

the Briefs

A Publication of the Orange County Bar Association



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September 2010
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President's Message

September 2010

Judging and Practicing in an Indeterminate World

I was fortunate enough to have attended the ABA's Bar Leadership Institute in Chicago earlier this year. It was a terrific program, and I enjoyed and benefitted from discussions about how other voluntary bar organizations deal with some of the same issues we face in these challenging times of economic uncertainty and a rapidly changing professional landscape. Not only was it comforting to hear that the OCBA's challenges are similar to those faced by others, but I was emboldened to learn that the OCBA is far ahead of other bar organizations in providing value to our members through the many programs we offer such as the Lawyer Referral Service, the Bench/Bar Conference, and more.

There was, however, an alarming presentation by one speaker who opined that the legal profession was not only in the midst of dramatic changes, but that we would experience even more significant changes over the next ten years than have occurred during the last thirty years. Unfortunately, this speaker did not provide specific suggestions that I can pass along to you in preparation for these changes. These trends were very broadly stated and dealt with complicated factors such as the impact of technology on the practice, the effects of the worldwide economy, and a more sophisticated and demanding clientele. But this speaker was very quick to state that clients would continue to need lawyers! Additionally, he said that our services were still going to have value, particularly in terms of providing our advice, judgment, and counsel on complicated issues. And I think we all instinctively know that our current and future clients are going to continue to face more and more complicated issues for which legal services are required and valued, particularly as the pace of business continues to accelerate.

I thought about these broad concepts and the challenges of the modern law practice as I read former Justice David Souter's excellent graduation speech to the Harvard class of 2010. I loved Constitutional Law classes during law school. Unfortunately, I have not had the

occasion to deal with very many of these issues in my litigation practice. I enjoyed becoming reacquainted with some of the constitutional concepts I hadn't really thought about for years as I read Justice Souter's speech. His judicial philosophy has application for our practices and how we might approach the changes that are coming.

Justice Souter cogently explained some of what the justices from the United States Supreme Court do when deciding constitutional cases and suggested that the "fair reading model" of interpreting the Constitution is too restrictive, not in keeping with the basic design of the Constitution, inconsistent with our fundamental "aspirations" as Americans, and impractical for the indeterminate times in which we live. Moreover, Souter explained his judicial philosophy in a very hopeful and optimistic way that recognized the brilliance of our Constitution, which he referred to as a "pantheon of values," and the challenges faced by the justices as they grapple with the meaning of certain facts that appear in the constitutional cases that make it to the Supreme Court. Souter suggested that the most difficult cases – "the cases that tend to raise the national blood pressure" – arise when constitutional values conflict, such as order and security on the one hand and liberty on the other, which of course is part of the beauty of the Constitution. He advocated a judicial philosophy of respecting the words of the Constitution and the historical context in which they were written, while grappling with and ultimately mastering the records on appeal which arise in our modern world, and then making a choice between conflicting constitutional values.

One of the most interesting points from the Souter speech was his observation "that behind most dreams of a simpler Constitution there lies a basic human desire for certainty and control." But he went on to state that while most of us long for a "world without ambiguity," Justice Holmes had wisely observed that "certainty is generally an illusion and repose is not our destiny." Justice Souter stated that "in an indeterminate world



Frank M. Bedell

I cannot control, it is still possible to live fully in the trust that a way will be found leading through the uncertain future." He said that justices can do this "by relying on reason, by respecting all the words the Framers wrote, by facing facts, and by seeking to understand their meaning for living people." Similarly, I think that we can apply some of these same philosophies to deal with uncertainties in our law practices. We all know that change is inevitable, and if the ABA expert is accurate, then we are in for more dramatic change over the next decade. But I am optimistic and hopeful about the changes that are apparently coming. If we continue to serve our clients diligently and responsively, treat each other fairly and professionally, and intelligently adapt to these new challenges, then the legal profession will continue to occupy its special place in the times to come.

One of the many great things about the OCBA is the continued involvement of past leadership and the close relationship we share with our local judiciary. For example, David King is heading a commission that is studying the ways that hearings are scheduled and conducted, as well as the types of experiences that lawyers and litigants have when they go to the courthouse, so that recommendations can be made for improving the effective administration of justice. Additionally, our Young Lawyers Section is incredibly active, and its members are always looking for and adapting to new trends in the law. I suspect that we all learn something from our younger colleagues every day. In short, the members of the OCBA are well positioned – future clients will continue to need our services, and we will continue to adapt so that we can deliver legal services that are important and valuable to the lives of our clients.

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

Professionalism Committee

● Congratulations to Pat Magill on ● Receiving the 2011 William Trickle, Jr. Professionalism Award

Magistrate Howard D. Friedman

Congratulations to Patrick M. Magill, the 2011 OCBA William Trickle, Jr. Award winner. Pat operates a small law practice with his son Robert. Despite the time demands of the practice, Pat always finds the time to serve the bar and the community. Pat has been involved for many years serving as Trustee and Past President of the Orange County Legal Aid Society Board of Trustees. Pat was instrumental in helping to establish the Central Florida Family Law Inns of Court, where he served as President for 2008-2009. Pat has served as a panelist/presenter/lecturer on legal ethics and professionalism at many OCBA continuing legal education programs through the years.



Patrick M. Magill

Pat has served countless hours as a voluntary Guardian ad Litem, helping to give a voice to our most vulnerable citizens. Pat put his experience and wisdom to further use by serving for many years as a Guardian ad Litem Trainer for the OCBA Legal Aid Society GAL Program. Most recently, Pat has served as a panelist on the statewide committee developing the training manual for volunteer Guardians ad Litem. Pat also served as the chair of the OCBA Professionalism Committee for many years.

For those of you who haven't yet met Pat, he is the type of person you can count on – and always count on to do the right thing. Aside from being an excellent attorney and advocate on behalf of his clients, Pat is possessed with the virtue of a kindness of spirit that is rare and valuable in our profession. Quoting Pat's professionalism award nomination, "Pat is well known in the legal community not only for his excellent legal knowledge and judgment, but for his unfailing courtesy, good humor and concern for and commitment to his clients, friends, family and community. Pat is highly regarded as an attorney who conducts himself in a manner consistent with the highest standards of ethics and professionalism."

By unanimous decree at a special meeting of the OCBA Professionalism Awards Subcommittee, it was determined that we recognize Patrick Magill for his career of professionalism by bestowing upon him the high honor of being the recipient of the 2011 William Trickle, Jr. Professionalism Award.

Patrick M. Magill epitomizes the type of individual we seek to recognize with the Trickle, Mathews and Glazebrook professionalism awards.

2011 Lawrence G. Mathews, Jr. and James G. Glazebrook Professionalism Awards Nominations Are Now Being Accepted!

Please honor Orange County's distinguished attorneys and jurists by making your nominations today for the 2011 Lawrence G. Mathews, Jr. Young Lawyer Professionalism Award (less than 15 years in practice) and the James G. Glazebrook Memorial Bar Service Award (jurist). For 2011, Pat Magill was unanimously

selected to receive the Trickle award, so if you make a Trickle Award nomination, it will be considered for the 2012 award. **The deadline for nominations is December 3, 2010.** As you may have gathered, these awards are for "lifetime" achievement. A previous nominee's continuation in the path of truth, honor and service may well result in his or her selection. You may renew your previous nomination or provide an addendum/update to a previous nomination.

Award nomination forms containing the specific awards criteria are available on the OCBA website. Please forward your nomination(s) or any question(s) regarding the awards to:

Brant Bittner, Executive Director
Orange County Bar Association
880 N. Orange Avenue
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Phone: 407-422-4551
Fax: 407-843-3470
Email: Brantb@ocbanet.org



Magistrate Friedman

FAQs

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

Nominations for the awards may be made by letter, email, facsimile, or by nomination form (available on the OCBA website). Clearly identify your nominee, indicate for which award you are making the nomination, and explain why your nominee embodies the qualities worthy of receiving the award. Ensure that you provide your contact information so that we may contact you if we have questions. Also, let us know if you desire to have the committee consider a previously submitted application. Forward your nomination(s) or any question(s) regarding the awards to Brant Bittner, OCBA Executive Director (see contact information above).

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

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

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OCBA Luncheon *September 30, 2010*

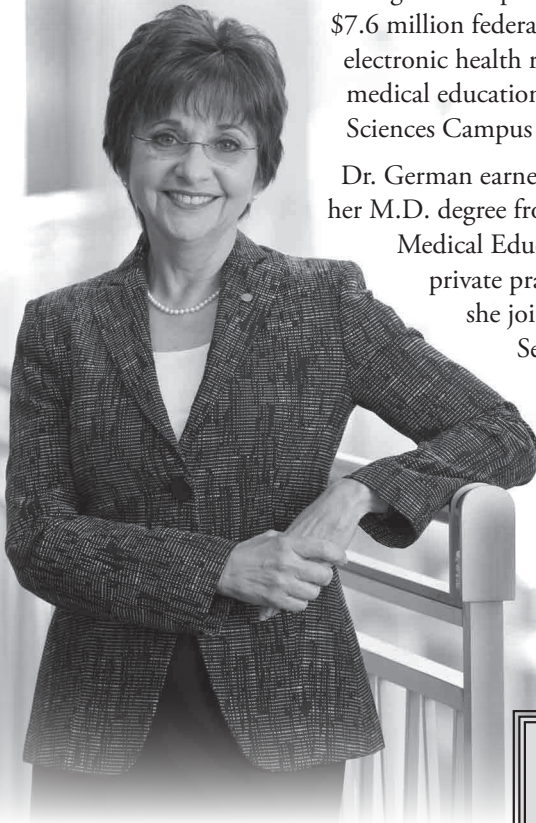
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The Orange County Bar Association is pleased to welcome Deborah C. German, M.D., Founding Dean of the University of Central Florida College of Medicine, as the speaker for its September Luncheon. Dr. German was appointed Founding Dean of the UCF College of Medicine in December 2006 and was also named UCF's Vice President for Medical Affairs in July 2010. She leads the development of the new medical college, comprised of the Medical Education (M.D.) program, the Burnett School of Biomedical Sciences, and the college's emerging clinical practice.

