

the Briefs

A Publication of the Orange County Bar Association



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September 2009
Vol. 77 No. 9

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President, Orlando Regional Chamber of Commerce

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FLABOTA Jurist of the Year Award

Criminal Law Committee

*United States Supreme Court Updates from
6/1/09 to 6/25/09*
William R. Jay



For the first time in its history, the OCBA is hosting a *three-day* Bench Bar Conference for members and area attorneys! If you've never attended a Bench Bar conference – or even if you have – the forum provides judges and attorneys an opportunity to meet informally to discuss issues important to both the Bench and the Bar.

Daily Schedule

9:00 a.m.-10:00 a.m.	Registration/Breakfast
10:00 a.m.-12:00 p.m.	Session I
12:00 p.m.-1:00 p.m.	Registration/Lunch
1:15 p.m.-3:15 p.m.	Session II
3:15 p.m.-3:30 p.m.	Registration/Break
3:30 p.m.-5:15 p.m.	Session III
5:15 p.m.-5:30 p.m.	Break
5:30 p.m.-6:30 p.m.	Wine & Cheese Reception

All sessions will be held at the OCBA Center
880 N. Orange Ave., Orlando, FL 32801

In addition to gaining valuable insight from members of the judiciary, each session offers attendees an opportunity to interact with other colleagues. Breakfast is offered with Session I, lunch with Session II and a reception follows Session III. An All Day Pass provides access to all three events, which will be catered by Arthur's. Each session provides 2.5 CLE credits.

*Early Registration
Deadline: October 16, 2009*

Wednesday, October 28, 2009

Session I	County Criminal
Session II	Circuit Criminal
Session III	Federal

Thursday, October 29, 2009

Session I	County Civil/Business
Session II	Circuit Civil
Session III	Appellate

Friday, October 30, 2009

Session I	Probate/Guardianship
Session II	Family Law
Session III	Juvenile

Member Early Registration:

\$50 per session
\$125 per All Day Pass (3 sessions)

Non-member Early Registration:

\$75 per session
\$200 per All Day Pass (3 sessions)

Member Late Registration:

\$100 per session
\$175 per All Day Pass (3 sessions)

Non-member Late Registration:

\$125 per session
\$250 per All Day Pass (3 sessions)

Seating is limited. Payment must be sent with registration.
Registration form and additional details are available online at www.orangecountybar.org.



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the Briefs

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DEADLINE INFORMATION

Advertising - 10th of the month prior to the month of publication

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

If the deadline falls on a weekend or holiday, the deadline is the next business 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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● Why Renew Your Membership in ● the Best Bar in the COUNTRY



Diego "Woody" Rodriguez

News Flash:

"This Association has reason to be proud and to hold its head as undoubtedly the best local Bar Association in the State and undoubtedly one of the *best in the entire Country*."

I'd say those are some brash words from a young leader, wouldn't you? In reality, while I and others in OCBA leadership positions share this sentiment, these timeless words were written by an OCBA President, **John Fisher**, back in June 1986. They were issued after he attended one of the annual leadership conferences offered to help Presidents prepare for the onslaught of responsibilities during their Presidency. And after surveying some of my predecessors, I find the results from these conferences to be the same year in and year out. As an OCBA President you walk away with very few, new ideas at these conferences because the OCBA is, dadgummit, just that good. Last month, OCBA President-Elect Frank Bedell and I had the honor of attending the Florida Bar's Voluntary Leadership Conference in Tampa on your behalf and we walked away with these three indisputable facts (1) the OCBA provides more services than any other bar in the state; (2) OCBA members pay the lowest dues; and (3) our bar association will continue to be the leading organization for years to come based on the fine work of the best staff in the country. Needless to say Frank and I walked away with the same sense of pride in the OCBA that **John Fisher** must have felt when he wrote his column over 20 years ago.

But the session did challenge us to recognize there may be some of you that will consider abandoning ship during these difficult economic times. That has not and will not happen in Orange County simply because we value our local bar association. To explain why a strong bar association is vital to Central Florida, I turn to another past OCBA President, **David King**, who wrote the following in July 1980:

The public's low image of our profession has been remarkably consistent for hundreds of years and is nurtured by self-inflicted wounds committed by some members of our profession that range on the scale of improprieties from felonies to rudeness. Admittedly we have an image problem and yet I would contend that the image perceived by our detractors does not accurately reflect the professionalism and service of the members of this Association. Our goal (as an association) must be to battle that incorrect image of the attorney and the best way to win that battle is through a strong local Bar Association, a Bar Association that nourishes its members by enhancing their professionalism, a Bar Association that reaches all segments of the public through its constant devotion to the rule of law, a Bar Association committed to fair effective and efficient administration of justice to all people, a Bar Association that is visible in the community and a Bar Association that is composed of lawyers that are proud to be lawyers.

As we assess the core reasons why members remain members, I am glad to report that **David King's** words still ring true today and have fueled our continued successes over the years.

For example, nine years later on September 12, 1989, then current OCBA President, **Charley Wells**, was ushering in a new era when he and the executive council approved the establishment of a Young Lawyers Section ("YLS"). In creating the YLS, **Charley**

Wells wrote the following about the organization's purpose: "With growth of our Association, it is a real benefit to have a structured Young Lawyers group which provides services to lawyers newly starting their career, and to the community at large." I can't think of a greater understatement to represent what the YLS has become. Not only has the YLS garnered accolades from both the Florida Bar and the American Bar Association as the best Young Lawyers' Section in the state and the country, but each year our YLS leaders put on over 30 plus events that range from professional programs (see the Afternoon in the Courthouse in which judges teach new lawyers how to become better lawyers) to community service events (see the Great Oaks Village Day, a fun day of giving back to the community) to social events with purpose (see the annual Evening with the Judiciary which helps new lawyers meet the judges they appear before in a friendly and less intimidating environment). By investing in our future leaders, **Charley Wells** and that executive council created what is now an indispensable component of our organization and our community.

But if you still have doubts about renewing your OCBA membership, I ask that you consider the following summary of services as provided by then OCBA President **Michael McMahon** in the June 1990 *The Briefs*:

- In Orange County, we enjoy a tradition of service and involvement that has given us the strength to be leaders in our profession. We have led in pro bono service through our Legal Aid Society and remain recognized as having the best sponsored pro bono program in the nation. (*Yep this is still true today*).
- Our Citizen Dispute Settlement program broke new ground when it was created, and remains a model others try to copy. (*CDS continues today having helped thousands of citizens over the past 20 years resolve their conflicts without further inundating our courts with litigation*).
- We were leaders when we built our own Bar Center and still receive inquiries from bars around the country who want to duplicate our achievement. (*Okay, admittedly this has changed since we remodeled and improved the quality of the building but occasionally we still get requests from other bar associations that are interested in developing their own centers*).
- We were the first in Florida to form a placement service for legal secretaries, paralegals and other nonlawyer personnel. Bars throughout Florida have tried to follow our lead, but none as successfully. (*This program has been challenged by other competitor placement providers and the internet but we still provide great quality candidates for your firms at the lowest placement rates*).
- And, we still have a free lunch every month for our members. (*Despite the escalating costs for our lunches we still provide them for free as a way to encourage our members to interact and hence cement the bonds of professionalism in Orange County*).

So if you have not renewed, what are you waiting for? This will be

continued page 5

***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.

McGhee v. Volusia County,

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

Acadia Partners, L.P. v. Tompkins,

759 So. 2d 732 (Fla. 5th DCA 2000)
Prevented multi-million dollar
judgment addition in complex
business litigation.

Wenzel v. Boyles Galvanizing Co.,

920 F. 2d 779 (11th Cir. 1991)
Affirmed a \$2.75 million dollar
personal injury award.

Boyles v. Mid-Florida Television Corp.,

467 So. 2d 282 (Fla. 1985)
Reversed the dismissal of a libel action
against an Orlando television station.

Hamlet v. Hamlet,

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

***Marriott International, Inc. v. Perez-
Melendez,***

855 So. 2d 624 (Fla. 5th DCA 2003)
Affirmed million dollar personal injury
verdict based on the "two issue rule".

***Lieberman v. Dept. of Professional
Regulations,***

573 So. 2d 349 (Fla. 5th DCA 1990)
Restored a physician's medical license.

Layeni v. Layeni,

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

Thomas v. Fusilier,

966 So. 2d 1001 (Fla. 5th DCA 2007)
Reversed forfeiture of \$250,000
payment required by marital
settlement agreement.

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OCBA Luncheon *September 24, 2009*

Leslie Hielema

President • Orlando Regional Chamber of Commerce

Sponsored by Marsh Global Consumer

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The entrepreneurial drive and expertise of Leslie Hielema is matched by few. Leslie is a leader

with a proven track record of management virtuosity, critical partnership development, and launching to new depth and scale. She is recognized for her development of MBA curricula in entrepreneurship, e-commerce, and her service as visiting professor at Valparaiso University.

A life-long student herself, Leslie holds a Master of Science in electrical engineering from the University of Michigan, a Master of Science in management with an international focus from Boston University, and a Bachelor of Science in electrical engineering from the Florida Institute of Technology (FIT).

With a unique combination of technical knowledge and business expertise, she continually pushes the boundaries on challenges ranging from product development to classified government contracting objectives both stateside and in global markets.

Leslie launched a twelve-year career with AT&T as a research and development engineer. She soon garnered top recognition, receiving AT&T's Exceptional Contribution Award. She rose to director of new product

development – Europe, Middle East and Africa - and was recognized for her applied sensibility of product development and deep understanding of business operations and community impact.

As a private consulting practitioner, Leslie helped entrepreneurs throughout Belgium, France, Germany, and the U.S. break into market with sustainability. She worked with clients to define applications and identify market segments, secure venture capital, and develop viable business plans. St. Joseph's College soon called on her to establish a new organization and manage a new grant through the Center for Indiana Partnerships.

Leslie manages diverse teams of engineers and scientists with ProLogic, Inc. in Indiana. She holds top secret security clearance for her work with government contracts. Championing her technical and entrepreneurial depth, her current responsibilities with ProLogic range from business development and marketing to development of geospatial decision support systems for work with classified government initiatives.

Since 2008, Leslie has used her incredible portfolio of talent, exper-

tise, and business acumen with the Central Florida Partnership team as president of the "Five Star" Orlando Regional Chamber of Commerce. The efforts of America's newest regional partnership to launch entrepreneurship to new scales of success attracted her to the region and, as an alum of FIT, she is pleased to return to Central Florida with her ten-year-old daughter.

The Ballroom at Church Street

11:30 a.m. - 1:00 p.m.

225 S. Garland Avenue

Orlando, FL 32801

Please RSVP to reservations@ocbanet.org
by Friday, September 18, 2009

Main Entrance: Garland Avenue between
Church Street and South Street

To ensure a proper luncheon count, RSVPs and CANCELLATIONS are requested no later than Friday, September 18, 2009. The OCBA is happy to provide 11 luncheons as part of your member benefits, **but no-shows incur additional charges for the Bar and walk-ins cannot be guaranteed a seat.** Please keep us up-to-date on your reservation status!

President's Message

continued from page 3

September. Also, our membership directory goes to press at the end of this year so you may not be guaranteed a listing unless you renew. But if the words of President's past can't convince you, then perhaps a brief glimpse of what is in store for our members this year will convince you beginning with the creation of a Paralegal's Section and the installation of Officers in September followed by . . . (to be continued in the October edition of *The Briefs*)

Pinning - Another Crackberry Tip

This tip comes from an unexpected source and after putting it to use I have to say it works as advertised. Past OCBA President **Wayne Helsby** and I had a candid discussion on the costs associated with texting. In our household, we have elected to avoid subscribing to a text plan since my wife and I have Blackberries and can communicate by phone or e-mail as part of our package. Some of my colleagues, perhaps with unlimited text plans opt to text me instead of e-mailing me. Mind you I still can't figure out why but apparently one of the reasons is that it is more immediate and jumps to the top of the list. Of course this assumes I will immediately respond because it is a text, a major flaw in their assumptions. But

the last edition of *The Briefs* you receive as we will be removing non-renewals from our rolls in

the moment I receive a text I always feel as though I just dropped a quarter on the ground and it rolled in the gutter beyond reach. And those coins add up to several dollars per month. But thanks to Wayne, who is a self-professed non-techie, he shared with me that if you own a Blackberry you can receive FREE text messages from other Blackberry users if you simply know their PIN number. Your PIN number is a specific number assigned to your Blackberry found under your Options icon. You simply scroll down to check on your Status and then scroll down again to the PIN number where you can copy it so you can send it to your friends. Not only does a PIN message virtually instantaneous but it shows up in red so it stands out. We tried it out with our Blackberries at home and not only does it work but I later verified with the T-Mobile billing gurus that none of our messages were being billed or even detected by their system as it is not routed through their servers. As an added protection, T-Mobile turned off my ability to receive text messages altogether. So see OCBA membership does have its privileges and for those of you who have a need to text me I'll gladly share my PIN number with you but if you don't mind I'll be keeping my change.

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

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The OCBA Endorses Marsh Global Consumer - Its New, Professional Liability Partner!

Time is one of a lawyer's most valuable assets. How much of this precious commodity do you spend wandering through a maze of insurance companies trying to find the right coverage?

The Orange County Bar Association has found a company that will work for you to find you and your firm the right insurance product at the right price. After evaluating several competitors in this area, the OCBA is proud to announce its partnership with our latest sponsor, Marsh Global Consumer, a service of Seabury & Smith, Inc. ("Marsh Global Consumer"). Marsh Global Consumer has a proven track record of successfully saving bar association members money as evidenced by their continuing, successful partnership with The Jacksonville Bar Association.

Marsh Global Consumer has a team of experienced, professional liability risk management professionals who will review your current coverage and advise you on potential modifications that might lower your risk, reduce your costs or increase your coverage. If the result of the evaluation confirms that no changes to your current coverage are necessary, Marsh Global Consumer will even recommend that you stay with your current carrier.

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Preamble

The practice of law is largely an adversarial process and Attorneys are ethically bound to zealously represent and advocate in their clients' interest.

