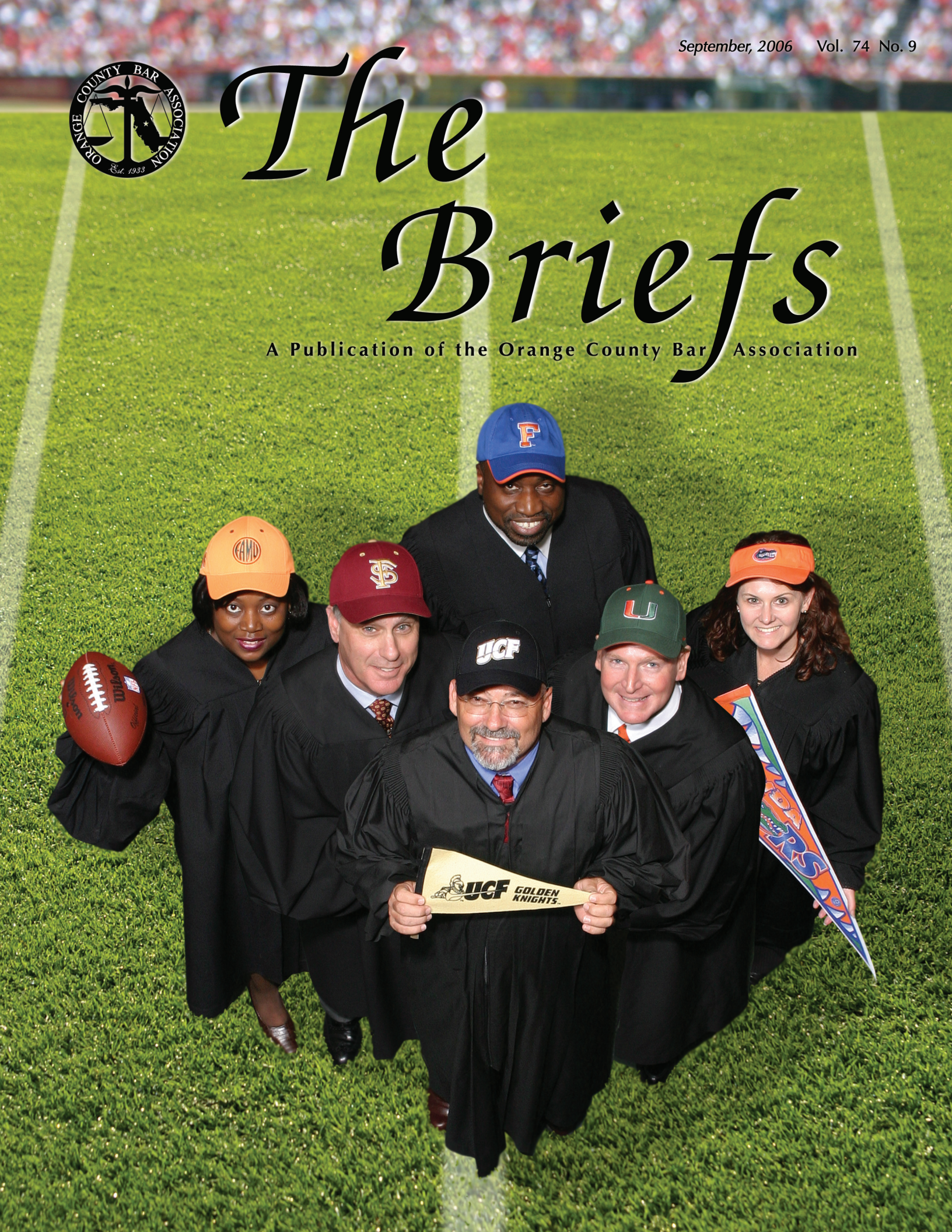
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The Briefs

A Publication of the Orange County Bar Association



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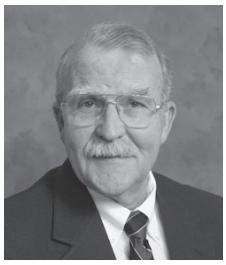
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About the September Cover

In addition to being well respected members of the Judiciary, these judges are good sports! Many thanks to Judge Jerry L. Brewer (UCF); Judge John M. Kest (FSU); Judge Faye L. Allen (FAMU); Judge Reginald K. Whitehead (UF); Judge Lisa T. Munyon (UF) and Judge Alan S. Apte (U. of Miami) for appearing on this month's cover of The Briefs.

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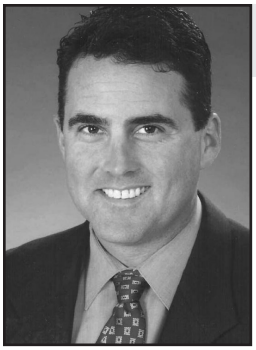
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DEADLINE INFORMATION

Deadline for October Edition: 09/1/2006
The deadline for each edition will be the first day of each month. If that day falls on a weekend or holiday, the deadline will be the last working day prior.

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When I Went to College There Were Two Sports: Football and Spring Practice

Thomas P. Wert

It's here. The time I have been waiting for since January 4th. That was the night that the University of Texas Longhorns snatched victory from the jaws of defeat, making a miraculous comeback with only ticks left on the clock, crushing the dreams of Heisman Trophy winners Matt Leinart and Reggie Bush and stopping the mighty USC Trojans from winning their third consecutive National Championship. Cliché? Maybe. But, many of us have been counting every day since and, now, it's here: college football season!

Now, I know many of you are saying, "This is supposed to be a serious column written for lawyers about legal things like *pro bono* service, professionalism and justice." Well, I did that already (snooze) and I'll probably do it again next month. This time, I want to have some fun. Besides, we all went to college and we practice law in the state of Florida, arguably the biggest college football state in the Union. Over the years, I have noticed there is a certain camaraderie associated with college football that comes out between opposing counsel while waiting for *ex parte* or during breaks at depositions, mediations or closings. I found team spirit can help smooth out the rough edges of even the most ornery opposing lawyer and foster the give and take necessary to finalize a deal or settle a case. So, even if you went to an all girl's school in Eastern Massachusetts, read on. A little football sense can be useful, even in the legal profession.

Did I mention: it's college football season? It is a time for lazy afternoons in front of the television or crazy afternoons on campus at your *alma mater*. It is about fried chicken, brats, chips and beer (lots of beer). It is about glory day stories and tailgate debates concerning what coulda', shoulda' or woulda' been but for that one bad call. If you are lucky enough to travel North for a game, you might even see what they mean when they talk about the change of seasons. There is nothing better than a crisp autumn day spent in a storied stadium. Visit Ann Arbor, Tuscaloosa, State College, South Bend, Lincoln, Norman, Gainesville, Oxford or Athens (to name only a few) on a Saturday in October. If places like these don't bring back fond memories of the privileges of youth, you studied way too hard.

In my preseason exuberance, I asked several OCBA members if they too were anticipating the upcoming season and I quickly found out I am not the only crazed football fan in this organization.[1] Sally Murray shouted, "The Longhorns will win the championship again this year for 3 reasons: (1) they won last year, (2) great recruiting, and (3) Mack Brown. Hook 'em Horns!!!"

With tomahawk chop in full motion, Bruce Blackwell chanted, "We will start and finish strong against the Hurricanes and the Gators, and keep our focus on the rest of the season to play for the ACC Championship in early December. Go Noles!"

Ken Hazouri chomped and disagreed but conceded, "At least the 'Noles can take solace in the fact that they have a built-in, ready-made successor to their legend, Saint Bobby ... none other than his own son, Jeff Bowden."

It was hard to figure out whether Bill Barnett was more fired up about football or basketball but can you blame him? Bill predicted,

> *The Gators will be strong as a garlic milkshake, win the SEC and go to a BCS bowl. We have the talent and the team has been inspired by the NATIONAL CHAMPIONSHIP BASKETBALL TEAM to be ready to play unselfish TEAM ball! Yea, we have the toughest schedule in the Nation but so did the 1996 NATIONAL FOOTBALL CHAMP GATORS. ... p.s. Noles will beat Miami by 10.*

Mickey Grindstaff begged to differ, "Tom, if the Gators win the SEC, it will be because the 4th-quarter non-conference loss to UCF on September 9 does not count against them in the SEC standings ... GO KNIGHTS!!!!"

Meanwhile, Bob Mansbach seemed stuck on coulda' woulda' shoudas' from last year:

> *I am looking forward to Vanderbilt's first winning season since 1982. Did I mention that I was up in Gainesville for the game last year, and other than UF bribing the ref' to call a penalty against Vanderbilt for celebrating (and any score since 1982 is cause for celebration to Vandy), Vandy would have kicked Gator tail.*

My Seminole friend, Jack McElroy, sounded like a subdued coach before a big rivalry game but I sensed a little fire in his belly:

> *I do think we will be strong this season and hope we can avoid the injuries and inconsistent play of last year, which will enable us to once again compete for a national championship. I know this is not the "smack" you are looking for, but I am pleased to note I will not be wearing a tattoo on my face for Thanksgiving like someone I know often does.*

Who knows if any of the above predictions will come true? The beauty of late August is nobody is right and nobody is wrong. Everybody is undefeated. Right now, we're all Number One. Of course, this will change. So, come November, if you see me at *ex parte* with a Seminole tattoo on my cheek, be gentle. It still takes me a little while to get over that one. Regardless of the outcome, I hope you all have a very safe and enjoyable football season. Peace and Go Gators!

[1] None of the Miami Hurricane alums I spoke with would respond. I guess they are waiting to review the prison release statistics before they commit their support to the Canes' season.

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

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

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

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

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

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

Marriott International, Inc. v. Perez-Melendez,
855 So. 2d 624 (Fla. 5th DCA 2003)
Affirmed million dollar personal injury verdict based on the "two issue rule".

Lieberman v. Dept. of Professional Regulations,
573 So. 2d 349 (Fla. 5th DCA 1990)
Restored a physician's medical license.

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

GEICO v. Krawzak,
675 So. 2d 115 (Fla. 1996)
Required disclosure of uninsured motorist insurance carrier as a party defendant.

Pixton v. Scotsman,
924 So. 2d 37 (Fla. 5th DCA 2006)
Reversed dismissal of negligence action for failure to comply with RCP 1.070(j).

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September 28, 2006

John Hillenmeyer

President and Chief Executive Officer
Orlando Regional Healthcare System

Will Healthcare As We Know It Survive?

Mr. Hillenmeyer came to the Orlando Regional Healthcare System in 1982 as Vice President of Operations, responsible for development of Orlando Regional's 150-bed Sand Lake Hospital. He served as Executive Director of that hospital until 1987, at which time he was appointed Executive Director of Orlando Regional's flagship institution, the 600-bed Orlando Regional Medical Center. In 1989, Mr. Hillenmeyer was appointed Senior Vice President and Chief Operating Officer, responsible for the operations of Orlando Regional's six hospitals in the Central Florida area. In 1994, Mr. Hillenmeyer was appointed Executive Vice President of Orlando Regional with overall management responsibility for development and operation of Orlando Regional's integrated delivery system. He was appointed President and Chief Executive Officer in May of 1997.