Under Dr. German's leadership, the UCF College of Medicine built a team of over 400 faculty and staff and appointed more than 1,000 volunteer faculty. Incredibly, the college has raised funds to provide four-year scholarships for the entire charter class. The class will begin its studies in a newly constructed, 375,000 square-foot medical school facility. The M.D. Program has also gained its preliminary accreditation. Dr. German and her team have secured a \$7.6 million federal grant to help Central Florida doctors develop and effectively use electronic health records to improve patient care, and they recently opened the new medical education and Burnett Biomedical Sciences buildings at the UCF Health Sciences Campus at Lake Nona.

Dr. German earned her undergraduate degree in chemistry from Boston University and her M.D. degree from Harvard Medical School. She was previously Associate Dean of Medical Education at Duke University Medical School while maintaining her own private practice in the areas of Internal Medicine and Rheumatology. In 1988 she joined Vanderbilt University as Associate Dean for Students and later Senior Associate Dean for Medical Education. She served on the Board of Trustees for the Tennessee Medical Association and chaired the Tennessee Board of Directors for the Arthritis Foundation. She also served as President and Chief Executive Officer of St. Thomas Hospital in Nashville. In 2005, Dr. German joined the Association of American Medical Colleges (AAMC) in Washington, D.C., as a Petersdorf Scholar in Residence.



Deborah C. German, M.D.

Founding Dean

University of Central Florida College of Medicine

The Ballroom at Church Street

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Please RSVP to reservations@ocbanet.org by
Friday, September 24, 2010.

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 24, 2010**. The OCBA is happy to provide 10 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!

RECENT SUPREME COURT CASES – JUNE 2010

Will Jay

Berghuis v. Thompkins **(June 1, 2010)**

With Justice Kennedy acting in his more expected role as the “swing vote,” Chief Justice Roberts and Justices Thomas, Scalia, and Alito held that the right to remain silent, like the right to have counsel during questioning, must be affirmatively asserted by a suspect in an unambiguous manner in order to invoke one’s *Miranda* right to remain silent. The Court reasoned that allowing ambiguity, such as when a suspect like Mr. Thompkins remains largely silent for 2 hours 45 minutes, to invoke the right would place both law enforcement and courts in the unenviable position of making tough judgment calls on what exactly a suspect means. Despite not being allowed to implicitly invoke one’s *Miranda* rights, the Court then held that one can implicitly waive those rights. So long as the warnings are given, the government proves beyond a preponderance of the evidence that they were understood, then a suspect can waive the right to remain silent simply by not remaining silent. The second issue decided, whether or not trial counsel was ineffective for not requesting a limiting instruction on the evidence regarding a co-defendant’s acquittal and conviction on various charges during his trial, was also resolved against Mr. Thompkins. The dissent, written by Justice Sotomayor, who was joined by Justices Stevens, Ginsburg, and Breyer, rested mainly on disagreement with the waiver issue – not whether or not Thompkins invoked his right to remain silent. Relying on *Miranda* itself, the dissent pointed out that the law says that sitting silent cannot constitute a waiver of the right to remain silent – that there must be more. The dissent disagreed with the idea that the sporadic one-word answers and head nods during 2 hours and 45 minutes were enough to show a waiver. Moreover, the dissent argued that reaching this broad new rule was unnecessary to reverse the Sixth Circuit and that the Court was overreaching. Justice Sotomayor concluded with the thought that this decision turned *Miranda* “upside down.” It may have, because by the looks of this decision, and several other recent decisions by the Court on *Miranda* issues, there seems to be five justices willing to turn it “upside down” on the way to throwing it completely out like yesterday’s trash.

Carr v. United States **(June 1, 2010)**

Statutory interpretation was the issue in *Carr v. United States*, and Justice Sotomayor wrote an opinion for the Court holding that the proper way to interpret a federal statute providing criminal penalties for sex offenders who traveled in “interstate or foreign commerce” and then failed to comply with registration requirements was to require the traveling occur only after the Act’s enactment, not before. Thus, the Court avoided an *ex post facto* analysis. She was joined by Chief Justice Roberts, and Justices Stevens, Kennedy, Breyer, and Scalia – who, of course, pointed out in a separate concurring opinion that he feels that the Court’s discussions about legislative history have no place in statutory interpretation. Justice Alito authored a dissent in which Justices Thomas and Ginsburg joined. The primary argument was that the majority’s holding defeats the purpose of the statute, and that legislatures routinely enact laws with present tense language as the “ambiguous” tense.

Barber v. Thomas **(June 7, 2010)**

Calculating credit for time served, and how it applies with gain time, can often become complicated. At issue in *Barber v. Thomas* was a federal statute that allowed for 54 days of gain time per year, with the last fraction of the year to be prorated. Justice Breyer, joined by the Chief Justice and Justices Scalia, Thomas, Alito and Sotomayor held, essentially, that the federal statute in question awards gain time for actual time served rather than the time someone is sentenced to serve. Justice Kennedy, joined by Justices Stevens and Ginsburg, dissented, arguing that the majority changes the meaning of “term of imprisonment” within the same sentence of the statute – a violation of the rules of statutory interpretation. Their second complaint was about the algebra required to prorate the last year of the sentence under the majority’s approach. The dissent’s approach to calculating release dates is best expressed as 365 days for the first year, 365 – 54 = 311 days for every year other than the first and last year, added to the last year which can be best expressed as: ((Days sentenced to – 54 days for the previous year’s gain time) * (approximately .85)). So, if

someone were to receive a 9 year and 1 month sentence, I am not able to figure out how the 54 days good time from year nine of the sentence can be applied to the additional one month (actually, .85 month, since the prisoner would have the “tenth” year of his sentence prorated too) left under the dissent’s approach.

United States v. Juvenile Male **(June 7, 2010)**

The issue of whether a question was moot was raised when the Supreme Court certified a question to the Montana Supreme Court asking whether or not the juvenile male’s duty to register as a sex offender under Montana law was contingent upon the child’s duty to register as a sex offender during his federal juvenile-supervision order. The Ninth Judicial Circuit had held that the juvenile’s duty to register under federal law during his period of supervision was a violation of the *ex post facto* clause, but since his supervision had ended before the Supreme Court addressed his petition for certiorari, the Court may no longer have a controversy to decide.

Carachuri-Rosendo v. Holder **(June 14, 2010)**

Although *Carachuri-Rosendo v. Holder* isn’t directly a criminal case, it is a case involving the deportation consequences regarding subsequent drug convictions in state and federal courts, so it is worthy of mention. Justice Stevens wrote for the Court and was joined by the Chief Justice and Justices Sotomayor, Ginsburg, Breyer, Alito, and Kennedy. The issue was whether or not Mr. Carachuri-Rosendo could petition the Attorney General to use his discretion to stop removal proceedings against him. He had been convicted of two misdemeanor drug possession charges in state court. Federal immigration law prohibits someone from petitioning the Attorney General to use his discretion to stop removal proceedings if they’ve been convicted of an “aggravated felony.” Federal law makes it a “felony,” punishable by up to two years prison, for a subsequent simple possession case if the prior conviction is alleged in the charging instrument and proven as a sentencing aggravator to the district court. The second conviction for Mr. Carachuri-Rosendo did not in-

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DAYTONA BEACH

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Tony is a 14-year-old child with a developmental disability. When he was born prematurely, his mother was unable to care for him and his sibling. A dependency case was opened, and Tony went to live with his maternal aunt. He lived with her until 2009, when his dependency case was reopened because his aunt could no longer handle his increasing behavior problems and difficulties in school. Tony was initially placed in foster care, but shortly thereafter he was placed with another aunt who had already adopted Tony's younger sibling. Tony and his new caretaker are currently receiving services through the dependency system. However, a long-term plan for Tony is critical to assist the family after the dependency case is closed, and that's where the Agency for Persons with Disabilities (APD) can help.



Ericka S. Garcia
GAL Developmental
Disabilities Attorney

APD is a state agency that can assist with long-term planning and needs for children and adults like Tony. APD provides an array of services, including residential habilitation, supported employment and/or living, and job coaches or mentors. To receive services, an application must be submitted along with documentation that the individual meets the definition of a developmental disability. As defined in Florida Statute §393.063, a developmental disability is "a disorder or syndrome that is attributable to retardation, cerebral palsy, autism, spina bifida, or Prader-Willi syndrome; that manifests before the age of 18; and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely." To prove the individual meets this standard, a medical diagnosis will be needed for a child with cerebral palsy, spina bifida, or Prader-Willi syndrome. In cases of mental retardation or autism, a child will usually have an initial psychoeducational, also referred to as a school evaluation, confirming the child's disability and placing him or her in a special education program. Although for most families, gathering the school records to support the developmental disability diagnosis is not difficult, for children in the dependency system it can become an ordeal. If the child has changed schools frequently – Tony, for example, changed schools four times in two academic years due to behavior problems – the school records may be difficult to track. The

constant moving may also prevent or delay a child from being evaluated in the first place. Even if the child is identified as developmentally disabled by a parent, caretaker, or family case manager, it takes time to have the child evaluated by the school, a psychologist, or a medical practitioner to confirm it and provide the correct documentation for the APD application. If approved for APD services, the child will be placed on a waiting list until funding becomes available. If the child is denied, an administrative hearing can be requested to challenge the agency's decision.