Lawyers are officers of the court and they are responsible to the judiciary for the propriety of their professional activities. Within that context, the legal profession has been granted powers of self-regulation which help maintain the legal profession's independence from undue government domination by the legislative and executive branches. Supervision by an independent judiciary, and conformity with the rules the judiciary adopts for the profession, assures both the independence and the responsibility of the legal profession.

In addition to Attorneys' professional responsibilities prescribed by substantive and procedural law, Attorneys are also guided by personal conscience and the approbation of professional peers.

In Orange County, Florida, there have developed certain community standards of legal professionalism, professional courtesy, and courtroom decorum previously acknowledged and recognized through the adoption in 1990 of the Orange County Bar Association Standards of Professional Courtesy and in 2003 through entry of Administrative Order 2003-07 establishing the Orange County Courtroom Decorum Policy.

Attorneys should strive to attain certain ideals of professionalism and demonstrate a minimum level of professional courtesy necessary to lend dignity to the practice of law in our community and instill public confidence in the justice system.

In order to promote and perpetuate the long tradition of professionalism among and between members of the Orange County Bar Association and the bench and to assist in the efficient administration of justice, the following Standards of Professionalism, Professional Courtesy and Courtroom Decorum, "Standards", are hereby adopted.

Introduction

The Standards set forth herein are those expected of Attorneys practicing in the Courts of the Ninth Judicial Circuit in and for Orange County. While not meant to be exhaustive, the Standards also set a tone or guide for conduct that might not be specifically covered by these Standards. The overriding principles promoted by the Standards are communication and civility between counsel, as well as cooperation with the Courts and other participants in the justice system.

The Standards have been codified with the hope that their dissemination will educate new Attorneys and others who may be unfamiliar with the Orange County legal community's expectations regarding legal professionalism, professional courtesy, and courtroom decorum. They have received the approval of the Executive Council of the Orange County Bar Association. They have also been approved by the Judges of the Ninth Judicial Circuit. These standards should be read consistently with the Ideals and Goals of Professionalism adopted by the Board of Governors of The Florida Bar in 1990 and the Conference of Circuit Judges and County Court Judges and Trial Lawyers Section of the Florida Bar Guidelines for Professional Conduct, (2008 Edition).

I. Discovery, Litigation Practice, and Scheduling

1. Attorneys shall refrain from discovery requests not reasonably related to the matter at issue. Attorneys shall not use discovery for the purpose of harassing, embarrassing, causing needless duplication of effort, or causing the adversary to incur unnecessary expenses.
2. Attorneys shall not propound or object to discovery for the

purpose of causing undue delay, needless vexation or obtaining unfair advantage.

3. Attorneys shall ensure that responses to reasonable discovery requests are timely, complete, and consistent with the obvious intent of the request. Attorneys shall not, and must counsel their clients not to produce documents in a way calculated to hide or obscure the existence of documents.

4. Attorneys shall, whenever appropriate, discuss and coordinate discovery planning with counsel for each party to the action (e.g., counsel should cooperate in scheduling and coordinating depositions after requested documents pertaining to the deponent have been disclosed.).

5. When setting hearings, conferences, and depositions, Attorneys shall not schedule any matter without first making a good faith effort to coordinate the date and time with counsel for each party to the action. Depositions and hearings shall only be set, with less than one week's notice, by agreement of counsel or when a genuine emergency exists. When scheduling hearings, Attorneys shall reserve sufficient time to permit a complete presentation by counsel for all parties.

6. Upon receiving a scheduling inquiry concerning a proposed time for a hearing, deposition, meeting, or other proceeding, Attorneys shall promptly agree to the proposal or offer a counter suggestion that is as close in time as is reasonably possible. When scheduling changes are absolutely necessary and requested due to professional or family commitments or emergencies, Attorneys shall cooperate with each other in agreeing to calendar changes when rescheduling will not have a material adverse effect on the rights of the client.

7. Reasonable extensions of time should be granted where such extensions will not have a material adverse effect on the rights of the client or result in undue delay (e.g., permitting a deadline for a response to discovery to be extended or not objecting to a first-time motion for extension of time in which to file an appellate brief or reply, etc.).

II. Conduct toward the Court, Attorneys, and Other Participants

1. Attorneys shall refrain from disrespectful and disruptive behavior towards the Court and likewise refrain from rude and offensive behavior towards opposing counsel, parties, and witnesses.

2. Attorneys shall abide by the spirit and letter of all rulings of the Court and instruct their clients to do the same.

3. Attorneys shall be, and shall impress upon their clients and witnesses the need to be, courteous and respectful towards the Court, opposing counsel, parties, and witnesses.

4. Attorneys shall make an effort to explain to non-party witnesses the purpose of their required attendance at depositions, hearings, or trials. Absent compelling circumstances, Attorneys shall give adequate notice to non-party witnesses before the scheduling of their depositions and make a reasonable effort when possible to provide advance notice of a subpoena for a deposition, hearing, or trial. Attorneys shall, when possible, accommodate the schedules of non-party witnesses when scheduling their appearance and promptly notify them of any cancellations.



continued page 24

[Or, as it will read on our CVs: A Review of the Availability of Interlocutory Appellate Relief Under Florida Rule of Appellate Procedure Rule 9.130(a)(3)(C)(v - viii).]

Introduction

This article will be the last in a long-running series by the Appellate Practice Committee of the Orange County Bar Association where the numerous types of orders subject to “interlocutory appeal” have been examined. So far, we have covered such exciting topics as jurisdictional orders, immediate possession of property, family law orders dealing with money or child custody, and entitlement to arbitration or appraisal. Florida Rule of Appellate Procedure 9.130(a)(3)(C)(i-iv). Rather than take four more articles to give you all you need to know about the remaining four subjects of Fla. R. App. P. 9.130(a)(3)(C), we have decided to put them all together in one end-all, be-all article so no one is left in a cliff hanger waiting to find out how the Bert Harris Act Interlocutory Appeals Chapter comes out. To accomplish this feat, this article harmonizes the appellate stylings of Barbara “I’m The Chair, I Can Write What I Want To” Eagan and Nicholas “You Don’t Have To Write ‘Hearsay’ To Give Nicknames!” Shannin. Nick starts with the first two and Barbara wraps matters up with the last two interlocutory appeals as follows.

I don’t want to work.

I want to bang on my drum all day.

—*Bang The Drum*, Todd Rundgren

Fla. R. App. P. 9.130(a)(3)(C)(v) allows for the interlocutory appeal of an order “that, as a matter of law, a party is not entitled to workers compensation immunity.” Now, before all you non-workers-compensation attorneys tune out, take note: this appeal *is* for you. In fact, a workers compensation practitioner has far less occasion to deal with an interlocutory appeal regarding workers compensation immunity than does a personal injury/insurance defense/construction litigation practitioner, since the whole point of workers compensation immunity is not that someone should be in a workers compensation case, but, instead, that someone is immune from being in a civil tort case as a result of being eligible for workers compensation. *See, generally*, Section 440.11, Fla. Stat. (2008) (providing workers compensation immunity in tort to employers under specific circumstances.)

The nuances of Ch. 440, Florida Statutes, and workers compensation immunity, what with its provisions concerning horizontal immunity, vertical immunity, and double diagonal skip-jump immunity (just seeing if you are still with me), I will leave it to either our workers compensation or trial lawyer sections to write an article describing the pros and cons of an immunity argument at a later date. What is very important for you, the practitioner, to know is two things: (1) the word “not” is very important; and (2) “magic words” do exist – and they work in places other than Cinderella’s Castle.

Regarding the first point, the word “not” in the single sentence for this appellate rule is absolutely pivotal. The reason – not every order rendering a decision concerning workers compensation immunity is eligible for immediate appeal. Instead, *only* those appeals taken

from decisions that someone is *not* entitled to workers compensation immunity are eligible for adjudication by an appellate court as an interlocutory order. *See, e.g., Mandico v. Toas Construction, Inc.*, 605 So. 2d 850 (Fla. 1992). So if the ruling is that Employer XYZ **is** eligible for workers compensation immunity, it will prove necessary to await the end of the case before appealing that ruling as part of a final order. If the ruling is clear, however, that Employer XYZ **is not** entitled to immunity by reason of the workers compensation statute, then can an appeal be taken immediately? The answer is, of course, it depends. It depends on what? Magic words!

Here is the good news – because you are a member of the Orange County Bar Association, you get this article for free and get to find out what those magic words are: “As a matter of law.” Yes, that’s right – if the order denying workers compensation immunity does so without specifying that the motion is denied “as a matter of law,” the prevailing case law is that the appellate court “cannot supply the jurisdictional language by inference” and the ruling would therefore not be appealable until the end of the case. *See, e.g., Footstar Corp. v. Doe*, 32 So. 2d 1272 (Fla. 2d DCA 2006). So, you attorneys representing Employer XYZ out there, if you want to be able to appeal a ruling denying your client the opportunity to exert Workers Compensation immunity, you must make sure that the order clearly denies your client that immunity using the magic words “as a matter of law” before you can bring in your favorite appellate attorney to take it up on an interlocutory appeal.

Okay, one down, three to go. Next up:

Well, we got no class

And we got no principals ...

School’s out for the summer

School’s out forever

—*School’s Out*, Alice Cooper

Fla. R. App. P. 9.130(a)(3)(C)(vi) allows for an interlocutory appeal to be taken for an order that determines “that a class should be certified.” I doubt that the class Mr. Cooper was referencing in the oft sung last-day-of-school anthem was meant as a class of litigants, but it still invokes our teaching point for appeals regarding class certification. If the order certifies a class, then it may be susceptible to an appeal immediately as a non-final order pursuant to Fla. R. App. P. 9.130(a)(3)(C)(vi).

If, however, like Mr. Cooper sings “We got no class,” then the next line could read, “And we got no interlocutory appeal, either.” Instead, an appeal of the denial of a certification effort concerning a class action can not be taken as an interlocutory appeal, but must be taken only after a final order has been entered. *See, e.g., Ero Properties, Inc. v. Cone*, 395 So. 2d 592 (Fla. 3d DCA 1981) (holding that even where a non-final order determined a count could be maintained as a class action, but still reserved for later ruling the nature and existence of the plaintiff class, the order did not qualify as an appealable non-final order.) Thus, like the appealability of a workers compensation immunity order, above, the issue to appealing it as a non-final order is clarity: if the order is clear that it is for the certification of a class, an appeal may be taken now, but a lack of clarity will likely compel a finding that the appellate court will not have jurisdiction until a final order is rendered. *Ero Properties, supra. See, also, Philip Morris v. Jett*, 802 So. 2d 353 (Fla. 3d DCA

continued page 18

Criminal Law Committee ● The Legislative Created Drop Ceiling and Raised Floor¹: A Brief Overview of Florida Statutes 775.082 and 921.0241

The Hon. Jenifer M. Davis



On July 1, 2009, the Florida Legislature modified the Criminal Punishment Code. For those practitioners who predate the code, the change seems reminiscent. Although this change likely merits a discussion of Florida sentencing history, sentencing theory, and perhaps even discussion of the potential foreshadowing,² alas, this author will avoid the intellectual temptation and attempt to limit herself to explanation and potential application of the law as it is currently understood.³

Florida Statute Section 775.082 (2009) provides that a court may not sentence certain felony offenders to prison unless the judge makes specific required written findings. To qualify, the offense must be a 3rd degree felony that is neither a forcible felony nor a violation of Chapter 810 and the offender must score 22 points or less. *Fla. Stat.* § 775.082 (2009).

The “forcible felony” exclusion is defined in Section 776.08, the same as it is in the sentence enhancement statutes for violent career criminals (VCC). *Fla. Stat.* § 775.082 (2009). VCC is not so commonly used in Central Florida as to make the definition visceral. Therefore, at the risk of boring those far smarter than I, forcible felony is defined as:

Treason, murder, manslaughter, sex battery, carjacking, home invasion robbery, robbery, burglary, arson, kidnapping, aggravated assault, aggravated battery, aggravated stalking, aircraft piracy, unlawful throwing, placing or discharging of destructive device, and any other felony which involves the use or threat of physical force or violence against any individual.

Of course, most of these listed felonies are not 3rd degree felonies; however clearly certain 3rd degree felonies such as burglary, robbery, aggravated assault, and aggravated stalking are not limited from a prison sanction.⁴ The final phrase is not a limitation as to the enumerated felonies listed before. *Rodriguez v. State*, 826 So. 2d 464 (Fla. 3d DCA 2002). The question remains as to what other 3rd degree felonies are excluded from this new law by the nature of being “any other felony which involves the use or threat of physical force or violence against any individual.”

In *State v. Hearn*, the Florida Supreme Court ruled that if the use of threat or physical force or violence against any individual is not a necessary element of the crime, then the crime is not a forcible felony within the meaning of the final clause. *State v. Hearn*, 961 So. 2d 211 (Fla. 2007). The court additionally held that this phrase in Florida Statute Section 776.08 should be interpreted the same as the phrase in the PRR statute. *Id.* Since battery on a law enforcement officer could be an unwanted touch, it does not qualify as a forcible felony. *Id.* However, resisting with violence is a forcible felony. *Harris v. State*, 5 So. 3d 750 (Fla. 1st DCA 2009).⁵

The logic of *Hearn* applies to most 3rd degree felony battery cases. See *Nelson v. State*, 987 So. 2d 1251 (Fla. 5th DCA 2008); *Johnson v. State*, 971 So. 2d 271 (Fla. 1st DCA 2008); *Spraulin v. State*, 967 So. 2d 376 (Fla. 4th DCA 2007). However, it does not apply to felony battery pursuant to Florida Statute Section 784.041(1) since the element requires bodily injury. *State v.*

Williams, 9 So. 3d 658 (Fla. 4th DCA 2009).

Neither shooting into a dwelling nor throwing a deadly missile into occupied vehicles qualify as forcible felonies. *Paul v. State*, 958 So. 2d 627 (Fla. 1st DCA 2007) and *Craps v. State*, 958 So. 2d 627 (Fla. 1st DCA 2007). Yet, unlawful throwing, placing or discharging of a destructive device is specifically enumerated as such a forcible felony. Retaliating against a witness is not a forcible felony. *Donaldson v. State*, 1 So. 3d 412 (Fla. 1st DCA 2009). Furthermore, attempt or conspiracy to commit one of the listed felonies is not a forcible felony and therefore is not excluded from the application of the statute. *Campbell v. State*, 935 So. 2d 614 (Fla. 3d DCA 2006); *Walters v. State*, 790 So. 2d 483 (Fla. 5th DCA 2001).

