

# *the* Briefs

A Publication of the Orange County Bar Association



October 2010  
Vol. 78 No. 10

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# President's Message

## The Joys of Learning

October 2010

I began this message shortly before Labor Day, which marks not only the end of summer but the beginning of the school year. Our family's younger son, Nate, started at Princeton Elementary this year. Watching him learn and seeing him adjust to school is part of what got me thinking about the joys of learning and the multiple ways that we can learn for our entire lives.

The beginning of school also reminded me of some of my favorite teachers, two of whom said that they were more interested in having us "learn how to learn" than they were with transmitting us specific bits of information to be memorized. The first – Gene Nichol – taught constitutional law at the University of Florida. Professor Nichol had an interesting life story. He was the first person in his family to go to college, much less law school. Nichol was a high school star quarterback who earned a scholarship to UF, but he was a year behind future NFL player, John Reeves. Realizing that he wouldn't get much playing time behind a guy like Reeves, Nichol transferred to Oklahoma State to play for the legendary coach Bum Phillips. Nichol never made it to the NFL, but instead enrolled in law school at the University of Texas. After practicing law in Alaska for a few years, Nichol took a teaching job so that he could spend more time reading constitutional law cases.

Nichol's classes were always lively and full of intense discussion, as he worked one side and then the other on topics such as the death penalty, affirmative action, and the limitations on search and seizure. You can imagine that Nichol did not generally have to spend very much energy to get law students to debate each other!

While I don't remember many of the cases from those classes, I do remember that Nichol said something like this: "The Court may change some of these principles, but what I really want you to learn is how to read a constitutional law case – that will really help you down the road." And he was right! Years later when I finally handled a case involving the First Amendment, I was able to retain the general framework taught by Professor Nichol while reading Supreme Court and Eleventh Circuit cases on the limitations a municipality can place on the construction of billboards.

More recently, I thought about another teacher – Jim Leutze – who also came to mind because of his devotion to a lifetime of learning and trying new things, including a new way of attempting to improve the lives of people around him. These are important lessons that I hope each of us can teach to our own children.

I met Dr. Leutze during my junior year at UNC-Chapel Hill. He taught a military history course, which impressively drew 300+ students every semester. The course was popular because Leutze was charismatic, extremely well-prepared and used multiple sources to describe not just battlefield maneuvers and military tactics, but also the political and psychological motivations behind some of the key wartime decisions. I'll never forget the palpable chills we felt while listening to Leutze read a letter from a mother to her son that was written during the

Civil War. During his classes, Leutze said that he was more interested in helping us receive a well-rounded liberal arts education that would enable us to learn for our entire lives than he was in having us remember a particular event at a battlefield.

I took my first visit to the European continent as part of Jim Leutze's annual summer battlefield tour. It was a terrific experience for a number of reasons, including the fact that I made a number of lifelong friends and was able to sit in the chair from which Winston Churchill delivered those stirring radio addresses. Moreover, between trips to the pubs and cafes (which I liked) and trying new foods, such as a paté and escargot (which I didn't really like), I even managed to learn enough to develop an abiding interest in military history, particularly World War II.

Earlier this year, I began to read an excellent book titled *Citizens of London: The Americans Who Stood with Britain in its Darkest, Finest Hour*, which told how three prominent persons helped Britain's fight against Hitler and assisted FDR in convincing an isolationist America that its participation was needed in World War II. Recalling that Leutze had lived in London and had written a book on the period immediately before America's entry into the war, I dropped him an email saying that I remembered his saying that he hoped we'd enjoy a lifetime of learning and that I had started a book he might like. He wrote back to say that he had bought, read, and liked *Citizens of London* and said that he was spending his "retirement" by running for the North Carolina senate. This was pretty cool news from a former university president who will be 75 later this year.

Which gets me around to Nate and kindergarten at Princeton Elementary. As parents, one of our desires is that Nate continues to love to learn and that he looks for ways to learn from others, so that he, too, can have a lifetime of learning. I'm happy to say that he's off to a great start, which is inspiring. In fact, if I could learn half as much each week as what Nate learns almost every day, I'd be thrilled. John Wooden said, "It's what you learn after you know it all that counts." There is a great wisdom in that comment, which I am sometimes reminded of all too frequently! Fortunately, I have a number of family members, friends, and colleagues who help me learn. We have a number of great committees and programs every year at the OCBA. I hope you can attend some of our events, make lasting friendships, and learn things that will help you, too, enjoy a lifetime of learning.

**Frank M. Bedell** is a shareholder with Winderweedly, Haines, Ward & Woodman, P.A. He has been a member of the OCBA since 1987.



Frank M. Bedell

# Professionalism Committee ● *Practicing Professionalism:* ● *Good Relationships Among Counsel*

James A. Edwards

**“Somebody ought to do something to improve professionalism in our legal system.”**

**H**ow often have you heard that or maybe said it yourself? There are many opinions about the causes of the problem and as many opinions about the solution. Two things seem certain: There is indeed a problem, and just talking about it won't fix a thing. I will leave the discussion about the cause and extent of the decline of professionalism for another day. I firmly believe that we can take steps individually and collectively to improve professionalism and thereby improve the efficiency, effectiveness and the pleasure of participating in our legal system.

Professionalism is often defined by listing traits associated with one who is perceived to be highly professional. The list of traits includes civility, courtesy, respect for others, a high level of competence, a sense of fairness, familiarity with the matter at hand, a high degree of preparedness and conducting legal matters according to the rules. Professionalism does not require or even contemplate passivity, apathy concerning the outcome of a matter, allowing another to take unfair advantage or in any other way becoming a doormat who is not fully representing the client's interests.

Individually, there are many things that each of us can and should do to increase professionalism in our own legal community. In many ways the civility, courtesy and respect aspects of professionalism grow out of good relationships among counsel. Here are some things that you may find are worth trying:

**1. Increase phone calls and decrease emails.** During a phone call, you can ensure that you are communicating clearly when you get the immediate response from your opposing counsel, complete with tone, pitch and volume. An email might be clear to its sender, but confusing to the recipient. You can each avoid misunderstandings by just talking with (not at) each other on the phone. You can really get to the bottom of whether there is a dispute, why the two of you disagree, what the extent of the disagreement is and whether there is an acceptable resolution if you are talking it through rather than going through a chain of emails or instant messages. A phone call allows you the freedom to talk about things totally

unrelated to your legal matter, which may result in finding out that you and your opposing counsel do have certain interests or values in common. This can lead to an even easier approach the next time you discuss matters. There is nothing wrong with accurately confirming your conversation in writing to memorialize it and hopefully the agreement that has been reached.

**2. Arrive early for your hearing, mediation or deposition.** Try arriving at least 15 or 20 minutes early for your next hearing, mediation or deposition. You will get to meet the lawyer who you have only spoken with on the phone. You can discuss local ground rules and practices with the courtroom deputy, which will help put you at ease, especially when you are from out of town. You will have a little informal time before the mediation or deposition starts to get to know the participants and to gather your thoughts. Your anxiety level will likely be low. You will be perceived as courteous, respectful of the other participants and well prepared. You have a chance to form some relationship with opposing counsel, co-counsel, or some other lawyers in the community. Compare those good things to what happens if you are 15 or 20 minutes late.

**3. Take a lawyer to lunch.** What I really mean is, at some point you and your opposing counsel should go to lunch together. Seriously. I have had cases all over Florida with many different lawyers. In most of the cases, there will be an opportunity after a hearing or during several days of depositions when all or at least some of the lawyers can get together for lunch. There is something about breaking bread together that makes it pretty hard to be rude, obnoxious or unprofessional to one another afterwards. On the other hand, it seems to focus the lawyers on the issues that really are disputed and may lead to a better understanding through informal discussion of what the case is really all about. I have found that we do not lose one bit being zealous advocates for our clients, and the good relationships improve cooperation and efficiency and permit the growth of trust.

Collectively we can enhance professionalism and work to make it a goal sought by

an increasing number of lawyers, judges and law students. Becoming involved with a section, committee or division of the local or state bar association will put you in touch with lawyers and judges who are professionals and who are glad to share what they have learned with you. Taking the time to participate in one of those groups or in one of the several Inns of Court, ABOTA, or a special interest voluntary bar association will be enjoyable and rewarding. The better you come to know the judges before whom you practice and the lawyers with whom you work, the better job you will do representing your clients.

The Orange County Bar Professionalism Committee has taken a special interest in our two local law schools. The goal is to try to reach the students at Barry University's law school and Florida A&M University's college of law in order to share with them the relevance and importance of professionalism. Magistrate Howard Friedman, former chair of the committee, taught a professionalism class at Barry. Magistrate Friedman, Judge Emerson Thompson, Dennis Wall and I participated in panel discussions about professionalism with FAMU students, faculty and administration last spring. This fall during orientation for incoming FAMU students, Professor Hurt teamed up with Judge Reginald Whitehead, Judge John Kest, Tom Zehnder and me to talk about the importance of professionalism, which starts upon applying to law school and follows through clinical programs, graduation and the practice of law. Our committee is quite happy to say that we have been invited back by both Barry and FAMU, and we are looking forward to doing what we can to help these students see the real value in professionalism.

**On a separate note,** our committee and the Orange County Bar Association recognize extraordinary professionalism demonstrated by our senior lawyers, young lawyers and judges by awards named to honor those great professionals who are no longer with us, yet who still guide us: William Trickel, Jr. (senior attorneys); Lawrence J. Mathews, Jr. (young lawyers) and Judge James G.

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## The Honorable Jorge Labarga

Florida Supreme Court Justice

Justice Jorge Labarga was born in Cuba in 1952. He is married to Zulma R. Labarga, and they have

two daughters. He arrived in the United States at the age of 11 and lived with his family in Pahokee, Florida. He graduated from Forest Hill High School in West Palm Beach in 1972 and received his B.A. (1976) and J.D. (1979) from the University of Florida.

Justice Labarga began his legal career in 1979 as an Assistant Public Defender with the Public Defender's Office in West Palm Beach, assigned to the appellate, misdemeanor and felony trial divisions. In 1982 he joined the State Attorney's Office in West Palm Beach, where he tried cases ranging from theft to homicide. In 1987

he joined the firm of Cone, Wagner, Nugent, Roth, Romano & Ericksen, P.A., and specialized in personal injury trial work. In 1992 Justice Labarga helped found the law firm of Roth, Duncan & Labarga, P.A., in West Palm Beach, where he continued to specialize in personal injury litigation and criminal defense.

Governor Lawton Chiles appointed Justice Labarga to the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, in 1996. Justice Labarga served in that capacity in the family, civil and criminal divisions. He also served as the administrative judge of the civil division.

In December 2008, Justice Labarga was appointed by Governor Charlie Crist to the Fourth District Court of Appeal. On January 1, 2009, Governor Crist appointed him to the Florida Supreme Court, where he presently sits as the 84th Justice to take office at the Florida Supreme Court since statehood was granted in 1845.

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The landscape in personal injury litigation is changing thanks in large measure to the federal government. No, it is not the 2010 Health Care Reform Bill that has drawn so much attention in recent months. Surprisingly, it is a federal law that has been on the books for 30 years that is creating the controversy and forcing litigants to make hard choices when they settle their claims. It is the Medicare Secondary Payer Act (MSP), originally passed in 1980, into which the federal government has breathed new life in recent months. Given the Center for Medicare and Medicaid Services' (CMS) new attitude toward the recovery of funds spent through the Medicare program, there are several pieces of information that practitioners should know in order to navigate these new, troubled waters. In this first part of a two-part article, I will address the history of the statute, the recent changes put in place, and the new attitude of the federal government in enforcing these provisions. In Part II, I will address the practical implications of these changes.

To understand the complexities of the contents of the Medicare Act, it is important to review the contents of the Medicare statute as it originally existed and to track its development over the ensuing 45 years. Medicare originated as a series of amendments to the Social Security Act of 1965, which provided a source of payments for hospital care for those over 65 years of age.<sup>1</sup> At that time, the Medicare program was the primary source of payment for its beneficiaries even when another source of coverage, with the exception of workers' compensation benefits, existed.<sup>2</sup> Medicare was secondary to the payment of workers' compensation benefits, and any payment made to or on behalf of a Medicare beneficiary who was eligible for workers' compensation benefits would be subject to and contingent upon reimbursement to Medicare.<sup>3</sup>

Congress has amended Medicare on numerous occasions, reflecting an overall desire to rein in the costs associated with Medicare in order to ensure its future viability. One of the most important amendments to Medicare occurred with the passage of the Omnibus Budget Reconciliation Act (OBRA) of 1980. With

the passage of OBRA, Medicare became a secondary payer not only for Medicare beneficiaries who are recipients of workers' compensation coverage, but also for Medicare beneficiaries who are recipients of the proceeds of a third-party policy of liability insurance. Congress has continually amended Medicare provisions in order to widen the scope of situations in which Medicare is a secondary payer, while at the same time augmenting the procedural teeth that the United States government has at its disposal in order to secure recoupment of Medicare disbursements.

The transformation of Medicare from the primary payer to the secondary payer with a right of reimbursement reflects the overarching statutory purpose of reducing Medicare costs.<sup>4</sup> The intent of Congress in shifting the burden of primary coverage from Medicare to private insurance carriers was to place the burden where it would be best absorbed.<sup>5</sup> The Eleventh Circuit Court of Appeals has summarized the effect of MSP by declaring that under certain conditions, Medicare will be the secondary rather than the primary payer for its insureds and that as a result, Medicare is empowered to recover from the rightful primary payer, or from the recipient of that payment, if Medicare pays for a service that was, or should have been, covered by the primary insurer.<sup>6</sup>

Medicare was originally created in 1965 in order to provide a safety net for American citizens once they reached the age of 65. Over time, it has become abundantly apparent that such an entitlement program, while well-intentioned, is extraordinarily expensive to operate. As members of the baby boomer generation approach the age of 65 – and the first baby boomers will reach that age this year – it has become increasingly crucial for Congress to find ways to provide for this social safety net in a manner that will not drain the system to the point that it ceases to function. To achieve the goal of financial solvency for future generations, Congress has made numerous changes to the language of the Medicare statutes in order to ensure that when alternative, primary sources of coverage, including liability insurance policies, become available, it will be those primary policies and not the federal government that will be ultimately respon-

sible for the costs associated with caring for individuals who qualify for Medicare benefits.

The language of the MSP makes clear that it was Congress' intent to make sure Medicare would be a secondary payer for the treatment of individuals who ultimately become the beneficiaries of a liability policy of insurance. Congress also created an incentive to comply with the reimbursement provisions of the Act through the creation of a double damages clause. As a practical matter, if Medicare is required to initiate a lawsuit in order to recover the reimbursement that it is owed pursuant to these statutory provisions, Congress has determined that Medicare will be entitled to recover not only the amount paid in Medicare benefits, but a penalty over and above that number in an amount equal to the amount paid in benefits. Congress enacted statutory language designed to give the federal government the ability to recoup the amounts spent in providing benefits to Medicare recipients.

The Department of Health and Human Services (HHS) has been delegated the authority to promulgate regulatory provisions designed to implement the MSP statute. HHS has done so with numerous regulatory provisions designed to allow the federal government to pursue the recovery of the amounts spent in providing Medicare beneficiaries with their needed care. First, it is obvious from a review of the regulations that plaintiffs, defendants, and their lawyers are potential targets for recoupment of Medicare payments, even after the payment of policy limits to settle a claim and the execution of a release. Pursuant to 42 C.F.R. § 411.21, a "primary payer" means insurers or self-insurers. "Primary payment" means, "When used in the context in which Medicare is the secondary payer, payment by a primary payer for services that are also covered under Medicare." Finally, "primary plan" is defined to mean: "A group health plan or large group health plan, a workers' compensation law or plan, an automobile or liability insurance policy or plan (including a self-insured plan), or no fault insurance."<sup>7</sup>

The regulations provide for the recovery of conditional payments at 42 C.F.R. §

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

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

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

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

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

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

***Mitchell v. Metropolitan at  
Lake Eola LLC,***  
947 So. 2d 1263 (Fla. 5th DCA 2007)  
Reduced lis pendens bond from  
\$600,000 to \$20,000.