In Tony's case, **Ericka Garcia**, a GAL staff attorney and Equal Justice Works Fellow, assisted with the case until attorney Ramon Vazquez was assigned as Tony's Guardian ad Litem. Before Ramon was assigned Tony's case, Ericka met with the school, requested the appropriate evaluations, and reviewed the previous evaluations conducted at an earlier age. Once the application for APD assistance was submitted, Ramon was notified that Tony had been deemed eligible. Currently, Tony is on the waiting list for services from APD. Although it may seem pointless to apply for services only to be placed on a waiting list, a new law became effective July 1 that allows children with open dependency cases to receive priority over all others, except for those in crisis. This means that Tony will receive services from APD sooner rather than later. Even if Tony is adopted by his new custodian, essentially closing the dependency case, he will receive services sooner because he was placed on the waiting list earlier. Ramon hopes to "ultimately, see [Tony] become a productive member of society, and function as normally as possible when he's an adult despite his disability." For now, Tony's life has stabilized since he completed one academic year in one school and is receiving therapy to assist with his behavior.

As the GAL Developmental Disabilities Attorney, Ericka is available to guide *pro bono* GALs through the ins and outs of APD and other related issues, particularly in cases where the youth is close to "aging out" of the system or where the child's developmental disability

poses a barrier to achieving permanency. Sometimes all that is necessary is additional guidance and training to give the *pro bono* GALs the information needed to independently advocate for their clients. In other instances, Ericka becomes directly involved in the process. She can assist GALs by providing research and attending court hearings when needed, reviewing the evaluations conducted either by the school or private psychologists, and submitting applications and pursuing appeals when necessary. Ericka also attends Independent Living staffings or other meetings with APD for youth either receiving services from the agency or still on the waiting list. She works closely with the Developmental Disability Specialist at Family Services of Metro Orlando in gathering documentation, coordinating efforts, and ensuring GALs have the latest information.

As Ramon points out, "as a GAL, you're looking at the child's best interest, and if there are services to help the child then you should pursue them."

If you would like to obtain assistance from Ericka, the GAL Developmental Disabilities Attorney, please contact the Guardian ad Litem Program at 407-841-8310 x 3176.

Submitted by the Legal Aid Society of the OCBA.

LEGAL AID SOCIETY Annual Fundraiser

2010 Breakfast of Champions



Wednesday, November 10, 2010
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dgraf@legalaidocba.org



**Please join us in continuing the important work
of our Legal Aid Society!**

Donna A. Graf

The Legal Aid Society of the OCBA operates two foreclosure-related clinics – a residential foreclosure clinic and a tenant foreclosure clinic – administered by staff attorney **Michael Resnick**. The clinics assist residents of Orange County who are negatively impacted by the housing crisis that has gripped the community by providing essential legal services to those in need of help.



Michael Resnick

“More and more people come to our office for housing assistance than ever before,” says Michael. “It’s amazing how the ‘new poor’ are hard working, middle class folks, who saved for emergencies and now have exhausted all of their monies. These clients are the ‘victims’ of our housing crisis and the associated lack of employment.”

In October 2009, the LAS received grant monies from the Florida Attorney General’s Office to assist low-income residents of Orange County facing the loss of their home due to bank

foreclosure. LAS used these grant monies to establish a focused and specialized foreclosure clinic. The clinic, under the direction of Michael Resnick, operates three days a week and serves an average of twelve to fifteen homeowners weekly. LAS’s foreclosure clinic has provided legal assistance to more than 200 clients who are faced with losing their homes.

Each homeowner who attends a foreclosure clinic receives the following legal assistance:

- a thorough explanation of the foreclosure process related to the legal action, including the timing of the foreclosure and other planning matters;
- an analysis of client’s eligibility for and possible participation in the federal loan modification/refinance programs;
- a discussion of current loan modification programs that may be available to the homeowner;
- legal assistance in filing a *pro se* response to the foreclosure complaint so that the client’s legal rights are preserved during the foreclosure process. This response includes the

filing of an Answer and Affirmative Defenses, Request for Mediation, and other related issues; and

- a discussion of other strategies that may assist the client in resolving his or her foreclosure-related problems.

Legal Aid also represents a limited number of homeowners in ongoing foreclosure litigation. The typical client is a senior citizen who is on a fixed income. The senior may have refinanced a home loan within the last few years to pay for unsecured debts and now has a larger mortgage payment than he or she can afford. Additionally, the refinance may have been predatory in nature. LAS’s hope in representing senior clients is that lenders will enter into reasonable loan modifications so that these seniors can keep their homes.

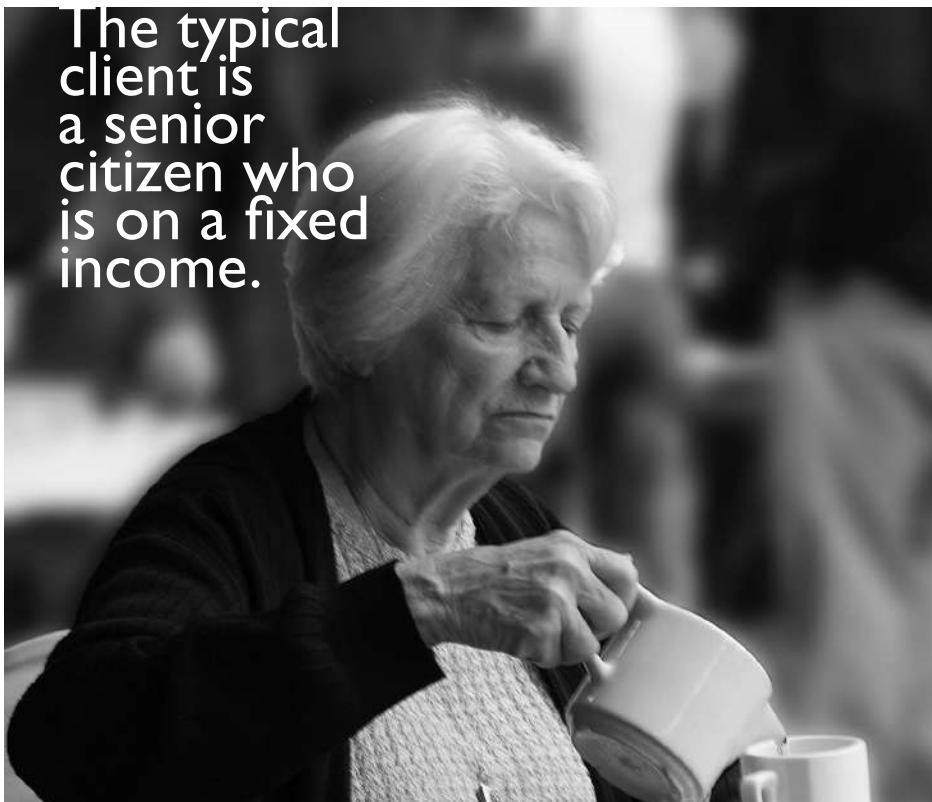
LAS also offers legal representation to tenants impacted by the foreclosure crisis. Many tenants have faithfully paid rent for months, unaware the landlord has failed to make his mortgage payments. These tenants are surprised when they are served with a summons and complaint related to their landlord’s foreclosure lawsuit. Every Friday morning, the LAS offers a tenant foreclosure clinic to inform tenants of their legal rights when properties they rent are involved in foreclosure proceedings. The tenant foreclosure clinic meets with up to ten tenants at a time and offers separate sessions for English-speaking clients and Spanish-speaking clients.

If you would like more information about housing issues, please contact Michael Resnick at mresnick@legalaidocba.org. For more information about the Legal Aid Society or to make a donation, please contact Donna Graf, Development Manager, at dgraf@legalaidocba.org.



Donna A. Graf
is Manager of Development for the Legal Aid Society. She has been an OCBA member since 2008.

The typical client is a senior citizen who is on a fixed income.



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

Angela M. Miller

The availability of patent protection for the mousetrap is well established. However, patent protection is also available for "useful processes." Pursuant to 35 U.S.C. § 101, "[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title." Although this language may appear straightforward, through the years there have been varying interpretations by the courts and the United States Patent and Trademark Office ("USPTO") as to what exactly is "statutory subject matter."

As a first installment of a two-part article, an overview of the history of software and business method patents will be presented in order to provide background on the *In re Bilski* case, decided on June 28, 2010. The second installment will feature an in-depth analysis of the decision, as well as actions taken by the USPTO and courts since the rendering of the decision.¹

1. Pre-Bilski History of Business Method Patents

(a) Business Methods – Not Patentable Subject Matter.

The patentability of business methods was first denied by the USPTO in 1869, when it was determined that methods of book-keeping were unpatentable and "contrary to the spirit of the patent law construed by the Office for years."² Decades later, the Second Circuit affirmed that a method of "transacting common business" did not constitute patentable subject matter.³ Additionally, in 1908 the Second Circuit, when considering a book-keeping system designed to prevent embezzlement by waiters, stated, in dicta, that any business method *per se* was unpatentable.⁴

Accordingly, a "business method exception doctrine" was formed, wherein business methods were not considered patentable subject matter by the USPTO and the courts. Adherence to this doctrine persisted for years, relatively unchanged. In fact, as recently as 1994 the Federal Circuit affirmed a holding by the Board of Patent Appeals and Interferences in *In re Schrader*, wherein a mathematical algorithm *per se* was held to constitute non-statutory subject matter.⁵

(b) Business Methods – Maybe Patentable Subject Matter?

Over time, the courts expanded their definition of "patentable subject matter." In 1980, the Supreme Court opined that "anything under the sun made by man" is patentable subject matter.⁶ For example, in *Diamond v. Chakrabarty*, the Supreme Court held that genetically modified organisms could be considered patentable subject matter.

