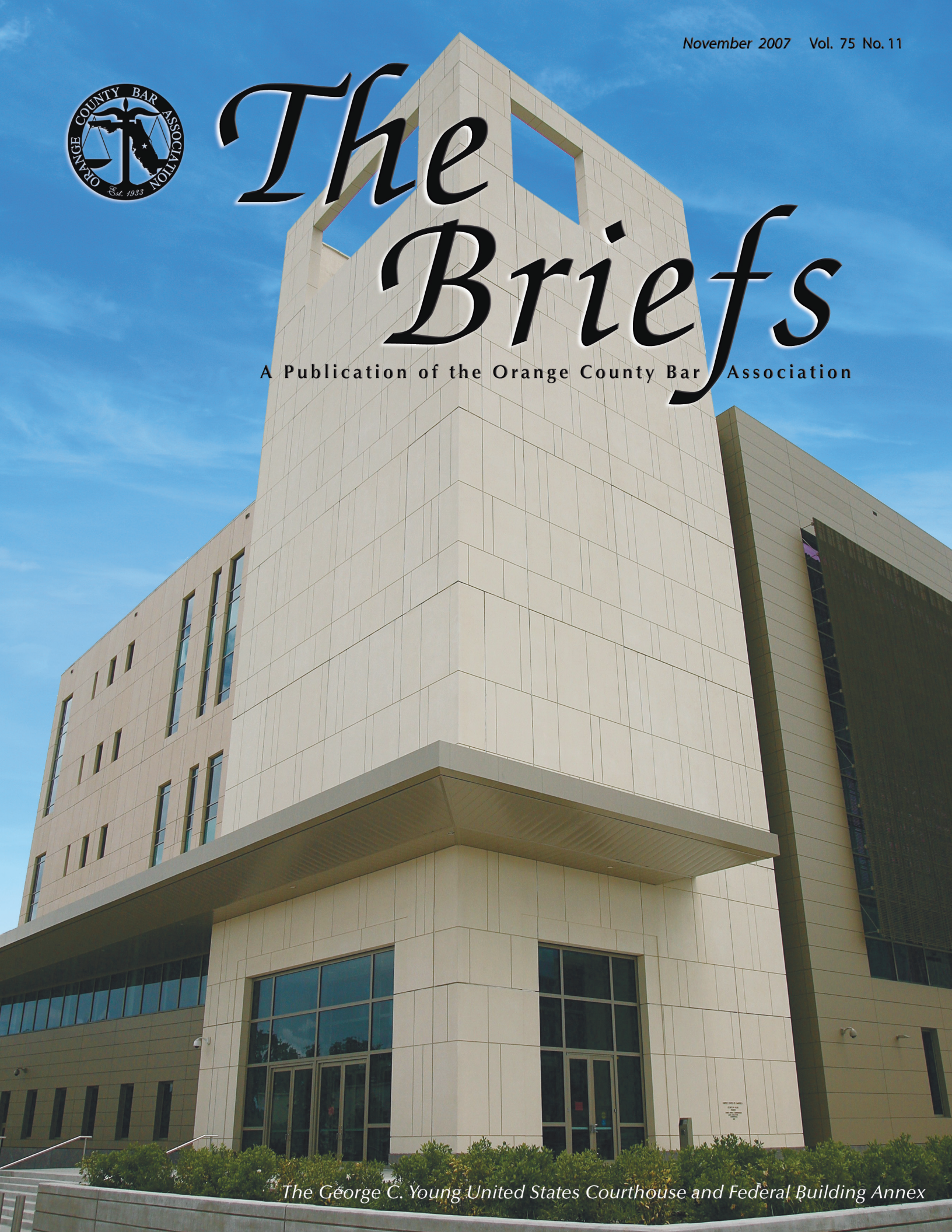
November 2007 Vol. 75 No. 11

The Briefs

A Publication of the Orange County Bar Association



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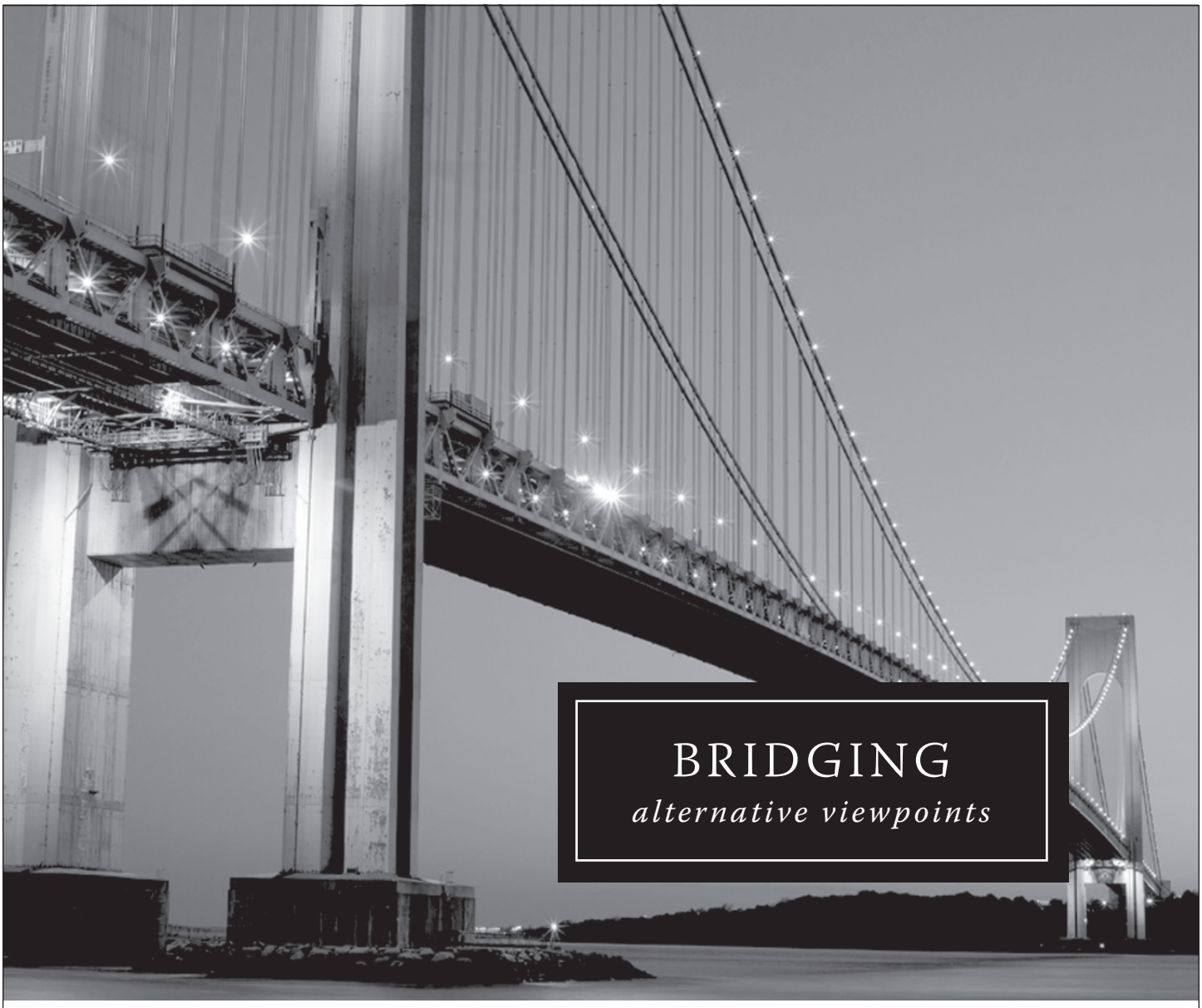


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- Licensed in Florida

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The Briefs

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DEADLINE INFORMATION

Deadline for February Issue: 01/01/2008

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

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Visit the OCBA's Website: www.orangecountybar.org



President's Message

November 2007

Tell Them Who We Are

. . . to educate the public about the legal system . . .

- OCBA Mission Statement

C. Gene Shipley

As we publish the last edition of *The Briefs* before beginning our 75th year, it is humbling to recall the names of our members who were responsible for establishing the Orange County Bar Association's legacy of service in Central Florida. We've all been privileged to witness any number of OCBA attorneys who have influenced Central Florida through their counsel, labor and judgment. Since joining the Bar, you've also probably heard old "war stories" and read articles in various legal publications describing the ways OCBA members have impacted the lives of so many in our community. Now, if you will, think back to the *first* litigation yarn you recall hearing. Do you remember reading your first article written about the sacrificial *pro bono* service given by a local attorney? Did you ever even see the inside of a courtroom while attending grade school? If you were raised in Central Florida, there's a good chance you never learned how essential the legal profession has always been to our local community, at least not until after you passed the Bar.

Growing up in St. Cloud, I recall my initial experience in civil education: an elective course first offered in 11th grade. My wife, a Boone High graduate, also waited until high school before the judicial branch was included in her course curriculum. We never knew how necessary lawyers and judges were to our ability to enjoy the standards of living to which we had grown accustom. We took for granted the freedoms, protections and privileges that would not be established or preserved, but for years of persistent service by those in our profession. It's no wonder why, according to a 2005 Florida Bar survey, over 40% of Floridians cannot correctly identify the three branches of American government.[1]

The past and present leadership of the OCBA want your children to know. For over a decade, through the efforts of OCBA members working closely with local teachers, Orange County students have learned about the importance of the judicial system and how it affects almost every aspect of their lives. For twelve years, the OCBA Law Related Education Committee has sponsored the Law Symposium. Attended each year by approximately 200 Orange County Public School educators, our members and other legal professionals discuss the current status of the law regarding education practices, curriculum and juvenile crime issues. The Law Symposium has been so beneficial to the Orange County School Board that our own Executive Director, Brant Bittner, has been invited to present our Law Symposium program to over 3,000 educators from around the nation during next year's National Dropout Prevention conference.

In addition to meeting with teachers, OCBA members get into the classrooms and actually help teach students. Many of our members have joined the initiative of Florida Supreme Court Chief Justice R. Fred Lewis through Justice Teaching, an interactive session held in elementary, middle and high school classrooms throughout Orange County. Students of all ages are taught about the American justice system and the basic principles underlying our constitution. Our members also introduce students to the judicial process during Law Week by conducting scripted Goldilocks Mock Trials and DUI Mock Trials; the students serve as judges, witnesses and juries. We also monitor and control the courtrooms during Teen Court. An alternative to punishment by school administration, Teen Court consists of students adjudicating and sentencing their peers for violating certain school policies. If my beautiful bride was still attending her *alma mater*, she would likely be enrolled in the Criminal Justice, Law and Finance Magnet program now offered at Boone High. She might even be coached and judged by the dozens of OCBA members contributing to the annual High School Mock Trial Competition.

OCBA members are committed to teaching civic education to students outside the classroom as well. Students participating in the Law Week Poster and Essay Contest compete for the opportunity to have the poster or essay they create, describing a certain judicial theme, displayed in the Orange County Courthouse atrium.[2] Many schools' curricula include field trips during Law Week to the 23rd floor of our local courthouse, where students observe live oral arguments held before three Judges visiting from the 5th District Court of Appeal.

Most notably, our Guardian *Ad Litem* attorneys, through the Legal Aid Society of the Orange County Bar Association, are dedicated to ensuring that parentless children in our community are educated. We invest countless hours of *pro bono* service every year by befriending and caring for our GAL kids. Whether requesting specific educational evaluations and services, advocating for the child during school IEP meetings, or occasionally joining in studies, our attorneys are there for the children in our community who

Continued on page 4

[1] If you missed Congressman Lou Frey during our September luncheon, you should talk to another OCBA member who attended. While there's no substitute for live Lou Frey, portions of his presentation can be found in "Enlisting a New Generation of Florida Citizens" on the Lou Frey Institute of Politics & Government website (www.loufrey.org).

[2] Law "Week" in Orange County has grown to be a six-week program that has been applauded by the Florida Supreme Court and awarded funding for the last two years by the Florida Bar for community education and outreach. Our sincerest thanks go to the OCBA Law Week Co-Chairs, Lori Spangler and Lissa Bealke.

