



The Briefs

A Publication of the Orange County Bar Association



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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.

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.

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Table of Contents

President's Message —————	3
<i>Pro Bono – What Sets Us Apart</i> C. Gene Shipley	
OCBA Luncheon Speaker —————	5
Carolyn M. Fennell, Director of Public Affairs Greater Orlando Aviation Authority	
Editors' Note —————	7
<i>A Special Thank You to Brant Bittner and the OCBA Staff</i> Thomas A. Zehnder	
Professionalism Committee —————	9
<i>Got Professionalism? Time is Running Out!</i>	
75th Anniversary Committee News —————	11
<i>Three Score and 15 Years Ago . . .</i> Diego "Woody" Rodriguez	
Legal Aid Society News —————	12
<i>Legal Aid Participates in Project Homeless Connect</i>	
Criminal Law Committee —————	15
<i>New Criminal Laws Enacted During the 2007 Legislative Session</i> Roger B. Handberg	
Appellate Practice Committee —————	17
<i>Take the Appellate Challenge!</i> Marcia K. Lippincott and Michael R. D'Lugo	
Side Bar —————	18
Jessica Hew	
Rainmaking —————	19
<i>Create Your Own Micro-Climate to Make It Rain</i> Mark Powers	
Insurance Law Committee —————	21
<i>Commercial General Liability (CGL) Policies – Update on Coverage in Construction Claims</i> James W. Markel	
Hearsay —————	22-23
Nicholas A. Shannin	
YLS On the Move —————	25
<i>Getting into the Swing of Things</i> Taylor C. Kessel	
Presentation Skills —————	27
<i>How to Grab Your Audience's Attention</i> Elliott Wilcox	
Financial Planning —————	29
<i>Confessions of a Recovering Insurance Agent</i> Andrew C. Orr, CFP®, CLU, ChFC, AIF®	
New Members —————	35
Announcements —————	38
Classifieds —————	41
OCBA Calendar —————	44

About the September 2007 Cover

The Second Annual Football Cover features another great team of judges who came out and sported their favorite colors for this issue of *The Briefs*! Many thanks to (front): Judge Alicia L. Latimore (Duke); Judge E. John Jordan (FSU); Judge Antoinette Plogstedt (UF); Judge Sally D.M. Kest (FSU); (middle): Judge Walter G. Komanski (UCF); Judge Nancy L. Clark (UF); Judge Mike Miller (UF); Judge A. Thomas Mihok (U.S. Naval Academy); Judge Thomas W. Turner (Ball State); (back) Judge Robert P. LeBlanc (Miami) and, in the helmet, Judge Mike Murphy (UF).

Photography: Lee Lucia, Lucia Video Productions • Photoshop: George Enos, Browder Printing Company



Page 5



Page 11



Page 15



Page 25

The Briefs

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DEADLINE INFORMATION

Deadline for November Issue: 10/1/2007

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

Publication of advertising herein does not imply any endorsement of any product, service or opinion advertised. The opinions and conclusions, including legal opinions and conclusions contained in articles appearing in *The Briefs*, are those of the authors and do not reflect any official endorsement of these views by the Orange County Bar Association or its officers and directors, unless specifically stated as such.

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Visit the OCBA's Website:
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Pro Bono – What Sets Us Apart

C. Gene Shipley

“ . . . to enhance the delivery of and access to quality legal services . . . ”

Orange County Bar Association attorneys have always contributed their time, efforts and wisdom to those living and working in Central Florida. As our community has grown, there has been a corresponding increase in the volume and level of services we have provided to those who live and work here. Of course, attorneys aren't the only leaders in our community who have contributed to this incredible growth. The skills and labor of engineers, architects, contractors, government employees and others responsible for construction and development are always essential to any growing community. If your appreciation for the services of those employed in the construction industry is limited to Orlando's skyline, ask OCBA members commuting to law offices in Orlando from areas like Clermont, Kissimmee and Daytona Beach, just how prolific these contributions are to them and their neighbors. The efforts of those working locally in the medical profession have always been important to Orange County, and the significance of those efforts will surely increase through the expansion in and around UCF's new medical school.

Regardless of where you live in Central Florida, everyone appreciates the most vital contributions we all receive from those working locally in the areas of education and law enforcement. So what differentiates the contributions that OCBA members provide to our community from the services of other local leaders? Two words: *Pro Bono*. Our commitment to serve all in our community, especially those with the greatest need but the least means, is the most significant contribution our members collectively give to Central Florida.

The creation of the Legal Aid Society of the OCBA (LAS) is one of our greatest achievements. Founded more than forty years ago by OCBA members, the LAS was established to provide legal services to those who could not afford an attorney. As the population of our community has grown, so has the scope and volume of *pro bono* services our members contribute. LAS now assists thousands of people every year who cannot afford legal counsel. On cases closed last year alone, OCBA attorneys helped over 1,300 new *pro bono* clients and continued work on more than 2,100 cases (of which 1,100 were children) in a variety of substantive areas, dedicating over 20,000 hours on *pro bono* cases and projects. The commitment of OCBA members to Central Florida will only increase in the future.

As a result of the legacy established by our members during the past four decades, the State of Florida has entrusted the LAS with the privilege and responsibility of being the only independent *Guardian ad Litem* program serving abused and neglected children in the state. Serving as GALs to kids removed from their parents, due to no fault of the children, predictably accounts for the greatest concentration of *pro bono* contributions by our members. Other family law cases, such as divorce, temporary custody and guardianship represent the next largest area of legal services we provide through LAS. Free

legal representation is also provided by OCBA members every year in a variety of other adversarial practice areas: housing cases such as eviction defense and mortgage foreclosures; consumer cases including bankruptcy and contract disputes over warranties and home improvements; petitions seeking unemployment compensation; and immigration matters.

However, the commitment of our members to *pro bono* service is not limited to our litigation attorneys. OCBA members serve in the Homeless Advocacy Project, meeting with homeless clients at a dozen sites around the county every month. Our attorneys help working families take advantage of Legal Aid's Earned Income Credit Tax Clinic to organize and file their taxes. Through the Community Education Program, we counsel and provide legal assistance at community events and fairs around Orange County. Our members participate in the Teen Parent Education Project, teaching a substantive law class to ninth graders in the Orange County Public Schools. OCBA attorneys, working through the AIDS Special Will Project, prepare wills and health care documents for people with AIDS/HIV. Countless members voluntarily serve our community every week through ongoing Teen Court, CDS and Family Mediation programs. State Prosecutors, Public Defenders, corporate attorneys, and other OCBA members practicing in areas of law that restrict *pro bono* work to weekends even volunteer on Saturdays, screening callers for appointments.

There exist a variety of professions whose services will continue to be essential for the ongoing growth of Central Florida. But, there is no profession like ours that collectively serves the neediest in our community without any expectation of remuneration. In November, we OCBA members will again have the exclusive privilege to serve Central Florida in a way only attorneys can, providing selfless hours of *pro bono* counsel and legal representation to low-income families and children living in our community. Please carefully review the annual preference form that will be distributed by the LAS to select from the primary legal practice areas facilitated by LAS staff.¹ Thank you for renewing your annual commitment to serve.²

¹ While numerous, diverse legal programs are identified in the annual preference form, members who provide non-listed legal services to other individuals and charitable organizations are encouraged to seek qualification from LAS for credit toward the mandatory *pro bono* requirements for OCBA membership and in order to seek malpractice insurance coverage and/or immunity offered under Florida law for said services. If you have questions about any of these opportunities, please contact one of the staff at Legal Aid. Cathy Tucker is the *Pro Bono* Coordinator, ctucker@legalaidocba.org, and can help you with questions about projects or cases. Susan Khoury, the GAL Program Director, skhoury@legalaidocba.org, can help you with all things GAL. Marilyn Carbo, the *Pro Bono* Specialist, mcarbo@legalaidocba.org, can sign you up for training. Corrie Canada, Referral Assistant, ccanada@legalaidocba.org, can refer you a case. Of course, LAS maintains all *pro bono* records for reporting on your Florida Bar dues statement. Please also consider attending one of the free CLE luncheon seminars offered twice every month through LAS.

² Thank you, Cathy Tucker, for your assistance with this President's Message.

C. Gene Shipley is a shareholder with Nardella Chong, P.A. He has been a member of the OCBA since 1998.



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September 27, 2007



Carolyn M. Fennell

**Director of Public Affairs
Greater Orlando Aviation Authority**

Carolyn M. Fennell is Director of Public Affairs for the Greater Orlando Aviation Authority. With her responsibilities in the aviation industry for media relations, public and community activities at Orlando International Airport and the Orlando Executive Airport, Ms. Fennell has been recognized as an authority in crisis management and media relations. She has more than 20 years experience as a journalist and public relations specialist.

Before joining the Aviation Authority, Ms. Fennell was production assistant to Peter Jennings for *ABC News* in London and a publicist for Walt Disney World. Among her awards is the Public Relations Professional of the Year by the Florida Public Relations Association. In addition, Ms. Fennell was previously named by *Orlando Magazine* as one of the 15 women defining power in Central Florida.

Ms. Fennell is chairman of the Board of Visitors of the School of Journalism and Graphic Communication for Florida A&M University. She is a former Chairman of the Metropolitan Orlando Urban League and former chairman of the Marketing Communications Committee of the Airports Council International - North America.

Ms. Fennell has lived in the United Kingdom, Asia and the South Pacific. She holds a Bachelor of Arts degree in English and journalism from Florida A&M University and studied at Queen's University, Belfast, Northern Ireland.

Ms. Fennell has been a motivational speaker and lecturer for a number of national and international conferences, colleges and events.

The Ballroom at Church Street • 11:30 a.m. - 1:00 p.m.

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Main Entrance:

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Surface Parking Lot - Garland Ave. between Pine St. and Central. Rates vary.
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SunTrust Bank Parking Garage - South St. and Boone Ave. Rates vary.
Church Street Parking Garage - Hughey Ave. and Bob Snow Ln. Rates vary.

Please RSVP for the luncheon no later than September 21, 2007.

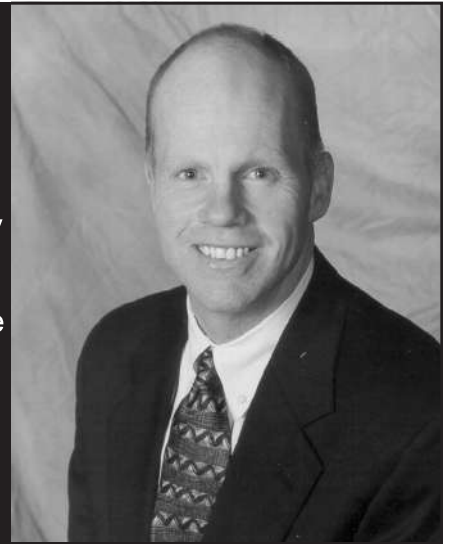
RSVP to Wendy Mazlin, Events Manager, at reservations@ocbanet.org.

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

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Walter McDonough, an accomplished attorney and business executive, brings to his mediation practice twenty years of experience as litigator, general counsel, lecturer and mediator in the construction, insurance and real estate industries.

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Editors' Note

A Special Thank You to Brant Bittner and the OCBA Staff

Thomas A. Zehnder

Kristyne Kennedy and I are very excited (and, I must admit, a bit apprehensive) to be taking over the reigns as Co-editors of *The Briefs* from Jessica Hew and Tad Yates. Under Jessica and Tad's watch, *The Briefs* transformed from a simplistic, black and white (with just a splash of orange!) publication to a professional, nearly full-color, magazine-quality publication of which we can all be very proud. Jessica and Tad deserve a lot of the credit for the transformation *The Briefs* undertook.