One year later, the Supreme Court held that the execution of a physical process controlled by a computer program was patentable subject matter. In *Diamond v. Diehr*, the claims at issue were directed to a process of curing rubber with a computerized numerical controller. The Court held that that post-computing operation on a physical object using a general-purpose computer satisfied § 101. The Court noted, however, that a mathematical algorithm, in isolation, would still not be considered patentable subject matter.⁷

(c) Business Methods – Patentable Subject Matter.

In the 1990s, a trilogy of Federal Circuit cases shed light on whether computer software, when tied to a particular machine or medium, is patentable subject matter. In *In re Alappat*, the Court held that the practical application of a mathematical algorithm was patentable subject matter in the context of a machine being used to produce a smooth waveform display, which was deemed to comprise a useful, concrete, and tangible result.⁸ In *In re Lowery*, the Court held that a claim directed to a computer-readable medium was patentable subject matter.⁹ Finally, in *In re Beauregard*, a patent claim reciting a computer-readable medium containing instructions for implementing a particular operation on a computer would be considered patentable subject matter, wherein the "computer-readable medium" served to supply a tangible article of manufacture.¹⁰

However, not until the watershed case of *State Street Bank and Trust v. Signature Financial Group*¹¹ did the Federal Circuit directly address whether "business methods" are, indeed, patentable subject matter. The *State Street* claims were directed to a "hub and spoke" financial management system. The Court held that a mathematical algorithm directing a machine to perform a method of doing business met the statutory requirements of § 101.¹² However, the claims in the *State Street* case still recited a statutory machine, and thus true business methods *per se* had not yet been considered

by the Court.

Three years later, in 1999, the Federal Circuit finally had the opportunity to address this issue in *AT&T v. Excel Comm. Corp.*, wherein a business method was held to be patentable subject matter as a process under § 101.¹³ Here the claimed invention was directed to a telephone call message recording process, involving the manipulation of numbers in a telecommunications system for use in billing.¹⁴ The Court held that a useful, concrete, and tangible result for a practical application that does not pre-empt other uses of a mathematical principle was patentable subject matter.¹⁵

2. Background of *In re Bilski*

(a) USPTO Prosecution History.

On April 10, 1997, applicants Bernard L. Bilski and Rand Warsaw filed a patent application directed to a method of hedging risks in commodities trading (i.e., business method claims).¹⁶ The "key claims" ultimately reviewed by the Supreme Court¹⁷ read as follows:

1. A method for managing the consumption risk costs of a commodity sold by a commodity provider at a fixed price comprising the steps of:

(a) initiating a series of transactions between said commodity provider and consumers of said commodity wherein said consumers purchase said commodity at a fixed rate based upon historical averages, said fixed rate corresponding to a risk position of said consumer;

(b) identifying market participants for said commodity having a counter-risk position to said consumers; and

(c) initiating a series of transactions between said commodity provider and said market participants at a second fixed rate such that said series of market participant transactions balances the risk position of said series of consumer transactions.

4. A method for managing weather-related energy price risk costs sold by an energy provider at a fixed price comprising the steps of:

(a) initiating a series of transactions between said energy provider and energy consumers wherein said energy consumers purchase energy at a fixed rate based upon historical averages, said fixed rate corresponding to a risk position of said consumers, wherein the fixed price for the consumer transaction is determined by the relationship:

$$\text{Fixed Bill Price} = F_i + [(C_i + T_i + LD_i) \times (\alpha + \beta E(W_i))]$$

Wherein,

F_i = fixed costs in period i ;

C_i = variable costs in period i ;

T_i = variable long distance transportation costs in period i ;

LD_i = variable local delivery costs in period i ;

$E(W_i)$ = estimated location-specific weather indicator in period i ; and

α and β are constants;

(b) identifying other energy market participants having a counter-risk position to said consumers; and

(c) initiating a series of transactions between said energy provider and said other energy market participants at a second fixed rate such that said series of transactions balances the risk position of said series of consumer transactions.¹⁸

The patent examiner at the USPTO rejected the application for lack of patent-eligible subject matter under § 101, reasoning that it “is not implemented on a specific apparatus and merely manipulates [an] abstract idea and solves a purely mathematical problem without any limitation to a practical application, therefore, the invention is not directed to the technological arts.”¹⁹

An expanded five-judge panel of the USPTO’s Board of Patent Appeals and Interferences (“the Board”) affirmed the examiner’s decision, emphasizing that the claims “do not recite any specific way of implementing the steps; do not expressly or impliedly recite any physical transformation of physical subject matter, tangible or intangible, from one state into another; do not recite any electrical, chemical, or mechanical acts or results; . . . and do not involve making or using a machine, manufacture, or composition of matter.”²⁰

The claims were also rejected on grounds that the claimed method is so broad as to preempt “any and every possible way of performing the steps of the plan” for managing consumption risk. The Board held that the claims were “directed to the ‘abstract idea’ [of hedging consumption risk] itself, rather than a practical implementation of the concept.”²¹

(b) *Bilski* Appeals to the Federal Circuit.

Bilski appealed the decision to the Court of Appeals for the Federal Circuit (CAFC). In 2008, the CAFC affirmed the Board’s decision, concluding that a claimed process

qualifies for patent protection if “(1) it is tied to a particular machine or apparatus, or (2) it transforms a particular article into a different state or thing” (citing *Diamond v. Diehr*, 450 U.S. 175, 192 (1981); *Parker v. Flook*, 437 U.S. 584, 588 n.9 (1978); *Gottschalk v. Benson*, 409 U.S. 63, 70 (1972); *Cochrane v. Deener*, 94 U.S. 780, 788 (1877))²². The CAFC observed that the Court had applied the “machine-or-transformation test” in *Diehr*, and that such an approach is consistent with the Court’s earlier decision construing § 101 and its predecessor provisions.²³ The CAFC recognized that “future developments in technology and the sciences may present difficult challenges” in applying that test, and acknowledged the possibility that the CAFC or the Supreme Court “may in the future refine or augment the test or how it is applied.”²⁴ However, the CAFC stated that “for the present case” the machine-or-transformation test is controlling.²⁵

In its 2008 opinion, the CAFC also refuted statements in its own decisions that were inconsistent with the machine-or-transformation test. In particular, the Court revisited the “useful, concrete and tangible result” language set forth in the *State Street Bank* case, which suggested that any process that yields such a result is eligible for patent protection.²⁶ However, the CAFC noted that the “result” standard is not by itself sufficient to distinguish patent-eligible from patent-ineligible processes.²⁷

Thus, the *Bilski* claims were not directed to patentable subject matter, and to be patentable, a business process must meet the machine-or-transformation test.

3. The Supreme Court Grants Cert. in *In re Bilski*

On June 1, 2009, the Supreme Court granted *Bilski* and Warsaw’s petition for writ of certiorari in *In re Bilski*.²⁸ The questions presented in the case are as follows:

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

Whether the Federal Circuit’s “machine-or-transformation” test for patent eligibility, which effectively forecloses meaningful patent protection to

many business methods, contradicts the clear Congressional intent that patents protect “method[s] of doing or conducting business.” 35 U.S.C. § 273.²⁹

Amicus briefs were then filed by sixty-eight (68) different entities.³⁰ Oral arguments were held before the Supreme Court on November 9, 2009.³¹ A decision was rendered by the Supreme Court on June 28, 2010.³²

Stay tuned for next month’s article which will feature an in-depth analysis of the *Bilski* opinion, as well as actions taken by the USPTO and the courts in view of the opinion.



Angela M. Miller is an attorney with Lowndes, Drosdick, Doster, Kantor & Reed, P.A. She has been a member of the OCBA since 2004.

¹To review an advance copy of the second installment,

please see <http://173.230.132.220/articles/what-supreme-court%E2%80%99s-decision-re-bilski-means-business-method-patents>.

²*Ex parte Abraham*, 1869 C.D. 59.

³*United States Credit System Co. v. American Credit Indemnity Co.*, 53 F.#818, 819 (S.D.N.Y.), aff’d at 59 F. 139 (2nd Cir. 1883).

⁴*Hotel Security Check Co. v. Lorrain*, 160 F. 147 (2nd Cir. 1908).

⁵*In re Schrader*, 22 F.3d 290 (Fed. Cir. 1994).

⁶*Diamond v. Chakrabarty*, 447 U.S. 303 (1981).

⁷*Id.*

⁸33 F.3d 1526 (Fed. Cir. 1994).

⁹32 F.3d 1579 (Fed. Cir. 1994).

¹⁰53 F.3d 1583 (Fed. Cir. 1995).

¹¹149 F.3d 1368 (Fed. Cir. 1998).

¹²149 F.3d 1368, 1373 (Fed. Cir. 1998).

¹³172 F.3d 1352 (Fed. Cir. 1999).

¹⁴*Id.* at 1358.

¹⁵*Id.*

¹⁶U.S. Serial No. 08/833,892, entitled *Energy Risk Management Method*.

¹⁷*Bilski et al. v. Kappos*, Syllabus, 561 U.S. ____ (2010).

¹⁸*Bilski et al. v. Doll*, *Petition for a Writ of Certiorari*, No. 08-____, filed January 28, 2009, pp. 7-8, http://www.uspto.gov/web/offices/com/sol/bilski_files/bilski_petition_for_certiorari.pdf.

¹⁹*Id.* at 148a.

²⁰*Id.* at 150a.

²¹*Id.* at 163a.

²²*In re Bilski et al.*, 545 F.3d 943, 954 (Fed. Cir. 2008).

²³*Id.* at 955.

²⁴*Id.* at 956.

²⁵*Id.*

²⁶*Id.* at 959.

²⁷*Id.*

²⁸08-964, *Bilski et al. v. Kappos*, *Proceedings and Orders*, <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/08-964.htm>.

²⁹08-964, *Bilski et al. v. Kappos*, *Questions Presented*, <http://www.supremecourt.gov/qp/08-00964qp.pdf>.

³⁰8-964, *Bilski et al. v. Kappos*, *Proceedings and Orders*, <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/08-964.htm>.