The law also provides that a violation of Chapter 810 of the Florida Statutes is excluded from this sentencing provision. Chapter 810 covers burglary, of course, but it also prohibits crimes facilitating burglary such as possessing tools or impairing telephone or power. *Fla. Stat. Ch.* 810 (2009). Furthermore, Chapter 810 delineates trespass violations, some of which are 3rd degree felonies. In addition, the 810 exclusion would prevent any felony voyeurism offender from claiming a mandated non prison sanction. *Id.*

If an offender qualifies, then the court may not sentence the offender to prison unless the court makes written findings that a non-state prison sanction could present a danger to the public. It is unclear what the requisite necessary factual findings would be to determine if such a sanction “could” present a “danger to the public.” Yet, such findings are required for a prison sentence.

Also effective July 1, 2009, Florida Statute Section 921.00241, titled “prison diversion program,” enables the court to divert certain offenders who score mandatory prison. *Fla. Stat.* § 921.00241 (2009). Similar to Florida Statute Section 775.082, in order to qualify for diversion, the offense must be a 3rd degree felony which is neither a forcible felony nor a Chapter 810 violation. *Id.* In addition, the offender may not have any such prior convictions. *Id.* Nor may the offender be subjected to a minimum mandatory. *Id.* If the qualifying offender scores less than 48 points, or 54 points if 6 points is for a technical violation of probation, then the sentencing court may divert the individual from prison. *Id.* The court must make written findings that the offender meets the criteria and the sentencing order must indicate that the offender is sentenced to the prison diversion program with certain requirements.

The 2009 Legislature has modified the Criminal Punishment Code to include a dropped ceiling for the roof of statutory maximum sentences and at the same time allowed for a raised floor of diversion. The question remains whether the modification signals future architectural changes to Florida’s criminal sentencing structure or whether the change merely touches up an old design.

The Honorable Jenifer M. Davis serves the Ninth Judicial Circuit as a Circuit Judge and currently presides in a criminal division. She has been a member of the OCBA since 2006.

endnotes... continued page 20

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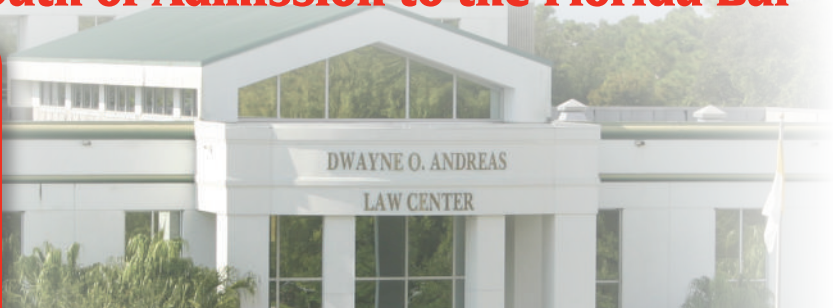
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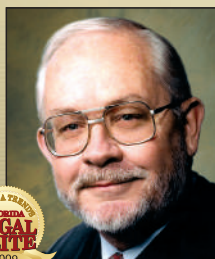
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Krista Bartholomew, Kavita Sookrajh and Bethanie Barber

The Courtroom Model of Advocacy through the Legal Aid Society's Guardian Ad Litem Program is well into its third year of implementation. The collaboration between assigned Guardian ad Litem (GAL) and the courtroom attorneys has proven to be an invaluable tool to better the lives of dependent children throughout Orange County. Legal Aid provides an attorney in each of the Dependency Courtrooms: **Krista M. Bartholomew** in Division 3, **Kavita Sookrajh** in Division 7, and **Bethanie Barber** in Magistrate hearings. These attorneys are present to assist both in and out of the courtroom and provide expertise on DCF policies and procedures as well as Chapter 39.

Pro bono attorney **Mark V. Morsch** has served as the GAL for a family of six children since 2005.

The children had been through multiple placements over the years. Last year, they were all placed with one relative caregiver in an attempt to keep the children together. Unfortunately, their situation rapidly deteriorated, and the GAL became very concerned about the children's well being if they remained in this placement. Mr. Morsch decided to seek a court order removing the children from this home. Assistance from the GAL Program was sought, and Krista Bartholomew provided sample motions along with assistance in drafting the details of the motions. When the matter came before the court for an evidentiary hearing, Ms. Bartholomew provided Mr. Morsch with assistance in presenting the motion, as well. This matter was addressed in a timely fashion, and the children were able to return to their prior foster parents who were interested in keeping the children long term. The children were removed from a very unstable and dangerous situation and provided the comfort and stability they desperately needed. A Termination of Parental Rights (TPR) trial is scheduled later this year. The GAL is hopeful that these foster homes will turn into permanent families. While the children are not all placed together, they continue to have ongoing contact and continue to feel happy and secure about their homes and future.

Attorney **Herb Allen** has been volunteering as a GAL with Legal Aid for well over 25 years. One of his cases involved a young girl who had been in the system for more than five years and was still without a permanent home. The mother failed over the years to comply with her case plan, and the father was never a part of the child's life. There were many delays on the part of the Department of Children and Families (DCF) in filing a petition for TPR. Mr. Allen's focus was on ensuring that the child was provided with stability and a real, permanent family. He sought assistance from the GAL Program's courtroom attorney, Ms. Sookrajh, to help him make the proper connections and arrange for meetings with higher level internal staff of the DCF. Once the GAL's position was made clear to DCF and the court, the GAL courtroom attorney was able to further support Mr. Allen with additional coverage and

advocacy at hearings. Mr. Allen was able to present a complete picture of this child's life and ensure that the TPR petition was filed and vigorously prosecuted by both the DCF attorney and the GAL. A few short months ago this young girl was adopted by her foster family.

Attorney **Jeff Badgley** is the GAL for a teenage boy on the Magistrate's Independent Living Docket. His parents' rights have been terminated, leaving the teen to rely on the state to meet all his needs. Despite having more than 20 GAL cases under his belt, Mr. Badgley had not recently represented many teens in the dependency system. GAL staff attorney Bethanie Barber is assigned to the Magistrate's courtroom and, as the GAL Program's transitions attorney, she is well versed in the needs of this particular population. She worked closely with Mr. Badgley to familiarize him with the rights of older foster children, as well as the obligations of DCF in providing very specific and clear services to the child. There were significant delays in some of the services for this teenager, including things as simple as providing him with his monthly allowance. The statutory time frames were not being followed but, with the support of the GAL Program courtroom attorney, Mr. Badgley was able to get this case back on track. The GAL pushed through court hearings, primarily in front of the Magistrate, and pursued contacts with the lead agency to ensure the child received what he was entitled to. The GAL Program provided assistance in collaborative motion-drafting and legal preparation for hearings where the child's services would be addressed. Mr. Badgley was also able to gain additional assistance through Intervention Services for the child.

Pro bono attorneys who would like assistance or guidance with Chapter 39 issues, as well as navigating through DCF policies, should feel free to contact any of our GAL Program attorneys. If you are facing looming permanency issues for children, please contact attorney **Stephanie K. Stewart** at ssewart@legalaidocba.org. If you are facing issues involving older children aging out of foster care, contact attorney **Bethanie Barber** at bbarber@legalaidocba.org. Concerns involving children with immigration issues should be directed to attorney **Kira Romero-Craft** at KRomero-Craft@legalaidocba.org. Any other issues should be addressed based on the assigned Division for the case: Division 3, Krista M. Bartholomew, kbartholomew@legalaidocba.org and Division 7, Kavita Sookrajh, ksookrajh@legalaidocba.org.

Krista Bartholomew, Kavita Sookrajh and **Bethanie Barber** are attorneys with the Legal Aid Society of the OCBA. Ms. Bartholomew has been a member of the OCBA since 2007, Ms. Sookrajh since 2006 and Ms. Barber since 2008.



Krista Bartholomew



Kavita Sookrajh



Bethanie Barber

"Among industrialized nations, the United States has the largest number of homeless women and children. Not since the Great Depression have so many families been without homes."

—National Center on Family Homelessness

The Center attributes family homelessness to the widening gap between income and housing costs, the transition to single parent households and the lack of traditional social supports.

The Legal Aid Society of the Orange County Bar Association operates a very aggressive and sophisticated housing law practice which advocates on behalf of low-income tenants and homeowners who become involved in the eviction and foreclosure process. Our typical client is a single parent, working in the hospitality industry, struggling to make ends meet.

In Florida, the eviction process is regulated by statute and designed to bring an eviction action to completion within 7 to 10 days of filing. Therefore, tenants involved in an eviction action are at extreme risk for losing their "home" within a very short period of time. The Legal Aid Society's housing practice is organized for maximum flexibility and speed so that tenants who are impacted by evictions can be represented in a timely and substantive manner. In addition, we attempt to advocate for changes in the law that will better protect the rights of tenants and their families.

Consistent with these efforts, the Legal Aid Society operates a foreclosure clinic for Orange County homeowners three times each week from noon to 4:00 p.m. The clinic handles 40 to 50 appointments monthly. The foreclosure clinic enables our attorneys to provide focused and specialized legal assistance suited to each applicant's individual foreclosure case. Our services vary and include formal representation of the foreclosure defendant, where appropriate.

Because of the variety of ways in which circuit courts have responded to the foreclosure crisis, an emergency petition is currently before the Florida Supreme Court regarding the establishment of a statewide foreclosure mediation policy. In the interim, Ninth Judicial Circuit Chief Judge Belvin Perry issued Administrative Order 2009-02 to relieve the foreclosure crisis in Central Florida and to provide homeowners with a direct line of communication with their lenders. Effective February 25, 2009, this Administrative Order establishes an optional mediation process for those homeowners who wish to attempt resolution of their foreclosure action through mediation. Lenders are required to advise homeowners of this optional mediation process by including a "Notice to Homeowner" in substantially the same form as outlined in Exhibit "A" to the Administrative Order. The "Notice to Homeowner" is served with the foreclosure complaint and attached to the summons. Although it appears that lenders are complying with the notice requirements, it remains unclear how many homeowners are actually taking advantage of the mediation process.

Although many at-risk homeowners do not request mediation for a variety of reasons, including fear, shock, denial, and language issues, local mediators have been very aggressive in encouraging lenders to entertain loan modifications. Further successes through mediation could be achieved if the Circuit Judges exercised the option, available under the Administrative Order, to automatically refer every foreclosure case to mediation upon the filing of a responsive pleading to the action.



The Legal Aid Society's commitment to assisting local citizens remain in their homes includes those who have been impacted by real estate fraud, mobile home park residents and owners, and rental housing involving substandard housing conditions. Even those who are officially homeless are extended legal services through the Homeless Advocacy Project. Using the services of 30 attorneys who donate their time as part of their *pro bono* commitment to the community, the Homeless Advocacy Project provides specialized assistance for the homeless in Orange County in the hopes that we can address some of the fundamental issues that impact the homeless in our community. The Legal Aid Society's housing practice is part of a statewide group of similar legal aid housing attorneys who, on a daily basis, provide feedback and information to each other as to housing matters that are ongoing throughout the State of Florida.

Since January 1, 2009, 17 *pro bono* attorneys have assisted with housing cases, 30 with clinics, and 254 housing cases have been closed. More than 700 of Orange County's most vulnerable residents have been served, giving families, children and special needs individuals a roof over their heads and "a place to call home." The housing practice at the Legal Aid Society is lead by **Michael L. Resnick**, who has 22 years of legal experience. Mr. Resnick is a graduate of the University of Toledo College of Law, magna cum laude. Prior to coming to the Legal Aid Society, he had been a corporate tax and real estate attorney and handled class action litigation.

For more information on *pro bono* legal services, contact Cathy Tucker, Deputy Director and Pro Bono Coordinator at ctucker@legalaiddocba.org or for development issues, such as donations or the "Breakfast of Champions," contact Donna Graf, Manager of Development at dgraf@legalaiddocba.org.



Michael L. Resnick is an attorney and **Donna Anne Graf** is the Manager of Development with the Legal Aid Society. Michael has been an OCBA since 1999, and Donna has been a member since 2008.



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Board of Governors Report : July 17, 2009

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*President-Elect of The Florida Bar

**Ninth Circuit Representatives to The Florida Bar Board of Governors

At its July 17th meeting in Naples, The Florida Bar Board of Governors ("The Board of Governors") addressed the following issues:

Electronic Filing

President Jesse Diner announced a major emphasis of The Florida Bar this year to work with the court system to develop a uniform electronic filing system for Florida courts.

Judicial Candidate Voluntary Self-disclosure Statement

Circuit Judge John Marshall Kest made a report on behalf of the Judicial Administration and Evaluation Committee and The Board of Governors approved a "judicial candidate voluntary self-disclosure statement." The statement will be given to all trial court candidates in future elections, and their answers will be posted on the Bar's website. The approval included providing copies of the self-disclosure statement to candidates in Creole and Spanish, but it will be up to candidates to provide translations of their answers.

Member Benefits

The Board of Governors approved, on the recommendation of the Member Benefits Committee, an agreement with Affiniscape Merchant Solutions, which provides credit card services for law firms. When attorneys accept credit card payments for retainers, Affiniscape will automatically deposit the retainer into the attorney's trust account but take the expenses related to the transaction from the law office operating account, as required by Bar rules. Under the agreement, Affiniscape, which has similar arrangements with 40 other state and local bars, will offer discounted rates for Bar members.

Identity Theft Regulations

The Board of Governors endorsed, on the recommendation of the Legislation Committee, the ABA position opposing the Federal Trade Commission's efforts to include lawyers and law firms in its Red Flag regulations requiring extra efforts by creditors to protect debtors from identity theft. The ABA argues that existing ethical rules protect client information and that providing legal services to clients does not make lawyers creditors.