But, we would be remiss - and Jessica and Tad would be the first to say so - if we did not recognize and thank our wonderful Executive Director, Brant Bittner, and the OCBA staff for their tireless efforts in making not only *The Briefs*, but our *entire* organization, what it is today. These folks do not get 10% of the credit they truly deserve, and so I wanted to take this opportunity to give them their just, albeit woefully overdue, recognition.

Since he took over as Executive Director, Brant has revitalized our organization. When Brant arrived, the OCBA was on hard times. Brant righted the ship, and now we are stronger than ever, growing at an unmatched rate,

and once again becoming a leader in our state among other local bar associations in service to our membership, to our legal profession and to our community.

But Brant has not done it alone. We are very fortunate to have a dedicated and loyal staff that is unwavering in their commitment to promoting and improving the OCBA. Below are photos of our OCBA staff, along with their names, their job positions and their contact information. If you don't know these folks, I urge to get to know them. They are the backbone of our organization and they are unfailingly willing to help our members with whatever they need for their practice to be a success - from providing placement services, to offering continuing legal education and seminars, to arranging conference room facilities, to facilitating networking and referral business. The OCBA is strong because of its employees - please join me in thanking this wonderfully dedicated and professional group for everything that they do for all of us. Thank you OCBA Staff!

Thomas A. Zehnder is a partner with King, Blackwell, Downs & Zehnder, P.A. He has been a member of the OCBA since 1996.



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Got Professionalism?

Time is Running Out!

There are less than 90 days to make your nomination for the 2008 OCBA Professionalism Awards

Make Your Nomination Now by E-mail, Facsimile, Letter or by Completing the Application Form

The OCBA Professionalism Committee is now accepting nominations for the Orange County Bar Association's most prestigious annual awards for legal professionalism – the William Trickett, Jr. Professionalism Award and the Lawrence G. Mathews, Jr. Young Lawyer Professionalism Award. In context, these awards have been and are considered to be the OCBA equivalent of a "Nobel Prize" for legal professionalism. The past winners of these awards are some of the most distinguished and well-respected attorneys in Orange County and remain committed to achieving throughout their careers the highest ideals of professionalism. The past winners are also highly successful attorneys who practice honorably with civility, who are recognized as leaders in their respective areas of practice, and who have demonstrated their commitment to professionalism and improving the practice of law not only by being consummate professionals, but also by being active in the community, with the OCBA and the Florida Bar.

In 1994, the OCBA founded the William Trickett, Jr. Professionalism Award to recognize an attorney for career dedication to aspiring to the highest ideals of professionalism. In 2003, the OCBA established the Lawrence G. Mathews, Jr. Young Lawyer Professionalism Award to recognize an up and coming lawyer for career dedication to aspiring to the highest ideals of professionalism. Annually, we honor the memory of distinguished attorneys William Trickett, Jr. and Larry G. Mathews, Jr. by presenting those awards to attorneys who have followed in their footsteps down the path of professionalism.

IMPORTANT ANNOUNCEMENT:

The OCBA hereby announces the formulation of an annual professionalism award for a jurist, dedicated to the memory of our friend, colleague and distinguished jurist, U.S. Magistrate James G. Glazebrook. The **James G. Glazebrook Memorial Bar Service Award** will be presented each year to an outstanding jurist for dedication to professionalism and outstanding service to and support for the legal profession.

Frequently Asked Questions

1. How do I make a nomination for the OCBA Awards for Professionalism?

Nominations for the awards should be in written form by, letter, e-mail, facsimile, or by nomination form (available on the OCBA website at

www.orangecountybar.org). Please indicate for which award you are making the nomination and explain why your nominee embodies the qualities worthy of receiving the award. Please also ensure that you provide contact information so that we may contact you if we have questions. Forward your nomination(s) or any question(s) regarding the awards to either:

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Orange County Bar Association
880 N. Orange Avenue
Orlando, FL 32801
Phone No.: 407-422-4551
Fax: 407-843-3470
E-mail: Brantb@ocbanet.org

Howard D. Friedman
Chair, OCBA Professionalism Committee
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Orlando, FL 32806
Phone No.: 407-836-7544
E-mail: ctgmhf1@ocnjcc.org

Continued on page 10



2. What are the award criteria for each of the OCBA Awards for Professionalism?

James G. Glazebrook Memorial Bar Service Award
(Jurist)

The James G. Glazebrook Memorial Bar Service Award is presented annually to the state or federal judge (including state magistrates, county court and circuit judges, and appellate judges; and federal magistrates and district court and bankruptcy court judges) serving Orange County or hearing cases in a district which includes Orange County, who best embodies the following characteristics: (a) service to and support for the legal profession and/or the Orange County Bar Association and/or The Legal Aid Society of the OCBA; (b) dedication to professionalism, both in and out of the courtroom; and (c) leadership in promoting the qualities that heighten professionalism, including civility, integrity, and respect for our system of justice.

William Trickel, Jr. Professionalism Award
(Attorney in practice 15 or more years)

Lawrence G. Mathews, Jr.
Young Lawyer Professionalism Award
(Attorney in practice less than 15 years)

Each year the OCBA Professionalism Committee, through the Trickel and Mathews awards, seeks to honor practicing attorneys whose conduct and career stand as a model 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 both younger attorneys and long-standing members who meet the highest standards of professionalism. Through the Mathews and Trickel 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.

3. What is the deadline for submitting my nomination?

The deadline for submission of your nomination for the 2008 Glazebrook, Trickel and Mathews awards is **December 1, 2007.**

4. Who are the past recipients of these awards?

*OCBA William Trickel, Jr.
Professionalism Award Recipients*

1994	David B. King
1995	Jules S. Cohen
1996	Hon. Gregory A. Presnell
1997	Hon. John Marshall Kest
1998	Darryl M. Bloodworth
1999	Chandler R. Muller
2000	R. Lee Bennett
2001	Hon. Sally D.M. Kest
2002	Ava K. Doppelt
2003	Bruce B. Blackwell
2004	Warren W. Lindsey
2005	Michael P. McMahon
2006	William B. Wilson
2007	Kirk N. Kirkconnell
2008	Now Accepting Nominations

*OCBA Lawrence G. Mathews, Jr.
Young Lawyer Professionalism Award Recipients*

2004	Tad A. Yates
2005	Nicholas A. Shannin
2006	Thomas A. Zehnder
2007	Diego "Woody" Rodriguez
2008	Now Accepting Nominations

*OCBA James G. Glazebrook
Memorial Bar Service Award Recipients*

2008	Now Accepting Nominations
------	---------------------------

5. Whose name should be added in 2008 to this list of distinguished attorneys and jurists?

It is up to you OCBA members. By making the small effort necessary to submit your nomination, you help a worthy friend, colleague, associate, partner or jurist receive the recognition that he or she deserves. You may make a nomination for one, two or all three awards. Make your nomination today and in doing so, help us serve and celebrate the memory of our colleagues William Trickel, Jr., Larry Mathews, Jr. and James G. Glazebrook.

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75th Anniversary Committee News

Three Score and 15 Years Ago . . .

— Diego “Woody” Rodriguez



By the time you read this edition of *The Briefs*, September will be upon us and 2008 will be around the corner. With it will come a year of many changes, including the election of the 44th President of the United States of America. But closer to home, 2008 represents a significant milestone in the history of the Orange County Bar Association. 2008 will mark the 75th anniversary of the “official” formation of the OCBA.

In recognition of the impact the OCBA has had on our legal community and the Orange County community as a whole, a 75th Anniversary Committee has been created to compile a more detailed account of the OCBA’s history and to commemorate its many achievements and contributions. Over the next year, this column will be dedicated to highlighting some of the historical moments and figures that have helped shape the OCBA into what it is today. The Committee is also discussing what other activities we should undertake to celebrate our organization’s history.

As Orange County is comprised of a number of transplants, myself included, the history of its preeminent legal organization is foreign to most of us. As a Co-chair of the Anniversary Committee, most of what I have gathered has been from past membership directories or the Lawyers’ Handbook as it was previously called. A copy of the 1973 handbook, donated to the OCBA by Judge Sally Kest, provides an excellent summary of our formative years.

Before 1933, lawyers practicing in Orange County were part of what was known as the 17th Judicial Circuit Bar Association, comprised of attorneys practicing in Orange and Osceola counties. That organization was formed in 1924, and our official list of presidents still recognizes the names of the individuals who led the 17th Judicial Circuit Bar Association.

In 1933, however, the OCBA emerged from that older association and was led by Maxwell W. Wells, Sr., who would become our “first” OCBA president. At the time, the OCBA operated under a constitution which was amended frequently.

Some 30 years later, the OCBA took another significant step in its development. At the general membership meeting held on November 16, 1967, the Orange County Bar Association approved its Articles of Incorporation and By-laws. Then on December 7, 1967, the OCBA became a not-for-profit corporation under Chapter 617 of the Florida Statutes.

Today, the structure of our organization remains largely unchanged. The by-laws adopted in 1967 called for nine members of the OCBA to be elected as at-large board members serving on an Executive Council along with four elected officers and the immediate past president. Today the composition of the Executive Council remains the same.

We know that the Legal Aid Society of the Orange

County Bar Association existed in some form prior to its incorporation in 1967. However, as a testament to the OCBA’s commitment to service, the Legal Aid Society was actually incorporated as a not-for-profit corporation on April 28, 1967, about eight months before incorporation of the bar association.

Another significant development in the OCBA’s history was the adoption of the Young Lawyers Section’s By-laws by the Executive Council on December 12, 1989. Today, more than 20 percent of the lawyers in the OCBA are members of the Young Lawyers Section. More importantly, a number of those who have served on the YLS board have gone on to lead the organization as members of the Executive Council, the Legal Aid Society Board and other substantive and social committees.

But all of this information only provides a snapshot of the OCBA’s history, and this is where you or your firm can help out. The Anniversary Committee is interested in any records, documents, photographs or publications relating to the OCBA’s history and its activities. Perhaps you have something as interesting as a scrapbook or as simple as an early issue of *The Briefs*. Perhaps your firm has kept membership directories in storage or in a corner of its law library. Or perhaps you were part of the talent show in the late 1990s and have some pictures to prove it. We welcome anything that memorializes our history.

The Committee is especially interested in copies of *The Briefs*, newsletters, membership directories or lawyer handbooks predating 1985. Whether the documents are donated or loaned, all contributions will be recognized and greatly appreciated in helping the Committee properly reconstruct our history.

In addition to your mementos, we invite you to offer any suggestions for our 75th Anniversary celebration. If you have a passion for history, then join us for our next Committee meeting. Times and dates are available on the OCBA website or via our e-mail blasts. And, if you have documents or publications you would like to share, please do not hesitate to contact me directly at dwrodriguez@aol.com so that your materials can be included in our efforts.