³¹*Id.*

³²*Bilski et al. v. Kappos*, 561 U.S. ____ (2010), <http://www.supremecourt.gov/opinions/09pdf/08-964.pdf>.

Hearsay

"Happy we who can bask in this warm September sun...."

~Henry David Thoreau

Whew!

That flew by. Summer, I mean. That was quick! Summer vacations have come and gone, and now it's time to get back to work and send the kids back to school. But it was nice while it lasted, wasn't it? Okay, yes – it was a little hot. But come on. We live in Florida. We may grumble a little during the dog days of summer, but we love the summertime, right? As sad as you may be to see summer winding down yet again, look on the bright side – here comes football season!

What did you do over the summer? Dive for scallops in Crystal River? Head north

to the mountains? Bask in the sunshine on your favorite beach? Well, if you were in town, hopefully you came out for the OCBA's Annual Summer Happy Hour and Trivia Event held at **Slingapours** and sponsored by **M&I Bank**. The summer trivia contest is always a guaranteed fun time and this year did not disappoint. Social Committee co-chair **Shayne Thomas** (Roetzel & Andress) put together another fantastic event! Congratulations to our first place teams: **Smarter When Drunk** and **Possible Tow**. Yes – you read that right. There was a tie! Join us next summer for the epic rematch that is sure to keep us all on the edges of our seats. But watch out for some stiff

competition from this year's second and third placed teams, **BP Environmental Society** and **Mel Gibson School of Anger Management**. No doubt, they will be focused on claiming the coveted gold champion's trophy for themselves next year.

Think you're a contender too? Well, let's see – (a) In what year did Queen Elizabeth II's coronation occur? (b) Which U.S. State registers the most earthquake activity each year: Alaska, California, or Hawaii? (c) What hit TV show spawned the spin-off *Maude*? These are just some of the questions our contestants had to answer correctly to secure their victories. If you are jumping out of your seat right about now to find someone to check your answers, then this event is for you! We will look for you next year. As you can see, it's never too early to start planning your team's name – they're as fun as the trivia!

Admittedly, though, trivia may not be everyone's thing. OCBA members have interests and hobbies as diverse as our membership. For example, did you know that we have in our midst a reigning croquet champion? That's right, **James M. Spoonhour** (Lowndes, Drosdick, Doster, Kantor & Reed, P.A.) has won the Winter Park Croquet Club's singles championship for the fourth time in the last five years, and that's on top of his national recognition as winner of the Azalea Invitational Tournament. Way to go Spoonhour! And, true to OCBA form, those diverse interests frequently result in our members finding avenues



Kimberly D. Webb

through which to continue to serve our community. **Joel Roberts** (GrayRobinson, P.A.) for example, has recently been appointed to the Winter Park Parks & Recreation Commission where he will help promote the city's parks and recreation programs. Speaking of football (What? It's September, of course a reference to parks and recreation means we were speaking of football!), thanks to the leadership of **William T. Dymond** (Lowndes, Drosdick, Doster, Kantor & Reed, P.A.), football in Orlando will continue to be a linchpin of New Year's Day entertainment across the country for at least the next eight years based on the recent agreement between Florida Citrus Sports and ESPN securing television coverage for Orlando's own Capital One Bowl through 2018.

Yes. Summer is winding down, but, as you can see, our OCBA remains as active as ever. Let's enjoy these last days of summer. Get out and toss a ball at your local park, hit the beach, and be proud in the knowledge that OCBA members are helping to make great things possible for all of our Central Florida neighbors. As always, keep sending your news, highlights, and Hearsay-worthy items to my attention at kwebb@gobel flakes.com. See you around!

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

(a) 1953, (b) Alaska, (c) *All in the Family*

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Agenda

Thursday, October 7, 2010

- 8:45 a.m.-9:15 a.m. **Registration / Breakfast**
- 9:15 a.m.-10:30 a.m. **Session I (1.5 CLE)**
Bankruptcy – Judge Arthur B. Briskman,
Judge Karen S. Jennemann
- 10:30 a.m.-10:45 a.m. **Break**
- 10:45 a.m.-12:00 p.m. **Session II (1.5 CLE)**
Federal – Judge John Antoon, II
Judge David A. Baker
Judge Gregory J. Kelly
(Ava K. Doppelt – Moderator)
- 12:00 p.m.-1:00 p.m. **Lunch**
- 1:00 p.m.-2:15 p.m. **Session III (1.5 CLE)**
Appellate – Judge Bruce W. Jacobus
(Judge Emerson R. Thompson, Jr. – Moderator)
- 2:15 p.m.-2:30 p.m. **Break**
- 2:30 p.m.-3:45 p.m. **Session IV (1.5 CLE)**
Business Court – Judge Frederick J. Lauten
- 3:45 p.m. - 4:00 p.m. **Break**
- 4:00 p.m. - 5:00 p.m. **Session V (1.5 CLE)**
Circuit Civil – Judge John M. Kest,
Judge Jose R. Rodriguez
- 5:00 p.m. - 5:15 p.m. “Approval of Settlements and Handling of
Trusts in Civil Court”
Judge Lawrence R. Kirkwood

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Friday, October 8, 2010

- 8:30 a.m.-9:00 a.m. **Registration / Breakfast**
- 9:00 a.m.-10:30 a.m. **Session I (2.0 CLE)**
County Criminal –
Judge Deborah B. Ansbro
Judge Heather L. Higbee
Judge Steve Jewett
- 10:30 a.m.-10:45 a.m. **Break**
- 10:45 a.m.-12:00 p.m. **Session II (1.5 CLE)**
Circuit Criminal – Judge Bob LeBlanc,
Judge Marc L. Lubet, Judge Alice Blackwell
- 12:00 p.m.-1:00 p.m. **Lunch**
- 1:00 p.m.-2:15 p.m. **Session III (1.5 CLE)**
Probate – Judge Lawrence R. Kirkwood
- 2:15 p.m.-2:30 p.m. **Break**
- 2:30 p.m.-4:00 p.m. **Session IV (2.0 CLE)**
Family Law – Judge Jenifer M. Davis
Domestic Violence – Judge Sally D.M. Kest,
Judge Theotis Bronson



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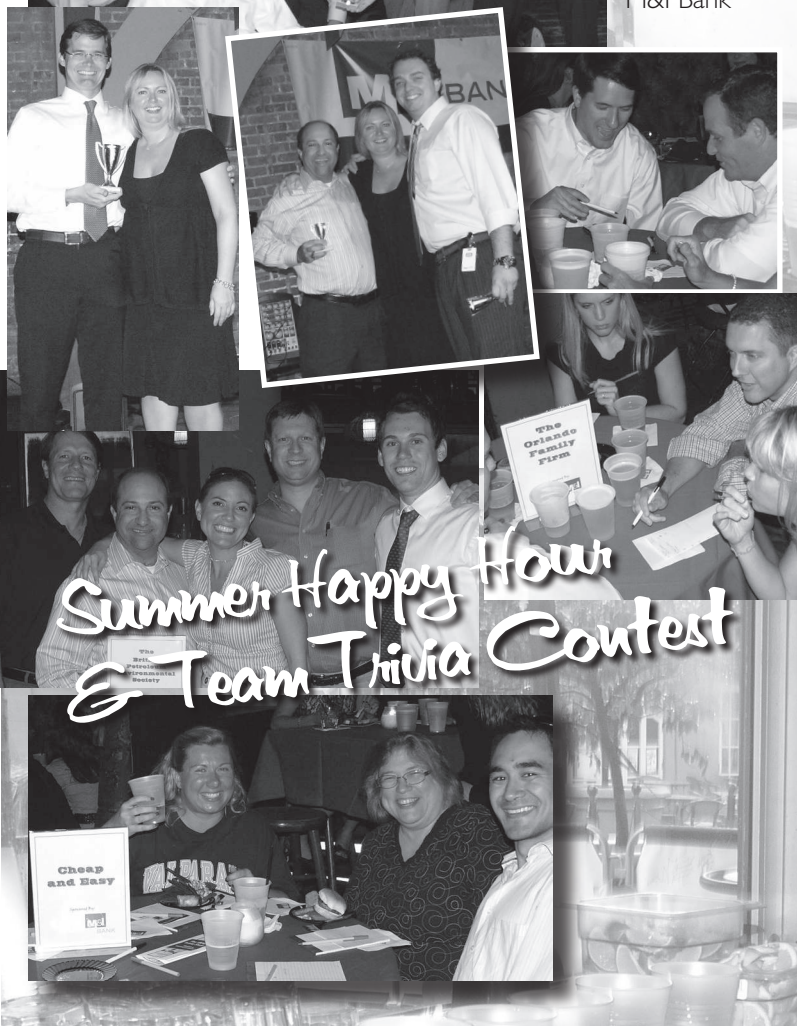
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Have You Heard the Buzz?

Lisa Warren

The Lawyers for Literacy Spelling Bee is a competitive, grown-up, spelling bee contest that supports a great mission – defending the right to read! The Young Lawyers Section of the Orange County Bar Association organized this inaugural event to benefit the courageous students of the Adult Literacy League.

The YLS and the Spelling Bee Host Committee ask local attorneys and companies to partner up and go head-to-head with their colleagues as they tackle the age old question, “To Bee or not to Bee?”

WHAT: YLS presents the **Lawyers for Literacy Spelling Bee**

WHEN: Thursday, October 7 at 6:00 p.m.

WHERE: Sonesta Hotel, Downtown Orlando

WHO: Teams of two spellers are fielded by law firms and/or corporations, with at least one speller being an attorney.

Current and future literacy students, working hard to increase their literacy skills and improve their lives, hope the answer will spell out a resounding, “Y-E-S!”