Florida Bar Foundation

Adele Stone, Florida Bar Foundation president, gave a report that Foundation IOTA revenues have been declining, from \$44 million three years ago, \$24 million two years ago, and \$11 million last year to an anticipated \$5.7 million in the coming year. The Foundation is pushing to increase lawyer *pro bono* efforts and also to get more private donations, she said.

Lawyer Regulation

The Board of Governors heard proposed rule amendments that would impose additional requirements on lawyers who are suspended and have not been reinstated for a period of three years or longer. Among the proposed new requirements, lawyers would have to show that they have taken 10 hours of CLE for each year or part of a year during which they are ineligible to practice, show familiarity with the law, and, if they waited more than 5 years to seek reinstatement, retake the MPRE and Florida portions of the bar exam. The proposed rule amendments will come back to the Board for final reading at its September meeting.

Issues Facing The Florida Bar

President Jesse Diner announced what he sees as the major issues confronting the Bar this year. Those include: working to implement electronic filing for the courts; continuing to advocate for adequate funding for the courts; defending SB 2108, which passed this year and put the funding of court-related functions of elected clerks of the court under legislative oversight; pushing to address the legal needs of children, especially carrying out recommendations from the Commission on the Legal Needs of Children; and helping lawyers address the current difficult economic conditions.

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Appellate Practice Committee

continued from page 9

2001)(denying jurisdiction over non-final order pertaining to, but not specifically certifying, a class of flight attendants.) While other nuances exist, if you handle class actions you are likely already familiar, and if you don't, you don't care. Kinda like the students singing *School's Out*

And with that, my class might be out until the conclusion, but school remains in session, with Professor Eagan now taking the helm for the third and fourth issues as follows.

Get up, stand up: stand up for your rights!

—*Get Up, Stand Up*, Bob Marley

Rule 9.130(a)(3)(C)(vii) permits appeals of interlocutory orders determining “as a matter of law, a party *is not* entitled to absolute or qualified immunity in a civil rights claim arising under federal law.” It is an important rule to know if you are a public official or represent one. The Rule is completely worthless to most of us. That being said, here is a brief history.

This provision arose from the “glitch” in the Florida Rules that interfered with federal immunity-from-suit rights of government actors. The Florida Supreme Court addressed this problem in *Tucker v. Resha*, 648 So. 2d 1187 (Fla. 1994). As discussed in *Tucker*, the Florida appellate rules do not permit appeals from a denial of summary judgment, for good reason. However, federal rules do permit appeals from denials of immunity defenses, when the denial hinges on questions of law. Absent an interlocutory appeal avenue, important immunity-from-suit rights in federal claims are rendered illusory. The *Tucker* court, therefore, decided in cases involving public officials, in *federal* civil rights actions, a denial of summary judgment based upon an immunity defense as a question of law should be permitted under Rule 9.130. As a result of this mandate, the Appellate Court Rules Committee (ACRC) drafted such a Rule for supreme court adoption. This is why you have it to contemplate.

The Florida Supreme Court recognized obtaining review of denials of summary judgment through certiorari proceedings, oft proved to be an impossible quest (you can learn why in the upcoming Appellate Practice Committee Writs Seminar, to be presented on October 15th). The Rule provided a necessary avenue for review at a meaningful point in the case – when an order is entered denying immunity. It offers consistency of review in federal civil rights claims, whether brought in state or federal court. It only applies to decisions denying immunity as a matter of law.

Through the years this author served on the Bar's Appellate Court Rules Committee, various parties brought several proposals forward for revisions to the Rule. These included requests for Rule amendment to include orders granting immunity and orders denying

immunity entered in cases arising under Florida law. None of the requests ever got out of the Committee, for only dimly remembered reasons, leaving certiorari the only remedy in such circumstances. For the one of our readers who might wish to learn more on the post-*Tucker* decisions and issues, we refer you to *D.O.T. v. Wallis*, 659 So. 2d 429 (Fla. 4th DCA 1995), the cases cited therein, and their progeny. The Immunity Rule continues to stand as adopted in 1995, as applicable only to federal claims.

What do you get when you kiss a girl?

You get enough germs to catch pneumonia

You get enough germs to catch pneumonia

After you do she'll never phone 'ya

I'll never fall in love again...

—*I'll Never Fall In Love Again*, written by Burt Bacharach, sung by Emmylou Harris.

[BE: Nick, what does that bunch of sap have to do with appeals? NS: It doesn't, but check it out – I've got the “Bert Harris” rule right there. Ok, Burt spells his name wrong but it's close! BE: I'll let it slide, but only because it's near the end and no one's reading it this far anyway....]

The final rule, Rule 9.130(a) (3)(C)(viii) – often dubbed the “Bert Harris Rule” – is equally obscure, but has a history linked to dark, legislative shenanigans to dismantle Florida growth management planning law. This rule, as with the proceeding one, also is only of benefit to government officials.

The ACRC presented this Rule for adoption with regular cycle amendments in 2005. The Rule exists for consistency with section 70.001(6), Florida Statutes (2004). The statute, and now the Rule, provide for interlocutory review where there is judicial determination that government action resulted in an “inordinate burden” to a landholder under the (to some infamous, to some famous) Bert Harris Property Rights Protection Act.

The Florida legislature adopted the Bert Harris Act as an end-run around Florida's nationally-lauded Growth Management Act under the guise of “protection of property rights.” Until the most recent legislative session, it constituted the most nefarious scheme toward dismantling Florida's growth management law.

By way of abbreviated background, in the 1980s the legislature decided, following a hue and cry from environmentalists, among others, that Florida should actually, comprehensively plan for growth if we desired to preserve any of our state's natural flora and fauna, rural lands, and diversity of lifestyles. Thus began the cyclical comprehensive land use planning process in which all jurisdictions must participate. The development industry was less than enthused, since the law was designed to curtail unregulated sprawl; and so, the battle began.

Once the Bert Harris Act passed, developers could challenge a local government's comprehensive land use plan decision, on the grounds that it placed an “inordinate burden” on their property. This proved a convenient way to quash the efficacy of growth management with threats of “Bert Harris” litigation.

The Act, however, permitted the government embroiled in Bert Harris litigation a right to immediate review of decisions that government action did produce an “inordinate burden.” The Appellate Rules, however,

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Judicial News

Chief Judge Belvin Perry, Jr. Receives FLABOTA Jurist of the Year Award

The Florida Chapters of the American Board of Trial Advocates (FLABOTA) selected Ninth Judicial Circuit Court **Chief Judge Belvin Perry, Jr.** of Orlando as its 2009 Jurist of the Year. Judge Perry was honored during FLABOTA's annual awards banquet at the Longboat Key Club and Resort on July 25. The prestigious award is given each year to a jurist who is committed to preserving and improving the



Philip King, Judge Belvin Perry, Jr., Samuel King

of the local Central Florida chapter, said: "Without question, those attorneys who practice before Judge Perry find him to be knowledgeable, prepared, and a no-nonsense type of jurist. He treats all attorneys in a professional manner and demands the same professionalism and respect in return. I believe I speak for the Bar as a whole in commenting that Judge Perry runs a well-organized and fair courtroom. He has the highest reputation as a jurist among practicing attorneys. In his role as chief judge, he has been extremely active in trial court budgeting issues, currently serving as Chair of the Trial Court Budget Commission, and representing the interests of the trial court in front of the Florida Legislature and associated bodies. In our opinion, he epitomizes what the Jurist of the Year should represent."

Founded in 1958, ABOTA is a national association of experienced trial lawyers and judges, whose members are dedicated to the preservation and promotion of the civil jury trial right provided by the 7th Amendment to the U.S. Constitution.

Submitted by Mindy Boggs, Executive Director, FLABOTA.



Judge Perry, Judge John M. Kest

jury trial system and who represents the highest standards of protecting and defending the American civil justice system.

"Judge Perry has made significant contributions to improve Florida's civil trial system, not just this year, but throughout his career," said Patricia D. Crauwels of Sarasota, President of

FLABOTA. "He has had a profound impact on the level of professionalism in the courtroom and has exhibited outstanding leadership in ensuring adequate funding to maintain access to the courts."

Judge Perry has been a Circuit Court Judge since 1989, presiding over both the criminal and civil benches in Osceola and Orange counties. He has been Chief Judge of the Ninth Circuit from 1995 to 1999 and again from 2001 to the present. His impressive biography offers proof of how he exemplifies the criteria for the award -- following the rule of law and applying it evenhandedly; demanding professionalism from all lawyers; and maintaining open and accessible working relationships with the trial bar. In addition to his service to the profession, Judge Perry's contributions to community include leadership roles in local organizations for homelessness, schools including the FAMU College of Law, and his church.

In nominating Judge Perry for the award, Phil King, Orlando attorney and president



Judge Perry and the Florida Chapters of the American Board of Trial Advocates

On the cover, judges in alphabetical order with their alma maters:

Hon. Allen S. Apte (Miami)	Hon. Mark Lubet (UF)
Hon. Fay Allen (FAMU)	Hon. Roger McDonald (FSU)
Hon. Maureen Bell (UF)	Hon. A. Thomas Mihok (NAVY)
Hon. Alice Blackwell (Furman)	Hon. W. Michael Miller (Furman)
Hon. Nancy Clark (UF)	Hon. Mike Murphy (UF)
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Hon. Walter Komanski (UCF)	Hon. Rand Wallis (Furman)
Hon. Bob LeBlanc (Miami)	Hon. Bob Wattles (UF)

Appellate Practice Committee

continued from page 18

provided no such vehicle; and, Article V, section 4(b)(1), Florida Constitution, only permits appellate review in the district courts of appeal to the extent provided by Rules. *See, e.g., Osceola County v. Best Diversified, Inc.*, 830 So. 2d 139 (Fla. 5th DCA 2002). For this reason, ACRC drafted a rule to comply with the statutory review provision, which the supreme court adopted.

Attempts to challenge the constitutionality of the Bert Harris Act have not been successful. *See, e.g., Brevard v. Stack*, 932 So. 2d 1258 (Fla. 5th DCA 2006) (Bert Harris Act is constitutional as it did not take away county's power to regulate property but *merely* provided method of compensation for partial takings). On a brighter note, attempts to amend the Rule to permit review of decisions that the government action is not an inordinate burden have failed.

Conclusion

While not downloadable to your iPod, we hope that you have enjoyed these four "ditties" as applied to the hopefully-somewhat-less-arcane world of interlocutory appeals. Remember these general principles about interlocutory appeals: You have to fit into one of the special categories, described above or in the earlier chapters; you have to appeal within thirty (30) days; you will have only fifteen (15) days from filing to file the initial brief; and the filing of the interlocutory appeal will not automatically stay the remainder of the case. Fla. R. App. P. 9.130. Perhaps most importantly, remember that when in doubt, consulting with an appellate practitioner is always your best bet – and please remember that you don't need to go to Miami or Tallahassee to find one. The Appellate Practice Committee and its members are here to assist you or your client. And that's no song and dance.

Barbara Anne Eagan, Eagan Appellate Law, PLLC, is Chair of the OCBA Appellate Practice Committee, a former Vice-Chair of the Florida Bar Appellate Court Rules Committee and has been named a 2009 Florida *Super Lawyer*, Appellate Practice. Eagan is Florida Bar Board Certified in Appellate Practice and focuses exclusively on Appellate litigation in all Florida courts.



Nicholas A. Shannin, a partner at Page, Eichenblatt, Bernbaum & Bennett, is a member of both the OCBA Appellate Practice Committee and the OCBA Executive Council. He has been named a 2009

Florida *Super Lawyer*, Appellate Practice. Shannin is Florida Bar Board Certified in Appellate Practice and provides appellate and trial support to trial counsel in state and federal courts.



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Criminal Law Committee

The Hon. Davis *continued from page 10*

¹ A dropped ceiling is one which the finished surface is constructed anywhere below the structure above it, likely for practical or aesthetic purposes. An inverse is accomplished by a raised floor.

² With terms such as "Prison Diversion Program" a "community supervision" one wonders if the Florida Legislature has started studying evidence based practices for sentencing.

³ To be clear, although the author analyzes the statute and potential application, in no way has she prejudged the application to certain situations or cases.

⁴ The requirement that the offender score 22 points or less would also be a limitation on most of these offenses.

⁵ On a complete tangent.... "So 3d"? Really?

The Magic of Mediation – Why it Works!

A. Michelle Jernigan

Often, as I exit from a private caucus, I hear the words: “Michelle, work your magic.” Now, I didn’t study magic in college or law school and I can’t perform the simplest of magic tricks. Nor am I boastful enough to think that I possess some mystical quality that causes parties to instantaneously arrive at amicable resolutions. Yet, like most mediators, I can state that 80 percent of all cases settle at mediation, or shortly thereafter.¹ So, the question makes me ponder: “What is magical about mediation or, in other words, why does it work?”

Measuring Success at Mediation

Before discussing why mediation works, it is helpful to define “success” in mediation. While academics, psychologists, and the mediation community may gauge success in mediation through a number of variables, most trial lawyers would define “success” as settlement.² Even given such a definition, many lawyers recognize that when mediation does not yield a settlement, the process was still helpful to them or their clients. For the purpose of this article the “Why it works?” will be primarily directed to why mediation helps parties reach resolution.

Why Mediation Works

First, mediation provides an event and a specific time, place, and location for meaningful negotiation to occur. In that respect mediation serves as a catalyst for settlement. Parties and their attorneys are caught up in the litigation machinery of the judicial process. They are engrossed in discovery with the hope of highlighting the evidence most helpful to their position. At the same time, they seek to diminish or undermine the evidence most favorable to their opponents’ position. Facing a mediation deadline promotes a “thirty thousand foot view” of their cases. Lawyers are faced with the following tasks: conducting a risk analysis, determining the likely outcome of the case at trial, discussing their client’s needs and interests, and developing a strategy to reach a resolution that represents their client’s best alternative to a judicial outcome. Parties and their attorneys enter mediation with an expectancy that settlement will be reached or, at a minimum, that all settlement options will be fully explored. The mediator, the attorneys, and the parties

focus tremendous energy on the task at hand. The event also draws key decision-makers who need to be present in order to “close the deal.”