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



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OCBA Legal Aid News

Legal Aid Participates in Project Homeless Connect

In 1987, Congress passed the Stewart B. McKinney Homeless Assistance Act, which established the Interagency Council on Homelessness. The Council is responsible for providing Federal leadership for activities to assist homeless families and individuals. As part of that responsibility, the Council has developed a 10-year plan to end chronic homelessness. The Council has asked counties and cities across the United States to adopt the plan and provide "Project Homeless Connect" events for their local homeless individuals. The events are organized to provide a one-day, one-stop shop of social services. The resources available at the events that have been held in Orange County have ranged from showers, hair cuts, medical care, employment opportunities, substance abuse and mental health counseling, ID cards, housing and shelter information to legal assistance.

As part of our mission, The Legal Aid Society of the Orange County Bar Association, Inc. participates in numerous community events designed to educate low-income citizens about their legal rights. These events also allow us to bring access to free legal assistance to the

neighborhoods and/or places where low-income residents congregate. In keeping with this part of our mission, the Legal Aid Society participated in all three Project Homeless Connect events in Orange County by having seven lawyers and three staff members in attendance. The first event was held in December in downtown Orlando, the second event in East Orange County on June 22nd, and the third event at Barnett Park on July 13th. The City of Orlando, Orange County and over 50 community organizations joined together to make these outreach efforts a success.

The three events together drew more than 700 homeless individuals who received an array of services. Legal Aid Society offered assistance to approximately 200 individuals, including helping many of them to obtain birth certificates and apply for food stamps, and giving legal advice on a variety of legal issues. The events were great opportunities to reach some of our neediest citizens all at one time. Legal Aid looks forward to participating in the Project Homeless Connect events again.

Submitted by the Legal Aid Society of the OCBA.



Legal Aid Society forms Building Committee

The Board of Trustees of the Legal Aid Society (LAS) of the OCBA has formed a Building Committee to address the organization's urgent need for additional space. The LAS purchased its current building located at 100 E. Robinson Street in 1988 from the Mateer Harbert law firm. At the time, the organization moved from the offices of the OCBA to its own headquarters. In 1988, the Legal Aid Society had five attorneys, 15 support staff and handled approximately 2,500 cases and *pro bono* projects per year. The population of Orange County in the late 1980s was approximately 575,000 individuals. The current building is approximately 10,000 square feet.

Today, the Legal Aid Society has 18 attorneys, 24 support staff (not including volunteers) and handles approximately 5,000 cases and *pro bono* projects per year. The population of Orange County is now over 1,000,000 individuals. Needless to say, the current building is bursting at the seams. Sadly, the organization is forced at times to turn away cases because of capacity restraints.

The Building Committee plans to consider various alternatives including expansion of the LAS's existing building, the sale or exchange of the existing building, the purchase of one or more additional buildings and long-term lease options. The Building Committee is chaired by Glenn Adams of Holland & Knight LLP, and other members include Matt Brenner of Lowndes, Drosdick, Doster, Kantor & Reed; Meena Hirani of Meenakshi A. Hirani, P.A.; Alex MacKinnon of Smith MacKinnon P.A.; Chuck Stepter of Fishback Dominick; and Esther Whitehead of the State Attorney's Office. If you have information that should be considered by the Building Committee, please contact Glenn Adams at 407-244-5222 (glenn.adams@hklaw.com) or any of the other Building Committee members.



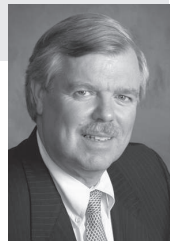
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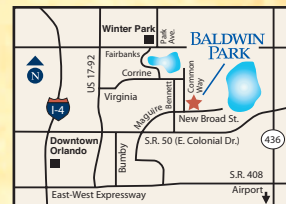
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Criminal Law Committee

New Criminal Laws Enacted During the 2007 Legislative Session

— Roger B. Handberg¹



The Florida Legislature completed its 2007 regular session in May. The following are five laws passed during that session that may be of interest to criminal practitioners.

1. Anti-Murder Act. One of the first bills implemented into law was the “Anti-Murder Act.” This bill revises the procedures that apply to violations of probation and community control. These new procedures apply to “violent felony offenders of special concern,” which include individuals who were sentenced to probation or community control for convictions for one of eighteen “qualifying crimes,” individuals who commit a “qualifying crime” after having committed such a crime previously, or individuals who are arrested for a “qualifying crime” after having been previously found by a court to be a habitual violent felony offender, a three-time violent felony offender, or a sexual predator. When it is alleged that a violent felony offender of special concern has violated probation or community control (except for a failure to pay costs, fine, or restitution), the Act provides that the individual may not be released from jail until a court has conducted a hearing. At that hearing, the court must determine whether the violent felony offender of special concern is a danger to the community and enter a written finding on that issue. If a violent felony offender of special concern is found to be such a danger to the community, the Act provides that the court must revoke the probation or community control and then sentence the violent felony offender of special concern. The Anti-Murder Act became law on March 12, 2007.

2. Sexual Offender Registration. In 2006, Congress passed the Adam Walsh Child Protection and Safety Act of 2006, which, among other things, requires that each state maintain a “jurisdiction-wide sexual offender registry” and that every sex offender register or face federal prosecution for the felony offense of failing to register. In response, the Florida Legislature modified Florida’s registration requirements to comply with federal law. Some of the changes include requiring registration of juveniles aged 14 or older who have been adjudicated delinquent for committing sexual battery or certain types of lewd battery or molestation offenses, as well as mandating sexual predators and some sexual offenders (as those terms are defined by Florida law) to report in person to the local sheriff’s office every three months as opposed to every six months. In addition, the Florida Legislature has imposed requirements on law enforcement. In particular, local law enforcement and some state agencies are now required to report to the Florida Department of Law Enforcement (FDLE) the failure

of a sexual predator or sexual offender to register, and the FDLE has been mandated by January 1, 2008, to “develop and maintain a system to provide automatic notification of registration information regarding sexual predators and sexual offenders to the public.” This legislation was signed by the Governor and became law on July 1, 2007.

3. Cybercrimes Against Children Act of 2007. This Act brings about four changes in Florida law. First, the Act creates a number of new felony offenses for misrepresenting an individual’s age when using the Internet to influence a child to commit sexual acts, traveling to meet a person thought to be a minor for the purpose of engaging in unlawful sexual conduct, and persuading a parent or guardian of a child to consent to a child engaging in sexual conduct. Second, the Act increases by one degree the felony level of a violation of Fla. Stat. §§ 827.071, 847.0135, 847.0137, and 847.0138 when the crime involves one of the following: more than ten images of child pornography, an image of a child under the age of five, an image of sadomasochistic abuse of a child, an image of sexual battery of a child, an image of sexual bestiality involving a child, or any movie involving a child. Third, the Act requires sexual predators and sexual offenders to register any e-mail address or instant message name with the FDLE. The FDLE is authorized to provide those e-mail addresses and instant message names to social networking Internet sites, so that those sites can use that information to screen for those users. Fourth, the Act provides that the Office of Statewide Prosecution may investigate and prosecute any violation of Chapter 827 (relating to abuse of children) when the crime is “facilitated by or connected to the use of the Internet or any device capable of electronic storage or transmission.” Under those circumstances, the Act states that any such crime is considered to be a “crime occurring in every judicial circuit within the state.” This Act was approved by the Governor on June 15, 2007, and will go into effect on October 1, 2007.

4. Crimes Occurring During a State of Emergency. The Legislature passed a bill that reclassifies the degree of certain burglary and theft offenses that are committed during a state of emergency. These reclassifications apply when the Governor has declared a state of emergency in the county where the burglary or theft occurs and the burglary or theft is “facilitated by conditions arising from the emergency.” By statute, that phrase is defined to mean “civil unrest, power outages, curfews, voluntary or mandatory evacuations, or a reduction in the presence of or response time for first responders or homeland security personnel.” Individuals

Continued on page 18

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Appellate Practice Committee

Take the Appellate Challenge!

——— Marcia K. Lippincott and Michael R. D'Lugo



This is the first offering from the newest addition to the Orange County Bar Association family of committees: The Appellate Practice Committee. Throughout the year, we will be providing OCBA members with information that may be helpful to your practice, whether you practice in a large firm or as a solo practitioner.

We, the Appellate Practice Committee, challenge you to test your knowledge of Florida appellate procedure by answering twenty simple questions over the next four months. Here are our first five questions, followed by the answers.¹

Questions

1. The Final Judgment from a bench trial is mailed to your office and does not arrive until 10 days later. You move for rehearing within 15 days from the date the judgment was mailed (10 days, plus the five-day mailing extension). Forty-five days later, the trial judge enters an order denying rehearing and within 30 days thereafter you appeal. Your opponent moves to dismiss your appeal. What will the appellate court do?

2. You lose a major jury trial. Final Judgment is entered 15 days after the jury returns a verdict. Within 10 days after Final Judgment, you move for a new trial based upon errors you allege occurred at trial. Twenty days later your motion is denied and you file your Notice of Appeal. Your opponent moves to dismiss your appeal. What will the appellate court do?

3. You receive a Final Judgment from a bench trial and immediately request an additional 10-day period to file your Motion for Rehearing because you are scheduled for surgery. The trial court grants your motion. Within the extended period, but more than 10 days after entry of the Final Judgment, you move for rehearing. Your motion is denied 30 days later. Within 30 days from this denial, you file your Notice of Appeal. Your opponent files a motion to dismiss your appeal. What will the appellate court do?

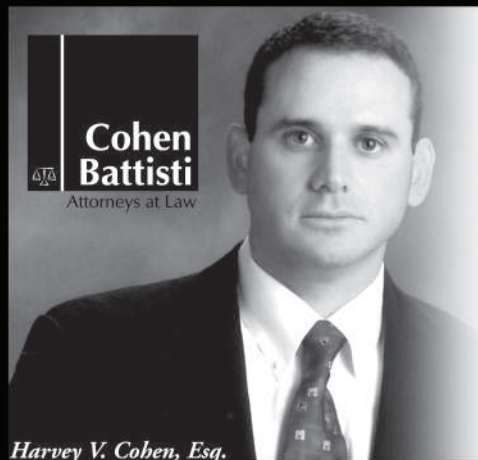
4. You win a major jury verdict. Your opponent moves for a new trial and it is granted. However, the order is deficient because it does not specify the basis for this ruling. You recognize this procedural error and, within 10 days, you move to amend the order. Fifteen days later the trial court enters an amended order granting a new trial that provides the reasons. You appeal within 30 days of the amended order, but your opponent moves to dismiss the appeal. What will the appellate court do?

5. Although a non-jury trial was held in your case, the trial court enters a judgment inaccurately titled "Default Final Judgment." The trial judge recognizes his mistake and *sua sponte* issues a corrected judgment identical to the first one, except for the removal of the inaccurate "default" moniker. You appeal within 30 days of the corrected judgment, but not the "Default Final Judgment," and your opponent moves to dismiss the appeal. What will the appellate court do?

Answers on page 30

¹The questions and answers are analyzed under the Florida Rules of Appellate Procedure.

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arrested under these circumstances may not be released "until the person appears before the committing magistrate at a first-appearance hearing." In addition to increasing the severity of burglary and theft offenses occurring during a state of emergency, the bill creates new burglary and theft crimes for items taken from an "authorized emergency vehicle." This bill was approved by the Governor on June 12, 2007, and went into effect on July 1, 2007.