Guests will enjoy great food, opportunities to network, and the chance to see teams of

two wrestle with some of the toughest words they’ve ever tried to spell – without spell check! This fierce, fast-paced and fun event will have teams of legal eagles vying for the championship and bragging rights as the *2010 Lawyers for Literacy Spelling Bee Champion!*

The spelling words start simple, but steadily increase in difficulty. Host Committee Chairman, **Joe Amos**, of Fisher, Rushmer, Werrenrath, Dickson, Talley & Dunlap, P.A., has taken some of the words out for a test drive, finding both “eponymous” and “arithmocracy” pretty hard to handle. Joe is joined on the Spelling Bee Host Committee by **William Beaver** of GrayRob-

inson, P.A., **Alana Brenner** of the City of Orlando, **Matt Brenner** of Lowndes, Drosdick, Doster, Kantor & Reed, P.A., and **Ryan Davis** of Winderweede, Haines, Ward and Woodman, P.A.

Look Who Will BEE There

Radio personality Erica Lee will “Bee” on hand, as will Spelling Bee Emcee Thaddeus Seymour, President

Emeritus, Rollins College, our Honorary Judge and Timekeeper. Spelling Bee Judges Mike Thomas of the Orlando Sentinel, Scott Harris from Central Florida News 13, and Marva Hinton from WDBO AM580 round out the VIP list.



Erica Lee



Marva Hinton



Mike Thomas



Scott Harris

Lucky Prize Drawing Adds Sting

In addition to the Bee, a drawing will be held for top-notch prizes such as dinner and wine for four at CRAVE restaurant in Orlando, a Barnes & Noble “Nook” and several other exciting surprises. You don’t need to attend the Bee to participate in the drawing. Members of the YLS organizing committee will have “lucky drawing” tickets available for anyone wanting to make a donation to the Adult Literacy League for a chance to win. The winners will be announced at the event but do not need to be present to win.

Don’t BEE Left Out of the Fun

Be part of the Lawyers for Literacy Spelling Bee, or simply attend to “Bee” a cheerleader and watch the fun. Contact: **Daryl Gottlieb** at dgottlieb@fisherlawfirm.com or 407-843-2111 for more information. Special thanks to our print sponsor: Document Technologies, Inc.

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- In prison, 65% of all inmates read below a fifth grade level.
- Someone who reads at a fifth grade level is not capable of passing the GED.
- Almost 50% of adults on welfare do not have a high school diploma or GED.

Operating six days a week and currently helping more than 800 adults achieve their goals, the Adult Literacy League offers the only proven road out of poverty, crime and unemployment: improved education. The Adult Literacy League develops readers to build a strong and literate community.

Lisa Warren is Community Relations Manager with the Adult Literacy League.

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YLS *on the move*

Ready to Say Good-bye to Summer?

Jacquelynne J. Regan

September is the month of change from hot summer nights to (slightly) cooler evenings as summer fades into fall. September brings to Orange County a plethora of festivals and celebrations marking summer's end. This month, Orange County will be abuzz with the End of Summer Downtown Orlando Bicycle Jamboree, North Florida Wine & Food Festival, Family Plaza Palooza, and Music on the Mall, just to name a few! YLS has lots of exciting events lined up for you, too. Read on to find out more! But first, a re-cap on what's been happening with YLS:

The **Brown Bag Lunch with Judge John Marshall Kest** on August 12 provided young lawyers with further insight into planning and preparing for depositions. This Brown Bag Lunch was the second installment covering this topic, and Judge Kest graciously led a continued discussion on the topic and answered questions. Judge Kest has agreed to expand this series to include a third luncheon to round out his coverage of discovery depositions. If you are interested in joining Judge Kest for the third and final installation of this topic on Thursday, September 23, 2010, please email Judge Kest's Judicial Assistant, Diane Iacone, at ctjadi1@ocnjcc.org.

The YLS would like to thank the Orange County legal community for once again making **The Backpack Project** a huge success! This year, YLS partnered with the Central Florida Association for Women Lawyers, the Legal Marketing Association, and A Gift for Teaching to provide students with backpacks chock-full of school supplies to use throughout the school year. The students and teachers of Rock Lake Elementary School truly appreciate the time and efforts of these four organizations, which will help ensure a successful 2010-2011 academic year and the school's continuing rank as an "A" school. Many thanks to committee co-chairs, **Melanie Griffin** and **Barbara Leach**, and their committee, who worked tirelessly to collect and

deliver these school supplies and donations to Rock Lake Elementary.

The 2010 Annual Law Clerks Reception was once again a sensational success! On July 21, this summer's law clerks and summer associates enjoyed a warm welcome from the several hundred lawyers, judges and elected officials who turned out for the event. Co-chaired by **Jacquelynne Regan** and **Jill Davis**, the reception was held at the Orlando Shakespeare Theater and catered by Funky Monkey, which provided scrumptious bites and cool drinks throughout the evening. Many thanks go out to our wonderful sponsors, including **Thomson West** and the many other businesses and firms who supported this event!

Now, on to our exciting events planned for fall! Don't forget to send in your registration form for the **19th Annual YLS Charity Golf Tournament!** This exciting annual tournament will take place on October 1 at the picturesque Reunion Golf Course and will begin with an 8:00 a.m. Shotgun Start. 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. For registration and sponsorship information, please contact Brett Renton at brenton@shutts.com, Jerry Lee Hanbery at jhanbery@ufledu, or download the flyer from the OCBA website.

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

you are interested in tutoring an adult learner with the Adult Literacy league by volunteering just one hour per week, please visit adulteracyleague.org.

YLS is proud to be launching its **Law School Mentoring Program** with Barry Law School and other Florida law schools. Thanks to the efforts of Mentoring Committee chair **Kristopher Kest** and his committee, YLS has already compiled a list of YLS members who have volunteered to mentor second- and third-year law students for one academic year beginning in the fall of 2010. But don't let that stop you! More mentors are needed to accommodate the large number of law students expressing an interest in this worthwhile program. If you are interested in serving as a mentor or participating as a law student "mentee," please visit the OCBA's YLS website page for program information and applications, or contact **Kristopher Kest** at kristopher.kest@lowndes-law.com or 407-418-6285.

The YLS **September 17 Luncheon** will be held at the University Club at 11:45 a.m. Please email your RSVP to admin@ocbayls.org. If you RSVP before September 14, 2010, the cost is \$20 for lawyers and \$12 for law students, government attorneys, solo attorneys, and judges; a late charge of \$2.00 will be added if you do not RSVP.

If you want to find out more about the Young Lawyers Section and its committees and events, please call me at 407-418-6438 or email me at jacquelynne.regan@lowndes-law.com. If you are not receiving the YLS email blasts, please send an email

to admin@ocbayls.org to sign up.



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

Professionalism Committee

continued from page 9

professionalism, including civility, integrity, and respect for our system of justice.

William Trickel, Jr. Professionalism Award for attorneys in practice 15 or more years.

Lawrence G. Mathews, Jr. Young Lawyer Professionalism Award for attorneys in practice fewer than 15 years.

Each year the OCBA Professionalism Committee, through the Trickel and Mathews awards, seeks to honor practicing attorneys whose conduct and career stand as models of success built on unquestioned professionalism. In making the award determination, the Professionalism Committee focuses on career success, service to community, service to the profession and, most importantly, consistently ethical conduct, accompanied by courteous demeanor and the highest moral standards, exceeding what is required by the Code of Professional Conduct.

The Professionalism Committee seeks to emphasize the OCBA's commitment to professionalism by identifying and awarding both younger attorneys and long-standing members who meet the highest standards of professionalism. I submit to you that there are many attorneys in our community who possess these qualities. Every year the Professionalism Committee and the Professionalism Awards Subcommittee strive to select for each award the individual who best exemplifies these qualities. Through the Mathews and Trickel awards, the OCBA seeks to show, in a tangible manner, that professionalism is an integral part of career success.

3. What is the deadline for submitting my nomination?

The deadline for submission of your nominations for the 2011 Glazebrook,

Trickel and Mathews awards is **December 3, 2010.**

4. Who are the past winners of these awards?

OCBA William Trickel, Jr. Professionalism Award Winners

1994	David B. King
1995	Jules S. Cohen
1996	Hon. Gregory A. Presnell
1997	Hon. John Marshall Kest
1998	Darryl B. Bloodworth
1999	Chandler R. Muller
2000	R. Lee Bennett
2001	Hon. Sally D.M. Kest
2002	Ava K. Doppelt
2003	Bruce B. Blackwell
2004	Warren W. Lindsey
2005	Michael P. McMahon
2006	William B. Wilson
2007	Kirk N. Kirkconnell
2008	Counsel Wooten, Jr.
2009	Mary Anne DePetrillo
2010	Leon H. Handley

OCBA Lawrence G. Mathews, Jr. Young Lawyer Professionalism Award Winners

2004	Tad A. Yates
------	--------------

2005	Nicholas A. Shannin
2006	Thomas A. Zehnder
2007	Diego "Woody" Rodriguez
2008	Elizabeth F. McCausland
2009	Heather Pinder Rodriguez
2010	Cara M. Dobrev

OCBA James G. Glazebrook Memorial Bar Service Award Winners

2008	Hon. Emerson R. Thompson, Jr.
2009	Hon. Alice Blackwell
2010	Hon. Lawrence R. Kirkwood

5. Whose name should be added in 2011 to this list of distinguished attorneys and jurists?

It is up to you, the OCBA members. By making the small effort necessary to submit your nomination, you help a worthy friend, colleague, associate, partner, or jurist receive the recognition for which he or she is due. You may make a nomination for one, two, or all three awards. Serve the memory of William Trickel, Jr., Larry Mathews, and James G. Glazebrook well by nominating a worthy recipient today.

Submitted by **Magistrate Howard D. Friedman**, former chair of the OCBA Professionalism Committee.