Second, mediation provides a forum and a structure for productive communications and negotiations. The mediator has the authority and the skills to direct the flow of information, guide communications, and structure negotiations in a way that maximizes settlement potential and minimizes hostility and destructive communication patterns. As a matter of law, the mediation is cloaked with the protective shield of confidentiality. Parties and lawyers are free to make admissions they would never make at trial and to float proposals that a judge or jury will never hear.

Third, the mediator, as an experienced, trained and professional neutral, has the power and ability to do things that the parties and their adversaries simply cannot. The mediator acts as a filter, reframing communication in such a way that messages convey their meaning without alienating the listener. Using the information presented, the mediator can explore with a party and their lawyer the difficulties in maintaining certain positions. As a skilled negotiator, the mediator can assist the parties and attorneys in structuring negotiations in a manner that will be productive and is most likely to yield a resolution. The mediator is the only participant that is neutral, has no agenda other than assisting parties in reaching settlement, and owes a duty to all participants and the mediation process. The role of the mediator places him or her in a unique position to gain insight into the parties’ underlying motives, which assists the mediator in developing options that maximize joint gain.

Fourth, mediation has become institutionalized in many states. As such, requesting mediation is now part of fulfilling the trial lawyer’s obligation to move the case forward on the trial docket. Requesting a negotiation may signal perceived weakness in a position. Not so with mediation. Attorneys in Florida expect to go to mediation. Requesting mediation in

this environment demonstrates an understanding of the benefits of the process and a recognition that one is taking control of their caseload. In many instances, setting mediation is simply reflective of a desire to comply with the court’s case management order.

Fifth, the litigation process is often civilized warfare. By contrast, mediation is the humanization³ of the judicial process. The justice system often leaves unaddressed the emotions underlying a dispute. Mediation affords parties an opportunity to vent and to work through emotions that may block rational decision-making. On occasion, mediation gives parties a venue to share an apology, heal a wrong, or restore a relationship. The mediator is in a position to listen to parties and demonstrate empathy and understanding, thereby giving each their “day in court.”

Sixth, joint session in mediation affords attorneys the opportunity to educate the opposing party. This is rare in the sense that at no other time in the litigation process is an attorney granted the chance for a direct dialogue with an opposing party. This access is restricted since it takes place in a protected forum, with the mediator in charge of the process. Nevertheless, it presents a golden opportunity for each lawyer to put his or her best foot forward in highlighting the strengths of their position and pointing out the weaknesses in the opposing party’s position. This is also a time when each attorney can humanize their client, invoke sympathy, promote empathy and understanding, and render an apology to the opposition.

Seventh, the mediator is able to challenge the position and the legal analysis presented by the lawyers in mediation without creating a high level of defensiveness. The mediator is viewed by most parties and their attorneys as having a neutral perspective on the case. When opposing counsel attacks a position pre-

continued page 32



Solo and Small Firm Committee

● Law Firm Shootings... ● Are You at Risk?

Warren T. Channell

Much has been written in the last few years about workplace violence. This usually involves reports of disgruntled employees in a workplace, or a former employee returning to the workplace to seek revenge for perceived wrongs. These types of incidents have been reported at all types of businesses, from manufacturing plants to large financial institutions ... but what about law firms? Could this happen in your office?

There have been few shootings reported in the last several years at law offices. Since some of these involved multiple victims, they were widely publicized:

San Francisco, California, July, 1993: Law Firm: Pettit & Martin. A gunman killed eight people and wounded six others before turning the gun on himself. He burst into the office with two EC-9s and a .45 caliber semi-automatic pistol. Before bursting into this office, he wrote out a long list of persons and organizations that he felt had wronged him, including the law firm. The suspect was a disgruntled client.¹

Chicago, Illinois, December, 2006: Law Firm: Woods & Phillips. This shooting occurred in an upper floor of the Citigroup Center, a high-rise in downtown Chicago that requires card access to get to certain floors in the building. The client was a truck driver who submitted a design for a portable toilet-type device for use by long haul truck drivers. When the idea did not take off like he expected, he blamed the attorney! He had attempted entry early in the day and was turned away by security staff in the lobby because he did not have an appointment. He returned posing as a delivery person delivering a manila envelope. He approached the security personnel in the lobby and, upon reaching the lobby counter, pulled a pistol from the envelope and demanded that he be taken up an elevator to the firm's offices. Once there, he pulled a chain and padlock from his bag and barricaded himself inside. He shot and killed two attorneys and a mailroom clerk before being shot and killed by a police sniper.²

Alexandria, Louisiana, October, 2007: Law Firm: Giordano & Giordano. The gunman was a retired city maintenance worker, apparently distraught over the recent death of his daughter and an unsatisfactory divorce settlement. There was no known relationship between the gunman and the firm. He shot five people, killing two of them, before being shot and killed by police after a ten hour stand-off.³ Accessibility from the street and proximity to the courthouse may have been what made him select this site. While this type of accessibility is great for your clients, it can have its drawbacks.

How many less severe incidents occurred that did not make the local or national news?

Does your law office pose any special risk for this type of violence? Several factors could contribute to your offices being exposed to a violent incident:

Practice area(s): Do you practice in the areas of family, criminal, bankruptcy, or other area that may lend itself to an emotion-

ally charged client? Is your client a victim of domestic violence or a batterer? You should look out for the telltale signs of abuse. Refer them to available domestic violence resources in your area for this.

Office location: Is your office located in an area known for violent crime? Is your office accessible from the street?

It is important to develop effective measures to minimize your risk.

- **Identify problem/disgruntled clients.** We all know the ones who give us the creeps when they call. You may want to decline to represent them if you do not feel comfortable doing so. If you do meet these clients in your office, schedule their appointments when other people are around.

- **Train your staff to identify highly disgruntled clients and potential clients.** Do they have a history of violent behavior? Depending on your practice area, do you routinely ask these types of questions during the intake/screening process? If clients later become disgruntled due to the outcome of a case, work to resolve their concerns and take time to explain to them why things came out the way they did. They may try to blame you. This type of client could file a complaint against you, or react violently.

- **Have an escape plan.** If violence erupts, you need to know how to get out quickly and safely. An escape plan can closely resemble a fire escape plan. Think of two different ways to get out of the building. In a fire scenario, you go in the opposite direction of the fire. Close and lock doors behind you. Do the same with a violent person. Have a designated meeting place for others on your staff, like you would for a fire evacuation. A good idea is to have your cell phone on your person, so you can call for help from anywhere inside the building if you cannot get out or from outside the building after you have left. As when a building is on fire, do not re-enter until you are certain it is safe to do so.

- **Greet at-risk clients at the door.** Walk them to their car when they leave. Look outside before they leave. Do you have a clear view between your office and their car?

- **Take precautions when walking to your car.** Look out the window or door before you leave. If you cannot see the parking lot from your office, consider installing closed circuit television. It is relatively inexpensive and can feed images into your computer. Is there anyone or any cars that perhaps should not be there? When approaching your car, look around it, under it, and inside it. This is easily done from a distance.

- **Your building layout and parking lot:** When your office is occupied is it obvious to anyone walking or driving by? Can everyone's car (including yours) be seen from the street? This type of layout should be avoided.

- **Mediations:** Schedule them in the courthouse or other secure location with appropriate screening if you think that violence is



a concern. A client in a probate dispute shot and killed his sister during a mediation in a Palm Beach County law office in 2002 after he had threatened to kill her. The mediation had been **ordered** at the Palm Beach County Courthouse, but was held at the office per the client's request. In a suit against the firm by the sister's family, the family is alleging the firm had a responsibility to protect her at mediation and should have disclosed the threat. Due to the violent threat made, the conversation was found not to be privileged.

• **Contact your local law enforcement agency's Crime Prevention Division.** Many offer free crime prevention surveys of businesses. They can help you apply CPTED (Crime Prevention Through Environmental Design) principles to your office layout to enhance safety.

• **Develop a method to screen persons entering your office.** Keep your front door or office door locked, and maintain a method (such as a window) to screen visitors prior to opening the door. Make sure you have a sturdy door with a deadbolt lock between you and the public. Use a high-quality, wide-angle peephole (see illustration right) to see who is outside your door. These common sense precautions can offer you an extra measure of safety.



• **Train and prepare yourself to resist and defend yourself** against a violent aggressor!

This is a seldom discussed option that needs to be considered. There are many attorneys in Orange County who have permits and carry concealed weapons to protect themselves. As mentioned in an earlier OCBA publication, you cannot bring them into the courthouse. Check yourself thoroughly before entering the building to make sure you left it behind.

Sometimes these shooters stew for a long time before lashing out. The Chicago shooter came back months later.



When clients do not get their way in court, might they blame you? Discuss the possibilities with them before going to court, and try to rationalize the judge's decision with them.

Consider your risks, and have a good safety plan in place. This will minimize your risk and keep your practice safe.

Warren T. Channell is a business and family law attorney in Winter Garden, Florida. He is a member of the OCBA Solo/Small Firm Committee and has been a member of the OCBA since 2004.



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¹ San Francisco Chronicle, July 2, 1993.

² Chicago Tribune, December 9, 2006.

³ www.wcbstv.com/topstories/Louisiana.law.firm.2.315596.html



Professionalism Committee

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5. Attorneys shall act and speak civilly to courtroom deputies, clerks, court reporters, judicial assistants, and other court personnel and recognize that they are an integral part of the judicial system. Attorneys shall be selective in inquiries posed to judicial assistants to avoid wasting their time. Attorneys shall endeavor to be knowledgeable about the Court administrative orders, local rules, and each Judge's published or posted practices and procedures.

6. Attorney shall endeavor to operate under these Standards when dealing with unrepresented litigants.

III. Candor and Fairness to the Court, Counsel, and Others

1. In all matters litigation or not, Attorneys shall not knowingly misstate, misrepresent, or distort any fact or legal authority to the Court or to counsel for any party to the action. Further, if this occurs unintentionally and is later discovered, it shall immediately be disclosed or otherwise corrected.

2. Attorneys shall notify opposing counsel of all oral or written communications with the Court or other tribunal, except those involving only scheduling matters. Attorneys shall simultaneously provide to counsel for each party to the action by substantially similar mode of delivery, copies of any submissions, correspondence, memoranda or law, case law, etc. to the Court (e.g., if a memorandum of law is hand-delivered to the Court, a copy shall simultaneously either be hand-delivered or faxed to each party). If the Court requests the parties to submit a proposed order, written closing argument, or statement of a party's legal position, unless otherwise specified by the Court, the submission shall be in the form of a pleading, memoranda, or proposed order and not in the form of a letter.

3. Attorneys shall draft proposed orders promptly, and the orders shall fairly and adequately represent the ruling of the Court. Attorneys shall promptly provide, either orally or in writing, proposed orders to counsel for each party to the action for approval. Any objections to entry of the proposed order shall promptly be communicated. The drafting Attorney shall clearly advise the Court as to whether or not the proposed order has been approved by opposing counsel.

4. In drafting agreements and other documents, Attorneys shall use their knowledge, training, skill, and integrity to ensure that the agreements and documents fairly reflect the true intent of the parties. Where revisions are made to an agreement or other document, Attorneys shall point out or otherwise highlight any such additions, deletions, or modifications to counsel for each party to the action.

IV. Efficient Administration of Justice

1. Attorneys shall not use the Court system for the primary purpose of harassing, embarrassing, causing needless duplication of effort, or causing an adversary to incur unnecessary expenses.

2. Attorneys shall endeavor to stipulate to all facts and legal authority not reasonably in dispute.

3. Attorneys shall encourage principled negotiations and efficient resolution of disputes on their merits.

4. Attorneys shall make a good faith effort to contact counsel for each party to the action prior to filing and upon receiving a motion to determine, first, whether the matter can be resolved without the necessity of Court hearing, or second, whether there are any matters raised to which all parties can stipulate. Adequate communication between Attorneys may alleviate the need for filing a motion and may allow entry of an agreed upon order in lieu of hearing. Adequate communication may further serve to narrow the issues that need to be litigated and reduce the amount of hearing time necessary to resolve a matter.

5. Attorneys shall promptly notify the Court or other tribunal of any resolution between parties that renders a scheduled Court appearance unnecessary or otherwise moot.

6. Attorneys shall notify counsel for each party to the action and the Court of a scheduling conflict and make efforts to ensure that others impacted by a scheduling conflict are notified as soon as it becomes apparent. Further, Attorneys shall cooperate with one another regarding all reasonable rescheduling requests that do not prejudice their clients or unduly delay a proceeding.

V. Courtroom Decorum

1. When appearing in Court, unless excused by the presiding Judge, it is expected that the Attorneys shall stand when Court is opened, recessed, or adjourned; when addressing, or being addressed by the Court; and when the jury enters or retires from the courtroom.

2. When making opening statements, closing arguments, or examining witnesses, Attorneys shall not approach either the jury or the witness without the Court's permission. Attorneys shall remain at the lectern unless using exhibits or charts.

3. Attorneys shall address all remarks to the Court and not to opposing counsel or the opposing party.

4. Attorneys shall avoid making disparaging personal remarks or showing acrimony toward opposing counsel and remain detached from any ill feeling between the litigants or witnesses.

5. Attorneys shall refer to all persons (including witnesses, other counsel, and the parties) by their surnames and not by their first or given names unless the permission of the Court is sought in advance.

6. Unless the court grants permission, only one Attorney for each party shall conduct the direct examination or cross examination each witness. The Attorney stating objections, if any, during direct examination, shall be the Attorney recognized for cross examination.

7. Attorneys shall request permission before approaching the bench. Any documents counsel wishes to have the Court examine should be handed to the clerk. Any paper or exhibit not previously marked for identification should first be handed to the clerk to be marked before it is tendered to a witness during examination. Any exhibit offered in evidence should, at the time of such offer, be handed to opposing counsel.

8. Attorneys shall not hold or place in any position in the courtroom that would allow the jury to see, any exhibit, whether marked for identification or not, unless the exhibit has been admitted into evidence and permission to publish the exhibit to the jury has been obtained from the Court.

9. In making objections, Attorneys shall state only the legal grounds for the objection, withholding all further comment or argument unless elaboration is requested by the Court. In examining witnesses, Attorneys' questions should not be echoing the witness's response.

10. Attorneys shall make all offers of settlement or requests for a stipulation privately and not within the hearing of the jury.