Prior to his tenure at Orlando Regional, Mr. Hillenmeyer worked in various administrative positions at the Greenville South Carolina Hospital System from 1974 to 1978. From 1978 to 1982, he was employed by American Medical International as an Administrator in Birmingham, Alabama and Orlando, Florida.

He earned a bachelor's degree in Business Administration from the University of Kentucky and a master's degree in Health Care Administration from Duke University. He is a diplomate of the American College of Health Care Executives, serves as Chairman of the Statutory Teaching Hospital Council, is Immediate Past Chairman of the Florida Hospital Association Board, and is a member of the Executive Committee and Board of VHA-Southeast. He is active in many civic organizations and currently serves on the Downtown Development Board as well as the Boards of the Presbyterian Retirement Communities, Economic Development Commission of Mid-Florida, SunTrust Bank and the UCF Foundation.

Downtown Marriott Hotel • 11:30 a.m. – 1:00 p.m.

Hosted by the Central Florida Association of Women Lawyers

To RSVP for the luncheon, please e-mail Mike Remensnyder, Events Manager, at reservations@ocbanet.org. Phone calls will not be accepted.

To ensure proper luncheon count, RSVPs are requested no later than 48 hours in advance. Those reserving less than 24 hours in advance will not be guaranteed a name badge. If you have made a reservation and find that you are unable to attend, please notify us as soon as possible via e-mail. We appreciate your effort to keep us up-to-date on your reservation status.

The Hon. Deborah B. Ansbro and the Hon. Mark D. Wixtrom

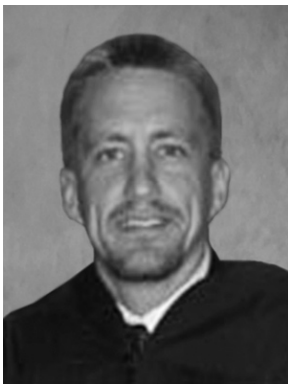
The Honorable Deborah B. Ansbro and the Honorable Mark D. Wixtrom took the oath of office in an investiture ceremony on July 21, 2006, at the Orange County Courthouse. After opening remarks, presentations and the swearing in, the new judges were "enrobed" by their families, symbolizing the judge officially taking office.

Judge Ansbro was appointed to the Orange County criminal bench by Governor Jeb Bush in April 2006. She received a bachelor's degree from the University of Central Florida in 1984 and a law degree from the University of Florida, College of Law in 1987. As a lawyer, Judge Ansbro practiced in the area of commercial litigation, with an emphasis on construction, commercial transaction and real property issues. Prior to working as an attorney, she worked extensively as a paralegal with a focus on real estate.

"I am honored beyond words to have been given this opportunity to serve my community and my profession in this capacity," Judge Ansbro said. "I am grateful for the support of so very many colleagues and friends, and I am hopeful I will be able to meet, and even exceed, their expectations." Judge Ansbro and her husband Patrick "Dennis" have one daughter.



Hon. Deborah B. Ansbro



Hon. Mark D. Wixtrom

Judge Wixtrom received a bachelor's degree in political science with honors from the University of South Florida in 1991 and a law degree with honors from the University of Florida College of Law in 1994. He worked for the Orange-Osceola State Attorney's Office from May 1995 to April 2006. While there, he worked in county court, circuit court, central intake, sex crimes and child abuse, and homicide and was a lead trial attorney in felony cases.

He was appointed by Governor Bush to the Orange County criminal bench in April 2006. "I am truly humbled to be appointed to the position of County Judge," Judge Wixtrom said. "The years I have spent serving the public as a member our justice system have impressed upon me the importance of having fair and impartial judges presiding over cases. I look forward to fulfilling my term with the honor, respect, and dignity that our judicial system mandates." Judge Wixtrom and his wife Jennifer have two daughters.

Submitted by the Office of Communications and Public Affairs, Ninth Judicial Circuit Court. The Hon. Deborah B. Ansbro has been a member of the OCBA since1988 and the Hon. Mark D. Wixtrom has been a member of the OCBA since 1995.

2007 PROFESSIONALISM AWARD NOMINATIONS

The Professionalism Committee is now soliciting nominations for the Orange County Bar Association's William Trickel, Jr., Professionalism Award, (15 or more years practice); and the Young Lawyers' Lawrence G. Mathews, Jr., Professionalism Award, (less than 15 years practice).

Each year the OCBA Professionalism Committee, through these two awards, seeks to honor practicing attorneys whose conduct and career stand as models of success built on unquestioned professionalism.

In making the award determination, the Professionalism Committee focuses on career success, service to community, service to the profession and, most importantly, consistently ethical conduct, accompanied by courteous demeanor and the highest moral standards, consistently exceeding what is required at a minimum by the Code of Professional Conduct.

The Professionalism Committee seeks to emphasize the OCBA's commitment to professionalism by identifying and awarding the attorney member and the young attorney member who meet the highest standards of professionalism. Through these awards, the OCBA seeks to show, in a tangible manner, that career success and the highest standards of professionalism are not only consistent, but also that professionalism is an integral part of career success.

Past recipients of the William Trickel, Jr., Professionalism Award include: Bill Wilson, David King, Jules Cohen, the Honorable Gregory Presnell, the Honorable John Kest, Darryl Bloodworth, Chandler Muller, Lee Bennett, Sally Kest, Ava Doppelt, Bruce Blackwell, Warren Lindsey, and Michael P. McMahon.

Past recipients of the Young Lawyers' Lawrence G. Mathews, Jr., Professionalism Award are: Tom Zehnder, Tad Yates, and Nicholas A. Shannin.

Nominations for each award should be by letter or nomination form (available on the OCBA website). Please explain in your submission why your nominee embodies the qualities of professionalism in the practice of law worthy of either award.

Please forward nominations by December 1, 2006 to:
Brant Bittner, Executive Director
Orange County Bar Association
880 N. Orange Avenue, Orlando, FL 32801
Phone: 407-422-4551 • Fax: 407-843-3470
E-Mail: Brantb@ocbanet.org

Nominations will close on Dec. 1, 2006 in order to give the Committee time to make the selections and present the nominees for approval by the Executive Council of the OCBA. The awards will be announced at the March 2007 OCBA Luncheon Meeting. The William Trickel, Jr., Professionalism Award winner will address attendees at the March Luncheon, and the Young Lawyers' Lawrence G. Mathews, Jr., Professionalism Award winner will speak to YLS members at its monthly luncheon.



Professionalism Committee

Ten Tips to Attain a Higher Degree of Professionalism



Jenifer M. Davis

We all agree professionalism encompasses more than mere rules of ethics. We know the attorneys who exhibit it. We know how much more we enjoy practicing law with partners and opposing parties who aspire to courtesy and kindness. We also know mentors and professional associates can help some attorneys who are professionally challenged. I have taught, and learned from, law school interns and inexperienced attorneys most of my career. From my experience, most attorneys are well meaning and seek to be good attorneys practicing in a professional manner.

In the interest of short-attention spans, here are a few tips that may enhance your work relationships. This is especially timely because August witnessed the arrival of many new attorneys. The Public Defender's office hired 25 new attorneys and the State Attorney's Office a comparable number. Often, when I have seen a breakdown of communication and trust between legal professionals, one of these rules has been broken.

1. **Pause. Take a deep breath and relax**. My children learned this technique at school; its relevance does not stop in the schoolyard. The professional world is not intended for displaying strong emotions. Crying and screaming usually requires a closed door and a close friend. Slightly modified from the "Field of Dreams," there is no crying in court. As a professional, you are responsible for protecting another's interest. It is not about you. It is absolutely necessary that you have emotions. However, find one person you trust and share your feelings with him or her rather than let everyone know your innermost fears, hopes and insecurities. Yelling is not appropriate. You should never initiate screaming at someone whom it is inappropriate to kiss. This, hopefully, will include everyone in your workplace.
2. **Avoid workplace dating.** In sixteen years of practicing law, I have seen more careers altered by violating this rule. Even if your firm allows it - resist. I understand the simplicity of finding love at work, especially when one is working constantly. However, expend the extra energy to find outside interests and people. If a workplace relationship works, it is distracting at the office. If the relationship does not work, it is even more distracting.
3. **Develop cordial relationships.** Although romance does not belong in the courtroom, friendships do. I, too often, begin work immediately without greeting my co-workers. No one is a work robot. Your colleagues have had a multitude of experiences since the day before. Take time to notice co-workers by saying, "Good morning." One of the most liked attorneys at our office has a ready smile each morning and says, "Happy Monday," or whatever day it happens to be. It is difficult to have enemies when even a Monday elicits a wish for happiness.
4. **Praise others.** It amazes me in this adversarial system how much attorneys need praise. Acknowledge others' successes. I use to give out M&M's with my business card and a quick note. Years later I would still see the note pinned to an attorneys' bulletin board. When I became Board Certified, nothing meant more to me than the letter from Warren Lindsey congratulating me on the accomplishment. If we ever opposed each other on a case, I would always know that we argued the issues with respect for each other.
5. **Assign good motives.** Every so often, an attorney will come running into my office looking as though he just got into a fight on the playground. He lacks grace and appears disheveled. This look almost always precedes the allegations of bad intentions from the opposing party: "You would not believe what ____(opposing attorney's name) just did!" This allegation continues, with the attorney accusing the other of lack of ethics or morality and giving specifics of actions. Normally the actions are not as bad as the motives assigned. Usually the attorney concludes the story with a request to call the adversary's supervisor or authorize a bar complaint. We are not perfect. Attorneys make mistakes both in actions and words. Rather than assuming bad intentions, assume good intentions. You can still protect your client without paranoia about the opposing party. In addition, have good motives. When accused of bad behavior - recognize your misstep and explain your intentions. This recently happened to me when a supervisor from another agency said unkind things to me and about me. Although it is never pleasant to be accused of negative behavior, when you know your motive is good, you sleep better at night.
6. **Stop hitting your friends.** Above all else, do not allow your paranoia about bad motives incite an ethics complaint. Always obtain advice before initiating such a drastic action. If we shoot down each attorney who makes a mistake, sooner or later everyone falls dead. As a grievance committee member, I often find ethics complaints transparent. If you think that you are ethically required to report another, seek the advice of an experienced mentor. Usually there is another, more reasonable, interpretation.