President's Message *Continued from page 3*

need our support the most.

While our members continue to positively influence present and future generations to come, it seems the OCBA has not similarly strived to educate the many voting citizens in our community who still don't know about the judicial branch of government or the roles played by legal professionals in Central Florida. Certainly, our clients know it. Yet, most of the articles written about OCBA attorneys are marketed to and circulated among other attorneys.

Next year, the Orange County Bar Association will embark on its first concentrated campaign to educate the public on the many ways attorneys and other legal professionals serve our community. The OCBA has partnered with a public relations agency specializing in legal professionals, TuckerHall, to develop a strategic communications plan for the 75th year and beyond. While OCBA committees and members will continue to fill *The Briefs* with substantive legal articles, we will be adding periodic pieces and other articles next year, honoring lawyers and law firms for their service to Central Florida over the years. The OCBA is also circulating *The Briefs* outside the OCBA membership. We delivered the October issue to more than 300 local elected officials and business organizations.[3] Our goal is to find the latest copy of *The Briefs* being read in every local chamber of commerce, political headquarters and business reception area - in addition to your firm's reception area. Finally, we're going to celebrate the 75th Anniversary milestone like only the OCBA can. We expect the 2008 Gala to eclipse prior attendance records, we're holding an OCBA Past Presidents Dinner, and we're planning other commemorative events as well. And Central Florida will hear about it.

In 2008, we will have a greater opportunity than ever before to fulfill another mission of the Orange County Bar Association: to educate teachers, students, parents and all citizens of Central Florida about the justice system and how OCBA members impact our local community. It is my privilege to be one of the nearly 3,000 OCBA members who will continue OCBA's legacy of service to Central Florida. As we begin the celebration of our 75th Anniversary, I hope you will take advantage of this unique opportunity to educate Central Florida on the history of that legacy, and the OCBA attorneys and judges who established it.

[3] We are actively seeking to expand the circulation list for *The Briefs*; recommendations are welcome!

C. Gene Shipley is a shareholder with Nardella Chong, P.A. He has been a member of the OCBA since1997.



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Grande Dame Reception

A "Grande Dame" reception was held in September honoring the women who have been practicing law for 20 + years. More than 50 women were in attendance at Dubsdread, including eight local judges.



Diane Holmes, Mary Ann Morgan, Cynthia MacKinnon and Marybeth McDonald



MaryAnne DePetrillo, Cathy Tucker, Marybeth McDonald, Susan Khoury and Sally Kest



Linda Brehner Lanosa, Mary Ann Morgan, Wendy Vomacka, Maura Smith, Kaye Collie and Sheila Deciccio



Judge Jackie Griffin, 5th DCA; Retired 9th Circuit Judge Dorothy Russell (who received the award for the first sworn in as a judge); 9th Circuit Judge Cynthia MacKinnon; 9th Circuit Judge Sally Kest; Orange County Judge Deb Blechman; 9th Circuit Judge Gail Adams; 7th Circuit Judge Midge Hudson and 9th Circuit Judge Maura Smith.

OCBA Luncheon Speaker

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November 29, 2007



Buddy Dyer

Mayor, City of Orlando

Raising the Bar: A Better Downtown

Orlando Mayor Buddy Dyer, the son of a shopkeeper and a long-haul truck driver, was born in Orlando on August 7, 1958. He was raised in nearby Kissimmee and graduated from Osceola High School. During his high school years Mayor Dyer was the captain of the baseball team, MVP of the football team and vice-president of his class.

For his academic achievement Dyer was awarded a scholarship to Brown University in Providence, Rhode Island. As an undergraduate, Dyer studied civil engineering and was vice-captain of the rugby team.

After graduation, Dyer returned to Florida to work as an environmental engineer. He later enrolled in law school at the University of Florida Law, where he was named Editor-In-Chief of the University of Florida Law Review. He was honored with membership in the Order of the Coif, an honor reserved for the top 10 percent of the graduating class, and became a member of Phi Delta Phi, a society that promotes high standards of professional ethics. Dyer also earned membership in the prestigious Florida Blue Key for exemplary service and leadership. He graduated with honors in 1987 and received the highest score on the Florida Bar Exam that year. Dyer also met his wife Karen Dyer at the University of Florida Law School and they were married in 1998.

Dyer has committed himself to public service since 1992 when he ran for the Florida State Senate and won. The people of Central Florida re-elected him in 1996 and 2000. Dyer's colleagues recognized his outstanding service and elected him to serve as the State Senate Democratic Leader for three years.

After much encouragement from community leaders Dyer decided to join the campaign for the Mayoral special election in 2003. On February 26, 2003, Dyer was sworn in as Mayor of Orlando. Dyer accomplished great things in the one-year term, which included: balancing the budget in the first 30 days, making reorganization plans for the city, and creating the Mayor's Education Action Council. One accomplishment of this Council was raising money to open several pre-K classrooms in Orlando's schools. Dyer was re-elected in March of 2004 and was sworn in on June 1, 2004, for a full four-year term.

Mayor Dyer serves on several boards in the Central Florida community. These include: Metroplan Orlando, LYNX, OUC, Metro Orlando Economic Development Commission, the Tourist Development Council, Florida Citrus Sports, United Arts, the UCF Foundation, and GOAA.

Mayor Dyer and his wife Karen, also an attorney, have two sons: Trey and Drew. They both attend public school in Orlando.

The Ballroom at Church Street • 11:30 a.m. - 1:00 p.m.
225 S. Garland Avenue • Orlando, FL 32801

Please RSVP for the luncheon no later than Friday, November 23, 2007.
RSVP to Wendy Mazlin, Events Manager, at reservations@ocbanet.org.

To ensure proper luncheon count, RSVPs are requested no later than 5 days in advance. Those reserving less than 24 hours in advance will not be guaranteed a name badge. If you have made a reservation and find that you are unable to attend, please notify us as soon as possible via e-mail. We appreciate your effort to keep us up-to-date on your reservation status.



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Professionalism Committee

What is this William Trickel, Jr. Professionalism Award About?



Ken Mann[1]

Simply put, Bill Trickel was the embodiment of professionalism. He viewed the law as not just a business, but a calling; he viewed his role as not just the client's advocate, but its counselor and advisor; he demonstrated that passion for your cause could be pled and argued with civility, and that one could vigorously disagree, but do so agreeably; and he had that innate ability to build consensus by his big, wide grin, his sense of humor and hearty laugh,[2] his humility and graciousness in defeat,[3] his preparation, his knowledge, and the force and sincerity of his convictions.

Bill truly cared – about people, God, community, and the law. He shared his time, his knowledge, his affluence, and his influence, to make Orlando, the law, and those around him better – from his family, to his colleagues, to our staff, for whom he eagerly led the annual "attorneys cook breakfast for the staff" breakfast party during the Christmas/Chanukah holiday season, to the Boy Scouts, to chairing the Florida Hospital Cancer Center Fundraising Drive that exceeded its $30,000,000 goal, to his church, to our clients, including difficult *pro bono* cases that were as emotionally draining as they were necessary, etc., etc.

It is no wonder that Bill was Student Body President and a member of Blue Key and the Hall of Famers at University of Florida for campus and community involvement and scholastic achievement; President of the Orange County Bar; a member of the Florida Bar Board of Governors; narrowly missed becoming Florida Bar President; was one of the original Fellows of the Florida Bar Foundation (by the way, you can still join – click on www.flabarfndn.org for details); and chaired the Health Law Section, which founded an annual, memorial, national writing competition in his name, with current prize money of $9,500. The Florida Hospital Foundation similarly created an annual Outstanding Volunteer Award in Bill's memory and the OCBA saw fit within weeks of Bill's untimely death on February 8, 1996, to rename its annual professionalism award to the William Trickel, Jr. Professionalism Award. Bill was truly loved and revered by all – his funeral service was a standing-room-only (including the lobby) assemblage of people from all walks of life.

Winston Churchill said, "We make a living by what we get, but we make a life by what we give." Bill Trickel gave of himself until his heart gave out. But he forever lives in our memory.

---

[1] Ken Mann, former chair, *inter alia*, of the Florida Bar Professional Ethics Committee, practiced with Trickel, Leigh & Mann, P.A. and its predecessor (1992-97). He now practices in Scottsdale, Arizona, as a member of Beus Gilbert, PLLC, whose litigation emphasis is a national practice in plaintiffs' contingency fee, non-class action, securities fraud litigation for bankruptcy trustees, investment funds, etc.

[2] Such as when he planted and activated a remote-controlled, Gator fight-song football player statue in my bookcase.

[3] *E.g.*, his good-natured demeanor in honoring his locally televised contract with Dick Leigh, which required he don a Husker tie and hat and let Dick decorate his room after Nebraska's crushing victory in the 1996 Championship at the Fiesta Bowl. No doubt there was a smile in heaven when the Gators returned to Maricopa County this year to crush the Buckeyes.

GOT PROFESSIONALISM?
Time is Running Out!

There are less that 30 days to make your nominations for the
2008 OCBA Professionalism Awards!

William Trickel, Jr. Professionalism Award
Lawrence G. Mathews, Jr. Young Lawyer Professionalism Award
James G. Glazebrook Memorial Bar Service Award

Nomination Deadline: December 1, 2007

See the OCBA website at www.orangecountybar.org for criteria, nomination forms and submission details. If you have questions, please call Brant Bittner, Executive Director, at 407-422-4551.



Thomas v. Fusilier,
32 Fla. L. Weekly D2457a (Fla. 5th DCA 2007)
Reversed forfeiture of $250,000 payment required by marital settlement agreement.

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

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

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

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

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.

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

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

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

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

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OCBA Legal Aid News

Pro Bono *Highlight – Matthew D. Pardy, Esq.*

Legal Aid Society of the OCBA

For more than 20 years The Legal Aid Society has operated a Homeless Advocacy Project for the purpose of assisting persons in resolving their legal concerns. The Project fulfills its mission by having approximately 40 Orange County Bar Association attorneys meet with the homeless every month, at 16 homeless shelters throughout Orange County, to assess their legal needs and to provide them with legal assistance where appropriate. Each request for formal legal assistance from a homeless person at a shelter generates an application for legal assistance that is then reviewed by a staff attorney at The Legal Aid Society, which makes a formal determination as to how the legal needs of the applicant can best be met (i.e., appointment of a *pro bono* attorney, referral to government agency, etc.). As one can imagine, providing legal assistance to the homeless can be a very challenging and daunting task, albeit a very rewarding one. The most common requests for legal assistance from the homeless include: helping obtain birth certificates and other identification for employment purposes, social security disability, child support, divorce, criminal matters, landlord/tenant disputes, alternative housing, small claims disputes, personal injury claims, and immigration. During calendar year 2006, the Homeless Project received 326 applications for legal assistance from the homeless. In addition, the Homeless Project provided legal advice or assistance to an additional 687 homeless persons who chose not to complete an application for legal assistance. As a result, the Project provided legal assistance to a total of 1,013 homeless persons, which is more than 15% of the entire homeless population in Orange County.



Matthew D. Pardy

One attorney participating in the Homeless Advocacy Project for the past several years is Matthew D. Pardy, a partner in the Orlando-based law firm of Kim, Pardy & Rodriguez, P.A. Matt received his B.A. degree from Colgate University and his J. D. degree from George Washington University. He began his legal career in Orlando as an assistant public defender and has also worked as an associate for a large Orlando law firm. Matt represents individuals in the areas of personal injury, including automobile and premises liability, first party insurance disputes, such as homeowner hurricane claims, and security/financial advisor negligence.

Commenting on his *pro bono* work for the Homeless Advocacy Project, Matt writes:

> As I struggle to pull myself away from a busy law practice each month and enter the homeless shelter to meet with their residents, I am always struck by the warm welcome and the deep appreciation for attorneys and legal advice. The immensity and prevalence of legal problems among the homeless underscore the resounding need for the Homeless Advocacy Program. Most legal problems involving the homeless have no immediate remedy, but many times I have found that answering what to many attorneys are basic legal questions provides the steps toward and hope for a solution and a huge reduction in a person's anxiety and stress. These people have not given up on themselves and are struggling for a better life. When I leave the homeless shelter, I often feel emotionally drained but the sun always seems to shine brighter.