5. Criminal Conflict and Civil Regional Counsel.

The Florida Legislature has created five regional offices to provide representation to indigent defendants who cannot be represented by the public defender because of a conflict of interest or some other reason. The geographic boundaries of the five regional offices are the same as those for the five district courts of appeal. Each regional office will be headed by a regional counsel who must be a member in good standing of the Florida Bar or the bar of another state for the preceding five years. The Supreme Court Nominating Commission will recommend three nominees for the position to the Governor who will select the attorney to serve in the position subject to Senate confirmation. An indigent defendant may only have a private attorney appointed to represent him/her if both the public defender and the office of criminal conflict counsel have a conflict of interest or are otherwise unable to represent the indigent defendant. For private counsel appointed in such situations, the Florida Legislature has set up a procedure for those "rare occasions" when an "attorney may receive a case that requires extraordinary and unusual effort" that would justify fees in excess of the caps that are specified in the statutes. In those circumstances, an attorney may file a motion with the chief judge for an order approving payment of a fee in excess of the limits. The chief judge must hold an evidentiary hearing. After considering the evidence presented, the chief judge may order an increase in compensation, but only to the extent necessary "to ensure that the fees paid are not confiscatory under common law." At any rate, an attorney may not receive more than 200 percent of the flat fee established for the category of case, "absent a specific finding that 200 percent of the flat fee in the case would be confiscatory." Moreover, an attorney may not receive an additional fee "if the number of work hours does not exceed 75 or the number of state's witnesses deposed does not exceed 20." This legislation was approved by the Governor on May 24, 2007. The legislation provides that the regional counsels should be appointed for a term beginning on July 1, 2007 with the expectation that the regional counsels will use the period from their appointment to October 1, 2007, to set up their offices. The other provisions of the legislation have varying effective dates.

¹ Handberg is an Assistant United States Attorney with the Orlando office of the United States Attorney's Office. The views expressed in this article are solely his own and do not reflect any position, policy, or opinion of the United States Attorney's Office or the United States Department of Justice. He has been a member of the OCBA since 2003.

Side Bar

Jessica K. Hew



In our second month of organizational togetherness, we have a lot to tell you! Let's get to it - starting with the most important joint function of the month!

Mark your calendars for September 13, 2007, the annual Joint Happy Hour at Doc's Restaurant. This event is a great mixer of the OCBA and many of the OCBA's *SideBars*. It is always well attended and a whole lot of fun! Join us!

The **Central Florida Paralegal Association, Inc.** (CFPA) hosts monthly lunches at three locations throughout the Central Florida area, including Winter Park/Maitland (second Thursday of the month), Downtown Orlando (second Wednesday of the month) and South Orlando (third Wednesday of the month). The Annual Meeting of CFPA will be held on September 21, 2007, at 6:00 p.m., at the Orange County Regional History Center. CFPA is also participating in the Alzheimer's Memory Walk 2007 on Saturday, October 6, 2007, at Lake Eola. Join Team CFPA - canine friends and family are welcome! Please visit CFPA's website at www.cfpainc.com for more details on these events.

During its July luncheon, members of the **Central Florida Association for Women Lawyers** (CFAWL) learned all about one of Central Florida's premier non-profit organizations, BETA Center. CFAWL would like to thank Lisa Blackwelder, Development Director for BETA, and Terry Delahunty (Foley & Lardner), a past chairman of BETA Center's board of directors, for their educational and inspiring presentation on BETA Center.

CFAWL is currently conducting its annual membership drive. The membership application (for both new and renewing members) is available online at www.cfawlw.org. CFAWL's New Member Reception will take place on October 11, 2007, starting at 5:30 p.m. at the Downtown Orlando Marriott. CFAWL invites you to attend and wants to welcome you as a new (or returning) member.

The Florida Bar Foundation awarded a \$1,000 grant for CFAWL's "Art Finds a Place for Children" event. The event's funds support A Place for Children, providing childcare for litigants and witnesses in the Orange County Courthouse. Details on this event are

Continued on page 20



Rainmaking

Create Your Own Micro-Climate to Make It Rain

Mark Powers



Watching them operate probably etched a picture in your mind of what a rainmaker is and probably set a high standard of what it takes to develop new business.

You've seen them at bar events, parties or large charity functions. Brimming with confidence, stereotypical rainmakers navigate most social situations with ease and radiate such self-assurance that new clients are continually drawn to them. As you watched them operate, the picture of individuals who are at their best in all social situations became your idea of the perfect rainmaker.

Unfortunately this level of social ease does not come naturally to everyone. In fact, you might be someone who is decidedly *not* at your best in unfamiliar social territory. When asked to market yourself, you might experience apprehension because you don't believe you are a *natural* at client development. For you, marketing means you have to "fake it," and few things are more exhausting than having to fake your way through a marketing activity or event that holds no interest for you. After trying a couple of times, you may have decided you just don't have what it takes.

But if you're not a natural marketer, are you doomed to always work for those who can make it rain? Or to join the ranks of sole proprietors whose firms limp along and never fully realize their potential? This can be of critical importance given that your ability to develop clients may help to shape your destiny.

I believe that *every* attorney can develop clients, even those who may not have the personality we normally associate with the stereotypical rainmaker. In my experience, there are as many different ways to market as there are attorneys.

The key is to identify and play to your own strengths.

One way to determine what your strengths are is to take a look at your hobbies, passions and interests, both inside and outside the practice of law. These hobbies, passions and interests tend to bring out the best in your personality. When your marketing approach is tied to what you love, your effectiveness as a rainmaker blossoms. Incorporating your interests enables you to operate in an environment of your own choosing and minimizes the anxiety you may feel when you are forced to socialize in other ways. At a Rotary Club dinner, for example, you might feel bored and uninterested because the agenda doesn't authentically engage you. However, when you are involved in something you love - be it sports, gourmet food or lecturing on a favorite topic - your comfort level is higher, you have more fun and you're more fun to be around. Let the stereotypical rainmakers storm away; I say create your own micro-climate for marketing success.

Read through the examples below that detail ways other attorneys create their own marketing micro-climates, and you may find out ideas on how you can use your less obvious talents to forward your marketing goals.

1. The Expert/Writer

Many attorneys have narrowed their practice areas to a specific niche and are considered experts in their field. Quietly passionate about their subject matter, they excel at building their reputation through the written word. Writing columns, newsletters, articles and books is how they market themselves and it's a good fit for their less outgoing personalities. In addition, their approach to research can kill two birds with one stone. We suggest these attorneys use *interviews* to obtain information regarding case studies and data, which can provide a great opportunity to initiate lunch meetings with clients and referral resources. This is what we call a "knowledge-based" approach to marketing.

2. The Expert/Speaker

Another knowledge-based approach is taken by attorneys who have developed ways to communicate their expertise clearly and are comfortable in front of groups. They focus on setting up seminars to educate potential referral sources and/or develop new clients. Like other experts, these attorneys can also use lunches and meetings with influencers, potential influencers and clients to research their workshops and seminars while deepening their relationships.

3. The Sport

These attorneys have a love of participating in or watching sports. Whether they are passionate about football, golf, sailing, skiing or any other recreational activity, sports of all kinds provide the perfect platform for building rapport with referral sources - even if business is never discussed. Attorneys who take this activity-based approach can market themselves by inviting referral sources to play (golf, tennis, etc.), asking influencers to attend games with them, giving out tickets to games or even organizing charity marathons or tournaments. The love of the game is a great excuse to connect and build relationships, both old and new.

4. The Family-Focused Attorney

Usually younger lawyers with children, these attorneys spend a great deal of time focused on church and school activities. Their marketing approach should take advantage of the contacts they make in coaching youth sports, sponsoring activities or participating in parent/teacher organizations. The contacts they make with other up-and-coming professional parents will often be the source of their future referrals. Family-focused attorneys' formal marketing plans will depend heavily on lunches and daytime activities as they will have less free time in the evenings due to family obligations, but their informal marketing plan can include much of their social life in the community.

Continued on page 20

5. The Gourmet

Attorneys who love gourmet food, wine and spirits have many options to market themselves and share their passion. They can cook for small groups at home or take clients to restaurants they've discovered. They can host or attend wine tastings with friends and referral sources. They can start dinner clubs in which meals are hosted by club members, or they can host parties that display their cooking talents or those of local chefs. The emphasis here will be on meals: lunches, dinners and other food- and wine-related events. They can share recipes, sources for hard to find items and give books that express their love of food and wine.

6. The Traveler

Traveling the world is often the passion of many different types of attorneys. To incorporate a love of travel into a marketing program, these attorneys can send an e-mail journal to friends and referral sources, create a photo-journal of their trip to share with others, or create a post-vacation event that showcases the food and drink of their destination. Some of our clients have even taken trips with their referral sources to golf, snow ski or scuba dive - all of which provide great opportunities to bond and develop relationships.

7. The Reader

If a passion for reading is your thing, you'll be gratified to know you can turn this to your advantage in marketing. Many professionals belong to book study groups whose members read business books and discuss them on a monthly basis. These groups can be comprised of other attorneys - especially if they are the group who sends your best business - or other professionals in the community whom you've gotten to know because you have clients in common. If no group like this exists in your area, start one. If reading business books sounds too much like work, consider joining a book club that focuses on fiction as this can also be made up of potential referrers.

The idea here is simple: don't make service club meetings your marketing focus if you aren't genuinely interested in their agendas. Instead of deciding that you don't have the right personality to market yourself, create a focus for your marketing that inspires you and fits your personality. Never forget that the ability to market yourself gives you power. With power, you can direct your career the way you choose. Do what you enjoy, share it with other people, and the business will follow.

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

forthcoming!

The **Hispanic Bar Association (HBA)** was also granted a Voluntary Bar Association Community Service Grant for "Conozcas tus Derechos" or "Know Your Rights." The program is a four-week series of workshops on differing legal issues for the local Hispanic community.

During June, the HBA held its Annual Membership Drive Happy Hour at Sam Sneads (sponsored by Felix T. Aguilu, P.A.) and also co-sponsored a Dessert Reception at the annual Florida Bar Meeting in honor of new Florida Bar President Frank Angones. The HBA is currently working on its Annual School Supply Drive, collecting school supplies for an entire second grade of an elementary school in Orange County. On October 25, 2007, the HBA will also present the "Path to the Bench" Seminar following the OCBA Bar Luncheon.

The **Paul C. Perkins Bar Association (PCPBar)** is pleased to announce that Dennis Archer has been confirmed as the speaker for the February 2008 Black History Month joint luncheon with OCBA. Mr. Archer is a past-President of the American Bar Association, past-Mayor of Detroit and past-Michigan Supreme Court Justice. He is a phenomenal speaker and should not be missed! Mark your calendars for an extraordinary luncheon on February 28, 2008, at 11:30 a.m.

The PCPBar Website is now officially up and running at <http://www.pcpbar.com/membership.html>. It has online membership applications, membership renewals and the ability to pay online. Please contact Donell Hicks at Treasurer@pcpbar.com if you have any questions regarding membership or dues.

Congratulations to Magistrate Odessia Joiner, who was recently honored and recognized by the Florida Counsel Past Bar President's Association for her work as the past PCPBar President,. Magistrate Joiner was presented with the Outstanding Bar President award during the Florida Bar's Voluntary Bar Leaders Conference in late July.

I hope that this helps you navigate the Central Florida legal organizations for September. Please send your organizational news to me at jhew@grahambuilder.com. Have a great Labor Day!

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



Insurance Law Committee

Commercial General Liability (CGL) Policies - Update on Coverage in Construction Claims

James W. Markel

The Commercial General Liability (CGL) policy, formerly called the “Comprehensive General Liability” policy, provides liability insurance to contractors, general contractors and subcontractors to defend them in litigation and indemnify them for personal injury and property damages they cause.