Continued on page 14

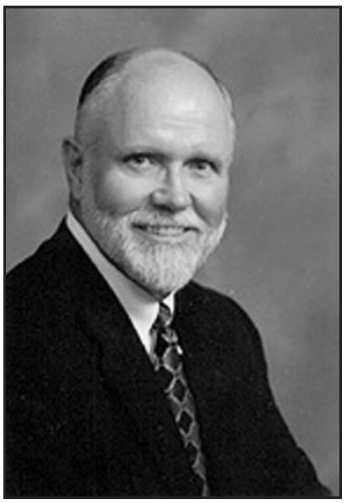
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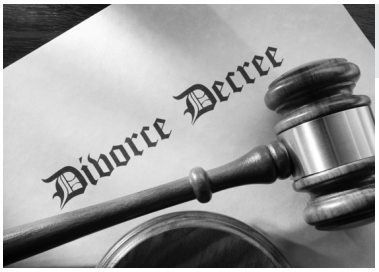
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Comments on Family Law

The Role of Family Lawyers in Pro Se *Divorce Mediations*



Meredith J. Cohen

Pro se divorce mediations are those mediations in which a mediator meets with a divorcing couple without attorneys to help the couple work out a marital settlement agreement utilizing the Florida Supreme Court Form and help the couple complete the other Supreme Court forms required to obtain a divorce without attorneys in court. Increasingly, divorcing couples are coming to mediation instead of attorneys for several reasons, including: (1) they have agreed on most issues and want to resolve the others through mediation; (2) they cannot afford or do not want to pay the retainers required by attorneys; (3) because of the high fees of divorce attorneys reported by their friends or the news media.

There is still a role to be played by family lawyers in these *pro se* divorce mediations. Since a mediator is not ethically permitted to give legal advice to the spouses, even if the mediator is an attorney, the mediator will not do so. The mediator should recommend that the husband and wife each go to an attorney of their choice at any time during the mediation when the spouse feels a need for legal advice. Once the Florida Supreme Court Marital Settlement Agreement and other Supreme Court Forms are completed and ready for signing, the mediator should recommend that each spouse take the documents to separate attorneys for review and legal advice on whether it is in the best interest of the spouse to sign the agreement and other forms as written.

Since attorneys are now permitted in Florida to ethically "unbundle" their legal services, that is, represent a client only for a limited and specific part of a case, the Family Law Attorney may agree to represent a divorcing person in mediation with a consultation to review the proposed Marital Settlement Agreement and other documents, and to give legal advice on whether the completed agreement and other forms as written are in the best interest of the client or whether additional language should be added before signing. The consulting attorney may want to put in an opinion letter his or her recommendations. Such a consultation may require one or more hours of the attorney's time, depending on the complexity of the case, and could be billed at the attorney's hourly rate.

I recall in one of my *pro se* mediations the attorney consulting with one of the mediating spouses wrote a two-page, single-spaced letter recommending that certain insurance provisions be added to the agreement. The other spouse agreed to the addition of such provisions, and they were added before signing. From my days of representing clients in divorce cases (which ended some eight years ago), I recall using a model Marital Settlement Agreement I had created over the years. This reminded me to include in every agreement I drafted or approved certain key provisions. The Supreme Court Form for a Marital Settlement Agreement provides sections for the basics, such as listing and evaluation of the assets and debts, primary physical residence and contact of the non-custodial parent, amount of child support, and alimony. But there is no section to cover what happens if one spouse dies before the parties are divorced - who will be the personal representative - and so on. The consulting attorney would probably recommend language on the death eventuality found in nearly every agreement drafted by an attorney for a private client. The attorney who consults with a spouse in *pro se* mediation may want to have ready a list of the key provisions the attorney includes in his or her agreements, which may be handed to the spouse with the opinion letter.

As more family mediators engage in *pro se* divorce mediation, the demand for Family Law Attorneys to offer the consultations described in this article will increase. If the consulting attorney is ready with the provisions considered vital to a complete Marital Settlement Agreement, the legal advice and recommendation to include those provisions in the mediated Marital Settlement Agreement before signing will be invaluable to the client.

Meredith J. Cohen, a Board Certified Marital and Family Lawyer, Family Mediator and Fellow of the American Academy of Matrimonial Lawyers, has been an OCBA member since 1962.

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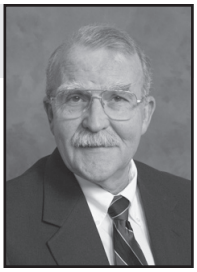
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Recollections . . .

Memories of Practice Before the Honorable Claude R. Edwards



James R. Cunningham

Over 36 years, the drawers in my desk seem to have taken on a life of their own, with contents ranging from dried out pens to nuts, bolts and fasteners from various pieces of office equipment. The other day, the rummaging turned up a small card with a number "4" on it, entitled, "Contested *Ex Parte* Matters." A souvenir of the day of retirement of the Honorable Claude R. Edwards.

Claude was appointed in 1968 to the bench by then Governor Claude Kirk and served until his retirement in 1988.

Practice before Judge Edwards was a challenging event and his morning hours were run with military precision. Outside his chambers on two hooks on the wall were numbered tags. On the left were uncontested *ex parte* matters and on the right were contested *ex parte* matters. On a first come, first served basis, an attorney whose case was ready to be heard would take the appropriate card with him into the inner sanctum before Judge Edwards.

Uncontested *ex parte* matters had to move promptly along in order of the cards drawn. When matter number 1 was concluded and the file closed, the attorney was expected to stand and move immediately so that matter number 2 could be heard with efficiency and dispatch. As for contested *ex parte* matters, these lasted six minutes. It was very easy to understand the time frame, as Judge Edwards had an egg timer on his desk and the sand timer would turn over as your number was called and your words had to stop when the last grain of sand hit the bottom. It did not matter if you were in mid-sentence or if you were in the middle of a word; you had to stop. Regardless of the complexity of the matter, the Judge would rule on the spot from the three minutes of argument that he heard from each side, and woe be to the attorney who attempted to ramble on or who asked for more time. Contempt orders were frequent.

Judge Edwards was quick to criticize, chastise or correct if you did not use his exact form of approved order and he would make your error quite clear in a room full of other attorneys; however, Claude was also quite kind with his praise and appreciation when an attorney did follow his rules, use his forms and present the case in a logical, straight forward, no nonsense fashion. He was a good teacher and was not afraid to "rule."

Many of us scoffed at the "take a number" system as reminiscent of the auto tag agency or a fast food restaurant, but after having appeared in many courtrooms for 36 years, I cannot criticize the efficiency and fairness of Judge Edwards' "take a number" system. The system never appeared again in Orange County and this curious little number tag I found as I was rummaging through my desk is now a historical souvenir of days gone by.

James R. Cunningham, Esq., has been a member of the OCBA since 1970.

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The Capital Jury

> ...by the time the Bill of Rights was adopted at the end of eighteenth century, the English jury's role in determining critical facts in homicide cases was entrenched. As fact-finder, the jury had the power to determine not only whether the defendant was guilty of homicide but also the degree of the offense. Moreover, the jury's role in finding facts that would determine a homicide defendant's eligibility for capital punishment was particularly well established. Throughout its history, the jury determined which homicide defendants would be subject to capital punishment by making actual determinations, many of which related to difficult assessments of the defendant's state of mind. By the time the Bill of Rights was adopted, the jury's right to make these determinations was unquestioned.
> (Welsh S. White, "Fact-Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial," 65 *Notre Dame L. Rev.* 1[1989]).

When the U.S. Supreme Court handed down its decision in *Furman v. Georgia* (1972) holding that the statutes at issue violated the Eighth Amendment because unguided jury discretion resulted in their arbitrary application, Justice Potter Stewart proclaimed capital punishment to be as random and cruel as being struck by lightning. Justices William Brennan and Thurgood Marshall found the death penalty in itself to be cruel and unusual punishment. Justice William O. Douglas asserted it was "pregnant with discrimination." But none of the justices questioned the appropriateness of a role for the jury in rendering a death sentence. *Gregg v. Georgia* (1976) further cemented the role of the jury in death penalty trials. The statute considered in *Gregg* served as a model for states crafting new laws across the country - it directed and limited jury discretion in decision making, and instituted procedural safeguards through bifurcated trials and automatic appellate review.

Although in many respects, American juries function quite well, capital cases continue to raise questions about the performance of and appropriate role for juries when a verdict can result in death. Social scientists who have studied the attitudes and functioning of capital juries have amassed years of research uncovering serious flaws in the way they perform. Much of the more recent research, such as that conducted by the Capital Jury Project, a 15-state study directed by Dr. William Bowers in states with three common types of death penalty statutes, substantiates earlier research findings. Over 30 years of research indicates that capital jurors enter sentencing deliberations with insufficient understanding of the law and of instructions to weigh aggravating factors and mitigating circumstances. Similarly, Capital Jury Project research suggests that jurors are likely to have decided on a sentence prior to the sentencing phase of a capital trial and are unlikely to change their minds during sentencing deliberation.

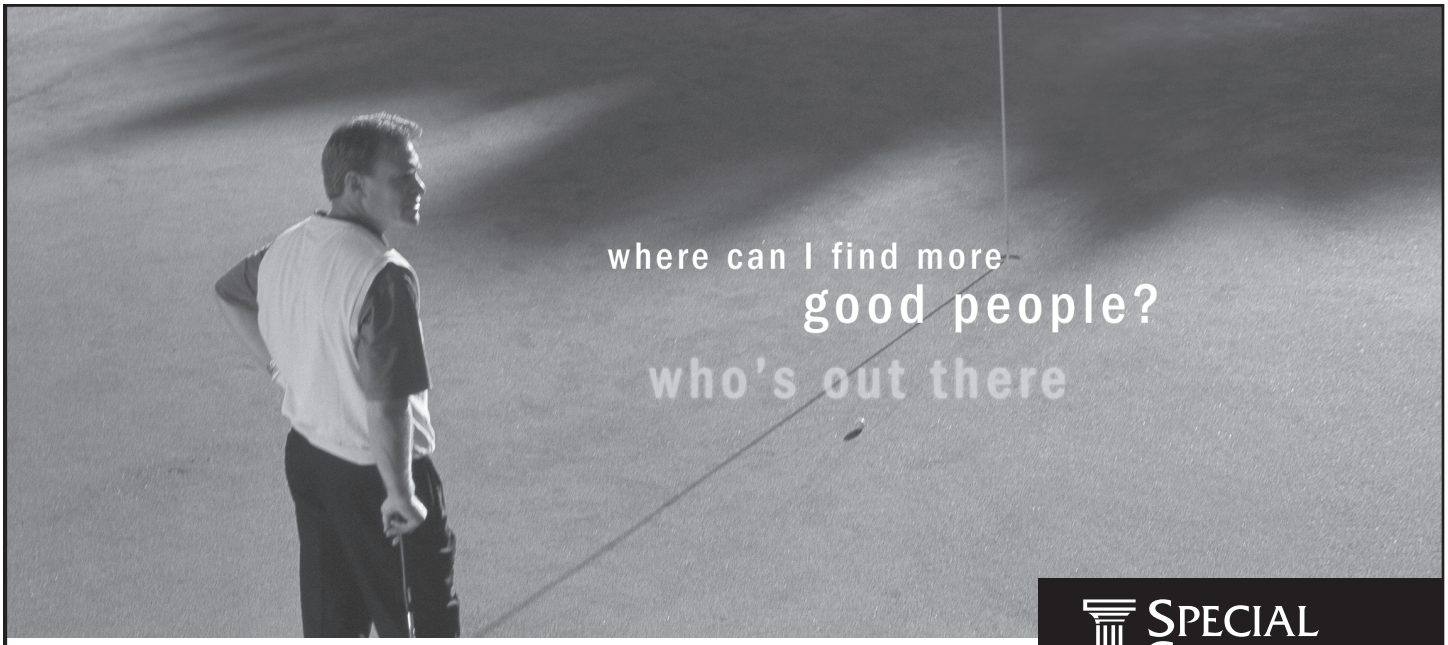
Given what the research demonstrates about capital jury decision making, what is the appropriate role for capital juries, and how can we maintain the constitutional integrity implicit in the right to a jury trial in capital cases?