Thanks to Matt for his continued *pro bono* work for the homeless on behalf of The Legal Aid Society and the Homeless Advocacy Project!

Submitted by the Legal Aid Society of the OCBA.

SAVE THE DATE!!!

November 29, 2007

Immediately Following the OCBA Luncheon

1:30-3:00 p.m.

Church Street Ballroom

"GAL 101—THE BASICS"

For Attorneys Serving as GALs in Dependency Cases

Speakers: Diego "Woody" Rodriguez, Esq.
Christi Adams, Esq.
Cara Dobrev, Esq., *GAL Program Litigation Coordinator*

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Special Feature

A Celebration and Dedication: The George C. Young United States Courthouse and Federal Building Annex

Jessica K. Hew

Do you remember the movie *Field of Dreams'* memorable line, "If you build it, they will come"? The George C. Young United States Courthouse and Federal Building Annex were completed earlier this year. And, as predicted, everyone came.

The Building

Drawing from her experience of overseeing the construction of the OCBA's original building years ago, The Honorable Patricia C. Fawsett, Chief Judge of the Middle District of Florida, undertook not only to construct a post-war public building in conjunction with the architectural style in Orlando, but also to incorporate art into the facility through the U.S. General Services Administration's Art in Architecture Program. The construction consists not only of a Courthouse building, but an integrated legal complex of eight acres, complete with a landscaped public park that connects the old and new Courthouses and is visible from the new building's terraces. A tree was also planted in the northeast corner of the park as a memorial to the late Honorable James G. Glazebrook, who passed away earlier this year. Included in the complex, but not yet complete, is the renovation of the old Courthouse, which will house the U.S. Bankruptcy Court, U.S. Attorney, and several smaller federal agencies.

Located at the corner of North Hughey Avenue and Interstate 4 on the east and Central Avenue on the south, the new Courthouse draws its post-war inspiration from numerous Downtown Orlando buildings, such as the former Courthouse, Orlando City Hall, and Orange County's Public Library and County Services buildings. These buildings are primarily glass, concrete and metal. The Courthouse was constructed with clean lines and a modern view: airy and sunlit.

Building on the sunlit concept, the Art in Public Places Program allowed the Courthouse to obtain a marquee inlaid laminated art glass window, and five smaller ones, by internationally recognized abstract painter Al Held. The western Division Street public entrance of the Courthouse, with a precast-concrete-tower overhead, is opposite the Untitled twenty by fifty foot masterpiece on the eastern wall. The Untitled window bathes the five story atrium between the entrance and the window in beautiful and dazzling colored light as you enter. Walking toward the Untitled piece, you pass the five smaller inlaid laminated art glass windows at entrance level along the southern walls of the Courthouse. All of the watercolors upon which the inlaid laminated art glass windows were constructed have been obtained by, and are now in the collection of, the Orlando Museum of Art to further tie the Courthouse to our local community.

The windows are not the only art in the Courthouse. There are also three large black and white photographs, *Three Sisters*, *Florida Trail*, and *Estero Island*, by Clyde Butcher hung in the jury room. These landscape-based photographs represent the Middle District's geographical areas: beach, wood and swamp. A small enclosed walled garden on the eastern end of the room is also included for jurors' use, tying live nature into the photographed version.

Judge Fawsett sums it up nicely:

> Within the history of courthouse architecture, this building is an unparalleled achievement, combining modern expressions of design, materials, art, and landscaping to provide a significant public place for the dispensing of justice.

The Celebration and Dedication

September 20th and 21st were banner days for the George C. Young United States Courthouse and Federal Building Annex. Although the new Courthouse was already in use and occupied, the building's dedication was celebrated with all of the grandeur a new Courthouse deserves.



The Honorable Patricia C. Fawsett, U.S. District Court Judge, Middle District, and The Honorable Clarence Thomas, U.S. Supreme Court Justice, were among the distinguished dignitaries who participated in the Federal Courthouse ribbon-cutting ceremony on September 21, 2007.

The Middle District Judiciary and the local chapter of the Federal Bar Association hosted an evening celebration on the 20th. Chaired by Jill Schwartz, then-First Vice President of the FBA, the open house event provided a premier social event for the bench and bar in the foyer and

Continued on page 12

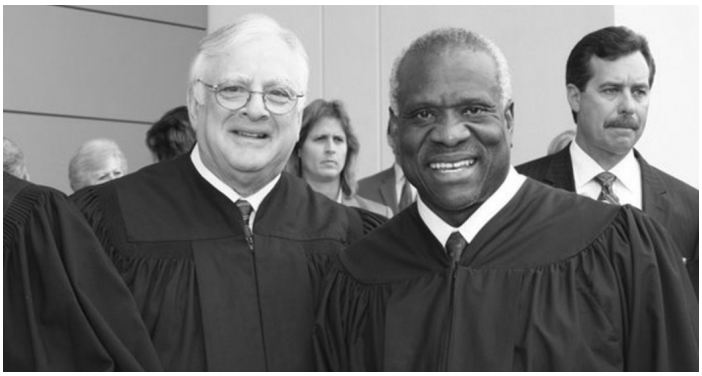
loft areas of the Courthouse. Attendees were also provided with a first-hand look at the building via tours, including looks at the holding areas, jury room, library and judicial chambers.

The 21st was a more formal, but just as festive, event. There was an impressive attendance list, including the Honorable Clarence Thomas of the U.S. Supreme Court, as the Keynote Speaker; the Honorable James L. Edmonson, Chief Judge of the U.S. 11th Circuit Court of Appeal; U.S. Congresswoman Corrine Brown; U.S. Congressman Ric Keller; the Middle District's judiciary; and many other local, state and federal dignitaries. The standing-room only crowd was regaled with stories about the project's design, planning, fundraising and construction, as well as some insights into the hurdles overcome along the way. These tales emphasized Judge Fawsett's unfailing dedication, ensuring that her vision became reality.

The celebrations were fitting tributes to such a remarkable building in which we can all be proud to work and to uphold the rule of law in our community.

Jessica K. Hew would like to credit *United States Courthouse, Orlando*, a publication of the U.S. General Services Administration, Public Buildings Service, for much of the factual building information contained within this article.

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



U.S. District Court Judge for the Middle District of Florida, The Honorable Harvey E. Schlesinger and U.S. Supreme Court Justice, The Honorable Clarence Thomas share a moment outside the new Courthouse.



The Honorable J.L. Edmondson, Chief Judge, 11th Circuit Court of Appeals, was a featured speaker at the dedication of the George C. Young U.S. Courthouse and Federal Building Annex.



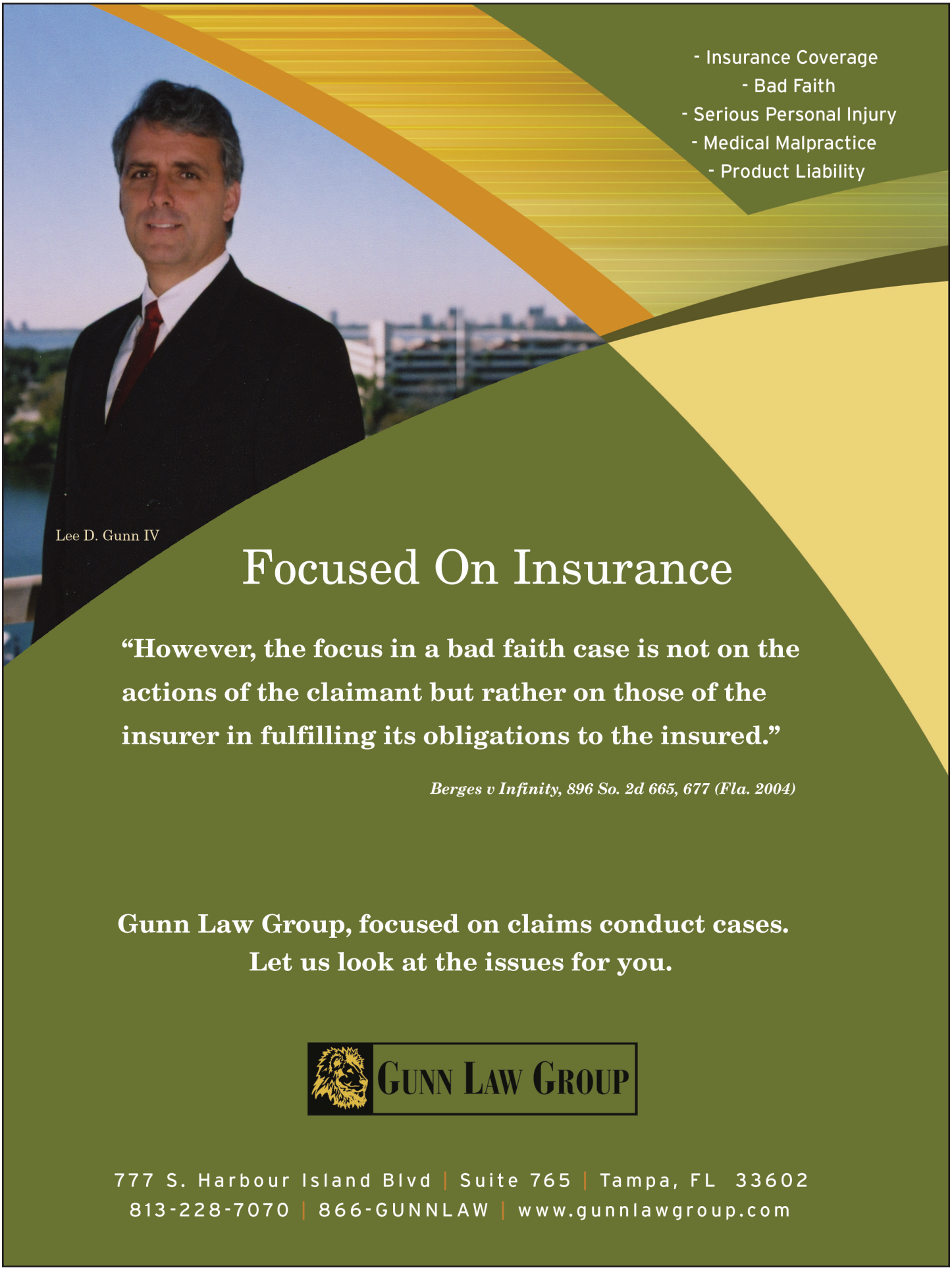








Photos courtesy of Linda Wade-Bahr, CWP, MCIWD, Web Design Engineer & Videoconference Administrator, U.S. District Court - Middle Florida.



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Feature Article

Restrictive Covenants: The New Loophole



H. Gregory McNeill

In *Florida Hematology and Oncology Specialists, P.A.* vs. *Tummala*, 927 So.2d 135 (Fla. 5th DCA 2006), the Fifth District Court of Appeal opened a loophole in Florida's restrictive covenant statute through which former employees can drive their proverbial trucks. Fortunately for employers, the Florida Supreme Court has accepted conflict jurisdiction of the *Florida Hematology* decision and it remains to be seen whether the high court will close it up.

The operative facts of *Florida Hematology* are simple. Dr. Tummala, an oncologist, executed an employment agreement with an oncology and hematology practice (the "Practice") which contained a restrictive covenant precluding him from competing for two years post-employment within a radius of 15 miles of the Practice. Pretty standard stuff.[1]

After about eight (8) years, Tummala resigned and immediately opened a competing oncology practice in Leesburg, Florida. Naturally, the Practice filed suit against Tummala for breach of the restrictive covenants and Tummala responded with the obligatory counterclaim.

At the evidentiary hearing, the Practice asserted a number of legitimate business interests to justify the restrictive covenant. The most common business interest in these types of cases, the relationship with existing patients, was not available because Tummala had taken great pains to avoid providing medical services directly to any of the Practice's existing patients.