The purpose of the CGL is to provide coverage for damages due to a contractor’s actions in tort. A CGL policy is not intended to provide coverage for a contractor’s contract obligations or to pay damages to correct or complete a contractor’s poor or incomplete work (which is the purpose of a surety bond).

AIA Document A201-1997, General Conditions of the Contract for Construction is the industry standard and the guide for a general contractor’s duties. Article 11.1, CONTRACTOR’S LIABILITY INSURANCE reads, in part:

The Contractor shall purchase from and maintain in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located such insurance as will protect the Contractor from claims set forth below which may arise out of or result from the Contractor’s operations under the Contract and for which the Contractor may be legally liable, whether such operations be by the Contractor or by a Subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable:

- .4 claims for damages insured by the usual personal injury liability coverage;
- .5 claims for damages, *other than to the Work itself*, because of injury to or destruction of tangible property, including loss of use resulting therefrom;
- .7 claims for bodily injury or property damage arising out of completed operations;

(emphasis added). The foregoing language reflects the industry standard for insurance coverage required of contractors and is, or should be, a guide to the courts in interpreting policies since insurance policies are written to serve the market. As a helpful aside, the AIA Document A201 “General Conditions of the Contract for Construction” is undergoing the 10-year extensive construction industry committees’ review and comments. A new version of A201, probably to be called AIA A201-207, is being adopted. It should be assumed that the insurance industry will have some input, directly or indirectly, in the articles setting forth the insurance requirements for contractors.

I. The “Completed and Accepted” Rule

Historically, the limitation of liability of contractors was based on the common law rule announced and discussed in *Slavin v. Kay*, 108 So.2d 462 (Fla. 1959), that the contractor’s liability for personal injury and property damage ceased when the project or work was completed and accepted by the owner:

In the opinion written when the matter came here the court referred to the ‘well-settled rule’ that contractors are not liable to third persons after their work was completed and accepted by the owner...”

Id. at 463. The “completed and accepted” rule has been fully elucidated and annotated in 70 A.L.R. 5th., 261, *Modern status of rules regarding tort liability of building and construction contractor for injury or damage to third person occurring after completion and acceptance of work; exceptions to “completed and accepted” rule*. In applying this rule, Florida courts have liberally upheld the exceptions to the rule to allow for liability – where the work is dangerously defective, inherently dangerous or imminently dangerous, the contractor concealed the work, the defect is latent, or the work constitutes a nuisance *per se*. The latent defect exception was discussed and approved in *Kala Investments, Inc. v. Sklar*, 538 So.2d 909 (Fla. 3d DCA 1989). In *Kala Investments*, the Third District Court of Appeal allowed a question of fact to be raised to defeat defense motions for summary judgment:

Under the *Slavin* rule, since its advent expanded to limit the liability of engineers and architects as well as contractors, the original wrongdoer is not relieved of liability if the defect is found to be ‘latent,’ that is, not apparent by the use of one’s ordinary senses from a casual observation of the premises . . .

. . . The co-defendants contend here, as they did below, that the defect was obvious because the placement of the window was ‘obviously’ almost a foot lower than the code requirement and ‘obviously’ did not contain a guard rail. But the test for patency is not whether the object itself or its distance from the floor was obvious to Kala, but whether the *defective nature* of the object was obvious to Kala with the exercise of reasonable care. . .

Id. at 913 (internal citations omitted).

Florida courts have since advanced and, while acknowledging the continuing existence of the *Slavin*

Continued on page 26



The Summer Happy Hour & Team Trivia event gave OCBA members a chance to strut their stuff. Congratulations to the winning team from Broad and Cassel!



YLS members have been busy this summer enjoying pub crawls and happy hours! Pictured having fun are Jennifer Sykes, Ryan Davis, Sarah Rumpf, Jennifer Cantrell, Wiley Boston.



The annual Afternoon at the Courthouse featured presentations by Chief Public Defender Robert Wesley and the Hon. C. Jeffery Arnold.



Dog Day Afternoon is always a special time for OCBA members and their canine buddies, including Alexander and Cara Dobrev and their "best friend," Lady Guinevere.

"What mighty contests rise from trivial things." – Alexander Pope¹

Greetings all and thank you for returning for another hearty helping of Hearsay! Our lead quote stems, of course, from a mighty contest held on a dark and stormy night in mid-July. Organized by **Shane "Gunslinger" Thomas** of Roetzel "Rhymes with Pretzel" & Address, this sold-out affair packed the house, with 150 contestants present in Parties of Five ready to duke it out to see who could acquire the coveted title of "OCBA Trivia Champions" for 2007. Last month's column detailed how it was a sell-out, and it was. There was no room at the inn for late-to-the-party teams, with those who didn't arrange their "Teameus Mas Geekeus" squad in advance getting split up to fill out the few teams that only had four. Once there, teams were treated to four rounds of questions, spanning the highly academic (Identify the physicist for whom the "exclusion principle" is named²) to the slightly less so (Of the three Holy Jessicas, who is the oldest: Alba, Biel or Simpson?³). And nearly everyone identified the "Magic Grit" line as coming from the legal classic, *My Cousin Vinny*. C'mon, I dare you - next cross-x opportunity you get, see if you can work in: "Were these magic grits? Did you buy them from the same guy who sold Jack his beanstalk beans?"

Despite the fact that the emcee (some **Shannin** fellow) insisted on keeping up with the crowd regarding the imbibing of free beverages while pausing for the scribbling of answers, the evening flowed like the aforementioned beverages and by the end, the Smarty-Pants Seven were ready to be announced. They were in reverse order of finish: 7. Gatorlando - led by **Sarah "Supafan" Rumph**, these intrepid answerers showed well; 6. Forgetmenot Once - the Zimmerman firm led by **Robert "Trebek is for Lightweights" Dietz** took home the title last year and defended well with this showing, but they needed to raid from their understudies; 5. Roetzel "Rhymes with Pretzel" & Address - **Tom "TP" Wert**'s squad included **Bill "Sitting Bull" Sublette** and posted the highest score yet for the ex-prez-laden squad. I'm guessing it was the addition of **Judge Thomas "Ringer" Sculco** to their squad; 4. Forgetmenot Twice - **Zimmerman** places twice, with the Team B bringing home the bragging rights for the year. Rumor has it they bring buzzer sets with them at the ZKS firm retreat; 3. The third place trophy went to **Trevor Arnold**'s team from GrayRobinson. No bonus points for the full-name usage, but Arnold's Army turned in a solid performance to bring back some hardware; 2. Second place trophy? Well, this Bridesmaid's trophy went to the Bride - and Groom - of the **Judi and Ryan's Team Hayes** squad. Judi's team, victors of the original contest, came back to form, picking up the Silver Plate. But who got the Cup? 1. **FIRST PLACE - WE'RE HERE FOR THE BEER**. Not only does **Broad and Cassel** pick up the most points, but it does so with a tremendous entry for best team name as well. Well done, O squad from B&C. Enjoy the trophy and we all look forward to watching your "spirited" defense of the title in '08!

I'd be remiss if I didn't plug, er, mention here the sponsors: many thanks to **Rumberger, Kirk & Caldwell**; **Jackson Lewis**; **Zehnder, King, Blackwell & Downs** (I've got Tom Z's support for life); and the aforementioned **Roetzel & Address** for their generous sponsorship (which, in the case of the later, included an extra keg to keep the questions moving for Round 4!)

Ok, no more trivia - well, until the footnotes. Anything else happen in July, at least since the Law Clerk Reception previously reported on? P.S. - speaking of Law Clerk Reception, mention should be made of the post-reception reception that was punctuated by a dance-

Nicholas A. Shannin

off between **Kristyne** “K-Square” **Kennedy** and **LaShawnda**. (Yeah, **Jackson** if you insist, but in my column, she’s got that Sting/Prince Status of only needing the one name.) Anyhow, as multi-talented as K-Square is, the pre-destined result was inevitable. All hail LaShawnda!

Well, for starters, a little politics is in the air. Last column mentioned **Eric** “Everything starts with an E” **Eisnaugle**’s tilt for the State House. This one raises to your attention the quest of **Rick** “No relation to Ross or Monica” **Geller** of Rumberger, Kirk & Caldwell to fill the County Commission spot of term-limited Teresa Jacobs. Yours truly is on the West Orange Habitat board, where Teresa attended nearly every Habitat dedication with a new flag for the homeowner. Rick, I’ll look forward to seeing you at the homesites for our newest West Orange neighbors!

Last month I reported to you the numerous Grand Guard (50-year members) of the Florida Bar in Orange County. One of those so honored was Billings Morgan Boatwright & Hernandez founder **Jerry Billings**. One-hundred and fifty of his colleagues, including former Orlando Mayor **Bill Frederick**, gathered at Casa Feliz in Winter Park to celebrate his 50th year as an attorney in style. Congratulations.

The Family Law Committee is hosting its annual Judicial Assistants Luncheon, with the tentative date set for September 21, 2007. If you are any kind of litigator at all, you know that a good rapport with the JAs is worth your weight in Nunc Pro Tuncs, while a bad rapport means hearing dates in 2009. Get the balance right by coming to this always popular event – for details, contact **Deborah Korleski** at Deborah@Korleskilaw.com.

Did this mag get to you by September 13? If so, then remember to head out to Doc’s that evening for the OCBA Joint Happy Hour. “Joint” refers to the collaboration of the OCBA with the YLS, the Paul C. Perkins Bar, CFAWL and the HBA, which makes Ocbaylspcpcfawlhba, an old Indian name meaning: “Everyone will be there and have a great time.” Chairs are **Sarah** “Neither Plain nor Tall” **Reiner** and **Nicole** “2d Cousin of Otis” **Smith**; contact the latter for details at nicole.smith@rissman.com. Speaking of Otis Smith, though, if you missed his talk at the OCBA luncheon, you missed one entertaining speaker. We got some real scoop on behind-the-scenes action at the Magic headquarters (not named Hogwarts), plus a real-world quote that let you know “If he was a great speaker then, he’s going to be a great speaker now.” Or something like that!

Ok, then, that’s a wrap for this month. Remember, keep sending me your Kudos, Do-gooder activities, Not-so-do-gooder activities or outright gossip - each has an equal chance of finding its way here – to nshannin@floridalawonline.com. Have a great September, stay cool and I’ll see you in October!

¹ OK, Trivia heads: This Pope-ular quote adorns the box of a game that may be in your closet. How many spaces on the game board? First one to answer correctly gets his/her name in print next month!

² Wolfgang “Amadeus who” Pauli.

³ The daughter of Homer and Marge is the eldest of the three. D’oh!

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



OCBA President Gene Shipley introduced Otis Smith, General Manager of the Orlando Magic, to more than 300 members and guests at July’s luncheon.



In addition to speaking about the Orlando Magic, Otis Smith spoke about increasing children’s opportunities in life by ensuring their access to quality education.



Billings, Morgan, Boatwright and Hernandez recently celebrated the 50th Anniversary of senior partner Jerry Billings’s admission to the Florida Bar. Pictured are Mary Ann Morgan, Jerry Billings and Joe Boatwright.



Members of the OCBA presented various topics at the Voluntary Bar Leaders Conference held in Orlando in July. Pictured are Woody Rodriguez, Kenneth Pratt and Jewel W. Cole.



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

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YLS on the Move!