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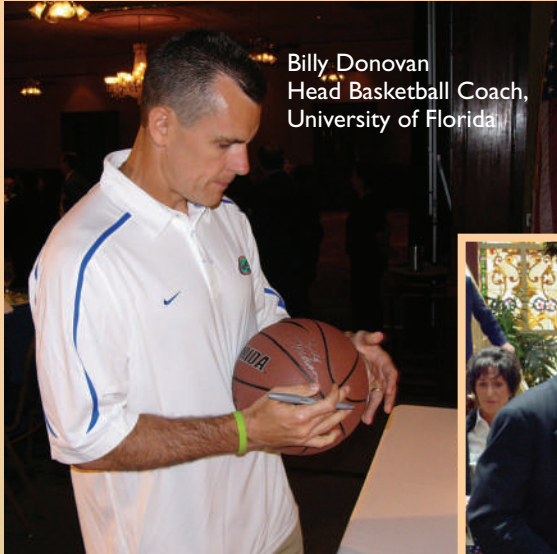
OCBA Luncheon

June 17, 2010

The Ballroom at Church Street

Martina Mandrigal
Frank Bedell

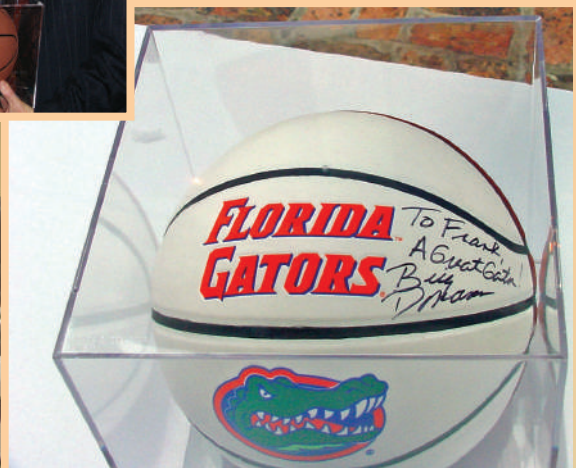
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Lissa Bealke



Amy Guy

Lissa C. Bealke, FRP, is a paralegal with GrayRobinson, P.A. She has been a member of the OCBA since 2000.
Amy M. Guy, CP, FRP, is a paralegal with Calandrino Law Firm, P.A. She has been a member of the OCBA since 2007.

Litigation Strategies & Solutions Seminar

Lissa Bealke, FRP and Amy Guy, CP, FRP

On October 2, 2010, the Orange County Bar Association Paralegal Section will host an all-day CLE seminar featuring practical litigation strategies and solutions. Speakers will share their expertise, including case strategy tactics and techniques. The seminar is designed to provide attendees with the necessary skills and insight to effectively handle a case from start to finish. The current topics and speakers are listed below:

- *Preparing for Court: Discovery and Evidentiary Issues*, presented by the Honorable John Marshall Kest, Circuit Court Judge for the Ninth Judicial Circuit, Orange County, Florida
- *E-Discovery, New Cases, Ideas and Techniques*, presented by Ralph Losey, Esq., Partner and National E-Discovery Counsel, Jackson Lewis, LLP
- *Attorneys' Fees and Costs: Recent Case Law Concerning Both Attorney & Paralegal Fees*, presented by James Hauser, Esq., Principal of Attorney's Fees in Florida, PL
- *Appeals, An Appellate Primer for Attorneys and Paralegals*, presented by Nicholas A. Shannin, Esq., Page, Eichenblatt, Bernbaum & Bennett, P.A., and Board Certified Appellate Practitioner and Certified Appellate Court Mediator
- *Solutions for Working in An Understaffed Office & Spotting Good Legal Talent*, presented by Peggy Bingham, Account Executive with AppleOne Employment Services
- *Essential Trial Timesavers and Techniques for Litigation*, presented by Lissa Bealke, FRP, GrayRobinson, P.A. and Amy Guy, CP, FRP, Calandrino Law Firm

This informative and economical CLE opportunity is open to all legal professionals, attorneys and paralegals. The seminar is approved for 6.0 Florida Bar CLE credits (5.0 general and 1.0 ethics). The cost is \$139 for OCBA members; \$159 for non-members; and \$119 for students/government employees. The seminar will be held at the Embassy Suites Downtown Orlando. Registrants will enjoy breakfast, lunch, and an afternoon snack. Complimentary valet parking is included.

This seminar is expected to fill up quickly. Please register at <http://events.constantcontact.com/register/event?oeidk=a07e2ytrqigd78d3cd3> or contact Amy Guy at amy@floridabusinesslaw.com or 407-601-4905, ext. 107 with any questions or concerns.



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Save the Date!!!

Retirement Celebration

The Honorable R. James Stroker, Circuit Court Judge in the Ninth Judicial Circuit, is retiring on September 30, 2010, after serving the citizens of the Ninth Judicial Circuit for more than 36 years on the bench.

Judge Stroker's retirement celebration will be held on Thursday, September 23, 2010, at 3:30 p.m. in the Honorable Frederick T. Pfeiffer/Honorable Rom W. Powell Jury Assembly Room, Room 180, Orange County Courthouse, 425 North Orange Avenue, Orlando, Florida.

Please join us on September 23rd to thank Judge Stroker for his service and wish him well in his retirement!

Supreme Court Cases

continued from page 6

volve such allegations or proof (although allowable under Texas law, the prosecutor chose not to) therefore, the Court held that unless the prosecutor alleges the prior drug conviction and it is found proven by the trial court, then it is not equivalent to the federal felony, and therefore doesn't fit in the definition of "aggravated felony" for deportation purposes. Justice Scalia, in his concurring opinion, wrote that a sentencing factor for recidivism, which increased the possible penalty from 1 year to 2 years, did not equate to being an element of the crime and making the crime itself a felony. Justice Thomas wrote a separate concurring opinion continuing to disapprove of *Lopez v. Gonzalez*, which is what he argues opened the door to people convicted of actual misdemeanors in state court, but hypothetical felonies in federal court, facing automatic deportation. He also disfavored the Court's "gymnastics" to reach the right result – he would end the analysis with the fact that Mr. Carachru-Rosendo had not been convicted of a felony in state court.

Holland v. Florida **(June 14, 2010)**

The issue in this case was whether or not the 1-year deadline for filing a petition for writ of habeas corpus in federal court, from the point in time that the direct appeals of the judgment become final, is subject to equitable tolling. The Court, in an opinion written by Justice Breyer, who was joined by Chief Justice Roberts, and Justices Stevens, Kennedy, Ginsburg, and Sotomayor, decided that it is subject to equitable tolling and that the Eleventh Circuit had applied the wrong legal standard in holding otherwise. This case did not involve just ineffective assistance of counsel, but extreme negligence in the face of the client even pointing out the correct legal standards to the attorney. Mr. Holland had been trying diligently to exercise his rights, and his attorney's extraordinary negligence stood in his way. Justice Alito pointed out in his concurring opinion that Mr. Holland's attorney simply could no longer be considered his agent based on the facts of this case, and therefore, Mr. Holland couldn't be held to account for his gross negligence. Mr. Holland had tried to have him removed, had told him the correct law, and in return, he was abandoned by counsel. Justice Scalia, joined by Justice Thomas, dissented and wrote that they did not

believe the statute permitted equitable tolling, and that if it did, Mr. Holland wasn't entitled to it. The argument was that Congress had addressed the issue of equitable tolling by outlining several things that would justify tolling, and by not addressing a situation like the one before the Court, Congress meant to exclude it. Because one is not entitled to counsel in such post-conviction proceedings, the dissent argued that no matter how terrible of an agent his lawyer was for him, he was his agent nonetheless and the government had no duty to provide him effective counsel.

Ontario v. Quon **(June 17, 2010)**

Officer Quon had his work-issued pager use audited by his employer, and it turned out that not very much of his text messaging was work related. He therefore suffered disciplinary action, and he chose to challenge the search and seizure of his text messages in federal court. The District Court, after a jury trial to decide the purpose of the search and seizure of the text logs, held that the Fourth Amendment had not been violated and ruled for the city of Ontario. The Ninth Circuit Court of Appeals agreed with the lower court that Officer Quon had a reasonable expectation of privacy in the communications on his work pager, but they disagreed with the District Court's finding that the search and seizure was reasonable – pointing to numerous less intrusive ways that the city could have audited the volume of text messages being sent to determine whether a larger character limit was necessary for work-related communications. The Supreme Court, in an opinion authored by Justice Kennedy, who was joined by everyone except for Justice Scalia in regard to one part of the opinion, found that the search and seizure was reasonable and rejected the Ninth Circuit's analysis of whether there were

less intrusive ways to achieve the same end as unworkable. This allowed the Court to avoid the need to determine whether there is a reasonable expectation of privacy in this (government employment) situation, an issue left open by a plurality opinion and a separate concurring opinion by Justice Scalia in *O'Connor v. Ortega*, 480 U.S. 709 (1987). Such workplace searches are reasonable for "non-investigatory, work related purposes," as in this case, or for investigation of misconduct.

Dillon v. United States **(June 17, 2010)**

This case involved a sentence reduction based upon the federal Sentencing Commission's 2007 revision as to how to treat crack cocaine versus powder cocaine. In 2008 the Commission made the revision retroactive. Given the opportunity to have his sentence reduced, Mr. Dillon seized it. The issue before the Supreme Court was whether he was entitled to a "resentencing," with the full benefit of *United States v. Booker*, 543 U.S. 220 (2005), which rendered the guidelines advisory or, on the other hand, was he only entitled to a "modification" of his sentence limited only to the one change the Commission made. Justice Sotomayor, writing for the entire Court except for Justice Alito, who did not participate, and Justice Stevens who dissented, held that Mr. Dillon was not entitled to a full "resentencing" but rather only the "modification" provided for by the Commission. Justice Stevens' dissent argued that by allowing the Commission to dictate what was open for consideration for sentence modification or not, the Court was violating its holding in *Booker* and that this case in particular had a very unjust sentence because had Mr. Dillon been sentenced after *Booker* he could have gotten the 5 years the judge wanted to give him rather than the much larger sentence he received

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Thoughts on Induction into the American Law Institute: The Law and Me

Dennis J. Wall, Esquire

The effects of the law on the actual lives of real people are remarkable. This thought struck me while travelling to Washington, D.C., for my induction into the American Law Institute¹ in May. It was also the theme of the talk given by the keynote speaker at the ALI Annual Meeting, Justice Stephen Breyer.