11. In opening statements and in arguments to the jury, Attorneys shall not express personal knowledge or opinions concerning any matter in issue.

12. It is inappropriate for any person present in Court to make gestures, facial expressions, a nodding or shaking of the head, outbursts, audible comments or the like manifesting approval or disapproval of witness testimony or whatever else is occurring during Court proceedings. Attorneys certainly shall not engage in this type of conduct and shall instruct their clients not to en-

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Go to the OCBA website at **www.orangecountybar.org** and click on Legal Resources. Sign up to become a Notary Public or renew your commission. Conduct your Florida MVR searches online. Refer your clients to the parenting course or the traffic safety course. It's easy, convenient and cost effective!



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is pleased to announce that

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Kimberly D. Webb

If all the cars in the United States were placed end to end, it would probably be Labor Day Weekend. -Doug Larson

Ah – Labor Day! That harbinger of summer coming to a close, vacations winding down, and kids going back to school. How do OCBA members spend their Labor Day weekends? Do you hit the beach? Cool off in the mountains?

Wander down to the Keys for a margarita and some snorkeling? Maybe you spend it closer to home, with a backyard barbeque or a family reunion. However you choose to celebrate, I wish you a fun and leisurely day of rest from the labors that consume the remainder of your year.



LaShawnda K. Jackson
Judge Alicia L. Latimore

among their peers throughout the state. The sheer numbers of our members who are recognized speaks volumes for the quality and professionalism of the legal community in Orange County and among the members of the OCBA.

In addition to being recognized by their peers for the quality of their legal work, OCBA members continue to be recognized even outside the legal profession for their commitment to the community through leadership and service. Congratulations to **Judge**

Alicia Latimore, Mayanne Downs, LaShawnda Jackson,

and **Darylaine Hernandez**, each of whom were nominated by the Girl Scouts of Citrus Council as 2009 Women of Distinction in recognition of all they do to provide positive role-models for young girls in our community. It is this kind of commitment to

Speaking of work, it is always fantastic when the hard work and excellence of our membership is recognized even outside of Central Florida, as is the case with the numerous honorees in this year's Legal Elite, Super Lawyers, Best Lawyers in America, and other state-wide and national publications recognizing the excellence of members of the legal profession. We have received numerous announcements and press releases acknowledging the accomplishments of our member lawyers and, although we cannot print them all, we congratulate all of the represented attorneys and law firms on receiving such recognition



LaShawnda K. Jackson
Candy Messersmith

community that makes the OCBA great. That's why I'm a fan of the OCBA.

Hey Facebookers, you too can become a fan of the OCBA! Yes - the OCBA is "going social"! As if we weren't already, but now we are doing it in a digital way. Next time you log in, before you start your next mafia war or list your five favorite '80s movies of the week, you can become a fan at the OCBA fan page, then be sure to skip over to the OCBA members-only group page to post news, start discussions and, even more fun, upload photos of OCBA members at work and play. And be sure to check back often for updates on OCBA events and announcements. BTW – anyone missing their cows? Some seem to have wandered onto my farm.

Whether you are traveling to the beach, the mountains, the Keys, or your own backyard this Labor Day weekend – be safe, and don't forget the sunscreen! And, as always, keep sending your information, pictures, and Hearsay-worthy items, to me at kdbwebb@gmail.com.

Kimberly D. Webb has been a member of the OCBA since 2002.

New Court Access Cards on sale beginning November 1, 2009

Cards valid Jan. 1, 2010 – Dec. 31, 2011.

Applications will be available on the OCBA website beginning October 1, 2009.

(Most applications can be processed by mail!)



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In July, The Florida Bar Board of Governors and The Florida Bar Young Lawyers Division Board of Governors were pitted against each other in the good natured "Battle of the Boards" for a coveted trophy. The YLD Board retained the trophy after successfully winning a scavenger hunt.

LaShawnda Jackson



Leslie Stewart, Melanie Griffin



Mary Ann Morgan,
Kenneth Pratt,
LaShawnda Jackson
Leslie Stewart,
Melanie Griffin



Andrew Jenkins,
Wade Bowden,
Albert J. Saulie, III
Chelsie Roberts
Jarrod Flynn

Side Bar

Kristyne E. Kennedy

Central Florida's voluntary bars are invited to submit news items for publication consideration in SideBar! Send news of upcoming activities, past events, meetings, award presentations, fundraisers and other items of interest, along with any photos and captions, to me, Kristyne Kennedy, at kennedyk@jacksonlewis.com, or call me at 407-246-8449 more information and deadline details.

See what the HBACF and CFAWL have been up to!

Mary Ann Morgan hosted CFAWL's Table for Eight dinner, which included 12 attendees! From left to right: Leslie Stewart, Mitzi Carr, N. Diane Holmes, Meena Hirani, Mary Ann Morgan, (daughter, Bethany) Ava Doppelt, Davina Fredrick, Elaine Silver, Jamie Moses, Dawn DuCarpe, Kim Preston and Allison McMillen.



Cindy Duque



Esther Whitehead, Judge José Rodriguez



Judge Maureen Bell, Joy Zubkin, Tiffany Faddis

The Hispanic Bar Association of Central Florida hosted its Scholarship Night with the Judiciary on July 30 at the OCBA Center. The cocktail party was held to promote the legal education of Hispanic law students by raising funds for a \$5,000 student scholarship.



YLS *on the move*

Celebrating Family, Friends and Fun!

Sunny A. Hillary

Labor Day, celebrated on the first Monday of September, is a symbol of the end of summer. Labor Day is also often viewed by families as the “last chance” to travel and by young adults as the “last weekend” for parties before the end of summer. How did Labor Day become a holiday? Well, in the first proposal, the holiday celebration was conceived as a street parade to exhibit to the public “the strength and esprit de corps of the trade and labor organizations.” It was followed by a festival for the workers and their families. This month, let’s recognize the valuable, hard workers all over the city, the county and the state, including you!

The YLS would like to thank The Legal Marketing Association and the Orange County legal community, especially the Young Lawyers’ Section of the Central Florida Association of Women Lawyers (CFAWL YLS), for once again making **The Backpack Project** a huge success. This year, the CFAWL YLS, through committee chair **Barbara Leach**, graciously paired with the OCBA YLS and collected a record-breaking amount of school supplies and donations. The students and teachers of Rock Lake Elementary School truly appreciate the time and efforts of these two organizations, which will ensure a successful 2009-2010 academic year and the school’s continual rank as an “A” school. Many thanks to **Melanie Griffin** and her committee who worked tirelessly to collect and deliver these school supplies and donations to the school.

On July 24, 2009, the YLS board members and committee chairs mustered their courage and strength to take on the daunting Grande Lakes Adventure Course at The Ritz-Carlton Hotel/JW Marriott. After gearing up in helmets, harnesses, and the all-important “D” belt, and taking a ground lesson on belay techniques and climbing knots, the group kicked into “Survivor” mode and took over the multi-level structure consisting of zip line cables, swinging footholds, and narrow platforms. Thank you to YLS President, **Ryan Davis**, for putting our minds and

bodies to the test and organizing this unforgettable team-building experience.

On August 27, 2009, members of the YLS and the CPA joined forces and enjoyed happy hour at 310 Lakeside! The young lawyers and accountants enjoyed refreshing drinks and a wonderful array of appetizers both inside and outside the restaurant. Special thank you to **Doug Martin** and the generous sponsors who were able to make the happy hour happen, the YLS, Matson, Driscoll & Damico, LLP, KPMG, and the FICPA State Young Committee.

The **18th Annual YLS Charity Golf Tournament** is coming up on October 2, 2009, with an 8:00 a.m. shotgun start at the beautiful Shingle Creek Golf Club. One of the biggest events of the year, the golf tournament is not only a great opportunity to play a round of golf with your clients and colleagues, but also to help fund all of the charitable projects that the YLS organizes throughout the year, including the YLS Scholarship and the Backpack Project. Prizes (\$250) will be awarded for Men’s Closest to the Pin; Ladies’ Closest to the Pin; Men’s Longest Drive; Ladies’ Longest Drive; Straightest Drive; and a \$10,000 Hole-in-One. Fees are: \$565 per foursome, \$165 per individual golfer, and \$135 per individual judge or government attorney. We’ve got fantastic sponsorship benefits, so be sure to get details and registration information from **Amber Nielson** at aneilson@iplawfl.com, or **Sunny Hillary** at sunny@brownstonelaw.com.

Finally, on October 3, 2009, head out to the Central Florida Zoo for the annual **YLS Family Fun Day!** Join fellow YLS and OCBA members and their families for an educational and entertaining experience with various mammals, reptiles, amphibians, and birds from around the world. The cost for the event is still to be determined, but will include admission to the zoo, one or two “animal encounters”

and a BBQ lunch. For more information or to RSVP, please contact **Kara Rogers** at krogers@bellroperlaw.com.

Please join us at the YLS **September Luncheon on September 17, 2009**, at 11:45 a.m., when we will be honored with the presence of District 40 State Representative **Eric Eisnagle** as our guest speaker. Email your RSVP to ocbayls@gmail.com. The cost is \$20 if you RSVP on or before September 15, 2009, or \$22 at the door; \$12 for law students, government attorneys, sole practitioners, and judges.

If you want to find out more about our section and its committees and events, please call me at 407-388-1900 or email me at sunny@brownstonelaw.com. If you are not receiving the YLS email blasts, send an email to me or ocbayls@gmail.com to sign up.



Sunny A. Hillary is an attorney with Brownstone, P.A. She has been a member of the OCBA since 2005.



Putting it to the test YLS style.



Sylvia H. Walbolt, the 2008 Tobias Simon Award recipient, spoke to more than 300 members and guests at July's luncheon.

July 23rd OCBA Luncheon at the Ballroom at Church Street



Norberto Katz presented a plaque to Florida House Representative Darren Soto in appreciation of his support of the Legal Aid Society.

Dean Cannon, Florida House of Representatives, Speaker Designate, spoke about legislative initiatives.



Frank Bedell, OCBA president-elect, presented Michael Gibson of Gibson Simon, LLC with a 100% Club certificate. The certificate is given to firms whose attorneys all belong to the OCBA.

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Criminal Law Committee ● United States Supreme Court Updates

from 6/1/09 to 6/25/09 William R. Jay

***Bobby v. Bies*, 129 S.Ct. 2145 (2009)**

In a unanimous opinion authored by Justice Ginsburg, the Court decided in *Bobby v. Bies* that the state of Ohio was not precluded by double jeopardy or collateral estoppel from holding a hearing to determine whether defendant Bies was mentally retarded so as to preclude him from being executed after mental retardation had previously been found to be a mitigating factor when the jury sentenced him to death before *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242 (2002), held that the death penalty was cruel and unusual punishment for mentally retarded defendants. In voting for death, the jury considered Bies' petitions for habeas corpus to be repeated requests to lower his sentence, not the state trying to increase the penalty. The Court also found that collateral estoppel did not prevent the state of Ohio from seeking a full hearing on the mental retardation issue to reinstate the death penalty the jury had voted for after the District Court and Sixth Circuit had granted Bies' petition for habeas corpus. The facts of the case were that Bies had received the death sentence before *Atkins v. Virginia*, when mental retardation was considered only as a mitigating factor against a death sentence rather than a bar to the death penalty. Under direct review, the Ohio Supreme Court recognized that Bies' mild retardation was a mitigating factor, but that it was outweighed by the aggravating factors. Before that court could apply *Atkins v. Virginia* to Bies' case, the federal courts intervened by granting his petition for habeas corpus, finding that the Ohio Supreme Court's earlier recognition of Bies' mental retardation ended the issue and required a life sentence to be imposed. The Supreme Court disagreed.

***Boyle v. United States*, 129 S.Ct. 2237, 77 USLW 4474 (2009)**

A 7-2 Court, in an opinion written by Justice Alito, with Justices Stevens and Breyer dissenting, held in *Boyle v. United States* that the federal RICO statute found at 18 U.S.C. sec. 1961 *et seq.* does not require special jury instructions requiring the jury to find that there was "an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages." Essentially, the Court held that the statute, as written, was not meant to simply apply to "organized" type crime "families," but applies also to groups such as the petitioner's who lacked such a more formal structure.

***Nijhawan v. Holder*, 129 S.Ct. 2294, 77 USLW 4489 (2009)**

Justice Breyer wrote a unanimous opinion for the Court in *Nijhawan v. Holder*, a case involving a question of statutory interpretation. The question was whether a statute that provided for aliens being deported if convicted of a crime of fraud or deceit in excess of \$10,000 was meant to apply only categorically to statutes where the amount of loss was an element of the crime, or whether it was meant to apply in fact-specific circumstances where the victim's loss exceeded

\$10,000. The Court held that Congress intended the statute to be applied in the latter method. The defendant in this case had been convicted of conspiracy to commit mail fraud, but the jury made no factual determination as to the amount. At sentencing, the defendant admitted to an amount of \$100 million and was ordered to make restitution in the amount of \$683 million.

***District Attorney's Office for the Third Judicial District v. Osborne*, 129 S.Ct. 2308, 77 USLW 4498 (2009)**

In *District Attorney's Office v. Osborne*, Justice Kennedy sided with Justices Scalia, Thomas, and Alito in an opinion written by Chief Justice Roberts in which the Court declined to create (or find, depending on one's point of view) a substantive due process constitutional right to post-conviction DNA testing. Instead, the Court found that William Osborne was left to try and find relief under Alaska's post-conviction scheme because that scheme was not shown to be fundamentally unfair. The Court also declined to extend *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963), to apply to the post-conviction setting after a defendant has received a fair trial. A large part of the Court's rationale was also based upon the unwillingness to take over the creation and what would end up being the administration of the post-conviction DNA testing system when the federal system and forty-six states already had a statutory scheme (and three more, including Alaska, with a court made system) in place. None of those systems' fundamental fairness was being challenged in this case.

continued page 37

JEROME P. MCCAULEY, C.P.A., P.A.