Getting into the Swing of Things

Taylor C. Kessel



Summer is almost over and it's time to get back into the swing of cooler weather. Some of you need to put those white linen pants back in the closet, and weekends at the beach are about to be replaced with large crowds decked out in orange and blue, garnet and gold, and black and gold. For many of us, that means the weekly pilgrimages back to our respective *alma mater*. It won't be long before we get to wake up to the sounds of the marching band tuning up on the practice field, the sweet smell of the first round of BBQ hitting the grill, and, of course, breaking out our favorite game-day shirt (or orange pants for some of us). But before I get too caught up in the fall madness, let's take a look back at some of the amazing events your YLS brought you this summer.

On Friday, June 20, over 120 young lawyers and summer law clerks attended the annual summer pub crawl in downtown Orlando. Everyone had a great time, and the new venues this year provided a great change of pace. Be on the lookout for info about our next pub crawl in the spring - you won't want to miss it! Thanks again to **Kristen Cox** and **Jason Hill** for putting together the lineup. On Friday, July 27, the Young Lawyers Section hosted its annual "Afternoon at the State Courthouse." More than 50 young lawyers, paralegals and law students attended the event, which was presented by a panel of judges led by **Judge C. Jeffery Arnold**. New and upcoming legal professionals learned some of the "unwritten" rules of procedure and conduct for practicing in the Ninth Judicial Circuit. **Nick Shannin** and **William Davis** assisted Judge Arnold with a skit, which, based on the reviews, was one of the highlights of the seminar. **Chief Judge Belvin Perry**, Orange County Clerk of Courts **Lydia Gardner**, Public Defender **Robert Wesley** and YLS President **Liz McCausland** gave brief talks about their respective organizations. Thank you to **Kristopher Kest** for planning this insightful event! On Saturday morning, July 28, YLS held its annual Dog Day Afternoon Pet Picnic at Fleet People's Park. Many thanks to **Kristen Cox** and **Michael Caborn** for putting on this great event for our canine friends.

And now for a few upcoming YLS and OCBA events. Plan to attend the OCBA Social Committee's annual Joint Happy Hour with PCPBar, HBA, CFAWL and YLS on September 13 at 5:30 p.m. at Doc's Restaurant. The next Guardian *ad Litem* lunchtime training session will be on September 18 from noon to 1:30 p.m. If you are handling a GAL case, this training session will be invaluable and it also includes lunch and CLE credit. This month, **Tenesia Connelly Hall** will present the topic, "Domestic Violence and Dissolution of Marriage Cases." For more info or to RSVP, call or email Misha Vanderhorst at 407-841-8310

x3176 or mvanderhorst@legalaidocba.org.

The Fall Oath of Admissions ceremony will be held on Wednesday, September 26, 2007, at the Orange County Courthouse, 425 Orange Avenue, Orlando, FL 32801. Check-in will begin at 5:45 p.m. and the ceremony to swear in the new attorneys will begin at 6:00 p.m. A reception honoring the new attorneys will begin at 6:30 p.m. for all event attendees to enjoy before and after the ceremonies. Please mark this evening on your calendar and be sure to share the details with new attorneys who took the July 2007 Bar Exam. If you have any questions or would like more information, please contact the committee chairs: **Christy Nash** at cnash@grahambuilder.com or 407-647-4455, or **Jacqueline Ferris** at JFerris@lseblaw.com or 407-481-5800.

On October 6, 2007, YLS will be working with Habitat for Humanity. If you are interested in participating, contact **Shane Fischer** at shane@fischer-law.com or 407-650-5509.

Just another reminder that the 16th Annual YLS Golf Tournament is rapidly approaching. It will be held on Friday, October 12, 2007, at the International Course at Champions Gate. The format this year will be a shotgun start beginning at 8:00 a.m. Breakfast and lunch are included in the registration fee. For more information please contact committee chairs **Elizabeth J. Anderson** at eanderson@sctlaw.com or **Sunny Lim** at slim@sctlaw.com. If you would like to help plan this event, feel free to attend the committee meeting on September 12 at 5:30 p.m. at Urban Flats.

The next UF Law Alumni Happy Hour will be held on Thursday, October 18, from 6:00 p.m. to 8:00 p.m. UF College of Law Professor Michael Seigel will be signing his book. If you are interested in attending, please RSVP to **Sarah Rumpf** at srumpf@cfl.rr.com.

As you can see from the packed lineup, this fall is going to be just as busy as the summer was. Throw in a few trips to Tallahassee or Title Town (a.k.a. Gainesville), and the winter holidays will be here before you know it. Now add in a conference championship, the beginning of the Dwight Howard and Rashard Lewis era, and the return of your two-time defending NCAA Basketball Champions and what little free time you thought you had is all spent. So, good luck to all of you who will be making those trips this year and stay safe out there on the roads.

Until next time, if you have any questions or want to find out more about our section, please contact me, **Taylor Kessel**, at 407-422-2454 or tck27@dbksmn.com.

Taylor C. Kessel is an associate at deBeaubien, Knight, Simmons, et al. He has been a member of the OCBA since 2005.

rule, apply the modern rule of “foreseeability” which holds that even after completion and acceptance by an owner, a contractor is liable when it was **reasonably foreseeable** that there would be personal injury or property damage on account of a contractor’s negligence or failure to disclose a dangerous condition known to the contractor, an obvious question for jury determination. *See Seitz v. Zac Smith & Co., Inc.* 500 So.2d 706 (Fla. 1st DCA 1987). The modern rule of “foreseeability” is digested and summarized in 75 A.L.R. 5th 413, *Modern Status of rules regarding tort liability of building or construction contractor for injury or damage to third person occurring after completion and acceptance of work; “foreseeability” or “modern” rule*. A recent application in Florida of the modern rule that the liability of contractors is not limited by completion and acceptance is the decision of *Kinney v. R. H. Holt Associates, Inc.*, 826 So.2d 328 (Fla. 2d DCA 2002). Setting aside a summary judgment entered for the contractor and subcontractor in a slip and fall case (and not discussing the *Slavin* rule even though the building was completed and accepted), the Second District Court of Appeal observed:

Cadstruct, as the general contractor, is subject to the same liability as the building owner for harm resulting from its particular work. *Cockerham v. R.E. Vaughan, Inc.*, 82 So.2d 890 (Fla. 1955) ...

Id. at 330.

II. Coverage for Contractor’s Own Work

The recent emphasis in damage claims in construction is finding insurance coverage for a contractor’s poor or incomplete work. It should be obvious that repair and replacement of construction defects and deficiencies is, or can be, expensive. Often there is no ready “deep pocket” in that, except for larger commercial or public projects (bonding required by law), few contractors are bonded. Thus, “Where’s the money?”

The Florida Supreme Court in *LaMarche v. Shelby Mut. Ins. Co.*, 390 So.2d 325 (Fla. 1980) announced the often quoted rule that the exclusions in a General Liability policy do not provide for the replacement and repair of the contractor’s work (in this case, the contractor’s completed work on a home was found deficient after passage of time):

To interpret the policy as providing coverage for construction deficiencies, as asserted by the petitioners and a minority of states, would enable a contractor to receive initial payment for the work from the homeowner, then receive subsequent payment from his insurance company to repair and correct deficiencies in his own work. We find this interpretation was not the intent of the contractor and the insurance company when they entered into the subject contract of insurance, and the language of the policy clearly excludes this type of coverage. Rather than coverage and payment for building flaws or deficiencies, the policy instead covers damage *caused* by these flaws. We agree

with the explanation of this type of coverage as stated by the Supreme Court of New Jersey in *Weedo v. Stone-E Brick, Inc.*, 81 N.J. 233, 405 A.2d 788 (1979) in which it said:

An illustration of this fundamental point may serve to mark the boundaries between “business risks” and occurrences giving rise to insurable liability. When a craftsman applies stucco to an exterior wall of a home in a faulty manner and discoloration, peeling and chipping result, the poorly-performed work will have to be replaced or repaired by the tradesman or by a surety. On the other hand, should the stucco peel and fall from the wall, and thereby cause injury to the homeowner or his neighbor standing below or to a passing automobile, an occurrence of harm arises which is the proper subject of risk-sharing as provided by the type of policy before us in this case.’ (405 A.2d at 791-792)

Id. at 326-327.

This type of reasoning, while apparently logical and based on a “business risk” analysis, rests solely upon the Florida Supreme Court’s interpretation of the exclusions set forth in the older “Comprehensive General Liability” policies. As clearly expressed without any exception by all Florida courts, an exclusion must be plain, clear and without ambiguity and an exclusion does not provide coverage. The exclusion interpretation has been followed in a recent case in which a claim for the cost of replacing shelves and lost storage use of a warehouse was denied as being outside of the coverage of a CGL policy. *See Aetna Cas. & Sur. Co. v. Deluxe Systems*, 711 So.2d 1293 (Fla. 4th DCA 1998).

In a landmark case, *State Farm Fire & Cas. v. CTC Development*, 720 So.2d 1072 (Fla. 1998), the Florida Supreme Court found coverage for damages when the contractor mistakenly built a home in violation of the setback requirements and a neighbor sued the homeowner and the contractor, resulting in a settlement with the neighbor and the incurring of attorney’s fees in defending the suit. The Florida Supreme Court allowed recovery against the insurer, after the insurer refused to defend the neighbor’s lawsuit, by interpreting the coverage language of “occurrence” - which included the word “accident” in the definition of occurrence, but did not define “accident.” The Florida Supreme Court ruled:

We hold that where the term ‘accident’ in a liability policy is not defined, the term, being susceptible to varying interpretations, encompasses not only ‘accidental events,’ but also injuries or damage neither expected nor intended from the standpoint of the insured. This definition comports with the language used in standard comprehensive general liability policies and with the definition of the term ‘accidental’ set forth in *Dimmitt*, 636 So.2d 700 (Fla. 1993) as ‘unexpected or unintended.’ 636

Continued on page 28



Presentation Skills for Lawyers

How to Grab Your Audience's Attention (before you even walk in the room)

— Elliott Wilcox



In sales copywriting, the most important element of any advertisement is the headline. If the headline doesn't grab the reader's attention, he won't read any further and the advertisement will be a failure.

In speaking, your presentation title is your headline. Unless you're a celebrity lawyer (with people flocking to see you just because of who you are), your title may be the most important element of your next presentation. Your presentation title serves as your "first impression." If the title doesn't grab potential audience members' attention, they may not even attend your presentation. After all, when do you think your audience starts deciding whether or not they want to listen to you? You don't think they wait until they've heard the first few words of your presentation, do you? No, they start deciding whether or not to listen to you before you even walk in the room. They start making that decision as soon as they discover your presentation topic. It doesn't matter whether your presentation will be amazing and will save their lives or improve their businesses. If potential audience members read your presentation title and think to themselves, "Who cares?!" then they will probably skip the meeting, and your presentation won't be a success.

This is why it is essential to write an attention-grabbing title for your speech. You want your potential audience members thinking to themselves, "I can't miss this! I've got to hear this presentation." Here are three formulas you can use to create compelling presentation titles that will grab the attention of potential audience members and drag them to your meeting:

1. The Question: "Are You Protected from Identity Theft?"

Using a question in your title grabs the audience's attention, forcing them to answer the question in their own minds. To maximize the effectiveness of your title, you need to make sure that you phrase the question in terms of your audience's interests (rather than in terms of your interests) because the best questions are the ones your audience is already thinking about. To develop an attention grabbing presentation title, you need to learn what's on the minds of your audience members. Survey or research your potential audience and find out what they are concerned about. When you find out what questions are on their minds, you'll discover the title of your presentation.

