:00 p.m. • Courthouse
23rd Flr. Judge's Conference Rm.
- 4 Paralegal Section Seminar**
*Working with Summation Search
Results & Saving Searches*
12:00 p.m. • Bar Center
Sponsored by Digital Legal
- 8 LAS Lunchtime Training**
Guardianship of an Adult, No Property
12:00 p.m. • Comerica Bank
- 9 Executive Council Meeting**
No Meeting
- 10 Social Security Committee**
12:00 p.m. • Bar Center
- 11 Family Law Executive Committee**
11:45 a.m. • Houlihan's
- 18 Family Law Committee**
12:00 p.m. • Bar Center
- 22 LAS Lunchtime Training**
Children's Issues Legislative Update
12:00 p.m. • Comerica Bank
- 25 Bankruptcy Law Committee**
12:00 p.m. • Bar Center
- Solo & Small Firm Committee Seminar**
*To Litigate or Mitigate –
That is the Question*
12:00p.m. • Bar Center
- 30 Business Law Committee**
12:00 p.m. • Location varies.
Please contact chair.
- Labor & Employment Committee**
12:00 p.m. • Contact Robert Sherry

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

LAS Lunchtime Training
Immigration
12:00 p.m. • Comerica Bank

An Afternoon at the State Courthouse
1:00 p.m. • Orange County Courthouse

- 15 Professionalism Committee**
12:00 p.m. • Bar Center

- 17 OCBA Luncheon**
11:30 a.m. • Church Street Ballroom

YLS Luncheon
11:45 a.m. • Citrus Club

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

- 18 Family Law Committee**
12:00 p.m. • Bar Center

- 22 LAS Lunchtime Training**
Children's Issues Legislative Update
12:00 p.m. • Comerica Bank

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

Solo & Small Firm Committee Seminar
*To Litigate or Mitigate –
That is the Question*
12:00p.m. • Bar Center

- 30 Business Law Committee**
12:00 p.m. • Location varies.
Please contact chair.

Labor & Employment Committee
12:00 p.m. • Contact Robert Sherry

The OCBA Elder Law Committee is presenting a series of public service seminars through the month of May. Please see the Announcements page for a complete list of dates, times, and locations. A detailed description of the seminars is available on the OCBA website calendar.

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