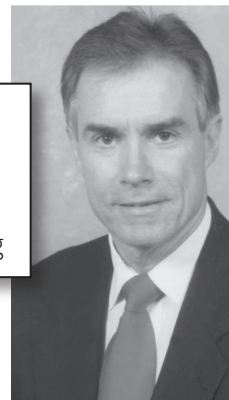
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The Magic of Mediation

continued from page 21

sented by the other side, it is viewed as an adversarial tactic used for the purpose of gaining leverage. When the mediator raises questions concerning the accuracy of a case evaluation or the strength of a legal position, people listen. Mediation also provides the mediator with the opportunity to participate in a risk analysis of each party's case. A good mediator will explore with the lawyers the probabilities of winning or losing the arguments espoused. This exercise typically takes place in private sessions and can be extremely valuable for the clients as they grasp what constitutes winning and the true likelihood of winning. During these sessions, the mediator will contrast the certainty of resolution with the uncertainty of an adjudicated outcome. Once most parties journey through this analysis, they strive to reach a settlement because they appreciate the benefits of closure and certainty.

Eighth, the mediator brings an air of civility to the process. The mediator's mere presence can reduce tension and help advocates shift from their role as adversary to their role as legal counselor. Mediators, by their apparent authority, command a certain level of respect from both parties and lawyers. Lawyers chose mediators that can achieve settlements in a manner that is consistent with that attorney's style and personality. As such, this creates a type of deference on the part of the lawyer to "let the mediator do their job" or otherwise stated, "allow the mediator to perform their magic." Parties may often enter the process with anger and hostility. These emotions

are diffused, however, when they are treated with dignity by the mediator, who empowers them to reach their own decisions with the advice of their legal counsel.

Ninth, the mediation process lends itself to multiple option development. Parties and attorneys enter mediation with some ideas about how settlement will be obtained. The mediator brings a completely fresh perspective to the dispute. Options that have never been considered by the parties and attorneys may become quickly apparent to the mediator. Parties view settlement options with their own agendas in mind – hidden and stated. But the mediator can brainstorm and "throw out" all options for settlement. While some may seem far-fetched, it can be an eye-opening and impasse-breaking exercise.

Tenth, mediators are in a unique position to establish rapport with the parties and to assist an attorney with client control and reality testing. Occasionally mediators serve as the bearer of bad news. Parties hire lawyers to champion their cause, but at the same time the attorney has an obligation to serve as a legal counselor. Sometimes it is difficult for an attorney to effectively serve in both roles simultaneously.⁴ The mediator, as a professional neutral, does not occupy the position of advocate and can therefore express a third-party perspective without diminishing the party's view of his lawyer as the champion of his cause.

I often tell people that "mediation is not the panacea to solve all social ills," but I do believe it is a valuable process that can restore relationships, resolve disputes, empower parties to take control and make their own decisions, and bring about nec-

essary closure for weary litigants. Given these societal benefits, perhaps there is some magic to mediation.⁵

A. Michelle Jernigan is a shareholder with Upchurch Watson White & Max. She has been a member of the OCBA since 1982.

¹ Reported statistics vary somewhat. The American Bar Association reports that over 85% of all mediations result in settlement. See M. Roberts, *Why Mediation Works* (August 2000) <http://www.mediate.com/articles/roberts.cfm>. Global Dispute Resolutions reports on its website that 80% to 85% of cases are settled through the mediation process. See *About Mediation* (May 2009) <http://www.globaldispute.com/mediation.php>. "Since over 90% of cases settle, the issue isn't whether it will settle, but when, how, and with what transaction costs will the settlement occur." F. Mosten, *Eleven Questions Most Commonly Asked About Mediation* (August 1998) at 3, <http://www.mediate.com/articles/mosten4.cfm>. Mediators from Upchurch Watson White & Max report ratios between 70% and 85%, with an average of 80% of all cases settling in mediation.

² R. Max, *Mediation: The Humanization of the Justice System Resulting in the Truest Equities Among the Parties* (2000) <http://www.uww-adr.com/pdfs/Humanization.pdf>. Mr. Max provides the following definition of success: "In practice, we measure success by victories ('win-loss'), from which we attain greater financial reward. However, true success and reward are found in achieving efficient and equitable results ('win-win') through an understanding of the human needs and interests of our clients."

³ *Id.*

⁴ "Quite often, their role of adversary professional causes many lawyers to respond aggressively or initiate preemptive strikes that the other party finds threatening. It is difficult for a lawyer to take care of a client and to play a meditative role at the same time." F. Mosten, *Eleven Questions Most Commonly Asked About Mediation* (August 1998) at 3, <http://www.mediate.com/articles/mosten4.cfm>.

⁵ I must credit Michael Roberts for his article on *Why Mediation Works*. It was extremely helpful in developing these theories on the "magic of mediation."

Professionalism Committee

continued from page 24

gage in this type of behavior. Attorneys shall further endeavor to inform those observers appearing supportively for their client or witness not to engage in this type of behavior. This behavior is strictly prohibited.

13. Attorneys shall refrain from making re-argument after the Court has ruled.

14. Attorneys shall ensure that their clients are adequately informed of any settlement proposals.

15. Attorneys shall cooperate with counsel for each party to the action during trials and evidentiary hearings by disclosing the identities of all witnesses reasonably expected to be called and the length of time needed to present their entire case. Attorneys should cooperate with a request to call a witness out of turn when the circumstances justify it, unless a client's material rights would be adversely affected.

16. In the courtroom, Attorneys shall not use tobacco in any form, chew gum, or bring bottles, beverage containers, paper cups, or edibles, except as permitted by the Court.

17. Attorneys shall turn off or place in silent mode all cell phones and pagers. Attorneys shall further turn off or mute the audio of any computers brought into or used in Court, unless specifically

permitted by the Court as part of the proceedings.

Committee notes:

Section I. 3. Producing requested discovery documents in the middle of one of several boxes of unindexed, unorganized materials with no clue or annotation may be obstructionist or vexatious. Any misleading response obscuring the existence of discoverable material, of course, should as well be deterred. It would be in the interest of professionalism to deter both the "needle in the haystack" document production and a response to discovery calculated to mislead.

Section III. 1. See *Boca Burger, Inc v. Forum*, 912 So.2d 561 (Fla. 2005).

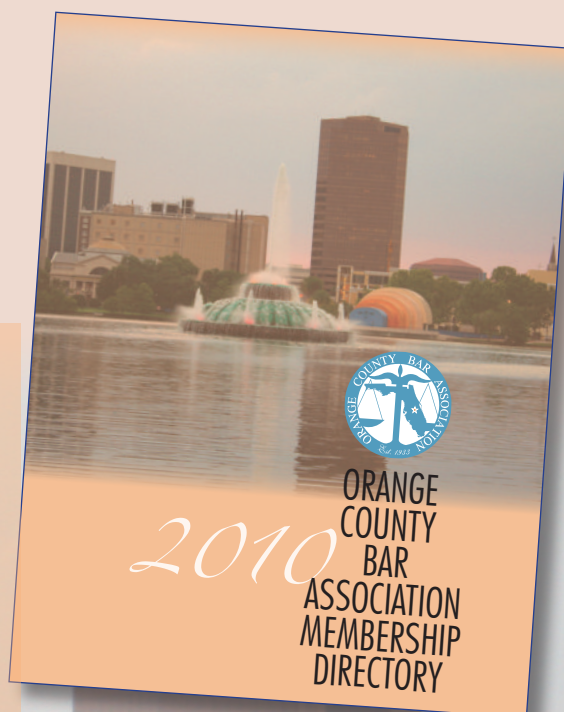
We are all hopeful this will move our legal community in the right direction. I would like to thank all professionalism standards subcommittee members, as well as the attorneys and judges who provided comments, for their time and effort in promulgating these standards.

Submitted on behalf of the OCBA Professionalism by committee chair, **The Hon. Magistrate Friedman** of the Ninth Judicial Circuit. Magistrate Friedman has been a member of the OCBA since 2005.

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Criminal Law Committee

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Yeager v. United States, 557 U.S. ____ (2009)

Yeager v. United States presented a very interesting issue regarding the Double Jeopardy Clause. Under *United States v. Powell*, the Court will not disturb inconsistent guilty and not guilty verdicts on the basis of the Double Jeopardy Clause. At issue in this case, however, was acquittals on some counts and a hung jury on the remaining counts, and whether Double Jeopardy precluded retrial on the hung verdicts. The District Court engaged in issue preclusion (collateral estoppel) analysis, found that the jury's acquittals did not necessarily resolve an element at issue in the remaining counts, and denied the defendant's motion to dismiss the remaining counts. The Court of Appeals, however, disagreed with the lower Court's reading of the record and found that the factual issues in the remaining counts had to have been considered by the jury, but that the jury was irrational in hanging on the remaining counts and apparently chose to treat the hung verdicts as being in conflict with the acquittals for analysis under *United States v. Powell*. Justice Stevens wrote for the Court and was joined by Chief Justice Roberts, and Justices Souter, Ginsburg, Breyer, and Kennedy (for the most part). The relationship between the Chief Justice's and Justice Kennedy's vote on this case is very interesting and is clearly evident of the coalition building in which the new Chief Justice is engaging. Justice Kennedy disagreed with the Court's failure to decide the issue preclusion (collateral estoppel) issue and the Court's mere suggestion that the Court of Appeals reconsider the issue. Justice Scalia, joined by Justices Thomas and Alito, dissented and took the position that Double Jeopardy is not at issue at all because the retrial after a hung verdict, even in the majority's own words, is a mere extension of the original trial and jeopardy. Justice Alito wrote a separate dissent joined by Justices Scalia and Thomas and wrote that not only did he not see this as a Double Jeopardy issue at all, but he went further in arguing that even under the issue preclusion (collateral estoppel) analysis, the record does not support a finding of issue preclusion and that the Court of Appeals should be forced to revisit the issues, not merely be "suggested" to do so. The holding the practitioner should take away from this case is that hung counts can be barred by Double Jeopardy if there was an acquittal on another count that creates an issue preclusion (collateral estoppel) situation.

Melendez-Diaz v. Massachusetts, 2009 WL 1789468 (U.S. 2009)

Melendez-Diaz v. Massachusetts was far less interesting in result than it was in the division of the Court. Justice Scalia wrote for the Court and was joined by Justices Stevens, Souter, Thomas, and Ginsburg, with Justice Kennedy writing a dissenting opinion joined by the Chief Justice and Justices Breyer and Alito. As one would expect, Justice Scalia found that *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004), applies to reports prepared by expert witnesses—in this case, a report generated by a drug analyst in a drug case. This has already been the law in Florida since

May 1, 2008, under *State v. Johnson*, 982 So. 2d 672 (2008). It is clear under this ruling that affidavits prepared solely for the purpose of litigation, such as breath test affidavits, would also be considered testimonial and the author should be subjected to confrontation. As far as driving records and other documents that may be offered into evidence as non-testimonial public or business records, *Yisrael v. State*, 986 So. 2d 491 (Fla. 2008) provides guidance as to what the difference between a normally kept record is versus a letter prepared to comment upon such records. Justice Scalia highlighted that there's a difference between a clerk's records and a letter prepared by the clerk asserting the absence of records. The former would not be testimonial, and the latter would be testimonial and subject to confrontation. The dissent relied upon public policy grounds, expressing worry over the practical effects of the ruling in the administration of justice, and it also interpreted "witness" to mean conventional "eye-witnesses" rather than unconventional witnesses (nearly all expert witnesses). Also, the dissent suggested that a defendant should have to exercise his right to compulsory service of process on witnesses that he wished to challenge, such as expert witnesses.

Safford Unified School District No. 1 v. Redding, 2009 WL 1789472 (U.S. 2009)

Safford v. Redding, the much anticipated "school strip search" case, really failed to deliver if one was expecting future guidance in this area. Justice Souter wrote for the Court, and he was joined by the Chief Justice and Justices Scalia, Kennedy, Breyer, and Alito. He was also joined in part by Justices Ginsburg and Stevens. Justice Thomas agreed with the Court that the school officials should be protected by qualified immunity, but disagreed with the other justices that the search violated the Fourth Amendment.

The analysis was very fact dependent and the Court concluded that the nature of the contraband, ibuprofen, was not dangerous enough to justify the strip search and that there was insufficient facts to reasonably suspect it would be found in Redding's underwear. The Court also concluded that the law in this area was not so settled that the school officials should be denied qualified immunity. It did leave for another day Redding's claims against the school board itself. Still, it's hard to imagine that the potential damages even approach the legal fees in this case at this point. Justice Stevens and Justice Ginsburg would have denied immunity to the school officials, finding that *New Jersey v. T.L.O.* 469 U.S. 325, 105 S.Ct. 733 (1985), was clear in its holding that a school search is only reasonable if there are reasonable grounds for suspecting the search will turn up the contraband and that the search was not excessive when considering the age and sex of the student, as well as the nature of the infraction. Justice Thomas disagreed that the search was unreasonable sighting the facts that a student had recently become ill from taking such prescription drugs, that the abuse of prescription drugs is a rapidly growing problem in schools, and that it is not uncommon for students to store contraband in their underwear. Moreover, he cited cases standing for the proposition that once there are grounds for a search, the search is justified anywhere the contraband could be found, which includes one's underwear. This raises the very interesting question as to how he would have decided a case where the search was even more intimate based on where contraband seems to be more and more commonly stored.

William R. Jay, a Board Certified Criminal Trial Attorney, is an associate at Carsten and Ladan, P.A. He has been a member of the OCBA since 1998.



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by Westlaw, FindLaw, Marsh Global Consumer, Colonial Bank, Commercial Equity Partners, Allegra Print & Imaging, Ruby Receptionist and Boehm & Boehm. Winner of FindLaw's \$100 AmEx card drawing was Aubrey Ducker of the firm Law Office Aubrey H. Ducker, Jr., LLP.

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I was so proud of myself the first time I successfully introduced an exhibit into evidence. But, as you know, pride goes before a fall...

I'd only been out of law school for a week or two and was trying my first Driving Under the Influence (DUI) case. DUI cases often involve a variety of physical and documentary evidence, and this case was no exception. There was a mugshot showing how the defendant looked when he'd been booked into the jail, a videotape of his field sobriety tests, documents showing the reliability of the breath testing instrument and, of course, a printout showing the results of the defendant's breath tests. Wanting to make sure that I didn't miss anything, I had handwritten each of my questions on my legal pad and was in the process of dutifully reading each predicate question aloud to the witness:

Q: I'm now showing you what's been marked as State's Exhibit A for Identification. Do you recognize that photo?