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

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

***Chaffin v. Overstreet,***  
982 So. 2d 11 (Fla. 5th DCA 2008)  
Reversed numerous provisions of trust  
judgment that violated due process.

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# What the Supreme Court's Decision in *In Re Bilski* Means for Business Method Patents - Part 2

Angela M. Miller

Last month's first installment of this two-part article provided an overview of the history of software and business method patents in order to provide background on the *In re Bilski* case. This second installment features an in-depth analysis of the decision, as well as actions taken by the United States Patent and Trademark Office ("USPTO") and courts since the rendering of the decision.<sup>1</sup>

## 1. The Supreme Court's Decision

On June 28, 2010, the Supreme Court issued the highly anticipated decision as to whether a process must meet the machine-or-transformation test to be eligible subject matter for patenting under § 101 and whether the machine-or-transformation test contradicts Congress' intent that patents protect methods of doing or conducting business.

### (a) The Kennedy Majority Opinion

Justice Kennedy wrote the sixteen (16) page majority opinion of the Court, with Justices Roberts, Thomas, and Alito joining in full, and Justice Scalia joining except as to parts II-B-2 and II-C-2 (with no explanation for this exception being provided). These sections relate to inventions of the "Information Age."

The majority opinion sets a general backdrop, characterizing Claim 1 as "a series of steps instructing how to hedge risk" and Claim 4 as "the concept articulated in claim 1 into a simple mathematical formula"<sup>2</sup>, citing § 101 as defining patentable subject matter, and identifying three specific exceptions to § 101's "broad patent-eligibility principles: laws of nature, physical phenomena, and abstract ideas."<sup>3</sup> The Court then considers two categorical limitations on "process" patents under § 101: the machine-or-transformation test and the categorical exclusion of business method patents.<sup>4</sup>

First, the Court squarely rejects that adopting the machine-or-transformation test is the *sole* test for constituting a 'process' as it would "violate statutory interpretation principles."<sup>5</sup> The Court relies on a § 100(b) determination, which states "[t]he term 'process' means process, art or method, and includes a new use of a known process, machine, manufacture, composition of matter, or material" and the Court is "unaware of any 'ordinary, contemporary, common meaning' of the definitional terms 'process, art or method'

that would require these terms to be tied to a machine or to transform an article."<sup>6</sup>

Further, the majority opinion states that "[t]his Court's precedents that the machine-or-transformation test is a useful and important clue, an investigative tool, for determining whether some claimed inventions are processes under §101. The machine-or-transformation test is not the sole test for deciding whether an invention is a patent-eligible process."<sup>7</sup>

The Court further notes in Section II-B-2 of the majority opinion that there are reasons to doubt whether the machine-or-transformation test should be "the sole criterion for determining the patentability of inventions in the Information Age," noting that the test "would create uncertainty as to the patentability of software, advanced diagnostic medicine techniques, and inventions based on linear programming, data compression, and the manipulation of digital signals."<sup>8</sup> However, as Justice Scalia did not join in this section of the majority opinion, this section is only a plurality decision and does not have the force of law at this time. Therefore, no valuable guidance was given by the Supreme Court as to whether software patents are patent-eligible.

With respect to categorically excluding business methods from patent protection, the Court in section II-C-1 of the majority opinion cites 35 U.S.C. § 273(b)(1), which states that if a patent-holder claims infringement based on 'a method in [a] patent,' the alleged infringer can assert a defense of prior use.<sup>9</sup> Thus, the Court reasons that "[f]or purposes of this defense alone, method is defined as 'a method of doing or conducting business'" and that "by allowing this defense the statute itself acknowledges that there may be business method patents."<sup>10</sup> However, "while §273 appears to leave open the possibility of some business method patents, it does not suggest broad patentability of such claimed inventions."<sup>11</sup>

Similar to section II-B-2, section II-C-2 of the majority opinion, the other section of the majority opinion that Justice Scalia failed to join, also discusses the Information Age. This section states: "[i]f a high enough bar is not set when considering patent applications of this sort [capacities to perform statistical analyses and mathematical calculations for efficient performance of business tasks], patent examiners

and courts could be flooded with claims that would put a chill on creative endeavor and dynamic change...[and] the Patent Act leaves open the possibility that there are at least some processes that can be fairly described as business methods that are within the realm of patentable subject matter under § 101"<sup>12</sup>; and "...even if a particular business method fits into the statutory definition of a 'process,' that does not mean that the application claiming that method should be granted."<sup>13</sup>

With specific respect to the applicants' claims, the Court "resolves this case narrowly on the basis of this Court's decisions in *Benson*, *Flook*, and *Diehr*, which show that petitioners' claims are not patentable processes because they are attempts to patent abstract ideas."<sup>14</sup> Specifically, in *Benson*, the Court held an application for an algorithm to convert binary-coded decimal numerals into pure binary code was not a "process" under §101, but rather an unpatentable abstract idea.<sup>15</sup> "It is conceded that one may not patent an idea. But in practical effect that would be the result if the formula for converting...numerals to pure binary numerals were patented in this case."<sup>16</sup> A contrary holding "would wholly pre-empt the mathematical formula and in practical effect would be a patent on the algorithm itself."<sup>17</sup>

In *Flook*, the Court held a procedure (which was a mathematical algorithm) for monitoring the conditions during the catalytic conversion process in the petrochemical and oil-refining industries was not patentable subject matter. The *Flook* Court later explained that the case "stands for the proposition that the prohibition against patenting abstract ideas 'cannot be circumvented by attempting to limit the use of the formula to a particular technological environment' or adding 'insignificant postsolution activity.'"<sup>18</sup>

Finally, in *Diehr* the Court explained that while an abstract idea, law of nature, or mathematical formula could not be patented, "an *application* of a law of nature or mathematical formula to a known structure or process may well be deserving of patent protection."<sup>19</sup>

In viewing Claims 1 and 4 in light of the *Benson*, *Flook*, and *Diehr* cases, the Court determined that "[t]he concept of hedging, described in claim 1 and reduced to a mathematical formula in claim 4, is an

unpatentable abstract idea, just like the algorithms at issue in *Benson* and *Flook*. Allowing petitioners to patent risk hedging would pre-empt use of this approach in all fields, and would effectively grant a monopoly over an abstract idea.”<sup>20</sup>

Finally, the majority notes that “nothing in today’s opinion should be read as endorsing interpretations of § 101 that the Court of Appeals for the Federal Circuit has used in the past” and that by “disproving an exclusive machine-or-transformation test, we by no means foreclose the Federal Circuit’s development of other limiting criteria that further the purpose of the Patent Act and are not inconsistent with its text.”<sup>21</sup>

(b) The Stevens Concurring Opinion<sup>22</sup>

Justice Stevens wrote a concurring opinion, with Justices Ginsburg, Sotomayor, and Breyer joining. Although coined a concurring opinion, the forty-seven (47) page Stevens Opinion reads more like a dissent, with Justices Stevens, Ginsburg, Sotomayor, and Breyer opining that “[t]he Court is quite wrong, in my view, to suggest that any series of steps that is not itself an abstract idea or law of nature may constitute a ‘process’ within the meaning

of § 101,” and that “[t]he wiser course would have been to hold that petitioners’ method is not a ‘process’ because it describes only a general method of engaging in business transactions – and business methods are not patentable.”<sup>23</sup> Further, “...a claim that merely describes a method of doing business does not qualify as a ‘process’ under § 101.”<sup>24</sup>

(c) The Breyer Concurring Opinion<sup>25</sup>

Justice Breyer wrote a concurring opinion as well, with Justice Scalia joining as to Part II. Although Justice Breyer notes he joins Justice Stevens’ opinion in full, Justice Breyer’s four page opinion was written “in order to highlight the substantial agreement among many Members of the Court on many of the fundamental issues of patent law raised by this case.”<sup>26</sup>

(d) Conclusion of the Supreme Court Decision

The Supreme Court ultimately affirmed the Federal Circuit’s judgment that, after applying the machine-or-transformation test, the claims of the *Bilski* application were not patent eligible. It appears that the only concrete take-aways from the highly anticipated *Bilski* decision are that

(1) business methods are not categorically precluded from patent protection; and (2) the Federal Circuit misapplied previous Supreme Court decisions (that is, *Benson*, *Flook*, and *Diehr*) when they mandated the machine-or-transformation test as the sole test for determining whether a business process is patentable subject matter.

However, and perhaps more importantly, the Supreme Court appears to have left the door open as to which business methods are patentable, which prior tests are proper to use in determining if said business methods are patentable, and whether any other types of test exist. Accordingly, it appears that the Supreme Court is simply instructing the Federal Circuit to “try again” with respect to determining whether a particular invention falls within the scope of §101.

2. Overall Impact of the Supreme Court’s Decision

(a) Effect on Patent Litigation and Current Cases Involving Business Methods

With respect to patent litigation, the *Bilski* decision could render a plethora of pure business method patents invalid and

*continued page 37*

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# Judicial News

## Investiture: The Honorable Patricia A. Doherty

The **Honorable Patricia A. Doherty** took the oath of office during a Judicial Investiture Ceremony held on Friday, August 20, 2010, in the Honorable Frederick Pfeiffer/Honorable Rom Powell Jury Assembly Room at the Orange County Courthouse.

The invocation was given by Father Robert D'Aversa of St. Patrick's Catholic Church, Mt. Dora, and opening remarks were given by the Honorable Belvin Perry,

Jr., Chief Judge of the Ninth Judicial Circuit. Presentations were made by the Honorable John M. Kest, Ninth Judicial Circuit; the Honorable Lydia Gardner, Clerk of Courts; and Frank M. Bedell, president of the Orange County Bar Association, who acknowledged the Legal Aid Society and the local voluntary bar associations.

Attorneys Council Wooten and Orman L. Kimbro introduced Judge Doherty, and the Honorable Dorothy J. Russell, Senior Judge of the Ninth Judicial Circuit, administered the Oath of Office. Archie O. Lowry, Jr. and Elaine F. Doherty performed the enrobing ceremony. After closing remarks, a reception was held at the Courtyard at Lake Lucerne in downtown Orlando.

Judge Doherty was appointed to the bench in May by Governor Charlie Crist. She comes to the bench from private practice with the Law Offices of Wooten, Kimbrough, Gibson, Doherty & Normand, P.A., where she practiced civil litigation in both state and federal court. She received her Juris Doctor from the University of Florida College of Law, where she graduated with honors in 1982. She completed her undergraduate study at the University of Florida, where she was a member of Alpha Eta Honor Society, receiving a Bachelor of Science Degree in Physical Therapy in 1977.

Judge Doherty has served on numerous professional committees and been actively involved with the Florida Bar Association, Orange County Bar Association, Osceola County Bar Association, Central Florida Association for Women Lawyers, American Board of Trial Advocates, Academy of Florida Trial Lawyers, American Trial Lawyers Association and the Lake County Bar Association. In the community, she is a past president of the Board of Directors for Catholic Charities of Central Florida.

She also serves on the Board of Directors for Mission for Vision and Our Turning Point Ranch – a foster home for girls.

Regarding her appointment to the bench, Judge Doherty said, "I am grateful to Governor Crist for giving me this opportunity and I look forward to many years of service to the people of Orange and Osceola counties."



The Hon. Patricia A. Doherty, the Hon. Dorothy J. Russell



Elaine Doherty, the Hon. Patricia Doherty, Archie Lowry, Jr.



The Hon. Lydia Gardner



### Patrick M. Magill

July 30, 1950 – September 28, 2010

Services for Patrick M. Magill will be held on Sunday, October 17, 2010, at 2:00 p.m. at Trinity Lutheran Church, 123 East Livingston Street, Orlando, Florida, 32801.

Condolences may be sent to the family at 1059 Weaver Drive, Oviedo, Florida 34765.

Pat was an Orange County Bar Association member for more than thirty years and worked tirelessly on behalf of the Legal Aid Society and his clients. He will be dearly missed by his colleagues and friends at the bar and in the community.

We extend our deepest sympathy to his family.

### History of the Pro Bono Program of the Legal Aid Society of the Orange County Bar Association, Inc.<sup>1</sup>

Catherine A. Tucker

The Orange County Bar Association is a voluntary bar which has been electing officers since 1924. Members of the association are members of the Legal Aid Society and are required to provide *pro bono* services each year. The Legal Aid Society's Board of Trustees sets the requirements, which currently are that each member accept two case referrals, contribute \$350, or participate in one of eight approved projects.

During 2009, 2,800 attorneys, including about 150 non-Orange County Bar Association members, handled over 1,300 new case referrals, contributed over \$400,000 and provided special services through various projects such as the Aids Special Will Project, Attorneys Fighting For Seriously Ill Children Project, Homeless Advocacy Project, Citizen Dispute Settlement and Family Mediation Program, Community Education Program, Teen Court, Earned Income Tax Credit Clinic, Telephone Screening Project, and Teen Parent Education Project. The Guardian ad Litem Program currently assists more than 1,500 children in juvenile dependency and some delinquency and criminal cases.

How a mandatory program was begun and why it has flourished are questions that are frequently asked. The creation was modest and the growth was incremental. The result is a source of pride for bar members. An analysis of a survey of OCBA members concluded that the structure, administration and longevity of the *pro bono* program probably account for the positive attitude that bar members have toward the mandatory program. Steven Wechsler, *Attorneys Attitude Toward Mandatory Pro Bono*, 41 Syracuse Law Review 3, 950 (1990). The history within the local legal community of performing *pro bono* work as part of one's profession is the basis for the continued support of the program. As noted by the Joint Commission on the Delivery of Legal Services to the Indigent in Florida in its February 1991 report, "While it is mandatory for its voluntary members, its success seems to be built more on its underlying acceptance as a law practice norm or expectation rather than its mandatory nature."

Attorneys who speak about their support for the *pro bono* program have personal

stories about their involvement with *pro bono* work and their role in the development of the Legal Aid Society.

Heskin Whittaker served as president of the OCBA in 1953 and for three terms on The Florida Bar Board of Governors. He recalls the transition from small bar association with informal referrals to a more organized program. Mr. Whittaker, who when interviewed in 1999 at age 88, described himself as the oldest living practicing lawyer in Orange County, recounted a practice of law and a bar that had changed dramatically. "When there were two two-week civil jury trial periods each year, the bar could use a volunteer to call attorneys about cases. When federal funds were available for legal services, it was the consensus of the local bar that we should handle our own legal aid. Making participation compulsory wasn't too difficult," said Whittaker. "A lot of members were willing."

The attorneys who obtained the special legislative act to fund a Legal Aid Bureau with filing fees and who incorporated the Legal Aid Society remember the creation of an organization as personal and special.

"I served as the Legal Aid secretary to the Executive Council of the Orange County Bar Association in the early '60s," said Egerton K. van den Berg. "I was given a book that looked like a ledger with script entries of the names of every bar member. There were about 160 to 180 names. We had different criteria that were reflective of that era. There were no divorces, custody, bankruptcy, or landlord-tenant matters. There were stiffer financial rules. We had criminal matters and litigation such as boundary disputes, breach of contract, warranty cases. We looked to level the playing field for those who could not afford an attorney. It was open, generous, progressive for its time. Inclusive and color blind."