Instead, the Practice relied primarily upon its legitimate business interest in its relationships with referring physicians. As everyone knows, a specialty medical practice is almost wholly dependent upon relationships with "referral" physicians for patients: family doctors, internists and general practitioners who refer their patients to specialists. At the evidentiary hearing, Tummala and the Practice testified, respectively, that between 80% and 90% of their oncology patients came from referral physicians. Moreover, these referral relationships were so important to the Practice that "wining and dining" referral physicians was an express condition of employment in Tummala's Employment Agreement. Furthermore, Tummala admitted that in establishing his new practice, he sought and received referrals from at least 18 of the same referral physicians he had developed in his eight (8) years with the Practice. Finally, the Practice presented uncontroverted evidence that its volume of referrals from these same referral physicians was down almost 70% since Tummala went into direct competition.

Okay, I know what you are thinking: slam dunk, right?

You would be wrong. The trial court refused to enjoin Tummala from practicing medicine or from seeking and receiving referrals from the same referral doctors. The trial court relied upon *University of Florida Board of Trustees v. Sanal*, 837 So.2d 512 (Fla. 1st DCA 2003) which concerned the enforcement of the restrictive covenant against an oncologist who also did not solicit or treat any prior patients. But more surprising is that the Fifth District Court in *Florida Hematology* affirmed the trial court.

In addressing referral physician relationships, the *Florida Hematology* court first acknowledged that these relationships were perhaps the Practice's "most crucial business interest":

> . . . the evidence was clear that [the Practice] (and most other medical specialists) received the significant share of their new patients from referring physicians. They expend effort, money and energy to cultivate referral relationships. And, it was a requirement of Tummala's employment that he develop these referral relationships for the benefit of his employer. Because referring physicians are the major source of new business for a specialist's medical practice, they are perhaps [the Practice's] most crucial "business interest." Therefore, [the Practice] makes a compelling argument that the law should recognize them as a legitimate business interest.

Florida Hematology, at p. 138. Nonetheless, the court stopped short of declaring these business interests to be "legitimate" for purposes of Florida Statute 542.335. The court reasoned as follows.

Florida Statute § 542.335(1)(b)(3) recognizes a legitimate business interest in "substantial relationships with specific prospective or existing customers, patients or clients." Because Tummala was not directly rendering services to any existing patients, the court turned its attention to "specific prospective patients."

Here, the *Florida Hematology* court referred to *Sanal*

Continued on page 16

[1] By the way, every physician with a non-compete agreement will claim that any restraints upon him or her regarding the practice of medicine shall "adversely affect the public health, safety and welfare." F.S. § 542.335(1)(g)(4). It is a statutorily valid defense, but it almost never works. Over the last 30 years, doctors have been enjoined as often as former employees in any other business or profession. It is a rare circumstance that doctors are able to avoid enforcement of a restrictive covenant based upon the public interest argument. *See Jewett Orthopaedic Clinic, PA v. White*, 629 So.2d 922 (Fla. 5th DCA 1994); *cf. Lloyd Demsey, MD, PA v. Mankowitz*, 339 So.2d 282 (Fla. 3d DCA 1976), cert. denied, 345 So.2d 421 (Fla. 1977).

which had held that in order for a relationship with a "prospective" patient to be a legitimate business interest, that relationship must be "specific and identifiable." *Florida Hematology*, at p. 139. In *Sanal*, this meant that Dr. Sanal's former employer could not claim a legitimate business interest in every prospective cancer patient in a 50-mile radius of the University of Florida Hospital in Jacksonville, Florida. This was a reasonable conclusion because the statute requires that the relationship with prospective patients be "specific." And since the Practice wasn't claiming a business interest in prospective patients anyway, the *Sanal* holding is somewhat beside the point. Or so one might think.

But not to the *Florida Hematology* court. Using *Sanal* as its springboard, the Fifth District Court concluded that if unknown prospective patients do not qualify as a legitimate business interest, then neither can the doctors who refer them to specialty medical practices:

> . . . the lack of a [specific and identifiable] relationship with a patient does not become a legitimate business interest simply by virtue of being referred by a physician.

Id., at p. 139.

Thus, it didn't matter that the Practice developed and nurtured relationships with these referral physicians, acknowledged to be the Practice's "most crucial business interest." It made no difference that Tummala was contractually obligated to maintain these relationships or that 90% of the Practice's patients came directly from these referrals. No matter how crucial the business relationship nor how significant the damage to the employer, in the Fifth District, an employer cannot protect a referral relationship by restrictive covenant.

This is a stunning curtailment of the scope of Florida Statute § 542.335. Worse, the rationale for refusing to protect an employer's interest in its referral relationships is not limited to the medical profession. Any business or profession which receives clients, customers or patients from referral relationships developed, nurtured and maintained by the business will, at least in the Fifth District, be unable to protect those relationships by use of restrictive covenant.

The irony of this opinion is clear. A former employee who may be clearly precluded from making a sales call on an existing customer or treating an existing patient could still, with impunity, seek and receive hundreds or thousands of referrals from his former employer's referral sources. It is difficult to square this opinion with the stated purpose of Florida Statute § 542.335, and the impact of this ruling on restrictive covenant cases should not be understated.

Despite the Fifth District's reliance upon it, the facts of the *Sanal* case provide no support for the Fifth District's decision. In *Sanal*, the First District affirmed the trial court's refusal to grant an injunction against Dr. Sanal, expressly noting that there was no evidence that he had sought or received referrals from the plaintiff's referral sources:

> In fact, it was undisputed that Dr. Sanal had treated only established patients of Jacksonville Oncology Group or new patients referred to the Group under the name of a senior member of the Group.

Sanal, at p. 514.[2]

Moreover, the Fifth District's conclusion that it is impossible to protect relationships with referral physicians in light of *Sanal's* holding that prospective patients be "specifically identifiable" simply does not follow. Enjoining a doctor from seeking and accepting referrals from his prior employer's referral sources would not preclude that doctor from providing medical services to the "unknown prospective patients" with which the *Sanal* court was concerned, so long as these patients were not the result of a prohibited referral. This result would not only recognize and protect the employer's legitimate business interest in its referral physicians, but would also permit a departing doctor to provide medical services to prospective patients with whom the employer had no specific relationship.

Because at least one other district court has affirmed a trial court's finding that a medical practice has a legitimate business interest in referral doctors, the Florida Supreme Court has accepted conflict jurisdiction of the *Florida Hematology* case. *See Southernmost Foot and Ankle Specialists, P.A. v. Torregrosa*, 891 So.2d 591 (Fla. 3d DCA 2004), where the Third District upheld a trial court's finding that Southernmost had legitimate business interests with regard to its "patient base, referral doctors, specific prospective and existing patients and patient goodwill." *Id.*, at p. 594. *Also see Open Magnetic Imaging, Inc. v. Nieves-Garcia*, 826 So.2d 415 (Fla. 3d DCA 2002).

However, until this conflict is resolved, attorneys practicing in the area of restrictive covenants in the Fifth District should be prepared to address the challenges presented by the Fifth District's opinion in *Florida Hematology*.[3]

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[2] One wonders why the First District Court of Appeal bothered to point out that Dr. Sanal had not sought or received referrals from plaintiff's referral sources if the *Sanal* court believed that referral sources could not be protected by restrictive covenant anyway.

[3] On November 1, 2007, as this article was going to press, the Florida Supreme Court inexplicably reversed its earlier position and decided that it had granted conflict jurisdiction "improvidently," choosing not to resolve the conflict created by the *Torregrosa* and *Tummala* cases. In a sharply worded dissent, Chief Justice Lewis chastises the Court for refusing to resolve the conflict, noting that "economic futures are placed at risk through the use of such covenants" and that "a clarification of what the law is with regard to restrictive covenants is imperative." The logic of Justice Lewis' dissent is inescapable and he urges the legislature to "remove this conflict and clarify the law."

H. Gregory McNeill is a partner/shareholder with Lowndes, Drosdick, Doster, Kantor & Reed. He has been a member of the OCBA since 1986.



What We Do . . .

Now I have a Future!



Robert B. Storrs, Jr.

One day in June, about three years ago, Etienne raced out of his house on his native island and began running for his life. He was running from men who, minutes earlier, had shot his father dead on the street – the same men who were coming to kill him and only failed because he had been alerted by a friend who had witnessed his father's assassination. Two days earlier, Etienne and his father had been attacked by men who abducted them, beat them, and almost tortured them to death, accusing them of spying for Americans and of helping to destroy the government of his country. He never found out if the men who killed his father were the same ones who stacked tires around him and his father, threatening to burn them to death. But he did know that he was now a marked man.



Charles Conroy, LAS attorney, and Etienne

Photo by Kathryn Kelly Photography

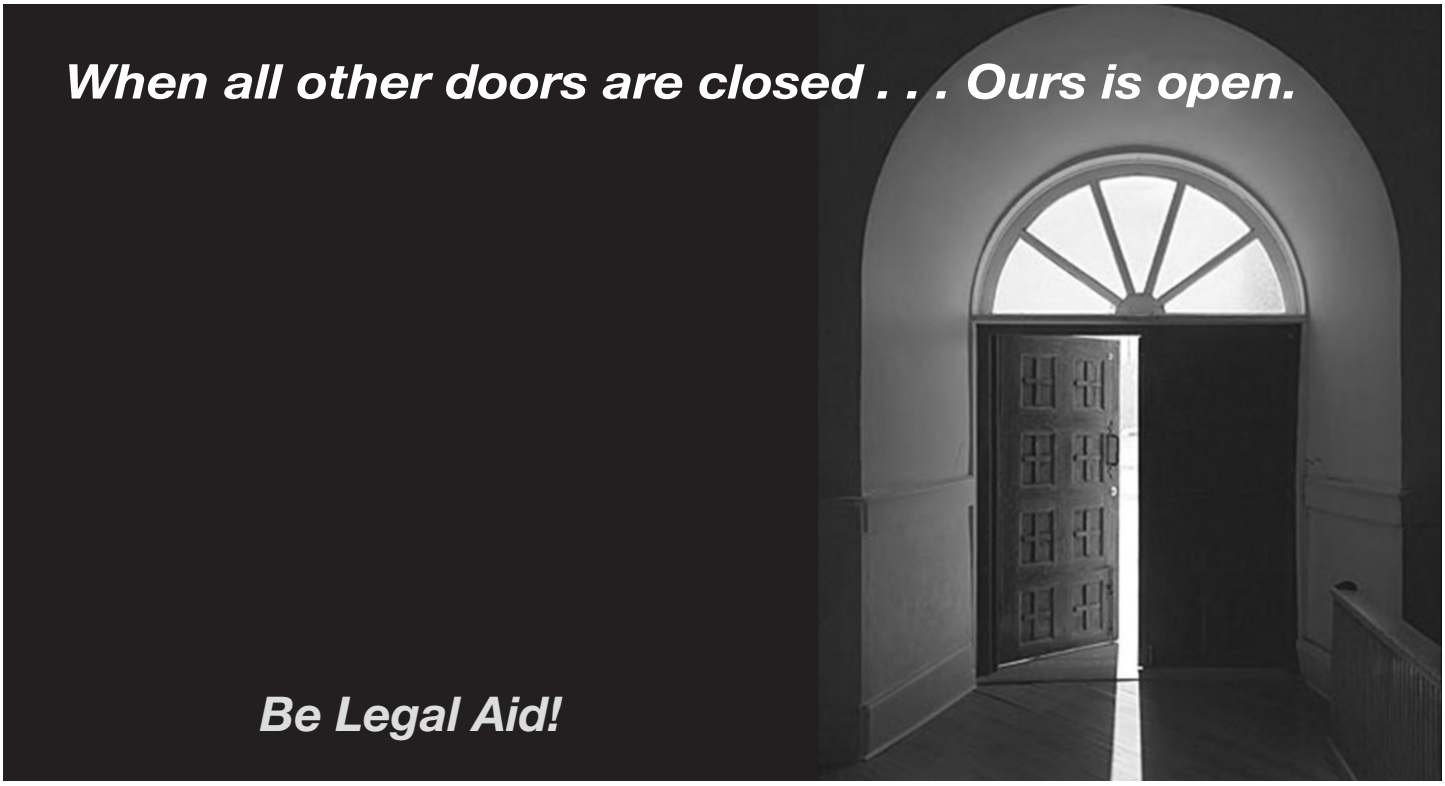
Etienne fled his homeland just hours ahead of the death squad tracking him. He escaped to one Caribbean Island, while his family managed to find passage to another. However, the authorities on that island were deporting refugees, and Etienne knew it was only a matter of time before he was again in danger. Eventually he made his way to the United States.