Judge v. Jury in Capital Sentencing

Some legal commentators argue that the process of guided jury discretion implemented after *Gregg* has not worked and has not truly remedied arbitrary application of the death penalty. *Gregg* has been criticized for failing to adequately prescribe criteria for establishing aggravating factors and mitigating circumstances, the scope of jury discretion in weighing them, and how juries should decide if such circumstances exist. Research by Ursula Bentele and William Bowers (1995) indicated that capital jurors often thought that the law mandated death when it didn't during the sentencing phase of the trial. They wrongly assumed that an aggravating factor, which simply makes someone eligible for a death sentence, necessitated a death sentence. Juries also misunderstood the role of mitigating circumstances:

> Finally, the interviews reflected a pattern in which mitigating factors play a disturbingly minor role in jurors' deliberations about whether a defendant should be sentenced to death. In stark contrast to the prominence of reported discussion of guilt and factors in aggravation, evidence that might tend to mitigate the offense is often entirely absent from the description of the process leading to imposition of the death penalty in these cases. It is difficult to imagine that jurors are able to make the "individualized assessment of the appropriateness of the death penalty" mandated by the Constitution without consideration of circumstances that would mitigate against that sentence. Even when jurors do report a discussion of mitigating factors, their understanding of what the law defines as mitigation is extremely limited. In the relatively rare instance when mitigating evidence is mentioned, jurors either seem not to understand what they are to do with such evidence or they dismiss it out of hand as no excuse for the murder. The impression conveyed is that unless the evidence in mitigation either proves that the killing was not deliberate or furnishes an excuse for the killing, such as insanity or duress - factors that would invalidate the capital murder conviction - it does not provide adequate reason to impose a sentence other than death.
> Ursula Bentele and William J. Bowers, "How Jurors Decide on Death: Guilt Is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse," 66 Brooklyn L. Rev. 1011 [2001].

Continued on page 20



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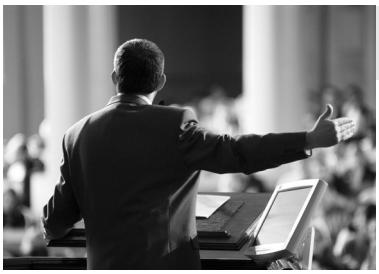
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Presentation Skills for Lawyers

Everything That Goes Wrong is Your Fault



Elliott Wilcox

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If you don't understand what that means, you're not alone. Most of the people reading this column won't understand what that phrase means. But if you speak Swedish, it probably makes perfect sense.

Let's assume for a moment that it was very important for me to have you understand that message. If you were among the majority of readers who didn't understand what it said, whose fault is that? Would it be your fault for not speaking Swedish? Or would it be my fault for not communicating clearly? Who should accept responsibility for ensuring understanding?

Stephen King, in his book, *On Writing*, says that when the reader doesn't understand, it's the *writer's* fault, not the reader's. The same principle applies with every presentation you make. When your listeners don't understand, it's *your* fault, not theirs. As the presenter, you must take responsibility for being understood. You can't blame anyone else when your listeners don't understand.

Well, actually, that's not quite true. You can blame the education system for not teaching your listeners a sufficient vocabulary to understand you. You can blame the room designer for lousy acoustics. You can even blame your listeners for not giving you 100% of their attention.

Yes, you can blame all of those things. But it still won't change anything. You still won't persuade your listeners to your way of thinking. Your listeners still won't understand you. Your presentation will *still* be a failure.

What is the goal of your presentation? Do you want your listeners to understand what you say? Want to persuade them to your way of thinking? Or, when you've finished speaking, do you want to be able to point fingers and blame them for not understanding you?

When your listeners don't understand you, your message falls on deaf ears. As I've said before, ideas that are ill-presented are as worthless as ideas that are *not* presented. If you want to be understood, start by accepting this principle of communication: ***Everything that goes wrong is your fault.***

"Everything that goes wrong is *my* fault? Ouch! That sounds harsh." It may sound harsh, but it's true. It doesn't matter who's to blame for the misunderstanding. If you want your presentation to succeed, you must put aside your ego and accept responsibility for any misunderstandings.

But many lawyers won't do that.

Jury trials are filled with examples of communication misunderstandings. In jury selection, you'll find lawyers asking questions while the jurors sit silently, staring back with blank expressions on their faces. During direct examination, you'll hear lawyers ask questions and get nonsensical responses. Even during closing argument, which should be the pinnacle of clear communication, you'll see jurors looking back at the lawyer with an expression that says, *"Huh?!?"*

To make matters worse, some lawyers, rather than accepting responsibility for the misunderstanding, will say something like "Strike that!" Do you want to know a secret? Saying "Strike that" doesn't actually strike anything from the record. When you examine the written record of your trial, that lousy question will stare right back at you, followed by "Strike that!" (The only thing that phrase does is make you sound like a lawyer.)

Anytime you see a look of confusion on your listener's face, don't blame the listener. Blame yourself. Accept responsibility. For example, imagine that you are in trial and picking a jury. If a potential juror gives you garbled answers that don't seem to answer your questions, should you blame the juror? Probably not. Most jurors give lousy answers because the lawyers asked lousy questions.

Instead, take responsibility for the misunderstanding. Try something like this:

- "I didn't phrase that very well, did I? Let me ask you a better question."
- "That was an awful question, wasn't it? Let me rephrase it."
- "I'm not explaining this very well, am I? Let's back up for a minute and start over."

If the juror doesn't understand your question, it's ***your*** responsibility to help them understand. The responsibility of clear communication lies with the speaker, not with the listener. The better your questions, the better their answers will be.

When you present, *everything* that goes wrong is your fault. But the sooner you accept responsibility for any communication misunderstandings, the sooner your presentation and persuasive skills will dramatically improve.

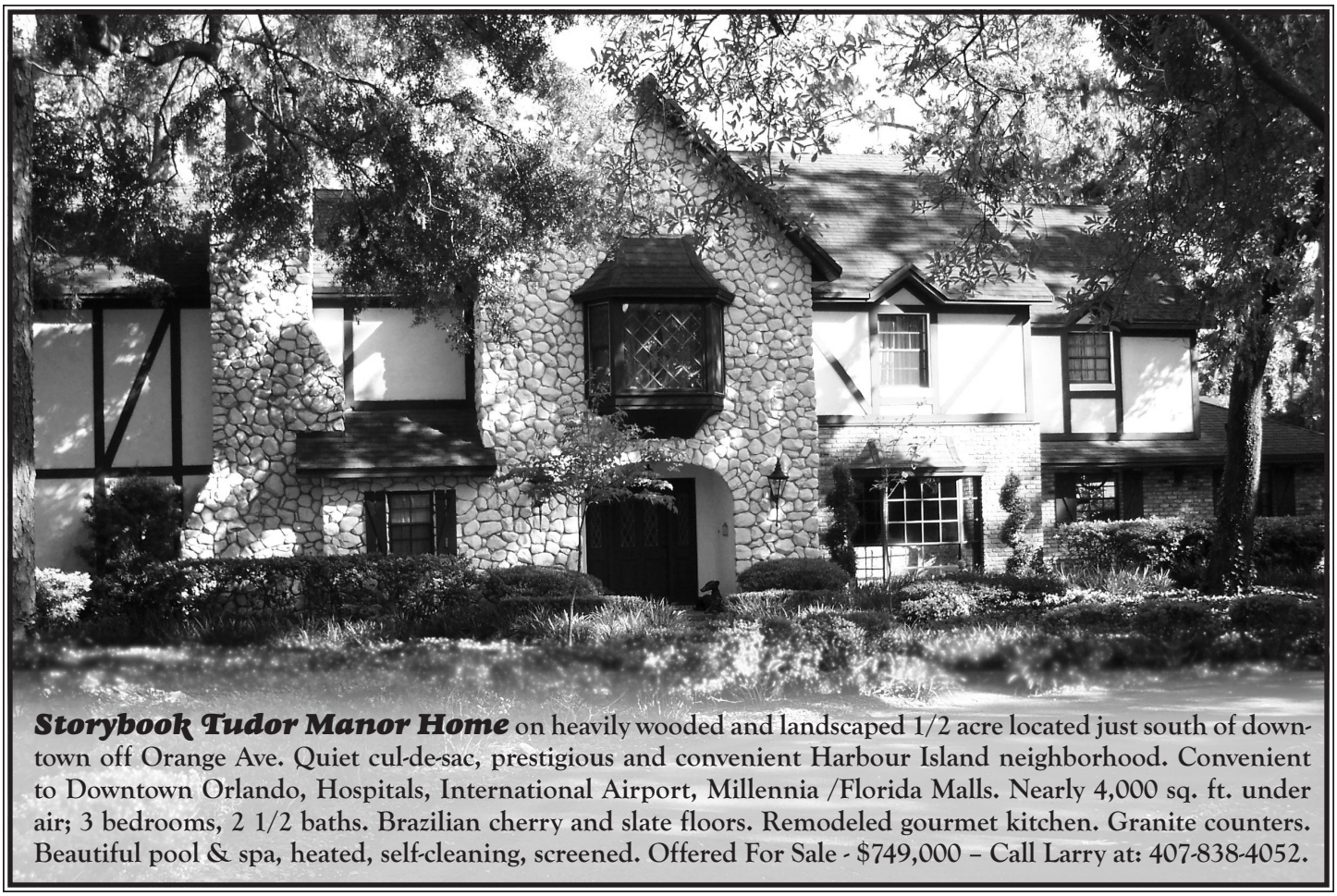
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Elliott Wilcox publishes Trial Tips Newsletter, a free weekly ezine for trial lawyers that reveals proven techniques to help you persuade jurors and win more trials. Sign up today for your free trial advocacy tips at www.TrialTheater.com.