In 1961, bar members secured a special act of the legislature establishing a legal aid bureau in Orange County and authorizing the county commission to allocate a portion of the county and circuit court filing fees for funding of the program. With these funds a secretary/referral coordinator was hired to do intake and make referrals to *pro bono* attorneys.

"When I came to Orlando in February 1957, they had a secretary from the bar at the courthouse with people waiting to be seen by her," recalls Jim Russ, past Legal Aid Board member.

Funds for legal services were made available through the Office of Economic Opportunity in 1965 as part of the War on Poverty. "I was appointed to evaluate the grant for the Executive Council. I felt that we could hire staff and not solely be dependent on volunteers and enlarge the eligibility in income and cases. There was strong objection but the vote was close," remembers van den Berg.

Russell Troutman, in his first year as a member of the Executive Council, opposed the application. He believed that a locally initiated and supported program would be better than one which was federally funded. He filed suit against Sargent Shriver and the Office of Economic Opportunity in federal court. *Troutman v. Shriver*, 273 F. Supp 415 (M.D. Fla. 1967), *aff'd*, 417 F.2d 171 (5th Cir. 1969). This suit triggered a significant amount of publicity in the print and television media and there was a reaction in the community. "It caught the attention of the bar membership," says Troutman. Members of the local bar expressed such strong support for the suit that the president of the bar called a meeting of the membership. The meeting was well attended and the decision to make an application for funds was withdrawn and the bar association decided to join in the lawsuit against the OEO. "I felt strongly in my heart that the Orange County Bar Association should say to the federal government, no we are well able to do it ourselves and will do it. It mattered not what other bar associations did. What mattered was that we as a community should do what our oath required that we do and do it ourselves."

"The controversy cost me the presidency of the bar association," says van den Berg. "The application was rejected by a slim majority of the bar, and I was defeated in the subsequent election for the vice-presidency."

"Russell was on the make as a political young lawyer and conservative in the

*continued page 14*

## Legal Aid Society

*continued from page 13*

community,” says Jim Russ. “Before the fight over the OEO the bar program was somewhat superficial, but once the bar association said we have to do it on our own, it was taken on as a more significant project.”

“There did develop a consensus that the bar should do something, if we were not going to seek the money. We liberalized the eligibility criteria. We sought contributions from attorneys. We had money through the statutory filing fee. We incorporated the program,” remembers van den Berg, one of the original incorporators.

According to the by-laws of the new corporation, the members of the bar association were members of the Legal Aid Society and the president of the bar association would serve as president of the Legal Aid Society. As president of the bar association from 1968 to 1969, Troutman also served as president of the Legal Aid Society. During his term, the first staff attorney was hired.

“I count my role in the formation and establishment of our Legal Aid Society as my best contribution,” says Troutman. “Through the years I have continued my work with Legal Aid in whatever way I can.” In addition to fulfilling his annual *pro bono* requirement, Troutman has provided funds annually for a summer law clerk at the Legal Aid Society and continued to be a driving force for Legal Aid.

“It is easy to be cynical about lawyers but there are a cadre of lawyers who are respected and set the tone,” said van den Berg, who retired as a partner at Foley & Lardner. The firm is the recipient of five Awards of Merit for outstanding *pro bono* service from the Legal Aid Society.

By the time the appellate court in the Troutman case affirmed the dismissal of the complaint challenging the OEO program in September 1969, Legal Aid Society had been in operation for two years with local funding and had hired its second director.

Through the next decade, the Legal Aid

Society relied on a variety of funding sources available to nonprofit organizations, such as United Way, and the filing fee and attorney contributions. The staff grew to include several attorneys and paralegals. In 1975, then director Jim Seals, now a circuit court judge, and Greg

In the late 1970s, federal money from the Legal Services Corporation (LSC) was made available throughout the country for local communities to apply for funding of legal services programs. With the uncertainty of the funds available to the Legal Aid Society, the Board of Trustees decided

to apply for federal funds and sought approval by the Executive Council of its application and to make the necessary changes in the by-laws of the Legal Aid Society. The Executive Council gave its approval, but the vote to change the by-laws required the approval of the membership. Ten years after the standing room only membership meeting on OEO funding, bar members met to decide on the application for LSC funds.

Greg Presnell, then president of the bar association and immediate past president of the Legal Aid Society, presented the argument in support of seeking the new funds. Recalls Presnell, “The Legal Aid Society had struggled with limited resources... filing fees and some other funds and we learned that other money would be available for Orange County. The Legal Aid Board approved the application and I led the effort to gain approval of the bar association.” The overwhelming response of the membership was to oppose the application for federal funds and to oppose changing the by-laws. “I recall vividly the meeting at the courthouse and being in the line of fire.”

“I was one of the people who supported getting the federal funds,” says Jim Russ. “When we got shot down with the federally funded issue we started another program, Greater Orlando Area Legal Services.”

Russell Troutman adds: “I did not think that we should apply for federal dollars with the strings attached in 1966 and I still was opposed to federal funds in 1977.”

“The fallout from the decision also benefited Legal Aid because it galvanized a group of attorneys who were distrustful of the federal money to get them to do

*continued page 26*

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The Standing Committee on Pro Bono Legal Service has challenged attorneys statewide to increase *pro bono* civil legal services to the working poor. The Committee has extended this challenge to the legal community in the Ninth Judicial Circuit, as well.

Beginning August 26, 2010, we are asking attorneys in the Ninth Circuit to accept at least one case or, if they have taken a case this year, to take one...more.

The challenge in the Ninth Circuit is between the Orange County Bar Association and a collaboration of other voluntary bar associations, including the American Immigration Lawyers Association of Central Florida Chapter; the Caribbean Bar Association; the Central Florida Association for Women Lawyers; the Central Florida Gay & Lesbian Law Association; the Christian Legal Society; the Greater Orlando Asian American Bar Association; the Hispanic Bar Association of Central Florida; the Paul Perkins Bar Association; the South Asian Bar Association; and the Young Lawyers Section of the OCBA. The winner is the group that accepts the most cases between August 26, 2010, and March 31, 2011.

The winning group will be invited to a celebratory dinner, with participating attorneys selected by the winning voluntary bar associations.

Voluntary bar associations that would like to participate in the challenge should contact Standing Committee member Gene Shipley of GrayRobinson at [Gene.Shipley@gray-robinson.com](mailto:Gene.Shipley@gray-robinson.com), Standing Committee member Chuck Stepter of Fishback Dominick at [cstepter@fishbacklaw.com](mailto:cstepter@fishbacklaw.com), or Standing Committee member Natasha W. Permaul of the Orlando Police Department at [Natasha.permaul@cityoforlando.net](mailto:Natasha.permaul@cityoforlando.net). To accept *pro bono* cases, attorneys may contact Legal Aid Society Pro Bono Coordinator Cathy Tucker at [ctucker@legalaidsociety.org](mailto:ctucker@legalaidsociety.org) or Community Legal Services Pro Bono Manager Andrea Mosley at [andream@clsmf.org](mailto:andream@clsmf.org).

### Please accept the challenge today!

Funding for the One Campaign is provided by The Florida Bar Foundation.

Submitted by The Standing Committee on Pro Bono Legal Service.

Presnell, now a federal judge and former Legal Aid Board member and Executive Council member, approached the Executive Council to add the option of contribution of \$150 in lieu of handling a case and to reinstate the mandatory referral policy. This option to make a contribution in place of taking a case was formally adopted and the council confirmed their intention to remove from membership any attorney who did not meet the *pro bono* requirement.

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Lee Wilson, Joie Cadle, Orange County School Board



Judith Smelser, moderator

More than 325 people attended the luncheon.



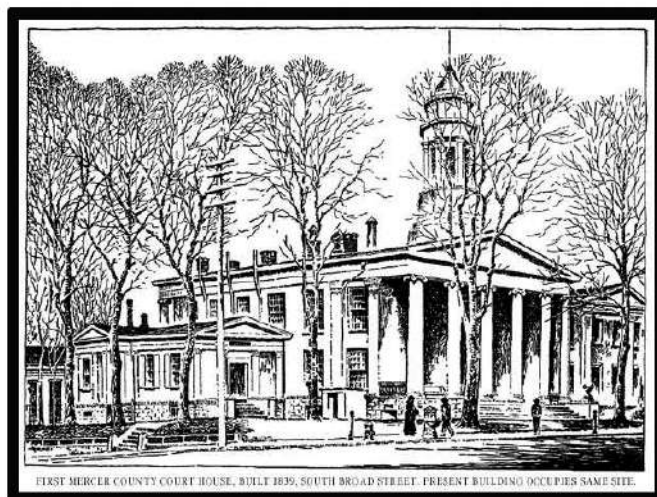
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# What Trustees Should Know about Florida's New Attorneys' Fee Statute

David P. Hathaway and David J. Akins

## Introduction

More and more lawsuits are filed in Florida alleging that the trustee of a trust breached a fiduciary duty to the beneficiaries. In these cases, the plaintiff might expect the trustee to use personal funds to pay legal fees, as opposed to spending money from the trust. Plaintiffs argue they should not have to suffer financially by losing more trust assets simply to enforce their legal rights. Indeed, the Florida Trust Code requires a trustee to administer the trust solely in the interests of the beneficiaries. See *Fla. Stat.* § 736.0802(1). However, many people would never agree to serve as a trustee knowing they would have to spend their own money to pay legal fees in the case of a lawsuit, and some trustees simply cannot afford to pay for lawyers. Under Section 736.1007, *Florida Statutes*, legal fees for trust administration are generally to be paid from the trust, and trustees would argue that any litigation emanating from trust administration should fall into the same category. This is a serious issue in trust litigation because some cases last for years, and the legal fees can be hundreds of thousands of dollars for each side.

The Probate and Trust Litigation Committee of the Real Property, Probate and Trust Law (RPPTL) Section of the Florida Bar worked for several years on proposed legislation to establish a framework for how to determine whether a trustee can continue to pay attorneys' fees from trust assets after an allegation of breach of trust has been made. The critical issues were who should have the burden of raising the issue (the trustee or the beneficiaries), what evidence should be considered, and what should be the burden of proof for the moving party. The legislation proposed by the RPPTL Section was enacted by the Florida legislature with minor revisions and replaced the original version of Section 736.0802(10), *Florida Statutes*, effective July 1, 2008 (the "Statute"). In general, the Statute allows a trustee to pay attorneys' fees from trust assets until a court bars the use of trust assets based on a determination that reasonable cause exists to find a breach on the part of the trustee.

## Prior Law

*Shriner v. Dyer*, 462 So. 2d 1122 (Fla. 4th DCA 1984) is the genesis of the current version of the Statute. *Shriner* involved multiple actions against co-trustees, individually and in their capacities as trustees, for damages. Although the co-trustees successfully defended against the substantive causes of action asserted against them, the court held that because the duties of the co-trustees conflicted with the trustees' individual interests, payment of their attorneys' fees with trust monies was improper, in violation of Florida law. See *Fla. Stat.* §§ 737.402(2)(y) and 737.403(2) (1983).

Relying on *Shriner*, the court in *Brigham v. Brigham*, 934 So. 2d 544 (Fla. 3d DCA 2006), found that co-trustees could not use trust funds to defend themselves against claims brought by beneficiaries of a trust for breach of fiduciary duty and mismanagement of trust assets. Because the co-trustees expended trust funds to defend against their individual liability, a conflict of interest existed between their duties as trustees and their individual interests, barring use of trust funds to pay for legal services, absent court approval.

In response to *Shriner*, the legislature amended Section 736.403, *Florida Statutes*, creating an exception to the requirement that a trustee have court authorization to pay attorneys' fees from the

assets of the trust if there is a conflict of interest. The amendment provided that court authorization was not required for —

Payment of costs or attorney's fees incurred in any trust proceeding from the assets of the trust unless an action has been filed or defense asserted against the trustee based upon a breach of trust. Court authorization is not required if the action or defense is later withdrawn or dismissed by the party that is alleging a breach of trust or resolved without a determination by the court that the trustee has committed a breach of trust.

*Fla. Stat.* § 737.403(2)(e) (2005).

The new Florida Trust Code, effective July 1, 2007, incorporated the exception contained in Section 737.403(2)(e) as Section 736.0802(10). As stated above, the Florida Legislature replaced the original version of section 736.0802(10) with the new Statute effective July 1, 2008.

## Practical Application of the New Statute

After a lawsuit is filed, the trustee must provide written notice to the beneficiaries of an intent to pay costs or attorneys' fees in the proceeding from the trust prior to making payments. *Fla. Stat.* § 736.0802(10)(a). After providing such notice, the trustee can begin paying his legal fees from the trust. In order to stop such payments, a plaintiff must conduct an evidentiary hearing. Specifically, the Statute provides in relevant part:

(10) Payment of costs or attorney's fees incurred in any proceeding from the assets of the trust may be made by the trustee without the approval of any person and without court authorization, unless the court orders otherwise as provided in paragraph (b).

....

(b) If a claim or defense based upon breach of trust is made against a trustee in a proceeding, a party must obtain a court order to prohibit the trustee from paying costs or attorney's fees from trust assets. To obtain an order prohibiting payment of costs or attorney's fees from trust assets, a party must make a reasonable showing by evidence in the record or by proffering evidence that provides a reasonable basis for a court to conclude that there has been a breach of trust. The trustee may proffer evidence to rebut the evidence submitted by a party. The court in its discretion may defer ruling on the motion, pending discovery to be taken by the parties. If the court finds that there is a reasonable basis to conclude that there has been a breach of trust, unless the court finds good cause, the court shall enter an order prohibiting the payment of further attorney's fees and costs from the assets of the trust and shall order attorney's fees or costs previously paid from assets of the trust to be refunded. An order entered under this paragraph shall not limit a trustee's right to seek an order permitting the payment of some or all of the attorney's fees or costs incurred in the proceeding from trust assets, including any fees required to be refunded, after the claim or defense is finally determined by the court. If a claim or defense based upon a breach of trust is withdrawn, dismissed, or resolved without a determina-

*continued page 32*



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# Hearsay

*"There is no season when such pleasant and sunny spots may be lighted on, and produce so pleasant an effect on the feelings, as now in October." - Nathaniel Hawthorne*

I was reading recently one of the compilations that come out each year recognizing the many extraordinary attorneys whom we have in our midst here in Central Florida. As I glanced through the names, I was proud to recognize the many OCBA members that were among them - members whose accomplishments at the top of their profession have been recognized throughout the State. Congratulations to this year's **Legal Elite, Best Lawyers, Super Lawyers**, and those recognized in all of the media this year as having reached the elite levels of our profession. We thank you for representing our community and our bar so well. In considering the achievements of our superlative lawyers, I thought also of the many other means by which our Orange County Bar members have been recognized in their practices and in the roles they have taken throughout our community and our state to elevate their practices to the highest levels of the profession.

Members of our OCBA have diligently worked to enhance our profession by giving their time and expertise to the activities of other voluntary bar associations in addition to their active roles within our own organization. At the national level, we want to congratulate **Charles Egerton**, Dean, Mead, Egerton, Bloodworth, Capouano and Bozarth, P.A., who has been named chair of the American Bar Association's Tax Section, leading the nation's largest organization of tax lawyers. Charles earned this national

leadership position after years of dedicated service to the organization in leadership roles for various committees and as liaison to other professional organizations at the local, state and national levels. Congratulations also to **John Elliott Leighton**, Leighton Law, P.A., who has been re-elected as chair of the American Association for Justice's Inadequate Security Litigation Group as well as being re-elected to chair the Academy of Trial Advocacy. **Kirk Kirkconnell**, Kirkconnell, Lindsey, Snure, & Ponall, P.A., has become a Fellow of the American College of Trial Lawyers, and **John "Skip" Kirst, Jr.**, GrayRobinson, P.A., has been elected a Fellow of the American Bar Foundation.