Once here in Orlando, Etienne laid his case before Charles Conroy, a Legal Aid Society attorney who specializes in immigration law. Charles reviewed the facts and recognized immediately that the case had merit. He filed a memorandum of law in support of Etienne's request for asylum and withholding of removal, accompanied by exhibits that clearly supported his request and established the likelihood that Etienne's life and freedom were threatened by a return to his country.

After due consideration, the request for asylum was granted. Today, Etienne is a free man in a free country, working toward the privileges and responsibilities of citizenship. He gives thanks and credit to Legal Aid, and especially to Chuck Conroy, for making his new life possible. It is one more example of the way lives can be changed when attorneys are willing to go the extra mile in the cause of justice for the oppressed.

Congratulations, Etienne.
Thanks, Chuck.

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



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Appellate Practice Committee

Take the Appellate Challenge! Part Three



Marcia K. Lippincott and Michael R. D'Lugo

We hope you have enjoyed the first two installments of our series of Appellate Challenge questions. These questions are somewhat different than the questions presented in the previous two installments of the Appellate Challenge. The earlier questions addressed situations in which a lack of familiarity with the appellate rules can result in the termination of your appeal. Here, the questions address areas that are not always as dire as the issue of whether your appeal lives or dies. However, the issues addressed are nevertheless very important, because they revolve around whether you are providing optimal advocacy for the client - questions such as the right to oral argument, appellate attorney's fees, and the adequacy of written filings with the appellate court. Once again, optimal advocacy for the client at the appellate level requires an experienced appellate lawyer.

Questions

11. You are appealing a final judgment against your client. You have already filed the Initial Brief in which you requested oral argument, and the Reply Brief. You feel that in order to better communicate your arguments to the appellate court, and to address any concerns the panel may have, you would like to attend oral argument. However, before oral argument is scheduled, the District Court issues an opinion. At that point you file a Motion for Reconsideration, with the only basis being the fact that the court ruled without scheduling oral argument. What will the appellate court do?

12. You are the appellee in a case in which the trial court entered a judgment in your client's favor. You have filed your Answer Brief and the appellant has already filed the Reply Brief. You had previously filed an enforceable proposal for settlement, and the trial court has ruled that you have an entitlement to attorney's fees at the trial court level. The District Court issues an opinion in your favor, affirming the judgment in favor of your client. After the opinion is issued, you file a motion with the appellate court requesting attorney's fees pursuant to your proposal for settlement. How will the appellate court rule?

13. After a jury verdict and final judgment are rendered in favor of your opponent, you timely file a Notice of Appeal. Based upon the voluminous record and the legal issues involved, you file a 50-page Initial Brief. Your opponent contests every issue raised in your Initial Brief with an equally lengthy Answer Brief. You then timely respond with a 15-page Reply Brief. You then attend oral argument, at which both sides are allowed to exceed their 20-minute allotment of time. Twelve weeks after oral argument, the District Court affirms the entry of judgment against your client on a *per curiam* basis, without an opinion. Is this the end of your appellate remedies?

14. You represent a party who has been the subject of onerous discovery requests that you feel will require the disclosure of privileged communication and documentation. You have argued to the trial court that the materials sought are privileged, and therefore immune from discovery. The trial court rules against you at the hearing, and signs an order dated November 1, 2007. However, because the trial court's judicial assistant temporarily misplaces the signed order, it is not entered on the court's docket until November 20, 2007. You file a Petition for Writ of Certiorari on December 15, 2007. Your opponent moves to dismiss your petition on the basis that the petition was not timely filed. How will the appellate court rule?

15. You represent a plaintiff in a personal injury action. After a jury trial, a verdict and final judgment are entered in favor of the defendant. You appeal to the District Court. After briefing and oral argument, the District Court issues an opinion affirming the trial court in all respects. You timely file a Notice of Appeal to the Supreme Court. Then, following the same briefing schedule that you followed at the District Court, you file your Initial Brief. Your opponent moves to dismiss the appeal for lack of jurisdiction. How will the Supreme Court rule?

Answers on page 26

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Carolyn M. Fennell, Director of Public Affairs for the Greater Orlando Aviation Authority, spoke at September's luncheon. The luncheon was sponsored by Westlaw and hosted by CFAWL.



The number of firms belonging to the OCBA 100 Club has grown to include 37 firms. At September's luncheon, Mark Morsch accepted a certificate on behalf of The Morsch Law Group from OCBA President-elect, Tad Yates.



More Gator games? But of course! Pictured at a recent game are Taylor Kessel, Kristyne Kennedy (hey, what's she doing there?) and Shayne Thomas.

HEARSAY

Nick Shannin is seeking three persons also ready to retire to form a regular bridge game. Retire? Ah, yes - I'm sure to be on my way to Del Boca Vista as soon as I get my e-mail from the infamous Nigerian bureaucrat who needs me to hold onto his 28M in graft money, for a small finder's fee of course. You know the e-mail I'm talking about that goes something like this:

> *May I first of all honestly express the seriousness and dutifulness with which I am sharing this correspondence with you. I implore you to hold it and all subsequent correspondences regarding this proposition in strictest confidentiality. We have identified a lot of misappropriated and inflated contract sums, which are presently floating in the suspense account of the Nigerian Federal Ministry of Finance (FMF), ready for payment. The companies that executed these contracts have been duly paid. It is part of the over-inflated sum, totaling US$28,250,000.00 that we intend to transfer into a foreign account....*

As you can tell from language like that, it is only a matter of time until I'm enjoying my cheeseburger in paradise, lost shaker of salt optional. And I thought that day had come this month when I received a spam-alarm-ringing e-mail from the Consulate of Namibia. Unfortunately, my retirement plan was delayed when I realized these two things: 1) there was no promise of money anywhere to be found; and 2) *it really was* from the Consulate of Namibia. Congratulations go out to **Steve Snively**, partner at Holland and Knight, for the distinctive appointment as a Consulate for this seventeen-year-old African nation. I mean, sure, what law firm doesn't have an office in Brussels, but to have direct connections to Windhoek, Namibia – well, that's a rare thing indeed!

Alright, if Consulate Snively isn't forwarding me requests to deposit large sums of money after all, I guess I'd better get back to my other non-paying day job as your loyal Hearsay columnist. Fortunately, for a job that doesn't pay, business this month was good - loads of events for the paparazzi to crank the F-Stop to 11 and let the shutters fly. First out of the gate was the wildly popular OCBA Social Committee Joint Happy Hour on September 13, 2007. While the omnipresent Young Lawyers Section was indeed a sponsor, they were not alone, since the event was also sponsored by a number of affiliate bars including Paul C. Perkins, the Hispanic Bar Association and CFAWL, with special guest star CFGALLA also ante-ing up to help throw this shindig. The second major Bar event at Doc's Restaurant this year ('twas also the site of the well-attended YLS Evening with the Judiciary), it appears much like the constitutional amendments; anywhere the MDs try to establish a foothold, we're coming in after them! In any event, the diverse assembly of sponsors proved to be effective in bringing together members from across the bar for a fine evening of bar solidarity.

[Prepare for a hook back to Nigeria, coming in four sentences.] A few days later, a smaller but equally spirited group showed up at a horse farm at 7:30 a.m. for a worthy cause: Oats for Zoe. You may have seen the story on the front of the sports section - or on CNN - about local abandoned and abused horses who



Nicholas A. Shannin

were adopted by Central Florida's own Michelle Akers. Turns out, our local FIFA luminary is actually the wife of partner-of-Shannin **Steve Eichenblatt**, who helped organize a fundraising breakfast for one of these medically challenged equines. The assembled group watched the U.S. Women's World Cup game against *Nigeria* [coincidence?], and therefore was a great success both because of the funds raised and the U.S. delivering a 3-nil victory. Equine or ASPCA friends alike can get more information about Oats for Zoe from Steve at seichenblatt@floridalawonline.com.

Garnering less press in the sports section but more in the Federal Judge Confidential (the tabloid alternative to the Federal Rules Digest) was the big granddaddy of all fall events this year and likely the cover story of this edition: the Grand Opening of the new federal courthouse. An opening so grand it couldn't be contained in one day, instead being split to a Thursday evening social gathering, with a more business-oriented version on Friday. Which one was better? Tough call – the Thursday event had the one-name luminaries from **Leon** to **LaShawnda** all in attendance, free flowing vino rarely seen in proximity to judicial chambers, and a selection of desserts that would have made Martha Stewart envious. (Well, when she's not in federal court herself, that is.) But before you give Thursday the nod, the guest list for the Friday event included a U.S. Supreme Court Justice, so in honor of **Justice Thomas**, I'll call Friday the bigger day. Still, the Thursday Eve event proved truly memorable for yours truly since **Deborah** "the fifth Designing Woman" **Botwin** convinced the **Honorable Judge John Antoon** to play docent, personally giving a small group of late-stayers a guided tour of the top floor of this magnificent building. I'm not going to say that life is good on the top, but I'd trade spaces with his judicial assistant anytime!

Yet one more judge-filled event took place in September – the YLS's Oath of Admissions and Reception. I'd regale you with the glorious turnout at that event, but I'll cajole you instead to turn to Brother **Kessel**'s YLS on the Move page to get the details instead. But before I go, I'll give you trivia heads another chance, this time Internet usage allowed! Identify the animal that graces both sides of the coat of arms from Namibia. First correct response gets the incredibly sought after prize of mention in the next issue of *The Briefs*. Good luck, and in the meantime, please send your kudos, gossip or other interesting information my way at nshannin@floridalawonline.com. Feel free to come by and take my chips at the **OCBA Poker Tournament (November 15th**, contact **Woody Rodriguez** at dwrodriguez@aol.com for details), and make sure to save the date for the **OCBA's Winter Wine and Cheese party on January 28, 2008** (contact **Judi Hayes** at jah@mcclanepa.com for details). Enjoy Turkey Day and I'll see you back here soon for more holiday cheer!

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



The YLS sponsored the fall Oath of Admission ceremony at the Orange County Courthouse on September 20, 2007, for attorneys who recently passed the Florida Bar. Many thanks to co-chairs Christy Nash and Jacqueline Ferris.



Sunny Lim and Elizabeth Anderson co-chaired the 16th Annual YLS Charity Golf Tournament, which was held at ChampionsGate on October 12, 2007. It was a huge success! Congratulations!



Gregg Swift and Eric Reed had it made in the shade at the annual golf tournament! They were among the 116 folks who got together on a beautiful Florida day to shoot a few holes and raise money for some worthy causes.



Stan realizes that the dating service has made a terrible mistake.

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YLS on the Move!

Wrapping up the Year!



Taylor C. Kessel

Fall is beginning to wrap up as we head quickly into the winter holiday season. Before you know it, we will be signing pleadings and documents with a 2008 date. The YLS is also getting into the holiday spirit of giving by presenting the scholarship award and helping out in the community through various outlets such as Habitat for Humanity and the Legal Aid Society. We are always looking for young lawyers to participate in service projects and other community involvement events, so please email us at ocbayls@gmail.com if you are interested.

On September 25, 2007, the Young Lawyers Section presented the YLS scholarship to MiaSarah Andujar. Each year YLS recognizes an outstanding high school senior who is in need of financial assistance to further his or her education by awarding a four-year scholarship. This year's recipient will begin college at Valencia Community College (VCC) and will attend her junior and senior years at the University of Central Florida. MiaSarah was awarded a scholarship for tuition in the amount of $2,500.00 for her first two years at Valencia and then can receive up to $5,000.00 per year for her final two years. MiaSarah is a recent graduate of Colonial High and is currently focusing on a degree in criminal justice.