2. The How-To: "How to Protect Your Business Against Claims of Sexual Harassment"

What benefit will your audience gain after hearing your presentation? Will attendees learn how to avoid a lawsuit? How to pay less income tax? What they should do if they get stopped by the police? That benefit is the reason the

audience wants to hear your presentation. To develop an attention grabbing presentation title, simply take the benefit you intend to provide and turn it into a "how to" statement. For example: "How to Hire a Lawyer Without Breaking the Bank," "How to Prevent Employee Theft," or "How to Cross-Examine Expert Witnesses."

3. Specific Numbers: "The Five Critical Mistakes Small Business Owners Make When Hiring a Lawyer"

Have you ever examined the headlines in the *The National Enquirer* or *The Weekly World News* while you were waiting to check out at the grocery store? (Don't be embarrassed -- you're not the only one who wants to know what Bat Boy, Bigfoot, and Paris Hilton are doing.) If you analyze their headlines, however, you will notice a common theme. Many of the headlines use specific numbers to grab the reader's attention. Why do they do it? It's not a random coincidence. These companies spend a lot of money researching what works and what doesn't work. They know that readers are more likely to buy a paper if they believe they will receive a specific benefit. That is why you will pick up magazines with headlines like, "7 Secrets for Losing 20 Pounds This Weekend," "9 Proven Strategies for Retiring Early," or "5 Quick & Easy Ways to Avoid Internet Scams." You can take advantage of this research by adopting this headline technique when developing your presentation title.

The success of your presentation is directly related to the attention-grabbing power of your presentation title. If you can't grab a potential audience's attention and get people to attend your presentation, they will never hear how wonderful you are (and they won't learn how your law firm can help them or discover why it's important for them to retain you). Invest some time in crafting your presentation title, and your next presentation will be filled with audience members who can't wait to hear what you have to say.

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

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So.2d at 704.” 720 So.2d 1072 at 1075

While this case received both praise and condemnation from commentators (mainly construction industry attorneys and authors), construction claims were and are being advanced for damages for deficient work. In 2005, a storm hit the industry in the case of *J.S.U.B., Inc. v. U.S. Fire Ins. Co.*, 906 So.2d 303 (Fla. 2d DCA 2005). Florida’s Second District Court of Appeal found coverage under a CGL policy for damages to repair several homes when the exterior walls moved or sank due to the subcontractor’s improper compaction of soil, use of improper soil or poor soil, or improper testing of compaction. The insurer quite rightly agreed that it was liable for damage to items added to the homes by the homeowners - **resulting damage** - but vigorously resisted the claims for faulty workmanship by the builder and the subcontractor of the original work. After the trial court found for the insurer based on the lack of coverage, the Second District distinguished *LaMarche* on the basis that the exclusions and the language of the exclusions discussed in *LaMarche* had changed. The Second District applied the reasoning of *State Farm v. CTC* of expanded coverage based on the interpretation of “occurrence.” Finding coverage, the court then looked at the exclusions and noted that under completed operations coverage, the exclusion contained an exception to the exclusion that read, **“This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.”** The important conclusion of the Court was:

...If the policies provide coverage, the exception to this exclusion would apply because the damage that occurred was the result of the subcontractors’ use of poor soil and improper soil compaction and testing. Accordingly, based on our conclusion that the policies provide coverage, this exclusion does not apply because the exception to the exclusion applies.

J.S.U.B., Inc. v. U.S. Fire Ins. Co., 906 So.2d at 310.

Following this decision, the Second District allowed a surety who repaired a golf course damaged by its contractor to seek subrogation against the primary and excess CGL carriers for \$4.7 million paid to the owner to settle litigation plus attorney’s fees. In *Ryan Inc. Eastern v. Continental Cas. Co.*, 910 So.2d 298 (Fla. 2d DCA 2005), the court recognized that there was a question of fact as to when the work was completed, opining that the exception to the exclusion did not apply to “work that has not yet been completed or abandoned,” and sent the case back to the trial court for determination as to when the damage to the golf course was sustained - either before or after completion of the work.

Essex Builders Group, Inc. v. Amerisure Ins. Co., 429 F.Supp.2d 1274 (2005) involved damages of \$6.25 million paid to the owner by the builder’s surety for fixing water damages sustained after completion. The builder brought

suit against the CGL carriers who refused to defend the suit brought by the owner with the builder’s surety intervening to obtain subrogation recovery. In a lengthy, articulate opinion, U.S. District Court Judge Conway applied the *J.S.U.B.* interpretation of the CGL policy, allowing coverage for the damages paid by the builder and surety and stating, “This Court believes *J.S.U.B.* represents a correct interpretation of *LaMarche* and *CTC Development*. As the Second DCA indicated in *J.S.U.B.*, *CTC Development* broadened the manner in which ‘coverage’ provisions in CGL policies must be interpreted.” Judge Conway further ruled that analysis and application of the exclusions “must await another day.”

III. Summary

The active practitioner would be correct in concluding that CGL policies provide coverage for the contractor if the work is performed by subcontractors, and not excluded by clear exclusionary language that can be properly applied to the facts of the claim. There are, however, two notes of caution:

1. Cases interpreting CGL policies are based on the specific policy language. One should expect that policy provisions may be changed as claims advance and multiply. Certainly, multi-million dollar claims by sureties against their bonded contractor’s CGL carrier, as contrasted with claims by homeowners or “little old ladies in tennis shoes,” may and eventually will cause insurers to redefine coverage. Presumably, the industry drafters will make “clear” the exclusions with “plain language.” Justice Overton observed in the landmark case of *Seifert v. U.S. Home Corp.*, 750 So.2d 633 (CITE), while concurring in the unanimous opinion that a broad arbitration provision did not clearly express the intent to include tort claims:

The authors of these arbitration provisions need to go back to the drawing board. If the intent is to provide for arbitration broadly for all claims, contract and tort, such a provision should make that intent clear...

I favor the broad application of arbitration provisions, but the intent of the parties must be made clear by the terms of these provisions.

Id. at 643.

2. The decision in *J.S.U.B.* is being reviewed by the Florida Supreme Court. The Eleventh Circuit in *Pozzi Window Co. v. Auto-Owners Insurance*, 446 F.3d 1178 (2006), a case in which the homeowners sustained water damages in their multi-million dollar house from windows manufactured by Pozzi and installed by a subcontractor, appears to agree with the expanded coverage under *J.S.U.B.* However, the Eleventh Circuit noted that the Florida Supreme Court on April 5, 2006, accepted jurisdiction of *J.S.U.B.*, causing the Eleventh Circuit to conclude that there is dissension about the “continued vitality of *LaMarche*,”

Continued on page 39



Financial Planning

Confessions of a Recovering Insurance Agent



Andrew C. Orr, CFP®, CLU, ChFC, AIF®

At my first meeting, I get up to introduce myself.

"Hello, my name is Andrew Orr and I'm an insurance-aholic."

"Hi, Andrew," my fellow addicts respond.

"My addiction started in 1991 when I was recruited by a quiet company into the life insurance business. Somehow I survived the meat grinder of eat-what-you-kill 100%-commission sales, although I now publicly apologize for many of those early sales. Had I known then what I know now, I wouldn't have advised on those purchases, particularly at those commission rates," I confess.

"It's okay. We all did it," Johnny says (Johnny used to be an agent with the good hands people).

"But, I had to make those sales," I add. "I needed food on my table. I had rent to pay and college loans. And while I had to find money to feed myself, I certainly had plenty to drink while I was there. Yes, the Kool-Aid (a.k.a. bias and self-interest) was poured freely by my general agent. Oh, he meant well. But he had to eat too; plus he owed the company some results since they gave him a million bucks or so for setting up his office. Pouring the Kool-Aid for his agents to drink was a no-brainer."

"Did they ever mention index funds in any of your training, Andrew?" asks Martha (Martha is a recovering insurance-aholic who used to work with a company who was like a good neighbor).

"No Martha, they never did. What was drilled into us, however, was that life insurance is tax-deferred and you have the ability to borrow out your gains tax-free using policy loans. We had very convincing sales illustrations that showed the math, and almost no one (short of a finance professor) could understand these illustrations. It was perfect. The prospect was confused, we were sharply dressed and represented a reputable company, and we sold to their natural instinct for greed and paying less tax to the IRS."

"Yeah, and we were even allowed to show people the effect of earning 12% returns for decades and decades, even though the average stock investor only earns 1/3 of the S&P 500 over twenty years according to Dalbar research," someone chimes in.

"Uh, huh. We sure were," I continue. "But the thought that most of these funds underperforming passive funds never occurred to me. One fund that I recall underperformed its passive counterpart by 6% per year...over the past ten years! That's really costly. We already had insurance costs such as mortality costs, expense costs, premium taxes, sales commissions and the like to deal with. Tax deferral, however, should have trumped these costs. But when you add another cost - the cost of underperformance by these more expensive actively-managed funds - that changes the equation entirely. An underperformance of 4% less per year, or even 2% less per year, from what passive funds would have done would be

many thousands of dollars of lost growth. Such lost growth would tend to eliminate the inherent tax advantages of using life insurance as an investment," I add.

"Plus, passively managed index funds, while not tax-free, are highly tax-efficient since present tax law allows just a 15% tax on long-term capital gains and dividends. If you were to grow a much larger pile of cash in index funds then, even though the growth is taxable, the after-tax income could very well be much higher than the tax-free income you borrow out of a life insurance policy (which has a smaller cash kitty in it due to the fact that it mostly offers higher-costing actively managed mutual funds)," I continue.

"Andrew, when I left the Pyramid and the Kool-Aid started wearing off, I too realized that these insurance sub-account funds, in many cases, were performing miserably compared to index funds. I was so upset by all the variable life insurance I had sold over the years, I didn't get out of bed for a week," exclaims John.

"I hear ya, John. Glad you finally left your mattress. I felt like staying in bed, too. This was particularly true when I looked at the insurance angle. That is, variable life insurance does provide a death benefit and index funds do not. But inexpensive term life insurance rates have declined to historical lows due to longer life expectancies, living healthier and medical advances. So, term insurance could be purchased by those still needing insurance."

"What we all seem to agree upon is that it would benefit the buyer of these insurance policies to explore what the facts are relating to their underlying fund performance compared to other funds, in particular passively-managed funds. I think their eyes would open quite a bit."

"What is also true is something my compliance officer told me: that past performance does not guarantee future results. Investment returns and principal value will fluctuate, so that investors' shares, when sold, may be worth more or less than their original cost. Investing in any mutual fund, whether index or actively managed, does not guarantee that an investor will make money, avoid losing capital or indicate that the investment is risk-free. Actively managed funds sometimes outperform index funds. You just don't know in advance which actively managed fund will outperform the appropriate index. Just because a mutual fund is an index mutual fund, it does not guarantee a performance superior to an actively managed mutual fund. There are no absolute guarantees in investing. He was some talker."

Everyone nods. I take a sip of my coffee and sit back down.

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

Take the Appellate Challenge!

Answers

If you believed that filing a Notice of Appeal is a task for your paralegal, the first five questions of the Appellate Challenge have hopefully changed your mind. Those who still delegate that task to a paralegal will perhaps reconsider doing so after reviewing these answers. Indeed, you may conclude that an appeal worth bringing belongs in the care of a lawyer who is an appellate specialist.