Thanks to the leadership of our own **Mayanne Downs**, president of the The Florida Bar, our members are being recognized at the statewide level as well. **Melanie Shoemaker Griffin**, Dean, Mead, Egerton, Bloodworth, Capouano and Bozarth, P.A., is known for her tireless work on behalf of the OCBA Young Lawyers Section as well as the Central Florida Association for Women Lawyers (CFAWL), for which she is a member of the board. Melanie has now also been recognized for her extraordinary efforts on behalf of our local bars as a 2010 Leader in the Law by the Florida Association

for Women Lawyers (FAWL). Melanie's award is in addition to having been elected the 2009 Most Productive Young Lawyer by The Florida Bar's Young Lawyer's Division. Congratulations, Melanie. **R. Lee Bennett**, GrayRobinson, P.A., has been elected to the Supreme Court of Florida's Commission on Professionalism by the Florida Bar's Board of Governors. And **Paul Chipok**, GrayRobinson, P.A., has been re-appointed to the Continuing Legal Education Committee of The Florida Bar.

At the local level, our members are increasingly busy as well. **William "Lawman" Umansky**, The Umansky Law Firm, P.A., has been appointed to serve on the Ninth Judicial Circuit Grievance Committee. **Alex Dobrev**, Lowndes, Drosdick, Doster, Kantor & Reed, P.A., has been re-elected to the Board of Directors for the NAIOP, Central Florida. **Brikena Isai Tomasic**, Lowndes, Drosdick, Doster, Kantor & Reed, P.A., has been appointed to the Board of Directors for the National Association of Women in Construction (NAWIC),

Greater Orlando Chapter. Finally, **Kristyne Kennedy** has been recently elected to serve on the Board of Directors for the Central Florida Human Resources Association (CFHRA).

Congratulations to all of our members who have worked so hard and achieved such recognition among our peers throughout the region, the state, and the nation. You have achieved the levels of excellence to which we all aspire. Your hard work is appreciated, and we are proud to call you our friends and peers.

As always, keep sending your news, highlights, and Hearsay-worthy items to my attention at [kwebb@gobelflakes.com](mailto:kwebb@gobelflakes.com).

**Kimberly D. Webb** is an attorney with Gobel Flakes, LLC. She has been a member of the OCBA since 2002.



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# YLS *on the move*

## Heading in the Right Direction

Jacquelynne J. Regan

October is here in all of its autumn glory! October ushers in the season of change and brings us "Evaluate Your Life Day"\* on October 19. Yes, folks: there is actually a day designated just for self-evaluation. While not as celebratory as Oktoberfest or Halloween (which we know most of you have already calendared), this day could bring you to an entirely new direction in life! It's the perfect occasion to take a moment to slow down, spare a little time for yourself, and make sure you are headed in a direction you want to go. Give yourself permission to change, if you want to – or keep on keepin' on, if you like the direction you see. As Dr. Seuss so aptly put it: "You have brains in your head. You have feet in your shoes. You can steer yourself any direction you choose. You're on your own. And you know what you know. And YOU are the guy who'll decide where you go!" We just hope that you steer yourself to a few of the YLS happenings we've got lined up! Here's a look at the recent events and things to come from YLS:

The **Young Lawyers Section Scholarship Selection Committee** is proud to announce that **Ketia Joseph**, Class of 2010 at Evans High School, is this year's recipient of the YLS Annual Scholarship. Ketia will be attending Valencia Community College for the first two years of college, after which she plans to attend the University of Central Florida to complete her studies in engineering. Upon receiving her four-year degree, Ketia hopes to join the U.S. Navy as an officer. The Scholarship Selection Committee is certain that Ketia has the tenacity, work ethic, and drive to accomplish these goals. She was recognized as this year's YLS Scholarship winner at the OCBA's September luncheon. Congratulations, Ketia!

The **Brown Bag Lunch with Judge John Marshall Kest** on September 23 provided the final installment of Judge Kest's three-part series, "Use of Depositions at Trials and Hearings." Attorney **Terry Young** assisted Judge Kest with the presentation and provided a prospective from the

practitioner's standpoint. The last date for the Brown Bag Seminars this year will be October 14. Because of the upcoming holidays and other conflicts, the Brown Bag Lunches will be suspended during November and December 2010 and will resume in January of 2011. If you are interested in joining Judge Kest for the Brown Bag Lunch on October 14, please email Judge Kest's Judicial Assistant, Diane, at [ctjadi1@ocnjcc.org](mailto:ctjadi1@ocnjcc.org).

The inaugural **YLS Dodge Ball Tournament** was a success, thanks to committee chair **Shayne Fisher** and everyone on her



committee! The wild seven-team tournament included a strong showing of teams from (in no particular order): 1) **Dellecker, Wilson, King, McKenna & Ruffier, LLP**; 2) **Allen Dyer Doppelt Milbrath and Gilchrist**; 3) **Shutts & Bowen**; 4) **Fisher, Rushmer, Werrenrath, Dickson, Talley & Dunlap, P.A.**; 5) **Lowndes, Drosdick, Doster, Kantor, & Reed, P.A.**; 6) **Winderweedle, Haines, Ward & Woodman PA**; and 7) **ProServe USA**. After the grueling round robin initial rounds, the teams seeded up in a double-elimination format where ProServe defeated Shutts & Bowen in the finals to take home the "Golden Wrench" trophy.



Thank you to all the teams that participated, and special thanks to **ProServe USA** for sponsoring the event!

Another October event not to be missed, the **Lawyers Spelling Bee** fundraiser, is set for Thursday, October 7 at the Sonesta Hotel in downtown Orlando. The event promises to be an entertaining opportunity to test your own spelling skills or marvel at those of your peers! The proceeds of the Lawyers Spelling Bee will benefit the literacy initiatives of the Adult Literacy League. For more information about the event, please contact **Daryl**

**Gottlieb** at [dgottlieb@fisherlawfirm.com](mailto:dgottlieb@fisherlawfirm.com). If you are interested in tutoring an adult learner with the Adult Literacy League by volunteering just one hour per week, please visit [www.adultliteracyleague.org](http://www.adultliteracyleague.org).

YLS has launched its **Law School Mentoring Program**. Thanks to the efforts of mentoring committee

chair **Kristopher Kest** and his committee, with generous support from Barry and FAMU law schools, YLS members are paired with second- and third-year students from local law schools to engage in a series of mentoring activities during this academic year. More mentors are still needed to accommodate the large number of law students expressing an interest in this worthwhile program.

To learn more or complete an application, please visit the YLS Section on the OCBA website. For questions, please contact **Kristopher Kest** at [ylsmentoring@gmail.com](mailto:ylsmentoring@gmail.com) or 407-418-6285.

The **YLS October Luncheon** will take place on **October 21, 2010** at 11:45 a.m. at the University Club, 150 East Central Blvd., Orlando, FL 32801. Please email your RSVP to [admin@ocbayls.org](mailto:admin@ocbayls.org). If you RSVP before October 17, 2010, the cost is \$20 for lawyers and \$12 for law students, government attorneys, solo attorneys, and judges; a late charge of \$2.00

will be added if you do not RSVP. Please be sure to include your full name, office, and names of any guests in your RSVP.

If you want to find out more about the Young Lawyers Section, its committees and events, please call me at 407-418-6438 or email me at [reganj@lowndes-law.com](mailto:reganj@lowndes-law.com). If you are not receiving the YLS email blasts, please send an email to [admin@ocbayls.org](mailto:admin@ocbayls.org) to sign up.

\* *Evaluate Your Life Day* was created by the folks at Wellcat.com.

\*\* The above text was copyrighted in 1990 in "Oh, the Places You'll Go!" by Dr. Seuss (Theodor Seuss Geisel). . [http://en.wikiquote.org/wiki/Dr.\\_Seuss#Oh.2C\\_the\\_Places\\_You.27ll\\_Go.21\\_.281990.29](http://en.wikiquote.org/wiki/Dr._Seuss#Oh.2C_the_Places_You.27ll_Go.21_.281990.29)

**Jacquelynne J. Regan** is an attorney with Lowndes, Drosdick, Doster, Kantor, & Reed, P.A. She has been a member of the OCBA since 2001.



The YLS had another "A+" year collecting supplies and backpacks for the students at Rock Lake Elementary School.

## YLS Mentors Needed!

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**What:** YLS-Law School Mentoring Program

**When:** Now!

**Where:** At your convenience! And...the time commitment is minimal (from 10-15 hours a year)

**Why:** We want to provide each interested student a fabulous young lawyer who's willing to spend a few hours to help student mentees prepare for some of the real life experiences encountered by practicing attorneys. Applications from second- and third-year law students are pouring in – in fact, there are about 25 more students interested in participating than there are attorneys to serve as mentors.

**How:** To get involved and learn more about the program, go to the YLS page of the OCBA website at [orangecountybar.org](http://orangecountybar.org) or contact Kristopher Kest at 407-418-6285.

**Don't delay! Volunteer to be a mentor today!**

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## 9 Critical Steps for Trial Preparation – Part 1

David J. Dempsey

*Important items that all paralegals should keep in mind*

The final weeks before trial are chaotic. The lead attorney is overwhelmed with enormous responsibilities that can have a significant impact on the outcome of the trial, from the smallest details to deciding on the theory of the case. Juggling all these critical tasks while maintaining focus and perspective is a Herculean task even for the most experienced trial attorney.

Paralegals play an indispensable role in the trial preparation process. It's imperative that, in conjunction with the lead counsel, you design and adhere to a plan to make sure your energies – and those of the entire support team – are focused on the tasks that will contribute most to the success of the trial.

As the final phases of intense trial preparation approach, paralegals can wear many hats: coordinating schedules, monitoring deadlines, helping prepare witnesses and documents, organizing files and exhibits, preparing subpoenas and working with all members of the support team, including expert witnesses, outside vendors, and other legal assistants and attorneys involved in the trial.

Every trial attorney will use the talents of a paralegal in different ways. In my practice, I tend to rely heavily on paralegals and delegate a considerable amount of responsibility to them.

While the following guidelines will not work for every trial team, these are nine critical steps I believe paralegals can take to help make sure when the opening gavel falls at trial, your team is prepared to prevail.

### I. Step 1 – Create a Plan

Nothing is more vital to the success of the trial than a well-implemented, detailed plan. At the outset of the trial, learn how you can be

most helpful by communicating with the lawyer or lawyers trying the case. Clearly determine the team's objectives and the role you will play in achieving those goals. As you prepare the plan, remember the costs of the trial and the amount at stake. If your trial team wins a \$10,000 decision but spends \$15,000 getting there, you will not serve your clients well.

Know exactly what you are expected to accomplish. All attorneys have their peculiar ways of preparing for trial. Misunderstandings late in the game exacerbate everyone's frustration and stress levels and, in some cases, can have a significant adverse impact on the trial. Here are some of the essential elements you should consider when creating your plan:

- **Task List:** Prepare a task list with a timeline, including specific deadlines to accomplish each task, ideally in chart form. Summation ([www.summation.com](http://www.summation.com)) provides excellent litigation support software for that purpose. Allow space for regular status updates from team members. Place the task list in a central location accessible to everyone at all times. The task list should provide specifics such as a description of the task to be accomplished, who is responsible for accomplishing the task and supervising its completion and any other information the team collectively deems essential to the case.
- **Delegate Duties:** Delegate responsibilities to team members and make sure there is a clear understanding of who will be

responsible for completing and supervising each task.

- **Focus on Essentials:** Eliminate what you don't have the time or the resources to accomplish. Additional depositions or research might be useful, but if the cost of completing a task, either in money or time, isn't justified, bring it to the attention of the attorneys on the team and discuss eliminating it from the plan.

### II. Step 2 – Communicate Clearly

After the plan is in place and your responsibilities are identified, constantly coordinate with your team and those for whom you are responsible (other paralegals, attorneys, outside assistants, investigators, experts and vendors). Hold everyone accountable, and politely but firmly let them know you expect results, not excuses.

Insist the team members notify you immediately if they encounter a problem they can't resolve independently and quickly. Discuss the plan and timetable you have implemented with your team, and make sure they understand the importance of their contribution. In the heat of battle, team members can either lose focus, or become so focused they are unable to divert their attention to other matters as the need arises. Everyone is juggling multiple responsibilities, and everyone is pressed for time.

Update the attorneys regularly, and notify them immediately if you encounter a

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serious problem with the case. Be clear in all your oral communications, both with your attorneys and your team.

Periodically update everyone with written correspondence, preferably through e-mails. Assume the responsibility for eliminating confusion. Know what your team needs to accomplish based on the plan you have designed, and constantly communicate the objectives with precision.

### III. Step 3 – Take Command of the Paperwork

Some cases involve a mountain of paperwork (exhibits, depositions, research, memoranda), and your ability to control the flow of that paperwork is vital to the success of the case. Few tasks are more important or more valuable to the lead counsel during the course of the trial. Mark, record and organize your documents in a manner that will be logical for you and for the attorneys who will need to readily access them during trial. Summarize and annotate briefs and memoranda in a concise and logical fashion. If the lead attorney has not specified how he or she would like to accomplish this, talk to him or her. Offer suggestions and ideas on how you feel the documentation should be organized, and make sure your proposals are acceptable before you invest countless hours on a plan you will need to recreate at a later date. Organize the paperwork in a way that will facilitate quick and easy use at trial.

### IV. Step 4 – Know Your Judge

Judges are creatures of habit and emotion, and they have a certain set of written and unwritten rules they follow in their courtrooms. Some have inflexible rules you violate at your own peril, while other judges operate in a laissez-faire manner; some are irascible; others very patient. Know as much as possible about the judge before any court appearance.

Do your part to understand the rules and idiosyncrasies of each courtroom. If there are published local rules, study them. If you know others who have tried cases before your judge, seek their insight. Learn from the mistakes of others. Know the judge's preferences and predispositions.

### V. Step 5 – Serve as the Sounding Board

Trials are intensely stressful, regardless of how many cases one has tried. When the stakes are big, the

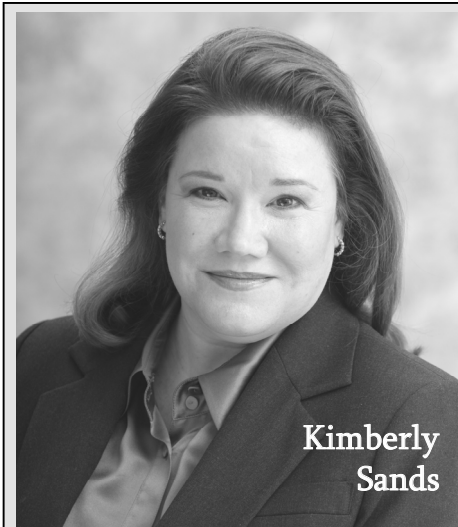
stress skyrockets. Offer to help the lead attorney by listening and offering insight. Don't simply agree with the lawyer's theory of the case, trial strategy, proposed opening statement, line of questioning or closing argument. Analyze them from the perspective of the judge or juror. Are they clear? Are they descriptive? Do they flow logically and are they easy to understand? Do they tell a story that will resonate with the judge and jurors? Is the theme of the case precise and consistent with the evidence and documentation?