The Fall Oath of Admissions Ceremony and Reception was held on September 26, 2007. Approximately 20 judges from around Central Florida were in attendance to congratulate and swear-in new attorneys recently admitted to the Florida Bar. **Judge Alice L. Blackwell** administered the Oath to the new attorneys. Immediately following the ceremony, the newly admitted attorneys, together with their family and friends, attended a reception in their honor at Harvey's Bistro. The co-chairs of the event, **Jacqueline Ferris** and **Christy Nash**, would like to thank their committee members, **Melanie Shoemaker**, **Suzanne Paulus**, **Angela Allen** and **Andrea White** for their hard work. Additionally, we thank event sponsors **Barry University School of Law**, **Westlaw**, **Let Us Frame It**, **Orange Reporting**, **Investigative Legal Services, Inc.**, **Barbara Perry Reporting**, **Florida A&M University College of Law**, **Latham, Shuker, Eden & Beaudine, LLP**, and **The Presentation Group**. Congratulations to all newly admitted members of the Florida Bar, and thanks to Jacqueline and Christy for organizing this great event!

If you are interested in taking on a Guardian *Ad Litem* case, or you would like to sharpen your GAL skills, then please join us for the Legal Aid Society's monthly GAL training luncheon. There are two training sessions scheduled in November and two in December. In November, LAS will present the following: November 13, Noon to 1:30 p.m., *Temporary Custody/Chapter 751* presented by **Catherine Tucker**, LAS *Pro Bono* Coordinator, 1.5 CLE (pending); November 27, Noon to 1:30 p.m., *Tips for Conducting a Home Visit* presented by **Doris Mackey** & **Tanika Patrick**, GAL Case Coordinators. Both December trainings sessions will be held on December 11 from Noon to 1:30 p.m.: Mediation and Dissolution of Marriage Cases presented by **Angel Bello-Billini**, Litigation Coordinator; 1.5 CLE (pending); and *Permanency Staffings and Case Plan* Conferences presented by **Stephanie Stewart**, Permanency Attorney. If you are handling a GAL case, please join us for these informative lunch training sessions at the First Presbyterian Church of Orlando, Eddington Ministry Center, 3rd Floor, Room 310A, located at 106 E. Church Street. Pre-registration is required for the free lunch and requested for training (or subject to space availability if not pre-registered). For more info, please call or email Misha Vanderhorst at 407-841-8310 x3176 mvanderhorst@legalaidocba.org.

The November YLS Luncheon will be held on Thursday, November 15, 2007, at the Citrus Club. Our guest speaker will be Thuong N. "Cuc" Foshee, mother of YLS President **Elizabeth McCausland**. This will mark the one-year anniversary of Ms. Foshee's release from a Vietnamese prison. If you are interested in attending the luncheon, please RSVP to ocbayls@gmail.com by Monday, November 12. The cost is $18 if you RSVP on or before November 12 ($20 at the door) or $10 for sole practitioners, law students and government attorneys.

Be sure to hold the date for the OCBA Winter Wine & Cheese Party on Thursday, January 24, 2008. This popular annual event is a great way for OCBA members to get together and celebrate the new year! For details, contact Kim Webb at 407-514-2637 or KDWebb@littler.com.

As an additional reminder: the Florida Bar Young Lawyers Division is currently accepting submissions for its quarterly newsletter, *Across the Bar*. If you have an article or photo of interest to young lawyers across the state that you would like to be considered for publication, please send it to **Chelsie Roberts** at croberts@fordharrison.com.

Until next time, if you have any questions or want to find out more about our section, please contact me, **Taylor Kessel**, at 407-540-7500 or taylor.kessel@cnl.com.

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

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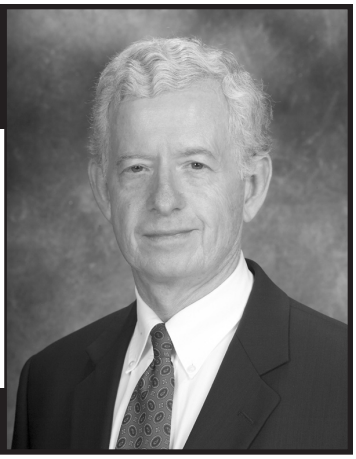
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Labor & Employment Committee

The Use of Conviction and Arrest Records in Making Hiring Decisions



Dawn R. Rodda

John Williams is the hiring manager for his advertising company. He just received the results of a background check for Susan Jones, a potential employee to whom he had given a job offer conditioned upon a satisfactory result from the background check. John just learned that Susan has an eight-year-old conviction for driving under the influence and an arrest last year for aggravated battery. Can John decline to hire Susan based on either the conviction or the arrest, or both? The answer is, of course, it depends.

In Florida, there is no legal prohibition against making hiring decisions based on either convictions or arrests, nor is there any limitation on the length of time since a conviction or arrest that an employer can consider. A few states prohibit employers from considering arrests, some exclude certain types of crimes from consideration, and others limit how many years back an employer may look. However, even in Florida, a blanket policy against hiring individuals with convictions or arrests, without further consideration, could be problematic.

Although not legally binding, the Equal Employment Opportunity Commission (EEOC) has provided guidance on the use of convictions and arrests in making hiring decisions. This guidance is often referred to by courts. The EEOC explains that it would certainly be discriminatory for an employer to disqualify an individual of one race because of his record but not disqualify an individual of another race who has the same record. However, the EEOC has taken it a step further and stated that, in the context of a criminal conviction, if the use of the record can be shown to have a "disparate impact" on a certain class of individuals, the employer must justify the practice based on business necessity. A disparate impact, also known as "unintentional discrimination," arises when a facially neutral policy, such as a prohibition against hiring any individual with a criminal conviction, has a disparate impact on a certain category of individuals. In the context of convictions and arrests, statistics show that racial minorities are arrested and convicted at higher percentage rates than non-minorities. If a disparate impact is present, the EEOC requires the employer to show that it considered (1) the nature and gravity of the offense; (2) the time that has passed since the conviction and/or completion of the sentence; and (3) the nature of the job held or sought.

Therefore, according to the EEOC, a blanket policy excluding all persons convicted of any crime from employment would not be consistent with business necessity. For example, in the situation above, because Susan's conviction for driving under the influence has little relation to her likely job duties in an advertising firm, the conviction should not be used to exclude Susan from employment. The analysis could be different if Susan's job duties included driving a company vehicle, because the relation between the conviction and the job is not as tenuous.

In regards to arrests, the EEOC cautions that while an actual conviction constitutes reliable evidence that a person was engaging in the conduct alleged, an arrest without a conviction does not establish that a person actually committed any wrongdoing. Therefore, considerations of arrests must not only be related to the job, but employers must also evaluate whether the individual actually engaged in the misconduct. The EEOC suggests giving the individual the opportunity to explain the situation and making follow-up inquiries as necessary to evaluate the individual's credibility.

Ultimately, John may decide not to hire Susan because Susan's arrest for aggravated battery creates an unreasonable risk to her future co-workers. Whatever his decision, John, and other employers alike, should evaluate the requirements of each of its job positions and make sure that any resulting exclusions are truly based on legitimate safety and security concerns. While not legally binding, the EEOC's guidance is influential to courts, and employers should use this guidance to evaluate their policies on the use of convictions and arrests in making hiring decisions.

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Dawn R. Rodda is an associate with Foley & Lardner LLP in the Orlando office. She has been a member of the OCBA since 2002.



Answers

Question #11. The appellate court will deny your Motion for Reconsideration. Either party can request oral argument, and the determination of whether to do so lies entirely within the discretion of the District Court. Each district has its own tendencies regarding the granting of requests for oral argument, with the Fifth District being the most favorable in terms of granting such requests. However, the deadline for requesting oral argument is the date that the last brief of that party is due. *Fla. R. App. P. 9.320*. Therefore, the appellant must request oral argument by the deadline for the filing of the Reply Brief. In addition, the request cannot be made within the Initial Brief. The request must be made in a separate document filed with the District Court. *Noel Enterprises, Inc. v. Smitz*, 490 So. 2d 95 (Fla. 5th DCA 1986). In the absence of a timely request for oral argument made in a separate filing, the District Court will deny a Motion for Reconsideration that is based solely on the fact that the court ruled without scheduling oral argument.

Question #12. The appellate court will deny your Motion for Attorney's Fees. Ordinarily, when a party has an entitlement to attorney's fees at the trial court level, that party also has an entitlement to attorney's fees at the appellate court level. *Hartley v. Guetzloe*, 712 So. 2d 817 (Fla. 5th DCA 1998). However, the deadline for filing a Motion for Appellate Attorney's Fees is the deadline for service of the Reply Brief. *Fla. R. App. P. 9.400*. Thus, in this question, because no Motion for Attorney's Fees was filed prior to the service of the Reply Brief, the appellate court will deny the request for appellate attorney's fees. *Respiratory Care Services, Inc. v. Murray D. Shear, P.A.*, 715 So. 2d 1054 (Fla. 5th DCA 1998). A timely Motion for Appellate Attorney's Fees would have been granted.

Question #13. A *per curiam* decision is not the end of your appellate options, but it is very close to the end of the road. The *per curiam* decision is a device that appellate courts use to affirm a trial court's ruling without issuing an opinion in which the court sets forth its rationale for its conclusion. In the absence of a written opinion, there is nothing the non-prevailing party can identify that would create the possibility of the Supreme Court exerting its discretionary jurisdiction to review the case. However, this is not the end of the road. *Fla. R. Civ. P. 9.330(a)* provides a mechanism that allows a non-prevailing party to request that the District Court issue a written opinion. The basis of the request must be that the attorney has a reasoned and studied professional judgment that a written opinion will provide a legitimate basis for the Supreme Court to exert its discretionary jurisdiction. While a *per curiam* decision is not the end of the appellate road, it is very close to the end, because District Courts rarely grant motions requesting a written opinion on this basis.

Question #14. The appellate court will deny your opponent's Motion to Dismiss the Petition, in spite of the fact that the judge signed the order forty-five (45) days prior to the filing of the Petition. The operative date for determining when the thirty (30) days to file the Petition begins to run is the date on which the order is rendered. *Fla. R. App. P. 9.020*. Rendition of an order is effected by the filing of a signed, written order with the clerk of the lower tribunal. *Belmont v. State*, 370 So. 2d 1173 (Fla. 4th DCA 1979). If a judicial assistant misplaces an order, then there will be an inadvertent extension of time in which to file the Petition. The rendition of the order in this case is the date on which the clerk entered the order into the court's docket, or November 20. Therefore, the Petition for Writ of Certiorari in this case was timely filed.

Question #15. The Supreme Court would be within its right to dismiss the appeal because of the failure of the appellant to submit a brief on jurisdiction. Unless the District Court certifies a question of great public importance in its opinion, the parties are required to submit briefs on jurisdiction. *Fla. R. App. P. 9.120(d)*. The purpose of these briefs is to present argument to the Supreme Court to convince the court to exert its discretionary jurisdiction to review a case. With certain very limited exceptions, the Supreme Court has the discretionary authority to decide whether to accept or reject jurisdiction in a given case. If the appellant fails to file the required brief on jurisdiction, chances are the Supreme Court will refuse to hear the case.

Next month we will complete our Appellate Challenge with five more questions designed to test your knowledge of the appellate process.

Marcia K. Lippincott, Marcia K. Lippincott, P.A., and Michael R. D'Lugo, a partner with Wicker, Smith, O'Hara, McCoy & Ford, P.A. Ms. Lippincott has been an OCBA member since1992 and Mr. D'Lugo has been a member since1999.