7. **Don't play word games with ethics rules**. We all learned in law school to analyze and scrutinize the meaning of words. A successful attorney can perform this task well. It is not appropriate, however, to use this skill when justifying bad behavior. When it comes to your own ethics, err on the side of broad interpretation.
8. **Resist rumormongering.** Speaking negatively about others is weak, hurtful and reflects more on the speaker's insecurity than the failings of the person being criticized. We should have all learned in junior high and high school how hurtful rumors can be. They do not belong in the professional world. If you would not say the statement to the person, don't say it about him.
9. **Recognize the danger of sending email.** Email is convenient and efficient when used well, but is ineffective, at best, and hurtful at worst. The majority of misunderstandings between opposing parties and co-workers arise from emails. Emails should be an efficient way to convey a sentence or two. Otherwise, get up from your desk and see you co-worker, or pick up the phone. I remember, directly after becoming the county court supervisor for the Public Defender's office, sending a paragraph about the importance of client relations. We were having a problem with attorneys being late for client meetings or missing the meetings completely. Such action is clearly unacceptable and I wrote a mandate explaining the policy. Joe DuRocher, the elected Public Defender, casually stopped by my office and said, "I find email to be an ineffective management technique." It may have taken me into the middle of the night to understand the importance of his statement, but I didn't miss the advice. Invest enough time and interest to look another person in the eye and explain your position. Much miscommunication comes from email. I constantly, in the quest for efficiency, forget this simple rule of effectiveness.
10. **Read email - don't interpret or assign a tone.** The corresponding danger occurs when you read an email and impose your own tone. When you don't hear the voice, it is best to assume the person is being factual rather than sarcastic or negative.

We have an adversarial system of justice because we believe it is the best creation of truth and justice. This system, however, does not equate to being adversarial and unkind. Above all, we are professionals who are responsible for helping others negotiate the justice system. I am proud to belong to a group of true heroes.

Jenifer M. Davis is the Trial Division Chief at the Public Defender's Office. She has been a member of the OCBA since 2006.





OCBA Legal Aid News

Susan V. Stucker Awarded Highest Pro Bono Honor

Catherine A. Tucker



At the August bar luncheon, the Judge J.C. 'Jake' Stone Distinguished Service Award was presented to Susan V. Stucker. For twenty years Susan has been a Guardian *ad Litem* (GAL) and a strong and compassionate advocate for children. She was recognized for her commitment to children and her continuing *pro bono* work.

The Judge J.C. 'Jake' Stone Distinguished Service Award, named in honor of the late Judge Stone who was active in the local community and in public service activities, is presented as the highest recognition given by Legal Aid. The award was first presented to Michael Walsh in 1987 and has been presented each year to an attorney who has demonstrated a career commitment to *pro bono* service.



Susan V. Stucker

Susan Stucker started her legal career with Akerman Senterfitt and then went to Baker & Hostetler. She went in-house with United Telephone in 1991 and is Senior Counsel with Sprint (Sprint Nextel Corporation), practicing in the area of labor and employment law. She is a graduate of Florida State University with a B.A. and a J.D. with high honors in 1985.

First recognized by Legal Aid in 1990 with a New Lawyer Award of Merit, she later received an Individual Award of Merit in 1999 for her continuing work as a Guardian *ad Litem*. When Susan joined OCBA after coming to Orlando, she opted to work with the Citizen Dispute Settlement program as a mediator. She attended a GAL seminar in 1986 while serving with CDS. She took her first case a month later and has been with the GAL Program ever since.

"To me, the GAL work has been the most rewarding part of being an attorney. It is true that it is very emotional," said Susan. "There are those cases where the parents never get their act together to get the kids back and then the kids get into trouble as well. But when the cases are successful, the feeling is incredible."

During her years of service, she has been appointed Guardian *ad Litem* for 71 children in 37 cases. She has closed seven cases with more than 100 hours and has logged a total of 3,700 hours on closed cases. She is currently a GAL for six children. Susan also volunteers with COMPACT, a non-profit group providing mentors and support to at-risk high school students, and currently serves on its Board of Directors.

She is married to Bruce Stucker, an attorney, and has a daughter, Cassidy, age ten.

Susan V. Stucker, Senior Counsel with Sprint, has been an OCBA member since 1986. This article was submitted by Catherine A. Tucker, Deputy Director/Pro Bono Coordinator of the Legal Aid Society.

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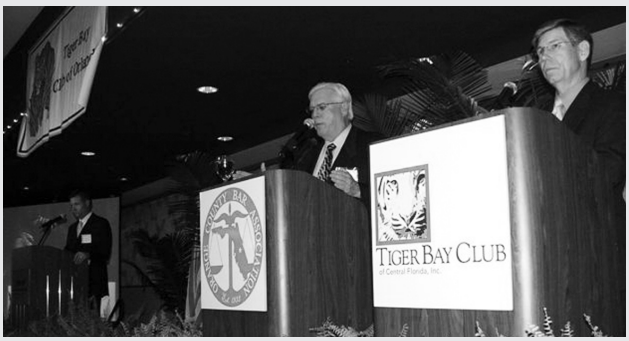
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State Senator "Skip" Campbell, Jr., and Congressman Bill McCollum were featured in the Florida Attorney General Candidate Forum at July's luncheon. The event was co-sponsored by the OCBA and Tiger Bay Club of Central Florida.



Orlando Sentinel *columnist Scott Maxwell moderated the Forum, which attracted more than 500 members and guests.*



"An Afternoon at the State Courthouse," organized this year by Jeremy Springhart and Alyson Innes, not only provided insight into judicial policies and procedures, but also offered courtroom decorum guidelines for attorneys, law clerks, paralegals and legal assistants.



The Orange County Board of Commissioners and the Orlando City Council proclaimed July 13th "Community Legal Services of Mid-Florida Day." City Commissioners Phil Diamond and Samuel B. Ings presented the proclamation to CLSMF board president Amy Goodblatt, executive director Bill Abbuehl, and CLSMF Orange County managing attorney Susan Firimonte.

HEARSAY

Can you believe September is here already?! Children are back in school, vacations are over, and we have said goodbye for now to all of those fresh-faced summer law clerks. As we watch students heading back to college, many of us are reminded of our own college days and fond memories from those years . . . back when we had so much fun hanging out with our buddies, talking trash about other school teams, writing notes using our school colors . . . hm . . . wait a minute . . . actually, that sounds like some lawyers I know! OK, so we don't have to let go of our team spirit just because we are responsible, professional adults. Lawyers can be a bit competitive after all, and maybe it is healthy for them to have an outlet for that competitive spirit through sporting events (or trivia contests!). Anyway, maybe you do not all agree on whose team is best or maybe (*gasp!*) you don't even really care about college football. There is one thing we all can agree on, though: we can all be proud to be part of one great winning group that we call the Orange County Bar Association. And as usual, your fellow OCBA members have been busy accomplishing great things, so here's what's up . . .

Charles H. Egerton, a founding member of Dean Mead, was recently selected for inclusion in the 2006 edition of *The International Who's Who of Corporate Tax Lawyers*. Who's Who Legal, publisher of *The International Who's Who of Corporate Tax Lawyers*, researches the opinions of law firm clients and tax lawyers from around the world. Only 403 attorneys throughout the world were selected for inclusion in the publication. Egerton is the only practicing attorney from Florida to have been named. The Health Law Section of The Florida Bar has elected **Troy A. Kishbaugh**, a shareholder with the law firm of GrayRobinson, P.A., to serve as Secretary of the Section. His one-year term commenced July 1, 2006. **Bradley M. Saxton**, shareholder at Winderweedle, Haines, Ward & Woodman, P.A., has been appointed for a one-year term as Chair of the Bankruptcy/UCC Committee of The Florida Bar's Business Law Section. **Joyce Ackerbaum Cox**, a partner with Baker & Hostetler, has been appointed to the Board of Directors for the Jewish Community Center of Greater Orlando.

OCBA members who were named among *Florida Trend* magazine's 2006 "Florida Legal Elite™" included **Jamie Billotte Moses** and **John Fisher**, both with Fisher, Rushmer, *et al.*, and **David J. Akins**, **Darryl M. Bloodworth**, **Stephen J. Bozarth**, **Lauren Y. Detzel**, **Charles H. Egerton**, **Lynn J. Hinson**, **Stephen R. Looney**, **Robert W. Mead, Jr.**, and **Joseph "Jay" Van Heyde II**, all with Dean Mead, *et al.* The Florida Legal Elite are the top lawyers practicing in Florida, according to the results of the magazine's statewide attorney surveys.

A number of members have been achieving board certifications in their various areas of practice. **Christopher V. Carlyle**, of The Carlyle Appellate Law Firm, was recently Board Certified in Appellate Practice by The Florida Bar. Rumberger, Kirk & Caldwell partner **David C. Willis** has become Board Certified in Construction Law. The distinction marks Willis's second Board Certification, as he is also certified in Business Law by The Florida Bar.

D. "Woody" Rodriguez, with Marchena & Graham, and **Clifford B. Shepard**, with Langston, Hess, Bolton, Shepard & Augustine, P.A., have both achieved Board Certification in City, County and Local Government Law. Rodriguez and Shepard were the only two attorneys in the Orlando area to become certified in this area, bringing the total number to eleven. Meanwhile, **Rodriguez** and **Nick Shannin**,



Kristyne Kennedy

who are both past OCBA YLS Presidents, seem to be neck-in-neck in the race to obtain certifications: **Shannin**, a partner with McDonough, Wieland & Shannin, who was recently Board Certified in Appellate Practice, has also become certified (like his buddy **Rodriguez**) as a Circuit Court Mediator. What is next for these two? Stay tuned, as we ponder the question . . . which one of the two is more "certifiable"?! (Oh, come on - you know I couldn't resist that joke!) Congratulations go out to both of you for your continuing achievements and, more importantly, for just being two really cool dudes.

Speaking of congratulations, it is time to announce the winners of the **OCBA's Summer Happy Hour and Trivia Contest**! Trivia buffs packed Slingapour's on Wall Street Plaza on July 19, 2006, while seventeen teams competed to win the coveted championship trophies at this charity event benefiting the OCBA Foundation. Congratulations to the winning teams: First Place - "**Forget Me Nots**" (Team Captain: **Robert Deitz**); Second Place - "**Eye of the Liger**" (Team Captain: **Gene Shipley**); and Third Place - "**State Attorney's Office**" (Team Captain: **Scott Herman**). Honorable mention also goes to other teams placing in the top ten: (4) "All We Do is Trivia," (5) "Trip to Zoo Meets Barry Law School," (6) "7 Years of College Down the Drain," (7) "deBeaubien a/k/a Junior Wookez," (8) "Team FSU," (9) "Defenders of Useless Knowledge" and (10) "Barry Barristers." Thanks to everyone who came out and participated, and special thanks to: event sponsors **Roetzel & Andress, Jackson Lewis LLP** and **Hollifield Legal Centre**; the OCBA Social Committee; event Co-chair **Vivian Cocotas** with Stump, Callahan, Dietrich & Spears, P.A.; trivia host **Travis Hollifield** with Hollifield Legal Centre; Curtis Earth with *Earth Trivia* for supplying us with questions and trivia kit; and Nicole and the rest of the fabulous staff at Slingapour's for doing such a great job taking care of us!