While it's ultimately the attorney's decision, the paralegal's insight, if handled in an appropriate manner, can be valuable. Offer honest, constructive advice. Don't agree with a theory or proposed course of action you find confusing or incomplete. If you have other ideas, be confident enough in your abilities and judgment to offer them. Attorneys frequently become so immersed in their cases, they lose perspective, which might cause them to pursue a line of questioning, an argument or a case theory that will be lost on the layperson hearing the evidence for the first time.

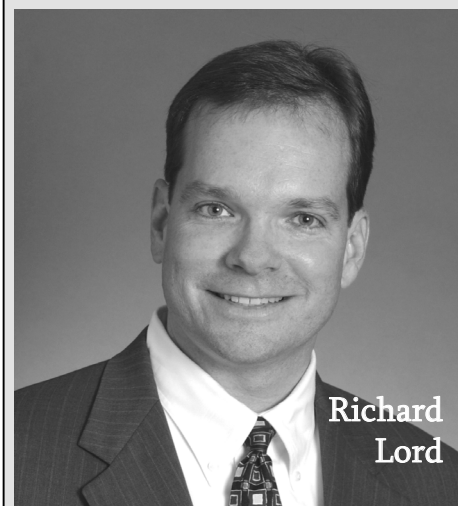
Listen to the presentation and review the arguments critically. Express your ideas diplomatically (and with the especially volatile attorney, carefully) but always with a view of what best serves the client and the case.

In next month's issue, we will continue the discussion of the steps paralegals can take to be effective in the trial preparation process, including helping to prepare visual aids and courtroom presentations, focusing on the details, and being confident in one's abilities and contributions.

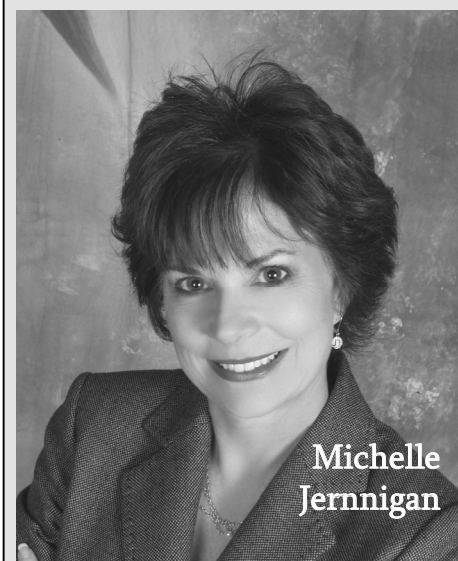
David J. Dempsey, JD, is the president and CEO of Neon Zebra, LLC, an executive presentation skills coaching and consulting company based in Atlanta, Georgia. He is a veteran of the courtroom, as well as a business executive, a university professor, an acclaimed author, an award-winning speaker and a presentation skills consultant for senior leaders at global and Fortune 500 companies. He is also the author of *Legally Speaking: 40 Powerful Presentation Principles Lawyers Need to Know* (Kaplan Publishing) and *Present Your Way to the Top* (McGraw-Hill Publishing). David Dempsey can be reached at [info@neon-zebra.com](mailto:info@neon-zebra.com) or 800-729-2791.



Kimberly  
Sands



Richard  
Lord



Michelle  
Jernnigan

David Henry of Henry/Potter Civil Mediation presented "Gender Issues in Mediation" to the Brevard County Association of Women Lawyers on August 27, 2010 in Viera.



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## Legal Aid Society

*continued from page 14*

more than pay lip service to Legal Aid," said Presnell. "No question that the issue strengthened the Legal Aid Society and its position that if you were an OCBA member then you did *pro bono* work."

Within the next year Legal Aid went through many changes and faced the challenge of declining specialized state funds when many were reduced or eliminated. Legal Aid was evicted from its office when the county ended an agreement to provide space. The OCBA, forced to re-examine its commitment to Legal Aid, increased the *pro bono* requirement to two cases and \$250 per year.

For many of the attorneys who began practicing in the 1970s, their support for the Legal Aid Society was grounded in their belief in an attorney's commitment to public service and *pro bono* work has often provided to them an opportunity to be part of serving the community through special programs like the Guardian ad Litem Program.

"When I came to Orlando to practice in 1973, *pro bono* work was part of being a member of the bar. I felt it was part of being an attorney. Through the Guardian ad Litem Program in particular I have enjoyed the work I've done with children," says Judge John Marshall Kest, past president of the OCBA and the Legal Aid Society. "Although there are disappointments, the opportunity that you have to make a difference in a child's life and be an advocate for the 'good guy' in the courtroom has been satisfying."

The Guardian ad Litem Program served 334 children in its first official year of operation in 1981. In 2009, about 1,500 children were assigned Guardians ad Litem. The program has drawn a core of about 300 *pro bono* attorneys who help children primarily in juvenile dependency matters.

"In my first year on the Legal Aid Board in 1979, there was an informal system where the judges would appoint attorneys to serve as Guardians ad Litem. We had a pilot project for a year and then the state offered us money to have a program without attorneys as GALs. We said we wanted to keep control of the program and refused the money," said Chuck Stepter,

longtime Legal Aid Board member.

"We preserved the best of what came before us but were open to new ideas," says Terry Ackert, former executive director of Legal Aid. "When confronted with big questions, we have to say we've been bragging about this, now let's do it."

For new attorneys, *pro bono* work is what is expected if you practice law in Orange County.

"Why does it work? *Pro bono* support came from bar leaders and respected lawyers and firms. The *pro bono* program was developed from the bar and then it became Legal Aid," said Chuck Stepter.

"It was not a delivery program having to approach the bar and say get involved."

"While there are conservative folks, they are progressive. *Pro bono* became an institution and as an institution, *pro bono* is self-perpetuating," says Judge Sally Kest, former Legal Aid Board member and former Executive Council member.

"I give tremendous credit to the folks involved in the early '70s. When I came

here in 1977 there was automatic doing of Legal Aid cases," says Mike McMahon, former president of the OCBA and former president of Legal Aid. "New lawyers would come into the environment where *pro bono* is expected. Since that expectation level exists, to decline involvement presents psychological hurdles. The burden is on the attorney to offer a reason not to participate. It has become culturally unacceptable to present other options."

"I think the acquisition of the bar center and the operation of the Legal Aid Society in the same building as the bar added to the connection between the bar leadership and Legal Aid," says Terry Ackert who was director during the construction and move into the bar center. "Bar leaders and members could see the staff and the clients and physically connect with the ownership of the program. They could take pride in it. Here it is, our baby."

In 1986, the Board of Trustees formally reinstated the policy of Legal Aid for referring *pro bono* cases and said that no member was exempt from *pro bono* services. The Board set criteria for those

members who could be excused from services and provided that government attorneys would also be expected to participate in *pro bono* work. In 1992, after the Supreme Court's opinion on *pro bono* services, the Board of Trustees of Legal Aid requested an increase in the fee to \$350 and it was approved beginning in 1993. When the Orange County Bar Association amended its by-laws in 1995, they continued the mandatory policy supporting *pro bono* work through the Legal Aid Society. "Unjustified failure or refusal to accept cases referred to the member from time to time by the Legal Aid Society, or to otherwise comply with the procedures established by the Legal Aid Society for service or contribution in lieu of service; provided however termination by the Executive Council cannot occur without recommendation to the Executive Council by the Board of Trustees of the Legal Aid Society of the Orange County Bar Association, Inc."

Dan DeCubellis, a former president of the OCBA, attributes the success of the program to the leadership of the original attorneys. "They had this great little idea of public service as a commitment of the whole bar. It seemed a reasonable request to make of a professional, and now it has developed a tradition and a life of its own."

"I feel I have been part of the program for 40 years and I am proud of my contribution. The origins for attorneys like myself are professional responsibility. There has always been the onus to upgrade the program if we say we are doing it ourselves. It always comes down to the individual commitment even in big firms," says van den Berg.

Throughout the past 50 years the Orange County Bar Association has strengthened its support of the Legal Aid Society, and the accumulation of events and memories has created a compelling personal connection for many members. This connection continues to promote the role of *pro bono* work as the expectation of an attorney who practices law in Orange County.

**Catherine A. Tucker** is the Pro Bono Coordinator, Legal Aid Society of the Orange County Bar Association, Inc. She has been a member of the OCBA since 1998.



<sup>1</sup>This article appeared in the April 1999 issue of *The Florida Bar Journal*, and some numbers have been updated for this edition of *The Briefs*.

## Professionalism Committee

*continued from page 4*



Glazebrook (jurist). The late Patrick Magill received the William Trickle award for 2011. However, we are actively soliciting nominations for both the Mathews and Glazebrook awards. Please visit the OCBA's web site for further information, or send your nomination to Brant Bittner at the OCBA. Nominations will be open until December 3, 2010.

**James A. Edwards**, a partner at Smith, Edwards & Cabaniss, P.A., is chair of the OCBA Professionalism Committee. He is a civil trial lawyer, appellate lawyer and a mediator. He has been a member of the OCBA since 1980.

## OCBA 2011 Professionalism Award Nominations

**Nomination Submission Deadline:**  
December 3, 2010

Please honor an OCBA attorney or jurist by submitting your nominations for

**2011 Lawrence G. Mathews, Jr. Young Lawyers Professionalism Award** (*Attorney in practice 15 or fewer years*)

**2011 James G. Glazebrook Memorial Bar Service Award** (*Jurist*)

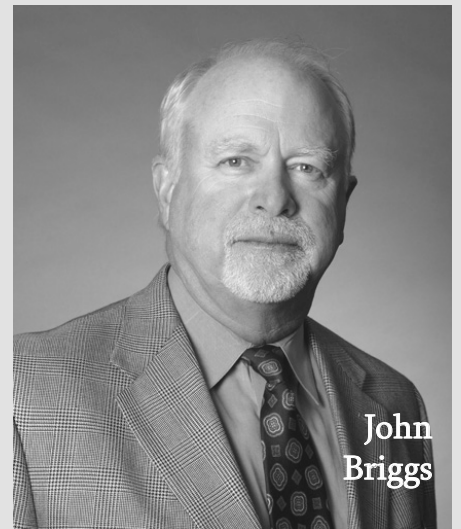
Criteria and nomination forms are available on the OCBA website homepage. Submission deadline is December 3, 2010. Please send completed nomination forms to Brant Bittner, OCBA Executive Director.



**Mike Orfinger**



**Sandra Upchurch**



**John Briggs**

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## Appellate Practice Committee

continued from page 6

411.24. Further, the regulatory scheme provides in 42 C.F.R. § 411.37 that recovery can be made against the party that received payment or against the primary payer. When the statutory and regulatory provisions are read in conjunction with one another, the overwhelming sense is that a system has been established by which the federal government can recover payments made to Medicare beneficiaries. Further, the penalties for failure to arrange for the reimbursement to Medicare can be onerous, both upon the recipient of those payments as well as upon the entity that has made the payment to the beneficiary. The prospect of double damages and exposure to a claim raised by CMS on behalf of the federal government is a very real possibility if Medicare's conditional payments have not been satisfied.

These statutory and regulatory provisions have been in place for some time now. However, it is only through recent developments that an aggressive effort on behalf of the federal government to recover Medicare expenditures has been waged. Although Congress has defined Medicare as a secondary payer in any case involving a liability policy of insurance for almost 30 years, two recent developments have drastically changed the landscape. The first of these events is the most recent amendment to the MSP statute that calls upon liability insurers to provide Medicare with detailed information regarding the settlement of any claim in order to provide Medicare with the information it will require to secure recoupment of all funds paid to Medicare beneficiaries who settle tort claims with liability insurers.

The penalties for failure to comply are onerous. Any insurer that fails to provide CMS with the necessary information shall be assessed a civil money penalty of \$1,000 for each day of non-compliance.<sup>8</sup> With these recent amendments to the MSP statute, and associated regulations designed to enforce these statutory provisions, both Congress and HHS have made abundantly clear the seriousness with which the federal government intends to pursue the recovery of funds paid to Medicare beneficiaries in situations in which those Medicare beneficiaries receive the proceeds of a settlement with a third-party liability carrier.

The second significant event was the filing of a lawsuit, *United States v. Stricker*, in the United States District Court for the Northern District of Alabama, in which

the United States government is seeking to recover in excess of \$68,000,000 of Medicare payments. What makes the *Stricker* litigation so significant is that not only has the United States named as defendants liability insurance carriers and the underlying defendant companies who made settlement payments to Medicare beneficiaries, but the United States has also named as defendants in that lawsuit the attorneys who represented the plaintiffs who were Medicare beneficiaries as well.

*Stricker* involves the settlement of numerous claims for which a class action had been established. The harm to individuals was caused by pollutants that had affected the health of hundreds of people, causing a variety of injuries ranging from eye irritation to cancer. Numerous chemical manufacturers were named as defendants in the class action lawsuit, and some of those defendants maintained policies of liability insurance to provide for defense and indemnity in the event that any claims were asserted arising out of products that they had produced. It was ultimately determined that of the members of the class, 907 individuals had received healthcare that had been funded by Medicare. CMS estimates that over \$68,000,000 in Medicare benefits had been provided. Pursuant to the MSP, Medicare is now seeking the recovery of that amount, as neither the beneficiaries nor the primary payers complied with the requirements of the MSP by reimbursing Medicare for the benefits that had been provided to these 907 individuals.

The *Stricker* case is a blunt sign that the federal government is now in the process of taking an active role in pursuing the recovery of Medicare benefits that are paid to eligible beneficiaries. The federal government is now taking advantage of the tools that Congress and HHS have provided, and it has put everyone on notice that it will take any action that it

deems appropriate, including pursuing double damages from primary payers by initiating litigation, in order to recover the funds that it has expended on behalf of Medicare beneficiaries.

Requiring insurance companies to provide detailed information regarding settlements to the federal government will facilitate the ability of CMS to pursue the recovery of funds paid out to Medicare recipients. The reporting requirements do not go into effect until January 2011, and they are



only for settlements entered into on or after October 1, 2010. However, regardless of when the reporting requirements go into effect, the ability of the federal government to pursue those funds already exists, as

*Stricker* makes clear. This new approach will have a direct impact on how personal injury claims are handled, both on the plaintiff side and the defense side.

In Part II of this article, I will address the practical implications of Medicare's new approach to the recovery of funds already paid and provide some recommendations on practical approaches that practitioners should be aware of prior to resolving personal injury claims.

**Michael R. D'Lugo**, Wicker, Smith, O'Hara, McCoy & Ford, P.A. has been a member of the OCBA since 1999. This article has been submitted on behalf of the OCBA Appellate Practice Committee.

<sup>1</sup>*United States v. Baxter International, Incorporated*, 345 F.3d 866 (11<sup>th</sup> Cir. 2003).

<sup>2</sup>*Id.* at 875.

<sup>3</sup>*Id.*

<sup>4</sup>*Zinman v. Shalala*, 67 F.3d 841, 845 (9<sup>th</sup> Cir. 1995).

<sup>5</sup>*Provident Life & Accident Insurance Company v. United States*, 740 F.Supp. 492, 498 (E.D. Tenn. 1990).

<sup>6</sup>*Baxter* at 875.

<sup>7</sup>42 C.F.R. § 411.21

<sup>8</sup>42 U.S.C. § 1395y(b)(8)(E)(i).

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# *Joint Happy Hour*

## OCBA and Other Voluntary Bars

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Everyone will be there, so be sure to **RSVP** and plan to attend!