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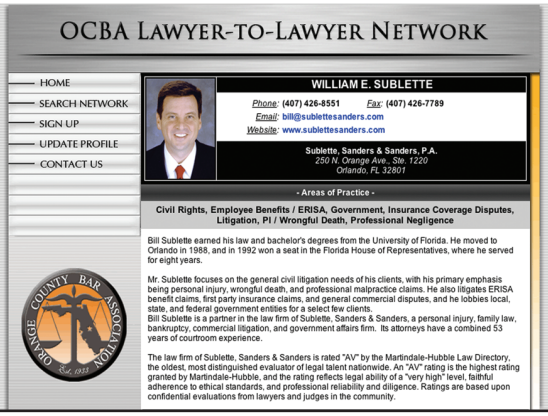


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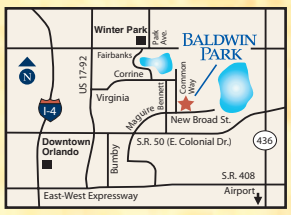


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Rainmaking

Managing Client Perceptions Equals Good Client Development



Mark Powers

Back when the airline industry was making money, they routinely reinvested in maintaining the look of their planes. The seats, carpet and wall covering in every plane were consistently replaced and kept looking good.

Why were they so particular about the look of their airplanes?

It was good business.

When passengers see stained carpets or frayed fabric on the seat in front of them they immediately begin to question how well the airline maintains the engine. The thought of a poorly maintained engine produces anxiety. If a smooth, pleasant and safe experience is what the airlines were after for their passengers, the perception that the plane is in shoddy repair does not help.

That customers leap to such far-reaching conclusions is not limited to the airline industry. In the absence of any real information about a service or product, consumers will look to the quality of whatever surface features they see. We do this with politicians, too – the less we know about their abilities, the more we vote based on their physical appearance. Worthy candidates suffer if they don't look good.

What does all this have to do with the legal profession?

Managing client perceptions is just as important for lawyers. Potential clients are nervous and feel at a distinct disadvantage when seeking legal services. They generally have a problem and want someone they trust to help them. As they sit in the reception area, their eyes wander as they unconsciously form that all-important first impression.

During this initial survey, if the reception area is full of mismatched furniture and a disinterested receptionist sits behind the desk, what kind of an impression do they form about the attorney who works there? Is worn décor or a lack of hospitality a true indication of the firm's professionalism or concern for clients? No, but it might as well be.

Contrast that experience with one in which a potential client walks into an office, is impressed by the décor and feels warmly welcomed by the staff. The first impression is a positive one and confers all manner of wonderful attributes on the firm - whether it deserves them or not. Here, the power of perception is made to work for you, not against you.

All of this is to say: manage the perceptions of your clients. They are drinking in the look, the feel and the sound of your firm at all times. Your signage, how hard you are to find, what the parking is like, whether or not your website and letterhead match, the sound of the receptionist's voice when she answers the phone – all must be welcoming and consistently professional in look and feel. According to B. Joseph Pine and James Gilmore, authors of several best-selling business books, we are in the *Experience Economy*. Today's sophisticated consumers seek an elevated experience when they buy goods or services. Starbucks can charge four bucks for their coffee because they deliver it in a more hip environment than the diner on the corner. Dentists have learned to quell the anxiety of their patients by installing massage chairs, earphones and television monitors that run movies, cartoons, whatever the patient wants. Theaters feature superior sound systems and seats that vibrate to the music. Design and technology are being employed at every turn to enhance the customer experience.

Many Atticus graduates have taken this idea to heart and have worked hard to create a better experience for their clients. One firm that specializes in divorce and is set in the deep south, where hospitality is sometimes elevated to an art form, has music piped into the parking lot so clients are surrounded by soothing sounds from the start. Inside, the office is comfortably furnished with upholstered chairs and harmonious colors. This attorney knows his clients are in pain and surrounds them in a relaxing, calm environment. They don't offer the clients something to drink, they provide the client with a menu and offer them a choice. And his efforts are more than skin-deep. On his staff are individuals who are expert at hand-holding anxious clients. Think this is too much? This is one of the top divorce firms in the state. They must be doing something right.

A PI firm we know has taken a page from retailers and others who use scents for the psychological cues they invoke. Microwave chocolate-chip cookies are made periodically through the day. The comforting, reminds-you-of-home smell of these cookies wafts through the firm and clients clamor to have them. It takes the edge off whatever tragic circumstances they are there to discuss.

What state of mind are your clients in when they come to your office? Rarely are clients in a law office because they want to be. They are usually dealing with a crisis of some kind, or attempting to forestall one in the future. How much better could you make the clients feel just by changing a few elements in your office? What kind of initial impression do you want your firm to make? Do you want to be seen as trustworthy, professional, dependable, stable, reassuring? Then ask yourself if the look and feel of your office sends that message.

If you can't tell what kind of impression you make, use the "mystery shopper" technique: ask someone your staff doesn't know, but you trust, to call your office, make an appointment, and come and sit in the waiting room. When you bring him back to your office, he can tell you how he was greeted on the phone, whether or not he was put on hold, how easy it was to find the office and what it's like to sit in your reception area. If asked, many of your spouses can tell you the same thing.

Continued on page 30

Side Bar



Jessica K. Hew

Once again our affiliate bar associations are keeping busy, offering plenty of upcoming events and continuing to do great work helping out in our community.

Paul C. Perkins Bar Association is working with The Coalition for the Homeless of Central Florida. As a part of the Annual Celebration, the Coalition will embark on an awareness campaign to bring light to the negative impact of violence against women and children. Naomi Judd, a nationally renowned entertainer, speaker, writer and humanitarian, will join the Coalition at the 2nd Annual Celebration luncheon on Tuesday, November 27, 2007, from 11:00 a.m. to 1:00 p.m. at the Rosen Centre Hotel on International Drive. Contact Debbie Melton with the Coalition at 407-426-1265 or Debbie.melton@cflhomeless.org with any questions.

PCPBar will also play an active role in the Parramore Kidz Zone Project on November 19, 2007, from 9:30 a.m. to 11:30 a.m. The program involves inviting young students from the Parramore area and introducing them to the criminal justice system through a mock trial at the Orange County Courthouse in Courtroom 6-B. PCPBar volunteers will assist in both individual mentoring and participation in the mock trial. If you are interested, please contact **Aramis Donell** or the **Honorable Faye Allen**.

On Wednesday, November 14, 2007, PCPBar and Jones High School will be participating in "Teach-In 2007" to celebrate American Education Week. The event, sponsored by Orange County Public Schools, Bank of America and the *Orlando Sentinel*, brings business and community leaders to the classrooms to discuss a variety of topics, including career fields, employability skills, and the importance of post-secondary education and/or overcoming obstacles. If you are interested or have any questions, please contact Lisa James at (407) 835-2300 ext. 2320.

The Central Florida Paralegal Association, Inc. has expanded to include another location for its monthly lunches. The four meeting locations are: Winter Park/Maitland on the 2nd Thursday of the month; Downtown Orlando on the 2nd Wednesday of the month; South Orlando, quarterly; and Altamonte Springs

Continued on page 32

Rainmaking

Continued from page 29

You can also take the test below to help you identify problem areas.

Client Reception

- All clients are greeted warmly and offered a beverage upon coming into our reception area.
- When meeting clients, the attorney comes to the reception area and escorts them to the conference room or office.
- New clients are given a tour of the office and introduced to key people on their first visit.
- The client is introduced to the Designated Hitter upon the first meeting.
- The clients are given some kind of token gift with the firm's name on it.

Facility or Office

- The overall office decor sends the right message to the client in terms of credibility, permanence, and trustworthiness.
- The reception area chairs are in good condition and comfortable for sitting.
- There is adequate and easily accessed parking for clients.
- Any offices that the client sees are neat and orderly.
- The office decor is matched to the type of client that frequents the firm.

Materials and Signage

- New clients receive maps or written directions in advance of their first visit.
- Firm signage is clear and not difficult to follow.
- New clients are given a "Welcome" package of information to familiarize them with the firm.
- Firm letterhead or logo is well-designed and consistent on all materials.
- The firm website has a look and feel similar to the rest of the firm materials, without being a duplication of the firm brochure.

Telephone System

- Clients are greeted warmly by a real human being when they call.
- The voice mail system is adequate to the clients' needs and always presents the option to speak to a real person.
- Attorneys never take a call when meeting with a client unless it is an emergency.
- All staff monitor their voice mail frequently.
- Telephone calls are returned the same day, or within several hours.

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



Presentation Skills for Lawyers

Make Yourself Heard in a Crowded Room

Elliott Wilcox



Congratulations, you're going to be addressing your entire association at next month's luncheon! What an honor! You're going to be addressing several hundred lawyers, so if you want them to hear you, you'll need to use a microphone. Here are six quick guidelines to help you get the most out of the microphone:

1. Understand how a microphone works. This sounds simplistic, but it's important for you to know: The function of a microphone is to amplify your speaking voice. That means you won't need to shout into it or speak louder than normal. When you raise your voice while using a microphone, you'll knock your audience out of their seats. How many times have you listened to a speaker who thought he needed to yell into the microphone? Remember how uncomfortable it felt being blasted at 150db? Do your audience a favor - don't shout into the microphone.

2. Beware of Plosives. No, not explosives... Plosives. Plosives are the speech sounds you produce when you stop the airflow in your vocal tract and then release a burst of air. For example, say the word "Power" or "Popeye" aloud. The puff of air that you produce when you create the "P" sound is a plosive. When you use the microphone, you will need to be careful of plosives, because if you're too close to the microphone, that burst of air will cause a "popping" sound that can be very annoying to your audience members. If you aren't careful with your plosives, your audience members will start cringing every time you say a word that starts with "P."

To avoid that "exploding P" sound, position your microphone so the puff of air blows across the top of the mic or to its side, rather than puffing directly into the mic. You can also move the microphone further away from your lips, so the puff of air doesn't strike the microphone.

3. Silence Sibilant "S" Sounds. Another sound that becomes dramatically amplified by the microphone is the sibilant "S" sound. There are two things you can do to avoid making that hi*sssssss*ing *sssss*ound *sssssss*o many *sssssss*peaker*sssssss* make when using a microphone. First, you'll want to practice minimizing your creation of that sound and soften the rush of air. (That means practice, practice, practice.) The next thing you'll want to do is back away from the microphone. The same tip that will help you minimize your plosive sound will also help minimize your sibilant "S" sound. If you offset the microphone so you're not breathing directly into the microphone, you won't sound like a *sssss*lithering *sssss*nake.

4. Position the microphone correctly. It's important to adjust the microphone properly so that it picks up your voice. You don't want to fumble with the microphone while you're standing before your audience so, before you get to the luncheon, take a moment and familiarize yourself with how the microphone stand works, because not every stand adjusts the same way. You'll want to adjust the microphone to the appropriate height so that it's about a handspan below your chin level. If you're short, you need to lower the mic or else we won't be able to see you. If you're tall, you need to raise the mic, because it will be directed at your chest, rather than your mouth, and we won't be able to hear you. Position the microphone properly, and the microphone will pick up every word you say.

5. Don't let body microphones brush against your clothing. If you're using a lavaliere microphone (the type that clips to your clothing), it's important to make sure that the mic doesn't rub up against your clothing. If your clothing brushes against the mic, it will make a loud scratching noise that drives your audience nuts. Find a safe place to attach the mic, and you'll eliminate all of those distracting sounds.

6. Stay away from feedback danger zones. The final annoying distraction you'll want to avoid is the dreaded sound of feedback. When you walk in front of the speakers, the microphone will pick up a constant loop of sound, blasting your audience with annoying feedback. Check out the area ahead of time so you know which areas are "safe" and which areas are off limits, and you won't punish your audience with feedback noise.

Congratulations once again on being asked to speak. You're going to do a great job. Follow these simple guidelines for getting the most out of your microphone, and not only will your audience look forward to hearing every word you say, they'll actually be able to hear you!

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Elliott Wilcox is the editor of Trial Tips Newsletter. To obtain a free special report, "The Top Ten Tips for Trial Lawyers," send an email with the subject line "OCBA" to FreeTips@TrialTheater.com.