A: Yes, I do.

Q: What is that photo of?

A: It's a booking photo taken the night the defendant was arrested.

Q: Does that photo truly and accurately depict the way the defendant looked the night you arrested him for Driving Under the Influence?

A: Yes, it does.

Q: Your Honor, I ask that what has been marked as State's Exhibit A for Identification be introduced into evidence as State's Exhibit #1.

Judge: Any objections?

Defense attorney: No, your Honor.

Judge: State's Exhibit A for Identification will be introduced into evidence as State's Exhibit #1 without objection.

Q: Your Honor, may I have permission to publish the exhibit to the jury?

Judge: As soon as the clerk marks the exhibit, you may.

Silently breathing a sigh of relief while simultaneously trying to suppress a huge grin, I approached the witness box, retrieved the photo, and handed it to the clerk. While waiting for her to mark it, I thought to myself, "I did it!" Oh sure, there hadn't been any objections, and the evidentiary predicate for photographs is the easiest one in the book, but still, I'd done it – I'd admitted my first piece of evidence! Having accomplished my goal, I approached the jury box and proudly handed the photo to the courtroom deputy, who then handed it to the first juror.

And that's when I made the stupid mistake that thousands of other trial lawyers make in court every day...



Elliott Wilcox

As soon as the photo left my hands, I returned to the lectern, reviewed my notes, and **immediately** started asking my next series of questions. The first juror didn't even have a chance to start looking at the photo before I was halfway into my second question. He hurriedly glanced at the photo and then handed it to the next juror, who barely looked at it before passing it along. None of the jurors spent more than a second or two looking at the photo before giving it to the next juror. As a result, something that should have been an important piece of evidence was completely ignored by the jurors, because I'd forced them to divide their attention between the exhibit and the witness's testimony.

Introducing exhibits into evidence isn't always easy. Often, we can get so caught up in the act of admitting evidence that we forget to give the jurors a chance to pause and look at our exhibits. But if we don't give them enough time to look at our exhibits, its evidentiary impact will be lost.

Here's your presentation practice tip: The next time you publish an exhibit to the jury, don't ask your witness another question until the jurors have finished looking at the exhibit. Don't rush them. Give them as much time as necessary to examine it, because if you start asking questions while they're still examining the exhibit, they're either going to ignore your exhibit or ignore your witness's testimony. Either way, they're going to miss essential information. Wait until the jurors finish examining the item, retrieve it from the last juror, and then walk back to the lectern to resume asking questions. By making this small change in your presentation, you'll make it much easier to direct your jurors' focus towards the most important evidence in your case, and you'll prevent them from missing the essential piece of evidence that proves your case!

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Elliott Wilcox is the editor of *Trial Tips Newsletter*. To get a free copy of "The Art of Cross-Examination," visit www.TheArtOfCrossExamination.com



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Speaking Engagements

Gregory A. Chaires of Chaires, Booderson & Guerrero, P.L., was invited to lecture on *Keeping What You Collect: The Expanding World of Payer Audits* at the 2009 Bones Society of Florida Annual Conference on Sept. 25, 2009, in Fort Lauderdale, Florida.

Anthony J. Diaz, Anthony J. Diaz, Esquire C.P.A., recently gave a presentation for the Orange County Bar Association Estate and Trust Committee on *Top Ten Ways to Avoid Going to Court or Getting that 3AM Call*.

Louise B. Zeuli of Louise B. Zeuli, P.A., in Maitland recently presented: *Arbitration: Is it in Your Future?* to members of Rotary Club of Seminole South in Longwood.

Events

Oct. 2 - YLS 18th Annual Charity Golf Tournament. Shingle Creek Golf Club. 8:00 a.m. shotgun start. Sponsorships available. See ad in this issue or contact Sunny Hillary at sunny@brownstonelaw.com or Amber Neilson at aneilson@iplawfl.com.

Seminars

Sept. 1 - Practical Foreclosure Defense and Loan Modification for Low Income Homeowners. LAS Lunchtime Training. 12:00 p.m. - 1:30 p.m. Comerica Bank, 111 N. Magnolia Ave., Ste. 1000, Orlando, FL 32801. 1.5 CLE pending. Speaker: **Michael Resnick, Esq.** Details: ctucker@legalaidthocba.org or mcarbo@legalaidthocba.org.

Sept. 15 - Delinquency Cases and the GAL. LAS/GAL Lunchtime Training. 12:00 p.m. - 1:30 p.m. Comerica Bank, 111 N. Magnolia Ave., Ste. 1000, Orlando, FL 32801. Details: ctucker@legalaidthocba.org or mcarbo@legalaidthocba.org.

Sept. 18 - Tax Issues Related to Family Law Cases. Family Law Committee. Speaker: **Patrick Burns**, Forensic CPA. 12:00 p.m. Orange County Courthouse, 23rd Floor Conference Room.

Sept. 22 - Employment Law Basics. Solo & Small Firm Committee Seminar. 12:00 p.m. OCBA Center. Speaker: **Heather Morcroft, Esq.** Contact Marie Marrero at mariem@ocbanet.org.

Oct. 13 - Family Law and Domestic Violence. LAS Lunchtime Training. 12:00 p.m. - 1:30 p.m. Comerica Bank, 111

N. Magnolia Ave., Ste. 1000, Orlando, FL 32801. Speaker: **Tenesia Hall, Esq.** Details: ctucker@legalaidthocba.org or mcarbo@legalaidthocba.org.

Oct. 15 - Appellate Practice Committee Seminar. 1:30 p.m. OCBA Center. Contact Marie Marrero at mariem@ocbanet.org.

Oct. 20 - Navigating Interagencies. LAS/GAL Lunchtime Training. LAS Lunchtime Training. 12:00 p.m. - 1:30 p.m. Comerica Bank, 111 N. Magnolia Ave., Ste. 1000, Orlando, FL 32801. Speaker: **Kavita Sookraj, Esq.** Details: ctucker@legalaidthocba.org or mcarbo@legalaidthocba.org.

News to Note

Criminal Practitioners: Cindy Schmidt, OCBA member and Boone High School law magnet program teacher, is collecting Motions to Suppress samples for students' use this fall. Please mail interesting police reports to: Cindy Schmidt, Boone High School, 2000 S. Mills Ave., Orlando, Florida 32806.

Barry University - For the fourth consecutive year, the ABA has awarded Barry University School of Law its National Law Student Division Volunteer Income Tax Assistance (VITA) Program Award. The program provides free income tax assistance to those who are underserved, veterans, and low to moderate income families/individuals. Recently the program expanded to offer VITA services in Spanish. Seventy-five Barry students volunteered this year.

The Orange County Office on Aging, the Orange County Library System, and Channel 9 will be presenting a monthly series of 30-minute seminars about caregiver services available for seniors in Central Florida entitled "Counsel for Caregivers: A Helping Hand of Healing." Seminars will be held at the library's downtown branch. For details, please contact: Jan Reynolds, Orange County Office on Aging, at 407.836.6553.

Correction: Due to an error, photos on page 23 of August's issue of *The Briefs* were misidentified. The top left photo is Lawson Lamar, State Attorney for the Ninth Judicial Circuit, and the photo directly below is Circuit Judge C. Jeffery Arnold. We regret the error.

Literary Society of the Orange County Bar Association

Reading List 2009-2010

Date	Author	Book	Discussion Leader
September 9, 2009	Robert Pirsig	<i>Zen and the Art of Motorcycle Maintenance</i>	Anna Palmer
October 14, 2009	Dashiell Hammett	<i>The Maltese Falcon</i>	Karen Jennemann
November 11, 2009	Gunter Grass	<i>The Tin Drum</i>	Dotty Green
December 9, 2009	Cormac McCarthy	<i>No Country for Old Men</i>	Stuart Bernstein
January 13, 2010	Elizabeth Strout	<i>Olive Kitteridge</i>	Maria Hinds
February 10, 2010	John Fowles	<i>The Magus</i>	Michael Nardella
March 10, 2010	Anne Enright	<i>The Gathering</i>	Bob Mansbach
April 14, 2010	Saul Bellow	<i>Herzog</i>	Matt Brenner
May 12, 2010	Greg Mortenson & Gary Snyder	<i>Three Cups of Tea</i>	Robert Hoofman
June 9, 2010	Elie Wiesel	<i>Night</i>	Dennis Wall



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OCBA CALENDAR

September - October 2009

OCBA Luncheon

Thursday, September 24, 2009

Leslie Hielema
President
Orlando Regional Chamber of Commerce
RSVP by September 18 to:
reservations@ocbanet.org

Sponsored by Marsh Global Consumer



September

- 1 LAS Lunchtime Training**
Practical Foreclosure Defense and Loan Modification for Low Income Homeowners
12:00 p.m. • Comerica Bank, 10th Flr.
- 2 Criminal Law Committee**
12:00 p.m. • Courthouse
23rd Flr. Judges' Conference Rm.
- Estate Guardianship & Trust Committee**
12:00 p.m. • Bar Center
- 3 Federal Judicial Relations Committee**
12:00 p.m. • Judge Conway's Chambers
- 9 Judicial Relations Committee**
12:15 p.m. • Courthouse
21st Flr. Conference Rm.
- Executive Council Meeting**
4:00 p.m. • Bar Center
- 10 Real Property Committee**
12:00 p.m. • Bar Center
- Social Security Committee**
12:00 p.m. • Bar Center
- OCBA Paralegal Committee**
5:30 p.m. • Bar Center
- 11 Family Law Executive Committee Meeting**
11:45 a.m. • Houlihan's
- Workers' Compensation Committee**
11:45 a.m. • Smokey Bones
- 15 Professionalism Committee**
12:00 p.m. • Bar Center
- LAS/GAL Lunchtime Training**
Delinquency Cases and the GAL
12:00 p.m. • Comerica Bank, 10th Flr.
- 16 Insurance Law Committee Seminar**
12:00 p.m. • Bar Center
- 17 YLS Luncheon**
11:45 a.m. • Citrus Club
- Appellate Practice Committee**
12:00 p.m. • Bar Center

- 18 Family Law Committee Seminar**
Tax Issues Related to Family Law Cases
12:00 p.m. • 425 N. Orange Ave.
#2310
- 22 Solo & Small Firm Committee Seminar**
Employment Law Basics
12:00 p.m. • Bar Center
- 23 Labor & Employment Law Committee**
12:00 p.m. • Bar Center
- 24 OCBA Luncheon**
Leslie Hielema
President
Orlando Regional Chamber of Commerce
11:30 a.m. • The Ballroom at Church St.
- 25 Bankruptcy Law Committee**
12:00 p.m. • Bar Center
- 30 Business Law Committee**
12:00 p.m. • Location varies.
Please contact chair..

October

- 2 YSL 18th Annual Charity Golf Tournament**
8:00 a.m. • Shingle Creek Golf Club
- 7 Criminal Law Committee**
12:00 p.m. • Courthouse
23rd Flr. Judges' Conference Rm.
- 8 Real Property Committee**
12:00 p.m. • Bar Center
- Social Security Committee**
12:00 p.m. • Bar Center
- OCBA Paralegal Committee**
5:30 p.m. • Bar Center
- 9 Workers' Compensation Committee**
11:45 a.m. • Smokey Bones
- Family Law Executive Committee Meeting**
11:45 a.m. • Houlihan's
- 13 Judicial Assistants / Magistrate Assistants Luncheon / Family Law Committee**
12:00 p.m. • Bar Center
- LAS/GAL Lunchtime Training**
Family Law and Domestic Violence
12:00 p.m. • Comerica Bank, 10th Flr.
- 14 Estate Guardianship & Trust Committee**
12:00 p.m. • Bar Center
- Executive Council Meeting**
4:00 p.m. • Bar Center
- 15 YLS Luncheon**
11:45 a.m. • Citrus Club
- Appellate Practice Committee Meeting**
12:00 p.m. • Bar Center
- Appellate Practice Committee Seminar**
1:30 p.m. • Bar Center
- 20 Professionalism Committee**
12:00 p.m. • Bar Center
- LAS/GAL Lunchtime Training**
Navigating Interagencies
12:00 p.m. • Comerica Bank, 10th Flr.
- 21 Insurance Law Committee**
12:00 p.m. • Bar Center
- 22 OCBA Luncheon**
11:30 a.m. • The Ballroom at Church St.
- 27 Solo & Small Firm Committee**
12:00 p.m. • Bar Center
- 28 Bench Bar Conference (3-day conference)**
9:00 a.m. • Bar Center
- 29 Bench Bar Conference (3-day conference)**
9:00 a.m. • Bar Center
- 30 Bench Bar Conference (3-day conference)**
9:00 a.m. • Bar Center



Visit the OCBA website at www.orangecountybar.org for updates on committee meetings, seminars and events.



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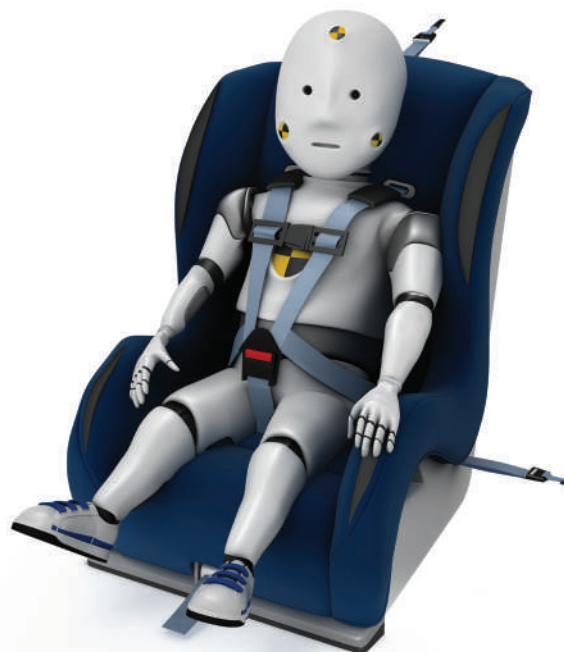
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