### **TO BENEFIT SECOND HARVEST FOOD BANK**

**DATE:** Thursday, November 4, 2010

**TIME:** 5:30 p.m. – 7:30 p.m.

**PLACE:** Ember // 42 W Central Avenue // Orlando

**COST:** \$10.00 for OCBA & voluntary bar members  
+ donation of non-perishable food item  
\$15.00 for non-members

**RSVP by October 26, 2010 to  
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*(When you RSVP, please indicate  
the name of the bar or bars  
to which you belong)*

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# Side Bar



Sunny Lim Hillary

In addition to the Orange County Bar Association, there are forty-one statewide bar associations, one hundred and thirty-seven county bar associations, seventy-seven regional bar associations within Orange County, and four specialty bar associations. Let's see what some of the bar associations in your neighborhood are up to!

## Central Florida Association for Women Lawyers (CFAWL)

Exciting news for CFAWL! On July 9, 2010, the Florida Association for Women Lawyers (FAWL) recognized CFAWL as its 2010 Outstanding Chapter! The **Outstanding Chapter Award** is presented annually to the FAWL Chapter that has (1) created new programs and/or expanded on traditional programs that further FAWL's mission; (2) provided programs that encourage and assist members to become leaders in the profession and in the community; (3) sought and gained exposure and recognition in both the legal community and the community as a whole; (4) successfully recruited and retained members; and (5) consistently participated in the state FAWL organization by paying dues in a timely manner, having an active chapter representative, attending meetings and functions, encouraging volunteers for committees and offices, working well with other local chapters, and assisting with FAWL projects.

In addition to earning the 2010 Outstanding Chapter Award, five CFAWL members received the **2010 Leaders in Law Award** in recognition of their meaningful contributions to the community through legal services they provide or volunteer work they undertake. The award recipients, each of whom is a positive role model for FAWL members, were **Judge Karen Jennemann, Mary Ann Morgan, Heather Rodriguez, Mary Ann Etzler, and Melanie Griffin.**

On November 2, 2010, at 6:00 p.m. at the Orlando Shakespeare Theater, CFAWL will hold its **2010 CFAWL Community Outreach Fair!** The fair is a wonderful way for the community to learn about local non-profit organizations and discover ways to support them by becoming involved. Last year, more than

fifty non-profit organizations and nearly four hundred members of the local community participated in this special evening event. For more information about the 2010 CFAWL Community Outreach Fair, please contact **Barbara Leach** at [BLEach@whww.com](mailto:BLEach@whww.com) or **Jessica Price** at [jessicakprice@gmail.com](mailto:jessicakprice@gmail.com). Artisan cheeses, delicious desserts, and a variety of wine will be served.

Also, keep an eye out for **CFAWL's Chocolate Night at Foster's and Farris** coming up on November 10, 2010, and **CFAWL's Holiday Party** coming up on December 8, 2010!

Also, keep an eye out for **CFAWL's Chocolate Night at Foster's and Farris** coming up on November 10, 2010, and **CFAWL's Holiday Party** coming up on December 8, 2010!

## Greater Orlando Asian American Bar Association (GOAABA)

On June 22, 2010, members of the GOAABA gathered at Spice Modern Steakhouse in downtown Orlando for an **Installation Happy Hour. General Magistrate Linh T. Ison** swore in GOAABA's newest board members, **Christy T. Nash** and **Wanda M. Reas**. Congratulations to Christy, who will continue to serve as community service chair, and to Wanda, who will serve as professionalism/CLE chair for a two-year term until June 30, 2012.

The remaining members of GOAABA's board of directors were installed on February 18, 2010, and will continue their service until June 30, 2011. The board members are **Glenn R. Leong** (president), **Jessica K. Hew** (president-elect), **Donna C. Hung** (treasurer), **Kim Y. Nguyen** (secretary), **Lisa X. H. Gong** (social/networking chair), **Sunny Lim Hillary** (communications chair), and **Angela M. Miller** (membership chair).

One of GOAABA's many missions is to serve as a bridge between the members of the local Asian American communities and the Greater Orlando community. To introduce both attorneys and law students to the new organization, on August 3, 2010, GOAABA hosted a happy hour at Sip Lounge, and on September 7, 2010, GOAABA gathered at Lam's Garden for yummy dim sum! Check out GOAABA's calendar for exciting upcoming events, including its one-year anniversary celebration on October 19, 2010! For more information, please contact **Lisa Gong** at [lisa.x.gong@gmail.com](mailto:lisa.x.gong@gmail.com). To become a member of GOAABA, please contact

**Angela Miller** at [angela.miller@lowndes-law.com](mailto:angela.miller@lowndes-law.com).

## Hispanic Bar Association of Central Florida (HBACF)

The HBACF is proud to recognize **Judge John E. Jordan**, Orange County Judge, as the recipient of the **2009-2010 HBACF Jurist of the Year Award**. Judge Jordan is respected for his long-time service to the HBACF and its goal of serving Hispanic lawyers, Hispanic law students, and the entire Hispanic community.

And, a special thank you to those who donated school supplies to the **HBACF Annual School Supply Drive**. As a result of your ongoing charity and support, the students of Englewood Elementary are equipped to start the new school year with a bang!

The **HBACF Scholarship Night 2010** was a success! On August 19, 2010, members of the HBACF and local lawyers and judges enjoyed an evening filled with live music, food, and drinks in support of the Hispanic Bar Association Scholarship Fund. All proceeds from this special event went to the Hispanic Bar Association Scholarship Fund.

On August 26, 2010, the HBACF, in conjunction with **City of Orlando Commissioner Tony Ortiz**, kicked off its annual **"Conozca Sus Derechos"** ("Know Your Rights") free legal workshop series. Each month, a free legal workshop will be presented to the members of the local community to educate them about a timely law-related topic. The August 26, 2010 workshop on foreclosures and the September 9, 2010 workshop on landlord/tenant issues were a success. Mark your calendars for the upcoming immigration seminar on October 14, 2010, and the bankruptcy seminar on November 11, 2010. All seminars are conducted at the Englewood Community Center located at 6123 LaCosta Drive, Orlando, FL 32807. The HBACF encourages anyone who may be interested in attending the seminars to contact **Nicole Sbert** at [sbertn@jackson-lewis.com](mailto:sbertn@jackson-lewis.com).

Please keep sending your bar news, along with event photos and IDs, to me at [sunny@hillaryllyaw.com](mailto:sunny@hillaryllyaw.com), or give me a call at 407-864-1616.

**Sunny Lim Hillary**, Hillary, P.A., has been a member of the OCBA since 2005.

## New Attorneys' Fee Statute

continued from page 18

tion by the court that the trustee committed a breach of trust after the entry of an order prohibiting payment of attorney's fees and costs pursuant to this paragraph, the trustee may pay costs or attorney's fees incurred in the proceeding from the assets of the trust without further court authorization.

See Fla. Stat. § 736.0802(10).

It is important to understand that the general rule, set forth in the first section above, is a trustee needs no one's approval to pay legal fees from the trust. For strategic reasons, however, a trustee may opt to pay legal fees out of pocket and request a court order specifically allowing payments from the trust. This might be particularly true for institutional trustees, who can afford to pay their own legal fees and do not want to risk upsetting a judge who may not be familiar with the Statute. It also might serve to preempt a full hearing under the Statute. In any event, for a plaintiff to obtain a court order preventing the trustee from paying legal fees from the trust, a motion is required. Some plaintiffs may incorporate this motion into the end of the complaint, but that practice is not preferred.

After the plaintiff presents his case, the trustee's attorney might move for what would be a judgment as a matter of law at trial, asking the judge to adjudicate the motion in favor of the trustee because the plaintiff failed to present enough evidence for the court to conclude there was a breach of trust. As stated above, the duty of a trustee is to administer the trust in good faith, in accordance with its terms and purposes and the interest of the beneficiaries, and in accordance with the Florida Trust Code. See Fla. Stat. § 736.0801. However, it is important to note that certain complaints by a plaintiff -- such as an inadequate trust accounting or a failure to provide certain information to the beneficiaries in a timely manner -- may not qualify as breach of trust issues. Honest mistakes or sloppy accounting might not constitute a breach of trust. In practice, the court will generally equate a breach of trust with the concept of a breach of fiduciary duty.

The elements for a cause of action for breach of fiduciary duty are the existence of a fiduciary duty and the breach of that duty such that it is the proximate cause of the plaintiff's damages. *Gracey v. Eaker*, 837 So. 2d 348, 353 (Fla. 2002). To prove a case in court, the initial burden of proof is on the beneficiaries to prove that a breach occurred which proximately caused an injury. If that is established, the burden shifts to the trustee to demonstrate that there was no breach or that the loss or injury would have occurred absent the breach. *Fort Myers Memorial Gardens, Inc. v. Barnett Banks Trust Company, N.A.*, 474 So. 2d 1215 (Fla. 2d DCA 1985). The trustee also may argue that there was no loss or injury. For example, if a trustee inadvertently transfers money from the wrong bank account for a personal expense, identifies the error and then immediately returns it with interest, there may be no damages.

In some cases, a plaintiff will question the judgment or discretion of a trustee, such as with regard to accepting offers to purchase real estate. When a trustee's judgment or discretion is involved, courts will not interfere with the trustee's actions except to prevent abuse. See Restatement (Third) of Trusts, §50. Absent a breach of trust, a trustee is not liable to a beneficiary for a loss or depreciation in the value of trust property or for not having made a profit. See Fla. Stat. § 736.1003. Additionally, the terms of a trust document generally provide wide latitude

in describing the trustee's powers, and there are public policy reasons for allowing trustees to pay legal fees from the trust. If a trust beneficiary is named to be a successor trustee of his parent's trust, knowing he has a strained relationship with siblings who are also trust beneficiaries, he may not want to accept the trusteeship and risk losing hundreds of thousands of dollars of personal assets to pay legal fees to defend his actions as a trustee. In turn, if beneficiaries are less willing to serve as trustee, settlors become less confident in having their wishes carried out through trusts, and the process would break down.

However, sometimes a breach of trust is flagrant. For example, a trustee who is not a beneficiary may have used trust funds to buy a new sports car. Where there is a breach of trust, not only will the court issue an order under subsection (b) of the Statute enjoining the use of trust assets to pay legal fees, but also the trustee would be subject to all the remedies for breach of trust in section 736.1001, *Florida Statutes*. As a practical matter, the evidentiary hearing on attorneys' fees under the Statute is much like a preliminary injunction hearing in a commercial litigation case. The court is hearing the gist of the evidence through witnesses and documents -- even though formal discovery has not been taken -- and making a ruling that may be very close to what the parties should expect at trial. For that reason, an early win for the trustee might cause the plaintiff to slow down or dismiss parts of the litigation, and a win for the plaintiff might cause the trustee to start making settlement offers rather than endure the expense of what might be a losing battle.

There is another interesting part of the Statute that is important to know for purposes of litigation. Subsection 10(b), provides that where a claim or defense based upon a breach of trust is withdrawn, dismissed, or resolved without a determination by the court that the trustee committed a breach of trust after the entry of an order prohibiting payment of attorney's fees and costs, the trustee may pay costs or attorney's fees incurred in the proceeding from the assets of the trust without further court authorization. The vast majority of civil cases are settled prior to trial, although more fiduciary litigation seems to go to trial because family emotions are often involved. Before trial, if a breach of trust case goes to mediation, the trustee can rely on the above language to demand that his or her legal fees be paid from the trust. If the plaintiff refuses, the parties may settle on a certain portion of the fees to be paid by the trust. Ultimately, the parties are wise to settle breach of trust cases because the legal fees for each side through trial can be hundreds of thousands of dollars, and a potential loss of the case for either side will be compounded by the risk of having to pay the opposing side's legal fees. Attorneys' fees and costs may be recoverable under sections 736.1004-1007, *Florida Statutes*.



**David Hathaway** is a shareholder in the Orlando office of Dean Mead's Litigation Department. He has been a member of the OCBA since 2002.



**David Akins** is a shareholder in the Orlando office of Dean Mead's Estate and Succession Planning Department. He has been a member of the OCBA since 2004.



Wanda Reas, Hae J. Kim, and Sung Mi Shin



General Magistrate Linh Ison,  
Wanda Reas, and Christy Nash

# GREATER ORLANDO ASIAN AMERICAN BAR ASSOCIATION

June 22, 2010

*Investiture & Happy Hour*



Donna Hung and  
Joe Panyanouvong

Jerry Lee,  
Greg Maaswinkel,  
Robert Lee,  
Jessica Hew, and  
Sunny Lim Hillary



Judge  
Antoinette  
Plogstedt,  
Stew  
Bernard



## HISPANIC BAR ASSOCIATION OF CENTRAL FLORIDA

*Scholarship Night*  
August 19, 2010

Judge Heather Higbee, Judge Martha Adams,  
Judge John Jordan, Beverly Jordan



Aristides "Kiko" Diaz,  
Karla Valladares,  
Gabriela Mosher

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# Presentation Skills for Lawyers

## Keeping Your Word



Moving isn't the easiest thing in the world. When you move from one home to another, you're basically transferring your entire life (and your family's life) to a new destination.

When we recently moved between homes, we had too much stuff (more specifically, too much HEAVY stuff) to move by ourselves, so we had to hire a moving company. Out of all the movers we contacted, only one of them called us back. When he called he did a terrific sales job – he told me that all of their movers were bonded, how reliable they were, how careful they were, etc., etc. Most importantly, he promised me that they'd be at our home "sometime between 11:00 a.m. and 1:00 p.m." to help us move.

Eleven o'clock arrived and, as you'd expect, the movers weren't on time, but no big deal – they said they be there between 11 and 1...

12:00 p.m. ...No movers.

1:00 p.m. ...No movers.

2:00 p.m. ...Still no movers, but when I call the moving company, the man tells me that the truck got stuck in traffic and promises me they'll be there "in half an hour."

3:00 p.m. ...No movers, and my calls go to voicemail.

4:00 p.m. ...No movers, and no return phone call. I finally get through to a customer service representative, and he tells me that the truck had a mechanical problem but will be there in "half an hour."

5:15 p.m. ...No movers, and no return phone calls, but I get a promise that they will be there "first thing" tomorrow morning, between 8:00 a.m. and 9:00 a.m.

Next day...

8:00 a.m. ...No movers.

9:00 a.m. ...No movers.

10:14 a.m. ...Finally, only 23 hours and 46 minutes later than expected, the movers arrive!

Now, regardless of how great a job they do moving our items from Point A to Point B, do you think I'll ever use their moving company again? Do you think I'll ever recommend their moving company to any

of my friends or colleagues? If you asked me for a recommendation, do you think I'd be neutral, or do you think I'd tell you to stay far away from this company?

The reason I'd never trust them again isn't because the truck was late. I understand that trucks can get stuck in unexpected traffic or that they can break down. That's not a big deal.

The problem is that they PROMISED me the truck would be there, and then when they learned they couldn't keep their promise, they didn't do anything about it. If they'd simply called me to let me know the truck was running late, I could have rescheduled other errands I had planned and gone on about my day. The truth is, I didn't necessarily need them to be at the house at 11:00 a.m. or 1:00 p.m. They could have come by at 3:00 p.m. or even 8:00 p.m. that evening and it wouldn't have mattered. What I really needed was to be able to trust that they would show up, and to know that I could count on them to keep their promises.

### So what's that got to do with presentation skills for lawyers?

Since you're a lawyer, every time you speak, you are making promises to your audience. Every time you stand before a group of potential clients, a group of jurors, or your senior partners, you are promising them that what you say is true, or will become true. But here's the downside to making promises. If you don't keep your word, jurors, judges, and opposing lawyers will hold it against you and your client, *even if the law doesn't require what you promised!*

For example, let's say that

you're a criminal defense attorney, and, during opening statement, you promise the jurors that your client will testify and that he'll reveal who the REAL killer is during his testimony. But after the prosecution rests its case, you decide that they've done a horrible job and that you don't want to put your client on the stand because it will give the prosecutors a chance to resurrect their case.