Now get ready for the OCBA's other upcoming social events! Plan to attend the **Fall Joint Happy Hour** with OCBA, CFAWL, PCPBar, YLS and HBA on **September 14, 2006** from 5:30 p.m.-8:00 p.m. This year's Joint Happy Hour is sponsored by **Westlaw** and will be at the beautiful Exchange Lounge (upstairs) on Church Street. Admission is free if you are a member of one of these organizations ($5.00 for non-members). This event is always very popular, so be sure to RSVP early! For additional information or to RSVP, contact **Shayne Thomas** at sthomas@carltonfields.com or (407) 244-8249. Also mark your calendars for other future OCBA social events, including the Texas Hold 'Em Poker Tournament (**November 16, 2006**); and the Winter Wine & Cheese Party (**January 25, 2007**). If you would like more information about these events, sponsorship opportunities or participating on the OCBA Social Committee, contact me at kennedyk@jacksonlewis.com.

Until next month, keep in mind that even if you have many leather-bound books and your apartment smells of rich mahogany, that doesn't necessarily make you a big deal. Just be real, stay classy and don't forget to send any interesting news, gossip, blind items or even unfounded rumors to me at kennedyk@jacksonlewis.com or fax (407) 246-8441!

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



Nearly 200 Orange County middle school students participated in the third annual Summer Law Camp program organized by the Public Defender's Office. Carter Young of the PD's Office consults with a Summer Law Camp student during a mock trial.



The OCBA Social Committee whipped up a mighty competition for the recent Trivia Contest. Pictured are Committee members Vivian Cocotas, Jessica Hew, Kristyne Kennedy, Chair, and Beth Patrie.



Hate to say it, but in addition to other team loyalties, we saw Gator fans pitted against Noles once again at the Annual Summer Happy Hour & Trivia Contest. Don't know who won? Read "Hearsay" for the low down!



The Hispanic Bar Association of Central Florida held its second annual "Noche de Salsa " (Night of Salsa) at the OCBA Center in July. The group enjoyed an evening of Salsa lessons taught by professional ballroom dancer Damian Martorana and his assistant.



Stan panicked, "this long just to get an application? How long to process a claim?"

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YLS on the Move!

It's that time of year again ...

Judith A. Garabo

Now that the summer clerks have returned to school, our YLS calendar slows down a little bit. Fortunately, that's just in time for college football season to pick up. I could wax poetic about football season for several column inches (about getting up at 6:00 a.m. to tailgate for a Noon game, about how much easier it is to smuggle a small bottle of Jack Daniels into the stadium when you go in through the alumni side rather than the student side, about scanning the crowd for a glimpse of Burt Reynolds, about watching Chief Osceola plant the burning spear...), but I won't. Suffice it to say that watching my beloved *alma mater* and team of choice at home entails a four-hour drive up and to the left, and donning a fair amount of garnet and gold. By the time you read this copy, we should have either beaten Miami on Labor Day Weekend or, let's face it, frittered away another one with a wide right.

While I couldn't be happier that the season is here at long last, this summer passed us by all too quickly. August brought us the second and final **Pub Crawl** on Church Street, including stops at the Exchange Lounge's Cigar and Wine Club, Lattitudes and Antigua. **Jason Hill** and **Kristen Cox**, both of Shutts and Bowen, are to be commended for their efforts in bringing fine entertainment to the Young Lawyers. Stay tuned for updates and other spur-of-the-moment pub crawls throughout the year. Big thanks go to FlyScribe and to Shutts and Bowen for their sponsorship.

August's luncheon brought a lively exchange of ideas from the candidates for Orange County Mayor and Orange County Commission thanks to YLS President **Wiley Boston**.

In late July, several Young Lawyers came out to **Paint the Town** in a project spearheaded by **Shane Fischer**, of Bogin, Munns and Munns. Joining him were Young Lawyers **Melanie Andre**, **Alice Holmes**, homeowner **Susan Koressel**, **Felipe Guerrero**, **Suzanne Paulus**, **Andrea White**, **Sarah Reiner** and **Melanie Shoemaker**. See the photo insert for the proud homeowner surrounded by helpful young lawyers!



YLS members donate time and assist local homeowners every year with the YLS "Paint the Town" project. Pictured here are Melanie Andre, Alice Holmes, homeowner Susan Koressel, Felipe Guerrero, Suzanne Paulus, Andrea White, Sarah Reiner and Melanie Shoemaker.

The **Afternoon at the Courthouse**, followed by an extended happy hour at Suite B, was a hug success thanks to the hard work of **Alyson Innes**, of Kilgore Perlman, and **Jeremy Springhart**, of Broad and Cassel. This program enjoyed yet another successful year thanks to the hard work and dedication of several young lawyers and judges, and provided a welcome introduction to the local judiciary and legal community.

The **YLS Golf Tournament** is again upon us and will take place on **September 8 at Orange County National**. **Chelsie Roberts**, of Ford and Harrison, and **Maria Hale**, of Fisher Rushmer, *et al.*, and their committee have been hard at work securing sponsors and filling foursomes. For more information, please contact either of them: croberts@fordharrison.com or mhale@fisherlawfirm.com.

In other YLS news, Board Member **LaShawnda Jackson**, of Rumberger, Kirk & Caldwell, was appointed to the Judicial Nominating Commission for the Ninth Circuit. Congratulations to LaShawnda on this remarkable achievement for a young lawyer!

On **September 14**, the Young Lawyers, along with the Paul C. Perkins Bar Association, CFAWL, the Hispanic Bar Association and the OCBA bring you a **Joint Happy Hour** sponsored by Westlaw at the Exchange Lounge on Church Street. Members of any sponsoring organization get in free; $5 gets anyone else in. **RSVP to Shayne Thomas** (sthomas@carltonfields.com) or to OCBAYLS@gmail.com.

September also brings us a **monthly luncheon on the 21st at the Citrus Club**, beginning at 11:45 a.m. and lasting until 1:00 p.m. It's $18 if you reserve in advance to OCBAYLS@gmail.com and $20 at the door. The cost is $10 for government attorneys and sole practitioners.

One more thing I've been waiting use in closing after years and years of insufferable Gatormongering...

GO 'NOLES!!!!

Judith A. Garabo is an associate with the firm of Greenberg Traurig, P.A. She has been a member of the OCBA since 1999.

 Continued from page 11

Furthermore, in 864 interviews conducted in six states, William J. Bowers, Marla Sandys, and Benjamin D. Steiner found that "six of ten jurors who thought at the guilt stage of the trial that either death or life was the right punishment held steadfastly to that conviction for the rest of the proceedings." (William J. Bowers, Marla Sandys, and Benjamin D. Steiner, "Symposium: Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making," 83 *Cornell L. Rev.* 1476 [1998]). These results have led some jury experts, trial lawyers, and judges to suggest that judges may be better suited to evaluating mitigating circumstances and handling the non-fact-finding facets of capital cases.

In *Ring v. Arizona* (2002), the Supreme Court struck down an Arizona law that enabled a sentencing judge to impose the death penalty if the judge made findings on additional aggravating factors. However,

> Ring did not alter the ability of federal and state legislatures to place the sentence determination responsibility in the hands of the judiciary. Ring simply held that any fact which enhances the available range of punishment must be found by a jury regardless of whether the determination of that fact occurs procedurally in the guilt or penalty phase of the trial. Whether judges or juries determine where a particular sentence should fall within the available range of punishment is not dictated by the Sixth Amendment. Instead, that choice is a public policy question legitimately to be determined by a legislative body.
>
> Therefore, the question becomes: how, in a potential death penalty case, in a post-Ring world, does one honor the requirements of the Sixth Amendment and still create a process best suited to avoid the fear of the arbitrary imposition of a sentence of death which gave rise to the unique Eighth Amendment sentencing requirements created by Furman and its progeny? In Nebraska, the Legislature has answered that question by having juries engage solely in the penalty-enhancing fact-finding required by Ring and leaving the remaining (and more subjective) aspects of the sentence determination process in the hands of a panel of professional, appointed jurists.
>
> Jon Bruning and J. Kirk Brown "Symposium: Capital Concerns: The Death Penalty in America: Ring Mandates Jury Consideration of Aggravators, But What About the Rest? The Case For Judicial Consideration of Mitigators and Judicial Sentencing," 15 *Stan. L. & Policy Rev.* 343 (2004)

In the aftermath of *Ring v. Arizona*, the Nebraska legislature created a capital sentencing scheme whereby a three-judge panel reviews each capital sentence. The panel must render a unanimous decision to impose a death penalty during the sentencing phase of trials. Montana also now leaves the determination of aggravating factors to juries, but judges consider mitigating circumstances and assign the final sentence.

Is the performance of juries in the sentencing phase so dire that the only options are to exclude jurors from the sentencing phase of bifurcated trials or assign them to advisory roles, as in the models used by Alabama, Delaware, and Florida, where the judiciary may override a death sentence? Valerie Hans, who has extensively studied juries, writes,

> Whether they are given these instructions in the quiet of a laboratory or the intense experience of the capital trial, whether they hear them from a researcher or a judge, and whether they report their understandings immediately or much later, people show serious comprehension problems... Thus, the findings of the Capital Jury Project point to a significant, and potentially correctable, problem with the judicial guidance given the capital jury. Research indicates that lay comprehension can be dramatically improved when judicial instructions are rewritten following psycholinguistic principles of clear speech. Comprehension is most enhanced when instructions take into account jurors' prior assumptions about law. By uncovering jurors' difficulties with sentencing phase instructions, and by informing us about the preexisting views held by jurors that could interfere with understanding and applying the law, the Capital Jury Project has made a vital two-fold contribution.
>
> Valerie P. Hans, "Symposium: The Capital Jury Project: How Juries Decide Death: The Contributions of the Capital Jury Project," 70 *Ind. L.J.* 1233 (1995).