Unless a Notice of Appeal is timely filed, the appellate court has no jurisdiction to proceed with the appeal and it will be dismissed. Generally, a Notice of Appeal must be filed in the lower tribunal within 30 days of the rendition of the order appealed. Fla. R. App. P. 9.110. But what does that mean?

Question #1: The appellate court will dismiss this appeal. The mailing rule, Rule 1.190(e), Fla. R. Civ.P., does not apply. Unless a motion for rehearing from a non-jury trial is served within 10 days of the filing of a final judgment, it does not suspend rendition of that judgment. *Grabarnick v. Florida Homeowners' Ass'n of North Broward, Inc.*, 419 So. 2d 1065 (Fla. 1982).

Question #2: The appellate court will dismiss this appeal. A motion for new trial in a jury trial in a jury trial must be served within 10 days of the return of the jury verdict in order to suspend rendition for appellate purposes. *Melton v. Schwinger*, 678 So. 2d 470 (Fla. 5th DCA 1996).

Question #3: The appellate court will dismiss this appeal. The trial court has no authority to extend the time for serving a motion for rehearing. Therefore, a motion for rehearing served within the time permitted by the trial court, but in excess of 10 days from the filing of the judgment, would not suspend rendition of the judgment. *Jones v. Jones*, 845 So. 2d 1012 (Fla. 5th DCA 2003).

Question #4: The appellate court will dismiss this appeal. An order granting a new trial is not a final order. Therefore, a motion to amend is not an "authorized" motion and does not suspend rendition. *Tedder v. Visually Impaired Persons of Southwest Florida, Inc.*, 819 So. 2d 274 (Fla. 2d DCA 2002).

Question #5: The appellate court will dismiss an appeal timely taken from the corrected order, but not timely taken from the original order. An order that is timely amended suspends rendition of the original order only where the amended order makes a substantive change from the original. *Rice v. Freeman*, 939 So. 2d 1144 (Fla. 3d DCA 2006).

Next month we will be back with five more questions to test your appellate knowledge.

Marcia K. Lippincott, Marcia K. Lippincott, P.A., and Michael R. D'Lugo, a partner with Wicker, Smith, O'Hara, McCoy & Ford, P.A. Ms. Lippincott has been an OCBA member since 1992 and Mr. D'Lugo has been a member since 1999.

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Continued on page 36

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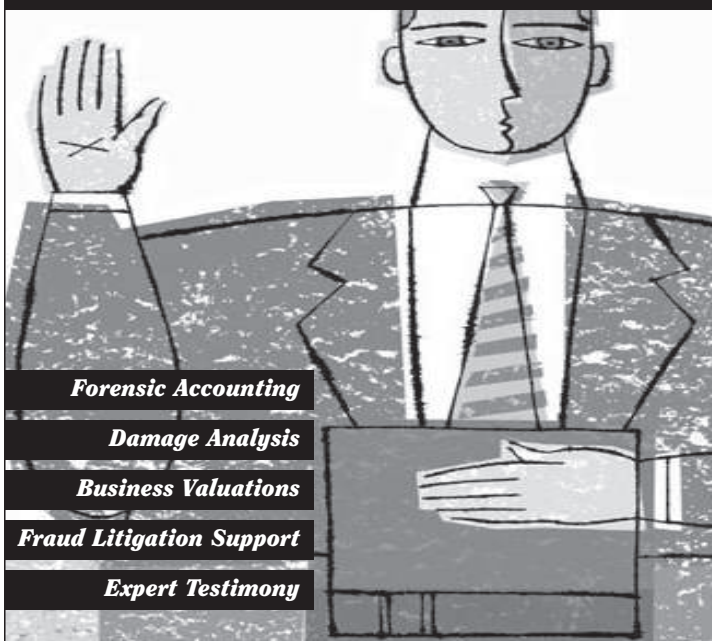
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Speaking Engagements

Matthew Brenner, Lowndes, Drosdick, Doster, *et al.*, spoke at the National Business Institute's June seminar called "Resolving Real Estate Title Defects" on the issues of "Closing Protection Letters" and "Access and Road Issues."

Joseph Lane, Lowndes, Drosdick, Doster, *et al.*, spoke at a National Business Institute seminar in April called "Strong Construction Contracts: Your Foundation for Management, Payment and Risk Management," speaking on the subjects of "Insurance" and "Licensing Matters and Individual Responsibility Holder for Individual License Holder." He also spoke at the Advanced Construction Law Seminar & Certification Review Course 2007 in March on the subject of "Hidden Issues in Construction Insurance."

Anna Long and **Hal Kantor**, Lowndes, Drosdick, Doster, *et al.*, were chosen as speakers for the July Marco Island, Florida Chamber's 21st Annual Environmental Permitting Summer School at the Marco Island Marriott Resort. Anna's topic was "Global Risk Based Corrective Action" and Hal was chosen a panel leader on "Making DRIs Work for You."

Richard Davidson, Lowndes, Drosdick, Doster, *et al.*, gave a talk to the OCBA Business Law Section last month on the topic, "Office of Foreign Asset Control" and the regulatory impact on business lawyers.

Brikena Tomasic, Lowndes, Drosdick, Doster, *et al.*, was published in the June issue of the OCBA *The Briefs* in an article emphasizing the importance of attorney professionalism through respect of others and fair play.

Publications

Dennis Wall of Orlando, FL, has just written the 2007 Supplement to the Second Edition of his book, *Litigation and Prevention of Insurer Bad Faith*. Published online and in print by West Publishing Company, the supplement adds new cases, statutes and other citations of authorities for a total of 3,500 cases, statutes and authorities.

Seminars

The Legal Aid Society continues its free **Lunchtime Trainings for Pro Bono Attorneys** series on the following dates: **Tues., Sept. 18** - *Domestic Violence and Dissolution of Marriage Cases* (1.0 CLE pending); Tenesia Connelly Hall, Domestic Violence Attorney; and **Tues., Oct. 9** - *Representing a Tenant in an Eviction* (1.0 CLE pending); Michael Resnick, Housing Attorney. Seminars are held from 12:00 p.m. to 1:30 p.m. at the First Presbyterian Church, 106 E. Church St., Orlando, FL 32801. Pre-registration is **required** for the free lunch and

requested for training. For details, visit the OCBA website or e-mail Cathy Tucker at ctucker@legalaidocba.org or Misha Vanderhorst at mvanderhorst@legalaidocba.org.

ABA Tort Trial & Insurance Practice Section (TIPS) presents the symposium, *Defending the Rule of Law in America: Countering Attacks on Judicial Institutions*, **Thurs., Oct. 4, 2007**, from 3:30 p.m. to 5:45 p.m., at The Breakers Hotel & Resort, Palm Beach, FL. CLE available. For information and to register, please go to www.abanet.org/tips.

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880 N. Orange Avenue
Orlando, FL 32801



2007

September - October Calendar

OCBA Luncheon • September 27, 2007

Carolyn M. Fennell

Director of Public Affairs

Greater Orlando Aviation Authority

RSVP by Sept. 21st to reservations@ocbanet.org

Luncheon
Sponsored by

Westlaw

September

- 11 Executive Council Meeting**
11:30 a.m. • Bar Center
- OCBA Paralegal Committee**
5:30 p.m. • Bar Center
- 12 Estate Guardianship & Trust Committee**
12:00 p.m. • Bar Center
- International Law Committee**
12:00 p.m. • Bar Center
- Judicial Relations Committee**
12:15 p.m. • Courthouse
- YLS Golf Tournament Committee Meeting**
5:30 p.m. • Urban Flats
- 13 Legal Aid Executive Meeting**
8:00 a.m. • 100 E. Robinson St.
- Real Property Law Committee**
12:00 p.m. • Bar Center
- Social Security Committee**
12:00 p.m. • Bar Center
- OCBA Joint Happy Hour**
With YLS, PCPBar, Hispanic Bar & CFAWL
5:30 p.m. • Doc's Restaurant
- 14 Workers' Compensation Committee**
11:45 a.m. • Smokey Bones
- E-Discovery & Computer Forensics Seminar**
9:00 a.m. • Bar Center
- 18 Legal Aid Society Board Meeting**
11:45 a.m. • 100 E. Robinson St.
- Entertainment Law Committee**
12:00 p.m. • Bar Center
- LAS Pro Bono Training**
12:00 p.m. • First Presbyterian Church, Orlando
- Professionalism Committee**
12:15 p.m. • Bar Center
- 19 Insurance Law Committee**
12:00 p.m. • Bar Center

- Solo & Small Firm Committee**
12:00 p.m. • Bar Center
- 20 YLS Luncheon**
11:30 a.m. • Citrus Club
- Paul C. Perkins Bar**
12:00 p.m. • Bar Center
- 21 Family Law Committee**
8:00 a.m. • 425 N. Orange Ave.
- Federal Courthouse Dedication**
10:30 a.m. • 401 W. Central Blvd.
- 24 CFWAL Board Meeting**
12:00 p.m. • Bar Center
- 26 Labor & Employment Committee**
12:00 p.m. • Bar Center
- Business Law Committee**
12:00 p.m. • Baker & Hostetler, SunTrust Bldg.
- 27 OCBA Monthly Luncheon**
Carolyn Fennell
Greater Orlando Aviation Authority
11:30 a.m. • Ballroom at Church Street
- Appellate Practice Committee**
5:00 p.m. • Bar Center
Start-up Meeting & Reception
- 28 Bankruptcy Committee**
12:00 p.m. • Bar Center

October

- 2 Effective Online Marketing Strategy Seminar**
11:30 a.m. • Bar Center
- OCALSS**
5:30 p.m. • Bar Center
- 4 CFWAL Luncheon**
11:30 a.m. • Citrus Club
- Elder Law Committee**
12:00 p.m. • Bar Center
- 9 Executive Council Meeting**
11:30 a.m. • Bar Center
- LAS Pro Bono Training**
12:00 p.m. • First Presbyterian Church, Orlando
- OCBA Paralegal Committee**
5:30 p.m. • Bar Center
- 10 Estate Guardianship & Trust**
12:00 p.m. • Bar Center
- International Law Committee**
12:00 p.m. • Bar Center
- Judicial Relations Committee**
12:15 p.m. • Courthouse
- 11 Legal Aid Executive Meeting**
8:00 a.m. • 100 E. Robinson St.
- Real Property Law Committee**
12:00 p.m. • Bar Center
- Social Security Committee**
12:00 p.m. • Bar Center
- YLS Executive Board Meeting**
5:30 p.m. • Bar Center
- CFAWL New Member Reception**
5:30 p.m. • Orlando Marriott
- 12 YLS 16th Annual Golf Tournament**
8:00 a.m. • International Course at Champions Gate
- Workers' Compensation Committee**
11:45 a.m. • Smokey Bones
- 16 Legal Aid Society Board Meeting**
11:45 a.m. • 100 E. Robinson St.
- Professionalism Committee**
12:15 p.m. • Bar Center
- Entertainment Law Committee**
12:00 p.m. • Bar Center
- 17 Insurance Law Committee**
12:00 p.m. • Bar Center
- 18 YLS Luncheon**
11:30 a.m. • Citrus Club
- Paul C. Perkins Bar**
12:00 p.m. • Bar Center
- OCBA Law Student Reception**
5:30 p.m. • Federal Courthouse
- 19 Family Law Committee**
8:00 a.m. • 425 N. Orange Ave.



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