Even though the law doesn't **require** you to prove who the real killer is, jurors may still hold you to your promise. Jurors expect you to be a man or woman of your word. So, if you're going to make any promises during opening statement, be prepared to deliver upon them. If you don't tell them who the real killer is, they may think you've failed to meet the burden (even though you don't have one) and may hold it against your client during deliberations.

Instead, here's a good rule of thumb for making promises, regardless of whether it's in opening statement, to an opposing lawyer, or to your client: It's better to **under promise** and **over deliver**. Make it easier than they thought it would be, and your audience will thank you for it. If your jurors think your case is stronger than you promised during opening statement, they'll give you the verdict you want. If your senior partners see you billed more hours or delivered superior work than what they expected, they'll give you that raise you deserve. When your clients see that their results are better (and delivered faster) than they expected, they'll not only hire you again, they'll tell

others what an amazing lawyer you are.

As a lawyer, your word should be your bond. Just be careful to never make a promise that you can't keep.

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





Mark Powers



Shawn McNalis

A particularly frustrating experience, not uncommon among lawyers, occurs when a friend or family member refers a potential client to one of your competitors. They don't do this because they think the other attorney is better, but because they don't really know what you do.

In previous columns we've discussed the many strategic conversations that attorneys who are successful rainmakers incorporate into their client development efforts. Another conversational strategy every attorney should be familiar with is called the Laser Talk. At first glance, the Laser Talk is nothing

more than a brief description of what a lawyer does for a living – a response to the question, “What do you do?” that is asked hundreds of times in any attorney's lifetime of social, personal and business encounters.

To some, these may seem like casual inquiries, but the savvy marketer recognizes these questions as marketing opportunities and the chance to deliver an answer that goes beyond the typical, uninformative, “I'm an attorney” response. Why would a lawyer want to describe his or her practice in such a lifeless way? To increase what we call *top-of-mind-awareness*, a well-spoken Laser Talk – and by this we mean a Laser Talk that doesn't sound phony or canned – allows you to speak powerfully, passionately, even humorously about what you do. The real estate attorney's Laser Talk that starts out with, “I'm a dirt lawyer,” tends to provoke greater interest than “I'm an attorney,” any day of the week. Likewise, the collaborative law attorney who opens with, “I'm a recovering litigator,” or the estate planning attorney who responds with, “I help people who don't want to outlive their money,” tend to be much more memorable and attract more business.

In the current climate of increased competition, being memorable should not be underestimated. Not unlike products that rely on branding to communicate their message and attract their market, successful attorneys rely heavily on referrals,

and this means people must remember them, want to use their services and/or tell others about their services. A verbal form of branding, the Laser Talk is an important part of a word-of-mouth marketing program that depends upon relationship building and top-of-mind awareness for its success.

Perhaps even more important than the power of the Laser Talk to communicate a message and brand the attorney is the thought process that must precede its creation. To follow the Laser Talk formula, you must answer the following questions:

1. Whom do you help? (This is your target market.)
2. What problems do you resolve? (These are the services you offer.)
3. What makes you uniquely qualified to do so? (This is your “USP” or unique selling position.)

In effect, the Laser Talk is a miniature marketing plan, as it forces you to identify your target market, articulate the service you provide, and highlight what makes you unique among your peers. Deceptively simple in appearance, these are all the basic elements of a marketing plan. Very few attorneys, unless they are working with an advisor, ever attempt to create a marketing plan, let alone boil it down to a brief, concise description intended to be spoken in a variety of different social and business situations. But great rainmakers know attracting clients starts with this kind of analysis – identifying those you want to work with and figuring out how they benefit from your services, then crafting language that communicates the message with great clarity. The attorney who says, “I work with high net worth individuals and families to protect their wealth and pass it on to their children intact,” is pinpointing the client and speaking directly to the client's concerns. A statement like this has much greater impact than simply saying, “I'm an estate planning attorney.” It will also linger longer in the mind of the potential client or referral source, which is assaulted with thousands of marketing messages every

day. Whether you recognize it or not, you are part of the vast marketplace competing for business, and you want your message to stand out.

In order to have your Laser Talk stand out, lead off with an interesting or provocative opening such as “I practice preventative law,” or “I'm the business owner's best friend,” to engage your listener. When you launch your Laser Talk this way you can then fill in the rest of the information as the listener asks questions. Use the next couple of sentences to say more about whom you help, how you help and what makes you unique.

Narrowing your focus to a particular practice area helps to foster the idea that you are unique and an expert in your field. Except for small-town general practitioners, narrowing your practice to a couple of complementary areas allows you to market it more powerfully. Different Laser Talks are created for each area and delivered to suit different audiences. For example, a real estate attorney who also offered estate planning services would have two Laser Talks: one to describe his real estate services and another to describe his estate planning services. Then he would modify the delivery depending on whether he was speaking to a colleague or a potential client.

Once you've identified the markets you serve and the services offered, it is important to further distinguish yourself in the eyes of a potential client or referral source. How do you do this? By including in your Laser Talk some aspect of your personal history, training, family background, life experience, or special interest that differentiates you from your peers. For example, the criminal attorney who mentions that he is passionate about criminal law because of his own mistakes as a teenager, or the family lawyer that mentions her own divorce left her with great compassion for those going through the process, leaves a more memorable, meaningful and human impression. Often what you would consider a weakness or a flaw in your background is what makes you more appealing to a potential client.

Begin to experiment with your Laser Talk as you meet people in the courthouse, at social gatherings, or at business meetings. Follow the formula previously described to begin. Once you can identify your clients, your services, how you help people and what makes you unique, put your own spin on the phrases and tie

them together in a natural sounding talk that takes no more than 30 seconds. Be creative, be humorous, but be clear: the Laser Talk is a powerful tool in cultivating clients. Choose your words carefully.

**Mark Powers**, President of Atticus, Inc., and **Shawn McNalis**, Senior Practice Advisor, co-authored *How Good Attorneys Become Great*

*Rainmakers and Time Management for Attorneys* and are featured marketing writers for *Lawyers, USA*. Mark founded Rainmakers™, a simple process for attorneys at all levels to stay focused on marketing, creating fresh ideas and on-going accountability to marketing. To learn more about Atticus or Rainmakers™, please visit the Atticus website at [www.atticusonline.com](http://www.atticusonline.com) or contact the Atticus office at 352-383-0490.

## In Re Bilski - Part 2

*continued from page 11*

unenforceable, as alleged infringers may argue that the patent claims are merely “abstract ideas” that are, according to the Supreme Court decision, not patentable subject matter.

Further, the Supreme Court has already instructed the Federal Circuit to review certain cases in view of its *Bilski* decision. Most notably, on June 29, 2010, the Court granted certiorari, vacated the decision, and remanded *Mayo v. Prometheus Labs* to the Federal Circuit to reconsider the case in light of *Bilski*<sup>27</sup>. In *Mayo*, the Federal Circuit found that the claims met the machine-or-transformation test, and that “[t]he asserted claims are in effect claims to methods of treatment, which are always transformative when a defined group of drugs is administered to the body to ameliorate the effects of an undesired condition.”<sup>28</sup>

Similarly, the Supreme Court remanded *Classen Immunotherapies, Inc. v. Biogen IDEC* in view of *Bilski*<sup>29</sup>. However, in *Classen*, the Federal Circuit held that the claims did not meet the machine-or-transformation test<sup>30</sup>. Accordingly, it will be interesting to see whether the Federal Circuit will determine a new test for determining patentable subject matter under § 101.

Additional cases that involve the *Bilski* decision include *Research Corporation Technologies v. Microsoft*<sup>31</sup>, *In re Bonnstetter*<sup>32</sup>, and *Accenture Global Servs. GmbH v. Guidewire Software*<sup>33</sup>. *Microsoft* relates to methods of halftoning color images, and the district court held the asserted claims invalid for failing to satisfy § 101. *In re Bonnstetter* relates to a method of benchmarking a job. *Accenture* relates to a method for generating a file not for an insurance claim, wherein the district court requested briefing on whether the asserted patents are invalid based on the *Bilski* decision.

### (b) Effect on Patent Prosecution

On the same day of the issuance of the *Bilski* opinion, the USPTO issued a

memorandum to “provide interim guidance to the Patent Examining Corps.”<sup>34</sup> The memorandum states that

Examiners should continue to examine patent applications for compliance with section 101 using the existing guidance concerning the machine-or-transformation test as a tool for determining whether the claimed invention is a process under section 101. If a claimed method meets the machine-or-transformation test, the method is likely patent-eligible under section 101 *unless there is a clear indication that the method is directed to an abstract idea*. If a claimed method does not meet the machine-or-transformation test, the examiner should reject the claim under section 101 *unless there is a clear indication that the method is not directed to an abstract idea*. If a claim is rejected under section 101 on the basis that it is drawn to an abstract idea, the applicant then has the opportunity to explain why the claimed method is not drawn to an abstract idea.<sup>35</sup>

Further, the memorandum states that “[t]he USPTO is reviewing the decision in *Bilski* and will be developing further guidance on patent subject matter eligibility under 35 U.S.C. § 101.”<sup>36</sup>

On July 27, 2010, the USPTO provided such further guidance in *Interim Bilski Guidance for Determination Subject Matter Eligibility Process Claims in View of Bilski v. Kappos*<sup>37</sup> (“*Interim Bilski Guidance*”), which supercedes the previous interim instructions issued on June 28, 2010. The *Interim Bilski Guidance* is “to be consulted by the USPTO examiners for determining subject matter eligibility under 35 U.S.C. § 101 of machine, composition, and manufacture claims”<sup>38</sup> and includes a summary sheet of the factors in determining whether a claim is directed to an abstract idea. Some of the factors weighing toward eligibility include: recitation of a machine or transformation, the claim being directed toward applying a law of nature, and the claim being more than a mere statement of a concept.<sup>39</sup> Some of the factors weighing against eligibility as set forth in the *Interim Bilski Guidance*

include: no recitation of a machine or transformation, insufficient recitation of a machine or transformation, the claim not being directed to an application of a law of nature, and the claim is a mere statement of a general concept.<sup>40</sup> Per the USPTO’s website, “this *Interim Bilski Guidance* will assist our examiners in their examination of applications where subject matter eligibility of method claims must be determined.”<sup>41</sup> However, the USPTO makes clear that it is seeking input from the public on *Interim Bilski Guidance* as it will “further refine and finalize this guidance.”<sup>42, 43</sup> Accordingly, as of the date of submission of this article, the factors listed in the *Interim Bilski Guidance* will be the factors the USPTO will review in determining whether a claimed invention is a patent-eligible process under 35 U.S.C. § 101.



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<sup>1</sup>As previously noted, on June 1, 2009, the Supreme Court granted *Bilski* and Warsaw’s petition for writ of certiorari

in *In re Bilski*. 08-964, *Bilski et al. v. Kappos*, Proceedings and Orders, <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/08-964.htm>. The questions presented in the case are as follows:

Whether the Federal Circuit erred by holding that a “process” must be tied to a particular machine or apparatus, or transform a particular article into a different state or thing (“machine-or-transformation” test), to be eligible for patenting under 35 U.S.C. § 101, despite this Court’s precedent declining to limit the broad statutory grant of patent eligibility for “any” new and useful process beyond excluding patents for “laws of nature, physical phenomena, and abstract ideas.”

Whether the Federal Circuit’s “machine-or-transformation” test for patent eligibility, which effectively forecloses meaningful patent protection to many business methods, contradicts the clear Congressional intent that patents protect “method[s] of doing or conducting business.” 35 U.S.C. § 273. 08-964, *Bilski et al. v. Kappos*, Questions Presented, <http://www.supremecourt.gov/qp/08-00964qp.pdf>.

<sup>2</sup>*Bilski et al. v. Kappos*, 561 U.S. \_\_\_\_ (2010), <http://www.supremecourt.gov/opinions/09pdf/08-964.pdf>, slip op. at 2.

<sup>3</sup>*Id.* at 5.

<sup>4</sup>*Id.*

<sup>5</sup>*Id.* at 5-6 (*emphasis added*).

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## **In Re Bilski - Part 2** *continued from page 37*

<sup>6</sup>*Id.* at 6, citing *Diamond v. Diehr*, 450 U.S. 175, 182 (1981).

<sup>7</sup>*Id.* at 8.

<sup>8</sup>*Id.* at 9.

<sup>9</sup>*Id.* at 11.

<sup>10</sup>*Id.*

<sup>11</sup>*Id.*

<sup>12</sup>*Id.* at 12.

<sup>13</sup>*Id.* at 13.

<sup>14</sup>*Id.*

<sup>15</sup>*Gottschalk v. Benson*, 409 U.S. 63 (1972).

<sup>16</sup>*Id.* at 71.

<sup>17</sup>*Id.* at 72.

<sup>18</sup>*Parker v. Flook*, 437 U.S. 584 (1978).

<sup>19</sup>*Diamond v. Diehr*, 450 U.S. 175, 187 (1981).

<sup>20</sup>Slip op. at 15.

<sup>21</sup>*Id.* at 16.

<sup>22</sup>Due to page limitations, a large portion of this article relating to The Stevens Concurring Opinion has been removed. To access the full article, please see <http://173.230.132.220/articles/what-supreme-court%E2%80%99s-decision-re-bil-ski-means-business-method-patents>.

<sup>23</sup>Concurring op., Stevens, J. at 2.

<sup>24</sup>*Id.* at 2-3.

<sup>25</sup>Due to page limitations, a large portion of this article relating to The Breyer Concurring Opinion has been removed. To access the full article, please see <http://173.230.132.220/articles/what-supreme-court%E2%80%99s-decision-re-bil-ski-means-business-method-patents>.

<sup>26</sup>Concurring op., Breyer, J., at 1.

<sup>27</sup>See Supreme Court certiorari summary dispositions at <http://www.supremecourt.gov/orders/courtorders/062910zr.pdf>.

<sup>28</sup>*Prometheus Laboratories, Inc. v. Mayo Collaborative Services et al.*, 581 F.3d 1336, 1346.

<sup>29</sup>See Supreme Court certiorari summary dispositions at <http://www.supremecourt.gov/orders/courtorders/062910zr.pdf>.

<sup>30</sup>*Classen Immunotherapies, Inc. v. Biogen IDEC et al.*, 304 Fed.Appx. 866, 2008 WL 5273107 (C.A.Fed. (Md.)).

<sup>31</sup>536 F.3d 1247 (Fed. Cir. 2008).

<sup>32</sup>*In re Bonnsetter* (Fed. Cir. 2010).

<sup>33</sup>2010 U.S. Dist. LEXIS 65193 (D. Del. 2010).

<sup>34</sup>Memorandum from Robert W. Bahr Acting Associate Commissioner for Patent Examination Policy to Patent Examining Corps dated June 28, 2010.

<sup>35</sup>*Id.*

<sup>36</sup>*Id.*

<sup>37</sup>See *Federal Register*, Vol. 75, No. 143, Tuesday, July 27, 2010, p. 43922-43928.

<sup>38</sup>Memorandum from Robert W. Bahr Acting Associate Commissioner for Patent Examination Policy to Patent Examining Corps dated July 27, 2010.

<sup>39</sup>*Id.*

<sup>40</sup>*Id.*

<sup>41</sup>[http://www.uspto.gov/news/pr/2010/10\\_35.jsp](http://www.uspto.gov/news/pr/2010/10_35.jsp), as accessed on August 12, 2010.