Should juries offer the last word in issuing a death sentence? Arguments have been made that putting the final sentencing function in the hands of the judiciary silences the jury as the "conscience of the community" and "authentic voice" of the community. According to these arguments, the capital jury serves as the voice of "community outrage." On the other hand, it is well established that the death-qualification process leads to a jury that is more homogeneous and less representative of a fair cross section of the community than juries that are not death qualified. Furthermore, in federal trials, this unrepresentativeness is exacerbated. The jury pool for a federally prosecuted crime is often very different for a crime prosecuted by the state. Jeffrey Abramson writes,

> In non-capital cases, we fall short of practicing the ideal of representative cross-section for a variety of practical reasons or shrewd attorney manipulation of jury selection. Selecting death penalty juries shares in this common run of problems but it is different in changing the ideal itself away from representative cross-selection. As is well known, capital juries need to be death-qualified. Members of the jury are recruited not randomly from the community at large, but only from among those who affirm their willingness to impose the death penalty in an appropriate case. Empirical research has shown persuasively that such a segment

Continued on page 23

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a) Client management software
b) On-line collaboration service
c) Interactive trials skills software
d) Man at street corner wearing sign – "Lawyers will save the world"
Hint: www.elite.com, products link

2. What is WLEc?

a) Women Lawyers Electronic Counsel
b) Legal seminars
c) Web bulletin board
d) Attorney referral web site
Hint: Search Google with "WLEc Thomson Live"

3. What is MTS?

a) Transaction software for mergers and acquisitions
b) Advertising that encourages people to give their lawyers large cash tips
c) Library inventory service
d) Disaster recovery service
Hint: Search Google with "MTS Thomson West"

4. What is practitioner?

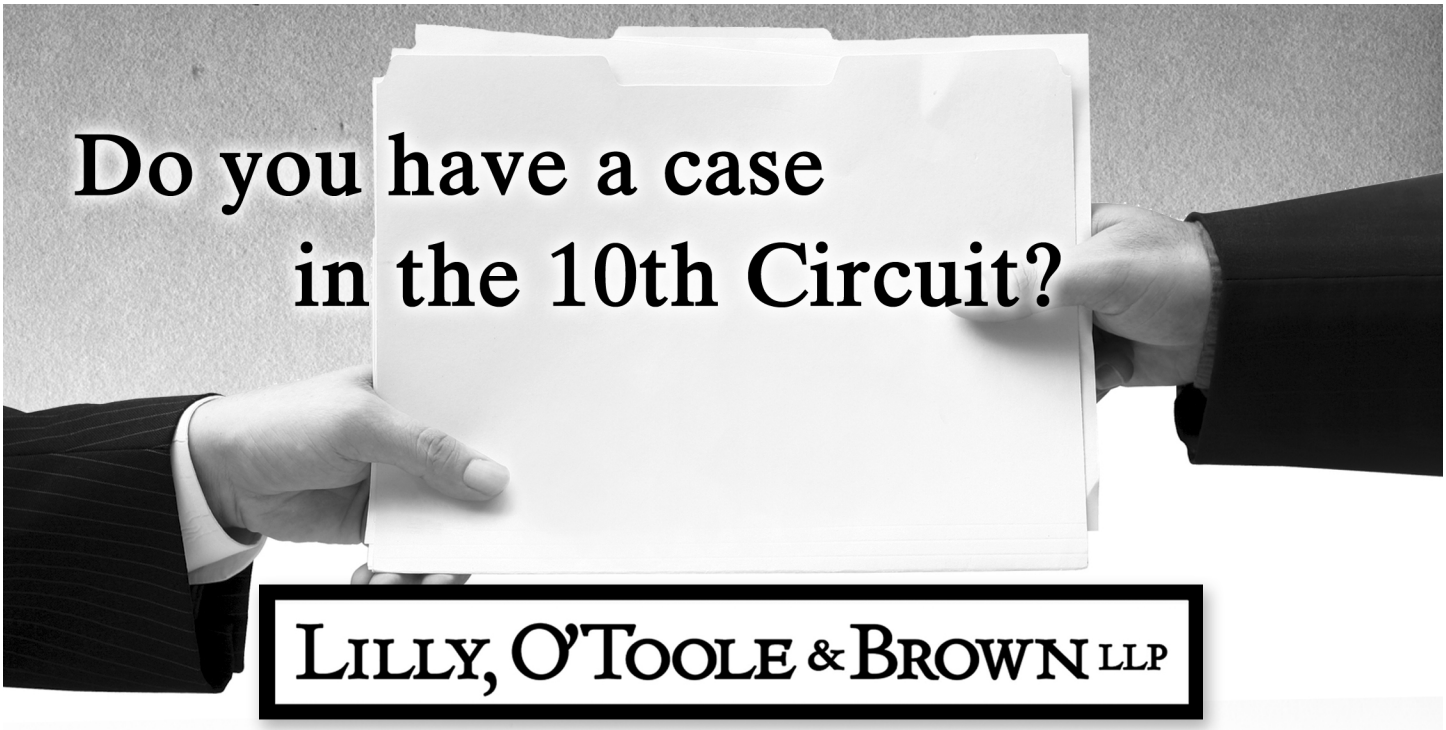
a) Trial presentation software
b) Practice specific research
c) Forms generating program
d) A brilliant attorney provided for free who does all your work so you can stay home
Hint: Search Google with "Practitioner Westlaw"

5. What is State Select?

a) Jurisdiction review service
b) Travel advisor for attorneys
c) Custom on line package
d) Select case law and forms by practice area

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ABA Commission on the American Jury *Continued from page 20*

> of the community is unrepresentative of the community on a host of attitudes and values affecting both the determination of guilt and also the choice of life versus death. For this reason alone, it is difficult to praise death-qualified juries as "the authentic voice" of the "community as a whole."
> Jeffrey Abramson, "Symposium: Capital Jury: Death-is-Different Jurisprudence and the Role of the Capital Jury," 2 *Ohio St. J. Crim. L.* 117 (2004).

According to Abramson, we can no longer say that a capital jury sentence is "the authentic voice" of the "community as a whole." Rather, Abramson contends, "What the jury does is to legitimize the decision to use the punishment against a particular individual. In a nation such as the United States with a long tradition of trial by jury, the procedural routing of capital sentencing through the jury helps to sell the sentence popularly, no matter whether it ends up at life or death," which may suggest that involvement of juries in sentencing phase of a capital trial is more a matter of public policy than of the law.

Conclusion

In the face of diminished public confidence in the capital system as DNA testing continues to uncover wrongful convictions, social scientists, legal scholars, trial lawyers, and judges have attempted to seek reforms that will directly address criticisms of the functions and performance of capital juries. Six of the ten recommendations of the Massachusetts Governor's Council on Capital Punishment in its Final Report (May 4, 2004) would directly impact the state's capital jurors if implemented. For example:

- Creating by statute a narrowly defined list of death-eligible murders, because the Council believed "The burden of narrowing a large pool of death-eligible murders down to the 'worst of the worst' is . . . too much to expect discretionary decision-makers to handle effectively."
- Implementing new trial procedures giving a defendant the choice of a new jury for sentencing if found guilty. According to the Council, contesting the prosecution's case or actively protesting innocence "seriously undermines the credibility of any efforts to take responsibility or to express remorse at the sentencing stage" for a defendant faced with one jury. Furthermore, studies indicate there is no good way for a defendant to show remorse once convicted.
- Mandating a heightened burden of proof to enhance the accuracy of jury decision making at the sentencing phase. The jury would be required to find that there is "no doubt" as to the defendant's guilt. The rationale is that juries have made errors and that residual doubt is possible after a finding of "guilty beyond a reasonable doubt." Thus jurors would be asked to find that they have no residual or lingering doubt before imposing the death penalty.
- Including an independent procedural review and an independent substantive review for the mandatory appellate review of each death sentence, under the rationale that judicial review is a traditional method of correcting trial errors. Although standard in most states, mandatory appellate review reversals in capital cases are generally limited to findings on procedural grounds. Given its broad statutory review authority, the Massachusetts Supreme Court would review every death sentence imposed "to ensure that such sentences are substantively just... This substantive review authority should operate independently of the review of procedural or other legal claims of error at trial."

These recommendations illustrate a continued awareness of the challenges posed by the capital jury in the administration of justice.

"The Capital Jury," by the ABA Commission on the American Jury, published in *The Commission on the American Jury: A Year in Review*. © 2005 by the American Bar Association. Reprinted with permission.



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Rainmaking 101 – Lesson 3



Mark Powers

In an ideal world all referral sources would be created equal. They would send you nothing but the best and brightest clients and cases - a steady stream of high quality work and loyal clients. Wouldn't life be grand? Unfortunately, in the real world, there is a great deal of difference in the quality of your referral sources and the sooner that you realize the difference, the better. Your existing group of referral sources is far from equal in terms of the amount and quality of work that they refer to you. In this lesson we are going to help you tell the difference by introducing the concept of your "Top Twenty" influencers.

Your Top 20 Influencers

Your Top Twenty Influencers are those referral sources that send you your highest quality business. They send you the kind of matters you specialize in and the kind of clients you most enjoy. These are the influencers who consistently send quality "A" client referrals your way. Most attorneys who have practiced for five or more years will have a small group of referrers that fit into this category - even if they don't yet have twenty of them.

This is an extremely important group of names to identify for yourself. These referral sources have probably kept you in business over the years because their good referrals have resulted in money in your pocket. Often, very substantial money. Calculated, or uncalculated, you have done something to impress this group and they demonstrate their trust and confidence in your abilities by continually sending you new clients.

Why Do They Refer To You?

As you work through the attached Top Twenty exercise, think about what you have done to cultivate the relationship you have with each referral source. Do they like you because you have a lot in common as people? Do they send you work because of your quick turn-around time? Do you possess a certain expertise that they have come to rely upon? Does your work make them look good to their superiors, their clients or end-users?

This group of referral sources often has the potential to send you even more business than they send you now. As you start studying them and paying attention to their referral habits, it may become clear that they have more work to give out. They could be spreading it around to other attorneys.

Acknowledgment

Never let this group of people, whether they are business professionals, fellow attorneys or your next door neighbor, wonder whether or not their referrals came to you. Always express your appreciation as quickly as you can - even if the client did not ultimately engage your services. You want to continually reinforce the fact that they thought of you so that the next time they have an opportunity to refer someone - your name is the first one on their mind. Immediately let them know that you appreciate their ongoing faith in you. Send them thank you notes and take them out to lunch every so often to thank them for their "trust and confidence" in you. Their referrals have added substantially to your income. Never take them for granted.

Cultivation

Invite them to join you in non-work related activities to further the bonds between you. Have fun with them if it is appropriate for the relationship. Include them in important practice changes and decisions - solicit their feedback. Keep them up-to-date on any new directions or services you incorporate.

The Next Step

Make a list of your Top 20 Influencers in the left-hand column under "Name." Next, list the type of influencer that the person is, such as "attorney" or "CPA" under "Type." Then, in the columns marked "High Rapport" and "Low Rapport," put a checkmark in the appropriate box. In the far right column, list the amount of money that their referrals amount to on a yearly basis. When this is complete you will have a matrix that clearly illustrates your most valuable relationships. Upon further study you might notice you have the basis for a marketing plan. Here's why: those influencers

Continued on page 26



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Orange County Bar Association

Rainmaking *Continued from page 25*

with whom you have high rapport should be put into a maintenance rotation - that is, you should contact them at a comfortable rate for the relationship. For some relationships, this will be two or three times a month, for others, once or twice a quarter. For those relationships marked "Low Rapport," cultivate them a little more aggressively, based on their receptivity, their availability and their ability to send you more work. Use this matrix to plan your marketing activities, follow your plan faithfully, and you should see a surge of new business.

Top 20 Influencers

Name	Type	High Rapport	Low Rapport	Annual $ Worth
				(to your practice)
1.				
2.				
3.				
4.				
5.				
6.				
7.				
8.				
9.				
10.				
11.				
12.				
13.				
14.				
15.				
16.				
17.				
18.				
19.				
20.				

In Lesson 4

The first three issues of this course have focused on who to talk to in your word-of-mouth marketing campaign. In the next issue we'll discuss strategic conversations - what to say when you are face-to-face with them.