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Side Bar

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on the last Friday of the month. CFPA also has two upcoming seminars scheduled: *Electronic Case Filing (ECF) Training (State/Federal)* on November 19, 2007, and *Improving Your Outlook (Microsoft)* on December 7, 2007. CFPA will be collecting toy donations at these seminars for its annual community service project, the XL106.7 Baby DJ Toy Drive, in an effort to help bring joy this holiday season to needy children here in Central Florida. On December 7, 2007, CFPA will hold its Annual Holiday Social at Baker & Hostetler, LLP. CFPA will also be hosting monthly Membership Mixers/Happy Hours the 3rd Thursday of the month. Visit www.cfpainc.org for more details.

The Central Florida Real Estate Council is holding its Holiday Party on November 30 at the Orlando Museum of Art from 7:00 p.m. to 10:00 p.m. There will be a Toys for Tots Collection and Fundraiser at the event. Recently, the 2007-2008 Board of Directors was elected: **Fred Jones**, President; **Joyce Savage-Gaston**, VP - Membership; **Grace Anne Glavin**, VP - Programs; **Henry Cooper**, Secretary; and Directors: **Jennifer Jones**, **John G. Pierce**, **Avery Smith**, **Richard Truitt** and **Sancha Brennan Whynot**.

The Greater Orlando Chapter of The American Association of Legal Nurse Consultants is a non-profit organization comprised of registered nurses who work with law firms, insurance companies, hospital risk management departments and governmental agencies. These legal nurse consultants (LNCs) are part of a specialty practice of nursing which involves reviewing and analyzing medical records, scientific literature and other health care related documents pertaining to injury due to negligence, defective products, toxic exposure, work-related accidents or crimes. Legal nurse consultants use their formal education and clinical experience to render informed opinions on the standards of care and resulting injuries. Please visit the chapter website: www.orlandoaalnc.org, for more information about chapter membership, benefits and activities, as well as the role of the LNC. The next Chapter Meeting is Thursday, November 15, 2007, at 6:00 p.m.

From all of us at *The Briefs*, have a safe and happy holiday season!

Jessica K. Hew is a partner with Graham, Builder, Jones, Pratt & Marks, LLP. She has been a member of the OCBA since 1995. Please send your submissions to Jessica at jhew@grahambuilder.com.

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



Financial Planning

Structured Settlement or Irrevocable Trust?



Andrew C. Orr, CFP®, CLU, ChFC, AIF®

A young single woman of 22 years is involved in a near fatal car accident. Miraculously, she survives with no disability and only a head trauma that, on the surface, appears to be fine yet may cause a health concern later in life.

With the help of a plaintiff's attorney the woman receives a settlement of $400,000 net, after paying her attorneys' fees and costs. Her attorney, concerned that the young woman was not yet responsible enough to take on the responsibility of managing such a large sum of money, enlists the aid of an annuity salesman who specializes in structured settlements. The salesman and the attorney work out a very simple structure where the $400,000 is to be converted to a tax-free guaranteed lifetime income of $1,000 per month.

The woman's uncle, who happens to be a client of mine, calls me to tell me about this situation and his concern that an annuity income of $1,000 per month isn't a good use of the proceeds. He asks me to look into the situation and to meet with his niece, her mother, and himself to discuss the options.

After the meeting and some deliberation we decide that the structure is indeed a bad fit for this young woman and that, instead, an irrevocable trust should be set up where the uncle and the woman's mother are to be co-trustees. Having her mother and uncle as co-trustees eliminates the risk that the young woman squanders her financial windfall. Plus, as loving relatives concerned for her financial well being, they will make funds available to her as necessary. Yet, until money is needed, the funds can be invested properly and with more growth potential over her lifetime, potentially leaving a legacy of her own someday.

A financial plan, not a structured settlement, is created where $100,000 is made immediately available so the woman can purchase an affordable car and home. Another $100,000 is invested in a moderate-risk portfolio to provide funds for her during her child-bearing years. And the remaining $200,000 is set aside for her long-term financial security needs.

Assuming a 10% return on $200,000, net of all costs, the young woman will have $12,048,013 at age 65. Of course inflation being what it is, that amount of money would still have a present value of $2,230,909 using a 4% inflation assumption.

When told of the financial plan and decision to forego the structured settlement, the attorney stringently recommends that his client reconsider. He even goes so far as to drive to her house to appeal to her better sense and to her mother's as well. Being aware of this action, I found it bizarre that he was so adamant about the annuity that I had to question whether or not he was tied in to the commission. In the end, however, I doubted this and concluded that the attorney was merely trying to genuinely help his client and to lessen his perceived malpractice risk by pitching the annuity so heavily. I can imagine that he was thinking, "What, is she crazy? She is only 22! I have to stop this." Little did he understand that her needs would be protected by fiduciary professionals, just as they were protected when he was litigating the case.

What if she had taken the annuity route? She would have been paid a total of $516,000 over the next 43 years. Granted this payment was *guaranteed* never to stop as long as she lived. But inflation was killing the value of that monthly payment each year. In ten years, the Future Value (FV) of $1,000 is $675.56, using the same 4% inflation rate. In 20 years, it is $456.39. In 43 years, it is just $185.17.

It would be one thing if the woman *needed* income today and *couldn't* work or if she were disabled. But this was not the case. She had dodged a bullet and had a real opportunity to set herself up for a lifetime of real financial security.

The best solution for her, then, is an irrevocable trust and a sound, low-cost globally diversified tax-efficient investment portfolio managed by a fiduciary advisor. Being in the irrevocable trust means she is prevented from selling her structured annuity income for some heavily discounted lump sum sometime in her future if money gets tight. The trust would not allow such a sale. Selling a structured annuity payment to a third party for a heavily discounted sum is a risk to seriously consider and one that the irrevocable trust solution would solve.

At the time, the attorney couldn't recognize the wisdom in all this. Of course not; his professional training had been based on litigation and the law and not financial planning. Perhaps the annuity salesman provided the advice the attorney needed in this situation. An annuity salesman may be all too happy to be regarded as a provider of advice because all roads will lead to a structured settlement annuity and a nice commission.

I asked Orlando plaintiff's attorney David Paul for the top conditions under which he would be comfortable recommending a structured settlement annuity to his newly settled clients. His response:

1. It has some type of tax benefit for client;
2. fear of malpractice if the structure settlement is not offered, since it cannot be utilized properly once the money is in the trust account;
3. availability of structure representatives for advice;
4. the defense often talks about structures at mediation;

Continued on page 34

Financial Planning *Continued from page 33*

5. it takes out the guessing game and risk to the client (especially if you have a client with zero experience in the investment world);
6. predictability.

All of these are valid points regarding structures. However, I think both the defense and plaintiff sides tend to automatically recommend the structure for these reasons, at the sacrifice of other non-annuity solutions. Many times this can be seen when the structured annuity salesperson is invited into mediation. This is like putting the fox in the henhouse to protect the hens. Yet often annuity salespeople are not the appropriate professionals to rely upon when trying to analyze the lifetime cash flow needs of the party receiving the settlement. Why? Because their number one goal is to move annuities and to meet production goals. They are like any insurance agent, and they are trying to sell as much of the product as possible; thus, they can present a clear conflict of interest.

Financial planners are skilled in the five main aspects of tax, insurance, cash flow, retirement, investing, and estate planning. Hopefully they have earned the Certified Financial Planner (CFP) – the high water mark for financial planning. And, most importantly for a situation such as this, they need to be fee-only. Fee-only planners are held to fiduciary standards of care and do not sell any financial products. Their expertise in objectively looking at a situation to find the best possible financial planning result for the client may be what is needed, not the basic skills and potential conflict of interest of an annuity representative.

A good way to handle this is to call in a fee-only financial planner to provide an opinion before deciding on a structure. Most advisors would be happy to do so without a fee in hopes of building a referral relationship over time.

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



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Scott L. Reed - *Scarborough Hill & Rugh, Attorneys at Law*

Sarah E. Rumpf - *The Law Firm of Stovash, Case & Tingley, P.A.*

New Partners

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Philip J. Wallace - *Grower, Ketcham, Rutherford, Bronson, Eide & Telan, P.A.*

Published

Richard D. West, **Caryn M. Green** and **Andrea L. Cain**, West, Green & Associates, had their analysis of revisions to 61.14 Fla. Stat. published in the June issue of *The Matrimonial Strategist*. West, Green and Cain offer advice to family law practitioners preparing marital settlement agreements in light of the amended statute, which now includes cohabitation as a ground for termination or reduction of alimony.

Speaking Engagements

Gregory W. Herbert of Greenberg Traurig, P.A. gave a presentation entitled *Common Intellectual Property Issues Facing Corporate Counsel* on September 27, 2007, to the Hillsborough County Bar Association Corporate Counsel Section.

News to Note

The OCBA 75th Anniversary Committee is seeking volunteers for its History Project. The History Project will encompass the compilation of OCBA history and publication of relevant historical articles about past activities and members in *The Briefs*. Please contact Woody Rodriguez at dwrodriguez@aol.com if you are interested in volunteering or have any questions.

Legal Aid Society Lunchtime Training for Pro Bono Attorneys: Nov. 13 - *Temporary Custody/Chapter 751*. **Nov. 27** - *Tips for Conducting a Home Visit*. **Dec. 11** - *Mediation and Dissolution of Marriage Cases*. **Dec. 11** - *Permanency Staffings and Case Plan Conferences*. See OCBA website at www.orangecountybar.org for registration details.

Seniors First Holiday Clothing & Gift Drive - YLS is collecting new, unwrapped gifts for Seniors First this holiday season. Gift ideas: sweaters, sweatshirts and sweatpants, gloves, slippers, nightgowns, pajamas, robes, lap blankets, scarves, warm hats, warm socks, a small poinsettia or small decorated tree, dried fruit, candy, cheese & crackers, coffee & tea, toiletries, and "designer imposter" perfume/cologne. Drop off: YLS Nov. 15th luncheon; OCBA Nov. 29th luncheon; 9:00 a.m. - 5:00 p.m. at the OCBA office from Nov. 1 - Dec. 21. For details, please contact Melanie Shoemaker at mshoemaker@deanmead.com or 407-428-5106.

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Correction: A photo caption on the Hearsay page misidentified a committee in October's issue of The Briefs. The OCBA Bankruptcy Committee, chaired by Lori Patton, hosted Jim Payne of WESH2 at its bankruptcy seminar in August. We apologize for the error and thank Lori and her committee for the excellent work they do.

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Miscellaneous

FREE - BOOKS - 2005 and 2006 Florida Law Weekly, Call 407-999-5656.

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2007 November - December Calendar

OCBA Luncheon • Thursday, Nov. 29, 2007

Buddy Dyer
Mayor of Orlando

Luncheon Sponsored by Westlaw

RSVP by Nov. 23rd to reservations@ocbanet.org

November

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

Legal Aid Society Seminar
Pro Bono Lunchtime Training
12:00 p.m. • First Presbyterian Church, Orlando

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

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

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

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

15 ***YLS Luncheon***
11:30 a.m. • Citrus Club

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

Texas Hold 'Em Poker Tournament
5:30 p.m. • Tanqueray's Bar & Grille

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

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

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

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

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

22–23 ***Thanksgiving Holiday***
Bar Center Closed

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

27 ***Legal Aid Society Seminar***
Pro Bono *Lunchtime Training*
12:00 p.m. • First Presbyterian Church, Orlando

Intellectual Property Committee
5:30 p.m. • Bar Center

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

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

29 ***OCBA Monthly Luncheon***
Mayor Buddy Dyer
11:30 a.m. • The Ballroom at Church Street

GAL 101 - The Basics Seminar
1:30 p.m. • The Ballroom at Church Street

December

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

OCALSS
5:30 p.m. • Bar Center

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

7 ***CFAWL Luncheon***
11:30 p.m. • Citrus Club

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

Legal Aid Society Seminar
Pro Bono Lunchtime Training
12:00 p.m. • First Presbyterian Church, Orlando

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

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

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

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

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

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

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

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

18 ***Professionalism Committee***
8:00 a.m. • Bar Center

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

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

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

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

20 ***YLS Luncheon***
11:30 a.m. • Citrus Club

Social Committee
5:30 p.m. • TBA

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

24–30 & Jan 1

Bar Office Closed for the Holidays

Please see OCBA website for updates: www.orangecountybar.org

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