<sup>42</sup>*Id.*

<sup>43</sup>The deadline for providing comments is September 27, 2010, and no public hearing will be heard on

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**Troy Kishbaugh** – *Gray-Robinson* - Health Law

**Christopher Morrison** – *GrayRobinson* - Health Law

## Speaking Engagements

**Ed Alexander**, Entrepreneurship Law Firm, P.L., presented a seminar entitled *Exit Planning for the Closely held Business* at the University of Central Florida Technology Incubator on August 12, 2010.

**Larry D. Smith**, partner at Southern Trial Counsel PLC and chair of The Florida Bar's Equal Opportunities in Law Section, attended the 2010 Voluntary Bar Leaders Conference in Ft. Lauderdale, Florida, and spoke on the topic, *Building Bridges Between the Bench, Bar and the Community*.

## Events

**Oct. 7** – *Lawyers for Literacy Spelling Bee*. Sponsored by the YLS and Adult Literacy League. 6:00 p.m. downtown Sonesta Hotel. Contact Zach Lynn at 407-422-1540, or Daryl P. Gottlieb at 407-843-2111.

**Oct. 15** – *Judicial Assistants and Magistrate Assistants Annual Appreciation Lunch*. Family Law Committee. 12:00 p.m. OCBA Center.

**Nov. 4** – *Joint Happy Hour*. 5:30 p.m. Ember, 42 W. Central Ave., Orlando, FL 32801. Sponsored by Westlaw.

## Seminars

**Oct. 7-8** – *OCBA Second Annual Bench Bar Conference*. Please see the OCBA web-

site at [orangecountybar.org](http://orangecountybar.org) for more information and registration form.

**Oct. 12** – *Cutting Edge Landlord Tenant Law Regarding 3-Day Notices*. LAS Lunchtime Training. 12:00 p.m.-1:30 p.m. Comerica Bank, 111 N. Magnolia Ave., Ste. 1000, Orlando, FL 32801. CLE: pending. Speakers: Larri Thatcher, Esq., Michael Resnick, Esq. Contact Cathy Tucker at [ctucker@legalaiddocba.org](mailto:ctucker@legalaiddocba.org) or Marilyn Carbo at [mcarbo@legalaiddocba.org](mailto:mcarbo@legalaiddocba.org).

**Oct. 13** – *Legislative Update – Estate, Guardianship & Trusts*. Estate, Guardianship & Trusts Committee. 12:00 p.m.-1:00 p.m. OCBA Center. CLE: 1.0 pending. Speaker: G. Charles Wohlst. Contact Marie at [marieb@ocbanet.org](mailto:marieb@ocbanet.org).

**Oct. 14** – *Brown Bag Lunch with Judge J.M. Kest*. 12:00 p.m.-1:15 p.m. Orange County Courthouse, Judicial Conference Room, 23rd floor. CLE available. Bring your lunch; water will be provided. To RSVP or submit questions, contact Judge Kest's Judicial Assistant, Diane, at [ctjadi1@ocnjcc.org](mailto:ctjadi1@ocnjcc.org).

**Oct. 26** – *ICPC: Out-of-State Placement for Dependent Children*. LAS Lunchtime Training. 12:00 p.m.-1:30 p.m. Comerica Bank, 111 N. Magnolia Ave., Ste. 1000, Orlando, FL 32801. CLE: pending. Speaker: Edward Dimayuga, Esq. Contact Cathy Tucker at [ctucker@legalaiddocba.org](mailto:ctucker@legalaiddocba.org) or Marilyn Carbo at [mcarbo@legalaiddocba.org](mailto:mcarbo@legalaiddocba.org).

**Oct. 26** – *Landlord/Tenant Basics*. Solo & Small Firm Committee Seminar. 12:00 p.m.-1:00 p.m. OCBA Center. CLE: 1.0 pending. Speaker: Marc Peltzman. Contact: Marie at [marieb@ocbanet.org](mailto:marieb@ocbanet.org).

**Oct. 28** – *Claims, Trends and Risk Mitigation*. 2:00 p.m.-4:00 p.m. OCBA Center. CLE: 2.0 (including .50 ethics). Fee: \$25 (OCBA members and their associates); \$35 (others). Speaker: Stephen Lang, Senior Vice President, Business Unit Leader, Marsh U.S. Consumer. Sponsored by Marsh U.S. Consumer, a service of Seabury & Smith, Inc. **Register by Oct. 22** with Marie at [marieb@ocbanet.org](mailto:marieb@ocbanet.org).

**Nov. 2** – *Special Issues for Clients: Cultural, Poverty, Mental Health*. LAS Lunchtime Training. 12:00 p.m.-1:30 p.m. Comerica Bank, 111 N. Magnolia Ave., Ste. 1000, Orlando, FL 32801. CLE: pending. Speakers: Darcy Fritz, GAL Case Coordinator; Sandi Sum-

ner, Family to Family Teacher. Contact Cathy Tucker at [ctucker@legalaiddocba.org](mailto:ctucker@legalaiddocba.org) or Marilyn Carbo at [mcarbo@legalaiddocba.org](mailto:mcarbo@legalaiddocba.org).

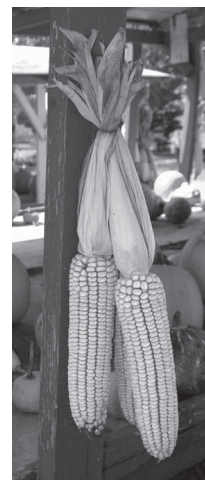
**Nov. 5** – *A Fresh Take on Ethical Conduct*. OCBA Paralegal Section. 11:30 a.m.-1:30 p.m. OCBA Center. CLE: 2.0 ethics. Speaker: Christina Fulks Taylor, Esq., VP/Director of Training for Fidelity National Title Group. Contact: [orangecountyparalegalsection@gmail.com](mailto:orangecountyparalegalsection@gmail.com).

**Nov. 11** – *Sex, Drugs & Violence: Inadequate Premises Security Litigation in Florida*. Seminar. Time: 8:30 a.m. OCBA Center. CLE: pending. Speaker: John Leighton. Sponsored by Leighton Law, P.A. Contact Marie at [marieb@ocbanet.org](mailto:marieb@ocbanet.org).

**Nov. 30** – *Beyond Law Firm Marketing Basics: Leveraging Online Legal Marketing Trends*. Solo and Small Firm Seminar. 12:00 p.m.-1:00 p.m. OCBA Center. CLE: pending. Speaker: Joe Rodriguez, FindLaw. Sponsored by FindLaw. Contact: Marie at [marieb@ocbanet.org](mailto:marieb@ocbanet.org).

## News to Note

**Oct. 7-8** – *2nd Annual Environmental Justice Summit at Barry Law School*. Reception (Oct. 7): 5:30 p.m.-7:30 p.m. with Colleen Swan, Tribal Administrator of Native Village of Kivalina, Alaska. Sponsored by the Center for Earth Jurisprudence. No charge. RSVP to [jgodard@mail.barry.edu](mailto:jgodard@mail.barry.edu). Summit (Oct. 8): 8:30 a.m.-5:00 p.m.. Keynote speaker Dr. Robert D. Bullard, Director of the Environmental Justice Resource Center at Clark Atlanta University. Sponsored by Barry Law School. Registration \$50 CLE, \$25 general public. To register or request info: [EnvJusticeSummit@mail.barry.edu](mailto:EnvJusticeSummit@mail.barry.edu) or 321-206-5763.



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# OCBA CALENDAR

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OCBA Luncheon

**Justice Jorge Labarga**  
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**Thursday, October 28, 2010**

**RSVP by Friday, October 22, 2010 to:**

[reservations@ocbanet.org](mailto:reservations@ocbanet.org)

## October

- 1 YLS Charity Golf Tournament**  
8:00 a.m. • Reunion Golf Resort and Club
- 2 Paralegal Section Major Seminar**  
*Litigation Strategies and Solutions*  
7:30 a.m. • Embassy Suites, Orlando
- 6 Business Law Committee**  
12:00 p.m. • Bar Center
- 7 2<sup>nd</sup> Annual Bench Bar Conference**  
8:45 a.m. • Bar Center
- Lawyers for Literacy Spelling Bee**  
6:00 p.m. • Sonesta Hotel
- 8 2<sup>nd</sup> Annual Bench Bar Conference**  
8:45 a.m. • Bar Center
- Family Law Executive Committee**  
11:45 a.m. • Houlihan's
- Workers' Compensation Committee**  
11:45 a.m. • Smokey Bones
- 12 LAS Lunchtime Training**  
*Cutting Edge Landlord Tenant Law  
Regarding 3-Day Notices*  
12:00 p.m. • Comerica Bank
- 13 Estate Guardianship & Trust Committee**  
*Legislative Update – Estate,  
Guardianship & Trusts*  
12:00 p.m. • Bar Center
- Executive Council Meeting**  
4:00 p.m. • Bar Center
- 14 Brown Bag Lunch with Judge J. M. Kest**  
12:00 p.m. • Courthouse  
23<sup>rd</sup> Flr. Judicial Conference Rm.
- Real Property Committee**  
12:00 p.m. • Bar Center
- Social Security Committee**  
12:00 p.m. • Bar Center
- 15 Family Law Committee**  
JA/MA Appreciation Luncheon  
12:00 p.m. • Bar Center
- 19 Professionalism Committee**  
12:00 p.m. • Bar Center
- 20 Construction Law Committee**  
12:00 p.m. • Bar Center

- Elder Law Committee**  
12:00 p.m. • Bar Center
- 21 YLS Luncheon**  
11:45 a.m. • University Club
- Appellate Practice Committee**  
12:00 p.m. • Bar Center
- 26 LAS Lunchtime Training**  
*ICPC: Out-of-State Placements for  
Dependent Children*  
12:00 p.m. • Comerica Bank
- Solo & Small Firm Committee Seminar**  
*Landlord/Tenant Basics*  
12:00 p.m. • Bar Center
- 27 Labor & Employment Committee**  
12:00 p.m. • Please contact chair.
- Diversity Committee**  
Please contact chair.
- 28 OCBA Luncheon**  
**Justice Jorge Labarga**  
Florida Supreme Court  
11:30 a.m. • The Ballroom at Church St.
- Claims, Trends and Risk Management Seminar**  
2:00 p.m. • Bar Center  
Sponsored by Marsh U.S. Consumer
- 29 Bankruptcy Law Committee**  
12:00 p.m. • Bar Center

## November

- 2 LAS Lunchtime Training**  
*Special Issues for Clients: Cultural,  
Poverty, Mental Health*  
12:00 p.m. • Comerica Bank
- 3 Business Law Committee**  
12:00 p.m. • Please contact chair.
- 4 Federal Judicial Relations**  
12:00 p.m. • Judge Conway's Chambers
- Real Property Committee**  
12:00 p.m. • Bar Center
- Joint Happy Hour**  
5:30 p.m. • Ember  
Sponsored by Westlaw
- 5 Paralegal Section Seminar**  
*A Fresh Take on Ethical Conduct*  
11:30 a.m. • Bar Center
- 10 Estate Guardianship & Trust Committee**  
12:00 p.m. • Bar Center
- Judicial Relations Committee**  
12:15 p.m. • Courthouse 21<sup>st</sup> Flr. Conf. Rm.
- Executive Council Meeting**  
4:00 p.m. • Bar Center
- 11 Social Security Committee**  
12:00 p.m. • Bar Center
- Sex, Drugs & Violence: Inadequate  
Premises Security Litigation in Florida*  
8:30 a.m. • Bar Center  
Sponsored by Leighton Law, P.A.
- 12 Family Law Executive Committee**  
11:45 a.m. • Houlihan's
- Workers' Compensation Committee**  
11:45 a.m. • Smokey Bones
- 16 Appellate Practice Committee**  
12:00 p.m. • Bar Center
- Professionalism Committee**  
12:00 p.m. • Bar Center
- 17 Elder Law Committee**  
12:00 p.m. • Bar Center
- Construction Law Committee**  
12:00 p.m. • Bar Center
- Insurance Law Committee**  
12:00 p.m. • Bar Center
- YLS Luncheon**  
11:45 a.m. • University Club
- 18 OCBA Luncheon**  
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Incoming President of the AMA  
11:30 a.m. • The Ballroom at Church St.
- 19 Family Law Committee**  
12:00 p.m. • Bar Center
- 22 - 26**  
**Bar Center Closed for Thanksgiving**
- 30 Solo & Small Firm Committee Seminar**  
*Beyond Law Firm Marketing Basics:  
Leveraging Online Legal Marketing Trends.*  
12:00 p.m. • Bar Center  
Sponsored by FindLaw

# ARE YOU ACCOUNTABLE FOR YOUR WORK?

Do you ask your clients to pay for your mistakes?  
Health Care Providers should be accountable for their mistakes.  
At Gunn Law Group, P.A.,

we believe in accountability.

*We are honored to receive the vast majority of our case referrals from fellow Bar members, with whom we share fees in accordance with the Bar Rules.*

- Insurance Coverage
- Bad Faith
- Serious Personal Injury
- Product Liability
- Medical Malpractice



**GUNN LAW GROUP**

ADVOCATING FOR JUSTICE

Lee D. Gunn IV

400 N. Ashley Drive / Suite 2050 / Tampa, FL 33602  
813-228-7070 / 866-GUNNLAW / [www.gunnlawgroup.com](http://www.gunnlawgroup.com)



# Side Impact?

## Did the vehicle lack a side impact airbag?

While the technologies necessary to incorporate side impact airbags for occupant protection have existed since the late 1990's, many vehicles today continue to be built without side airbags for side impact protection. Such systems have been proven to provide invaluable and necessary head protection, and the failure to incorporate such airbags in many cases results in needless catastrophic brain injuries and deaths.

If your client has been involved in a side impact accident and sustained a catastrophic or fatal head injury, the Didier Law Firm can help you evaluate whether the installation of an airbag could have made a difference.

You may have a product defect case.

# ASK THE QUESTION.

Call **407.895.3401** or visit **ProductSafetyAttorneys.com/SideAirbags**

*Let us evaluate your product defect claim today.*

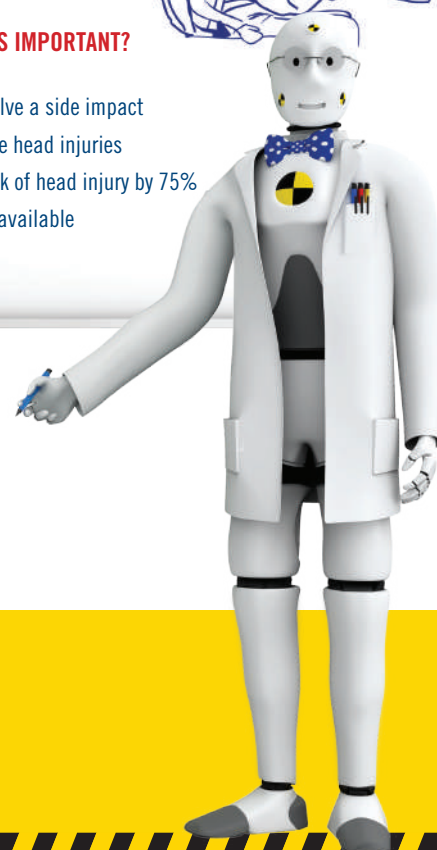
### SIDE AIRBAG SAFETY 101



#### Q: WHY ARE SIDE AIRBAGS IMPORTANT?

- A. 30% of all accidents involve a side impact
- B. Many side impacts involve head injuries
- C. Side airbags lower the risk of head injury by 75%
- D. The technology is readily available

ANSWERS: A, B, C & D



**DIDIER LAW FIRM, P.A.**

PRODUCT SAFETY ATTORNEYS