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



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Announcements

New Associates

Jason Hill - *Shutts & Bowen LLP*

W. Doug Martin - *Grower, Ketcham, Rutherford, et al.*

Sarah E. Rumpf - *Urban & Thier, P.A.*

Jeremy T. Springhart - *Broad and Cassel*

New Partners

J. Stephen McDonald - *Pohl & Short, P.A.*

James C. Washburn - *Pohl & Short, P.A.*

Speaking Engagements

Anne-Marie L. Bowen, of Anne-Marie L. Bowen, P.A., a consumer debtor law firm in Orlando, recently made a presentation on Ethics at the American Bankruptcy Institute Southeast Bankruptcy Workshop in Amelia Island, Florida.

Dennis Wall spoke on July 25, 2006, to more than 100 members of the Jacksonville Claims Association on "Good Faith Claim File Handling--The Ethics of The Thing." The Defense Research Institute also recently published Dennis's article, "Experts, Gatekeepers, and Insurance Issues in Federal Cases," both online and in print.

News to Note

Seminar for Real Estate Attorneys - The 2006 Real Estate Law Symposium, presented by the Orlando Regional Realtors® Association and the Central Florida Real Estate Council, will be held on Wednesday, September 6, 2006, from 8:30 a.m. to 4:30 p.m. at the Renaissance Orlando at Sea World, 6677 Sea Harbor Dr., Orlando, FL 32821. Speakers will include OCBA Real Property Law Committee members. Topics will include real estate fraud, foreign investment and a case law and legislative update. Registration is $109; lunch and complimentary parking is included. Earn CLE. Register at www.orlrealtor.com.

Job Fair - The Southern Region of the National Black Law Students Association (SRBLSA) will hold its 2nd Annual SRBLSA Fall Minority Recruitment Weekend on September 15-16, 2006, in Birmingham, Alabama. The purpose of the event is to infuse diversity within the legal community by creating strong networking opportunities and legitimate hiring avenues with law firms, corporations, State and Federal agencies. The SRBLSA invites firms to attend and/or to become sponsors. Additionally, firms are encouraged to take advantage of a "**Resume Drop**" program ($50 fee) that will allow them to receive students' resumes. For details, contact srblsajobfair2006@yahoo.com or FAMU College of Law/OCBA member Camara Williams at camarawilliams@hotmail.com.

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Our ORLANDO office seeks: Corporate Associate with 6+ years of experience handling complex real estate finance and lending matters, real estate loans, mortgage warehouse lending, and other bank-related matters. Portable business is a plus. **Employee Benefits Attorney** with 6+ years of extensive employee benefit experience in designing, drafting, and assisting employers with administration and compliance issues for qualified (defined contribution and defined benefit) and nonqualified employee retirement plans, executive compensation plans, and welfare and fringe benefit plans for ongoing and terminating plans and in mergers and acquisitions. Thorough working knowledge of ERISA and the internal revenue code required. Portable business is a plus. **Land Use and Zoning Associates** with 3+ years of experience. Prior governmental experience is not required but a plus. **Litigation Associate** with 2+ years of experience in construction litigation. Excellent academic credentials, research and writing skills are required. **Public Finance Attorney** with 6+ years of significant public finance experience. Practice consists of bond counsel, disclosure/underwriters' counsel, trustee counsel and borrower counsel representation. **Real Estate Associates** with 3+ years of transactional commercial real estate experience. Environmental and land use experience is a plus. **Real Estate Attorneys** with 8+ years of experience in real estate and/or land use, along with portable business.

Strong academic credentials and excellent writing skills required for all positions. Florida Bar membership or willingness to sit for next examination required. Send resume/cover letter to: Danielle Shannon, Akerman Senterfitt, One SE Third Avenue, 28th Floor, Miami, FL 33131. Fax: 305-374-5095 or Danielle.Shannon@akerman.com. See full listing of current hiring needs at www.akerman.com.

LAND USE/REAL ESTATE ATTORNEY: Bogin, Munns & Munns, an AV rated law firm, with seven offices in Orlando and Central Florida, seeks experienced land use/real estate attorney with 3 to 5 years or more experience to assist with dynamic and expanding real estate practice. Creative compensation arrangements available with great opportunity for growth and advancement. Send resume in confidence by fax to: 407-578-2128 or e-mail to bmm@boginmunns.com.

CONSTRUCTION DEFECT ATTORNEY w/min. 5 yrs. exp. in field. Competitive salary, Exc. benefits. Send resume to: Mng. Counsel, 2420 Lakemont Ave., Ste. 125, Orlando, FL 32814. FAX: (407) 388-7801. St. Paul Travelers businesses are EOE.

BOGIN, MUNNS & MUNNS, an AV rated law firm, with seven offices in Orlando and Central Florida, seeks two real estate attorneys, one with one to three years experience and one with 5 to 10 years experience to assist with dynamic and expanding real estate practice. Creative compensation arrangements available with great opportunity for growth and advancement. Send resume in confidence by fax to 407-578-2128 or e-mail to bmm@boginmunns.com.

BOGIN, MUNNS & MUNNS, an AV rated Orlando firm seeks bi-lingual attorney with 3-5 years experience in plaintiff personal injury including trial experience. Outstanding opportunity to join growing dynamic firm with excellent benefits and compensation package. Send resume in confidence by e-mail to bmm@boginmunns.com or fax to 407-578-2128.

BOGIN, MUNNS & MUNNS AN AV RATED Orlando law firm, seeks experienced attorney for high volume, growing corporate/tax practice. Excellent opportunity to join rapidly growing, dynamic law firm. Experience with structuring real estate transactions helpful. Exceptional team atmosphere and opportunity for growth and advancement. Send resume in confidence by fax to 407-578-2128 or e-mail to bmm@boginmunns.com.

BOGIN, MUNNS & MUNNS, an A-V rated law firm, seeks attorneys with three or more years experience in real estate, corporate, estates and general transactional to work in our offices in Clermont, Leesburg and Daytona Beach. Excellent opportunity to join growing dynamic firm. Send resume in confidence by fax to 407-578-2128 or e-mail to bmm@boginmunns.com.

ALVAREZ, SAMBOL, WINTRHOP & MADSON, P.A., A Full Service AV rated firm has immediate openings for the General Liability/Commercial Transportation Practice Groups. Successful candidates will have one to four years experience. Please forward resume in confidence to, Firm Administrator, Alvarez, Sambol, Winthrop & Madson, P.A., P.O. Box 3511, Orlando, Florida 32802 or email to hrf@aswmpa.com.

REAL ESTATE ATTORNEY: Lowndes, Drosdick, Doster, Kantor & Reed, P.A., an AV-rated law firm located in Orlando, Florida, seeks an attorney with a minimum of three years transactional real estate experience to assist with dynamic and expanding real estate practice. Applicant must possess good academic credentials, excellent writing skills and excellent references. Compensation will be commensurate with experience. The law firm offers outstanding financial stability with steady practice growth, sophisticated clientele, outstanding credentials and excellent facilities. Send resume and writing sample in confidence to Nicholas A. Pope, Esq. , or Jacqueline Bozzuto, Esq., Post Office Box 2809, Orlando, Florida 32802.

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ALTAMONTE SPRINGS LAW FIRM looking for lawyer with 3-5 years experience in construction litigation. Salary and benefits to commensurate with experience. Send resume to: Attorney, 986 Douglas Avenue, Suite 102, Altamonte Springs, FL 32714.

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STUMP, CALLAHAN, DIETRICH & SPEARS, an AV rated firm, seeks attorney with a minimum of 3+ years real property experience. Send resume in confidence to P. O. Box 3388, Orlando, FL 32802-3388, or fax to 407 425-0827.

CORPORATE/TRANSACTIONAL ATTORNEY – Orlando AV law firm seeks associate attorney with 3+ years corporate/transactional experience. Excellent salary/benefits. Send resume to Administrator, Railey & Harding, P.A., 20 N. Eola Dr., Orlando, FL 32801, jcorser@raileyharding.com. Fax (407) 648-8049.

RISSMAN, BARRETT, HURT, DONAHUE & MCLAIN, an AV-rated law firm seeks attorneys for its Orlando office with 3+ years experience in PIP. Interested parties should reply to Jennings L. Hurt III, P.O. Box 4940, Orlando 32802-4940 or via email to bucky.hurt@rissman.com.

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2006 September - October Calendar

OCBA Luncheon • September 28, 2006

John Hillenmeyer, President & CEO
Orlando Regional Healthcare System

RSVP by September 26th to reservations@ocbanet.org

September

1 ***Diversity Luncheon***
8:00 a.m. • Bar Center

CFAWL Bar Luncheon
11:30 a.m. • Citrus Club

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

OCALSS
5:30 p.m. • Bar Center

6 ***2006 Real Estate Law Symposium***
8:30 a.m. • Renaissance Orlando at Sea World
RSVP: www.orlrealtor.com

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

Federal Judicial Relations Committee
12:00 p.m. • Judge Conway's Chambers

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

8 ***Workers' Compensation Law***
11:45 a.m. • Bar Center

Diversity Committee
12:00 p.m. • 255 S. Orange Ave., Ste. 1401

The 15th Annual YLS Section Charity Golf Tournament
8:00 a.m. • Shotgun Start
Orange County National

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

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

Family Law Executive Board Committee
12:00 p.m. • Bar Center

Judicial Relations Committee
12:15 p.m. • Orange County Courthouse, 21st Floor Conference Room

14 ***Legal Aid Society Executive***
8:00 a.m. • 100 E. Robinson St.

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

Fall Happy Hour
5:30 p.m. • Exchange Lounge at Church St.

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

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

International Law Committee
12:00 p.m. • Rissman, Weisberg, et al., 201 E. Pine St.

20 ***Solo & Small Firm Committee***
12:00 p.m. • Bar Center

YLS Board Meeting
5:30 p.m. • Cooney Mattson

21 ***Young Lawyers Section Luncheon***
11:45 a.m. • Citrus Club

Family Law JA Luncheon
11:45 a.m. • Ivanhoe Plaza
RSVP: Mary Nardi - 407-426-8203

Hispanic Bar Association
5:30 p.m. • TBA

Paul C. Perkins Bar General Meeting
6:00 p.m. • FAMU College of Law

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

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

26 ***Technology Law Committee***
12:00 p.m. • GrayRobinson, P.A.

27 ***CFACDL***
11:45 a.m. • Sorosis Club

Business Law Committee
12:00 p.m. • 255 S. Orange Ave., Ste. 1401

28 ***OCBA Luncheon***
John Hillenmeyer, President & CEO, Orlando Regional Healthcare System
Will Healthcare As We Know It Survive?
11:30 a.m. • Downtown Marriott

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

October

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

OCALSS Meeting
5:30 p.m. • Bar Center

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

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

6 ***Diversity Committee***
12:00 p.m. • 255 S. Orange Ave., Ste. 1401

CFAWL Bar Luncheon
11:30 a.m. • Citrus Club

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

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

12 ***Legal Aid Society Executive***
8:00 a.m. • 100 E. Robinson St.

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

13 ***Workers' Compensation Committee***
11:45 a.m. • Bar Center

17 ***Legal Aid Society Board***
11:45 a.m. • 100 E. Robinson St. (Upstairs)

Professionalism Committee
12:15 p.m. • Bar Center

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