The effects of the law on the lives of real people became evident beginning with my departure from Orlando International Airport. I set off the screening buzzer somehow, and an employee of TSA explained to me, "The machine has selected you for further screening." The further screening began with a swab across my hands by another TSA employee, who plucked the swab off his wand and tossed it into a spectrometer of some sort. I asked what it did. Mr. TSA told me that this search was for the residue left behind by materials used to make bombs. (I passed.) These efforts by the Federal Government, of which TSA is a part I am told, must comply with the U.S. Constitution's prohibition against unreasonable searches and seizures. Someone in the Federal Government decided that these efforts are reasonable. I agree.

After I boarded the aircraft, a sign new to me lit up alongside the "Fasten Seat Belt" sign. The new sign instructed us passengers to "Turn Off All Electronic Devices." This instruction was clearly the result of a Rule or Regulation. I understand that many if not all electronic devices have the inherent capacity to interfere during takeoff and landing with aircraft electronics, things like radar, navigation, and the like. Everyone who took an administrative law course in law school knows that, in basic terms, a Rule or Regulation must be "reasonable" if a court is to uphold it. This new sign also seemed reasonable to me, just as the swab search for the residue of bomb-making components seems reasonable to me.

With some time to kill before the first American Law Institute event began, I made a short visit to the National Museum of American History. It is a part of the Smithsonian, affectionately known as "the nation's attic," of course. Among the other objects on display is a piece of the lunch counter and four stools from the Woolworth's in Greensboro, North Carolina. Four students from a North Carolina university sat on those stools and asked to be served fifty years ago. They were refused. The only reason they were refused service is because they were Black. In the end, freedom of assembly was the issue. The law protected freedom of assembly 50 years ago, and the law protects freedom of assembly now. Whether it will actually protect people may depend on the people shaping the law, as it did 50 years ago.

Back to Justice Breyer, who asked a question that seemed to sum up all these different thoughts about how the law affects the ways in which people actually live their lives. The question he asked

ran along these lines: Why would you want to live in a society that ignored the basic purposes and consequences of its laws, but instead interpreted law only to correct or punish even minor deviations?

Why, indeed.

In conclusion, the law will continue to affect the lives of people to the degree that the persons who make and shape the law – practicing lawyers, judges, legislators, professors of the law, juries and everyone else – consider the purposes and consequences of what they are doing.



Dennis J. Wall is the founding member and chair of the OCBA Insurance Law Committee. He has been a member of the OCBA since 1978.

¹For those of you not familiar with it, the American Law Institute, or "ALI," is a group of some 4,000 members who are practicing lawyers, judges, and law professors. Their common goal is to make the law perform better in the actual lives of real people affected by it. In pursuit of this goal, the ALI publishes Restatements of the Law, including final proposals considered at this year's annual meeting on Employment Law, and Property (Wills and Other Donative Transfers), and Restitution and Unjust Enrichment, among others. The ALI also debates and publishes Restatements of prevailing, widely accepted principles such as Principles of Government Ethics and Principles of the Law of Nonprofit Organizations. One of the projects accepted by the ALI for a future Restatement of Principles will address insurance, and I will be in the group of advisors, or consultants, who will have input on that particular project.

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Presentation Skills *Powerful Openings*

"Ladies and gentlemen, Madame Chairman, and distinguished members of the head table - thank you for letting me speak with you tonight. It is a real pleasure to be here at the Acme Company annual meeting. I just flew in from Duluth, and boy, are my arms tired. [Pause for laughter]. Let me apologize in advance, but I didn't know I was going to be called on tonight to speak..."



Elliott Wilcox

Ugh. If that's how the speech started, would you want to listen to any more? Unfortunately, that's exactly how many speeches start, wasting opportunities that are only available at the beginning of the presentation.

The first moments of a speech set the mood for the entire presentation. Start with a whimper, and the audience predicts the rest of your speech will bore them. Ramble at the onset, and they bet the rest of your speech lacks direction, too. But start your speech with power, energy, and conviction, and they scoot to the edge of their seats, focus their eyes on you, and pay rapt attention. Successful openings can accomplish three objectives:

1. Grab the audience's attention.

Effective openings capture the audience's attention from the very first word. Remember though, it's not enough to just start strong – the rest of your speech must deliver on the promises you make with the opening.

2. Focus their attention (introduce the topic). When you begin, the audience may not be focused on you. You're competing with incoming Blackberry messages, catastrophes at home, even their desserts. You need them to focus on you and your presentation. Give the audience a reason to listen to your presentation. When they understand why the topic matters to them, they'll want to listen to the rest of your speech.

3. Connect with the audience. Smile. Look them in the eyes. Show enthusiasm. These first moments let you develop rapport with your audience. The more they like you, the more they want to listen to you.

Here are six techniques to help jump start your next presentation:

Start with a story. "As I drove past the guard gate and pulled into Sarah's driveway, I had no idea how much my life was about to change. It was early April,

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1998..." People's ears perk up when they hear a story.

Start with a question. "How confident do you feel about your retirement plan? Will you be able to maintain the lifestyle you've grown accustomed to?" A good question will pique your audience's interest and keep them listening for your answer.

Start with the benefits. "Imagine crafting an opening statement where your client's story comes to life. The jury leans forward, listening with rapt attention and nodding their heads in agreement. From the corner of your eye, you see your opponent writing (a very large) number on a piece of paper, hoping that you might still be willing to settle..." Audience members want to know, "What's In It For Me?" Speak to their interests, and they'll reward you with their attention.

Describe their problem. "As the clock sounds 7 o'clock, you call home and apologize – you're going to miss dinner, again. Two hours later, you stop at the drive-thru for your high-carb, high-fat dinner. By the time you finally arrive home, the kids are already in bed, and you have just enough energy to watch a little TV before crawling into bed. Sound familiar? How many of you feel there aren't enough hours in the day? Let me tell you about a case management system that can add 1½ to 2 hours to your day." If they recognize themselves in the problem you've described, they'll want to listen to your solution.

Start with a quote or poem.

Others have already said it better than you can, so take advantage of their wisdom. "Henry Ford said, 'You can't build a reputation on what you're going to do.' Neither can this firm. If we're going to have a reputation as the best labor relations firm in the city, we need to achieve three objectives..."

Start with a contradiction. Imagine a candidate addressing the national convention with this statement: "If you elect me, you'll pay more taxes next year." Would that grab your attention? Once the politician grabs their attention, he explains how he wants them to pay a lower tax rate, but to earn significantly more money under a new job creation and development program. Audiences often pay more attention when they disagree with what you say. What accepted beliefs can you challenge? Start with the bombshell, and then explain your position.

Whether it's an opening statement or a speech to the local service organization, the first moments of your presentation are essential. Take the time to craft a dynamic opening, and your audience will give you their undivided attention.

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



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Rainmaking 101

● Strategic Conversations: ● The Initial Consultation

Mark Powers & Shawn McNalis



Mark Powers



Shawn McNalis

Your initial consultation with a prospective client is an often-overlooked Strategic Conversation that's critical to the client development process. When handled well, **the first impression you create will inspire trust** and convert a prospective client into a paying client. When handled poorly, the client will seek the services of one of your competitors. Your success, and your firm's profitability, depends directly on how skilled you are in making this all-important conversion.

To make a significant first impression, think about the lawyer/client relationship from the client's point of view. Clients seek your professional services because they lack the necessary expertise to solve a problem. In hiring you, they gain the expertise they need but lose control over a problem or situation. Along with a lessened sense of control, most clients believe that their risk – the consequences that face them if they fail – is much greater than their lawyer's risk. In many cases, they are right.

To compensate for this unbalanced feeling, clients depend on the level of trust they feel for you. If, in the initial stages of getting to know you, the client feels you'll minimize his risk, he'll trust you and hire you. So how do you demonstrate that you are worthy of his trust? By knowing what the client looks for in the initial interview.

First, the client wants to tell his story. Whether the situation involves a simple transaction or a complex business dispute, clients are impressed by someone who will listen to and understand their situation. For complex matters, use reflective listening techniques. Ask relevant questions and repeat what the client has said using phrases such as, "Let me see if I understand what the main issues (or concerns) are..." or "What I hear you saying is..." This approach not only lets the client know he is being heard, it allows you to clarify important details. During this, or any meeting with clients, don't allow interruptions or take phone calls. Clients won't trust you if they don't feel important enough to have your full attention when face-to-face.

Once the client has told his story, if it is appropriate to express sympathy upon hearing the client's problem or situation, do so. Phrases such as, "I'm sorry you've had such a difficult time," or "It's unfortunate you've had to go through this experi-

ence," or "I sympathize with you – that must have been very hard," go a long way to building trust. Clients need to believe you care about them and their matter before they'll trust you. The need to be sympathetic will vary according to your practice area and the type of work you do, so use your best judgment. However, a client wouldn't be in your office if he wasn't experiencing some kind of a problem that requires professional help, so act accordingly.

The next step in earning the trust of a potential client is to explain how and why you can help him. In all likelihood, you've dealt with many situations similar to his; refer to these cases as you discuss the actions you might take. Clients want to hear that you have experience with similar situations – it shows that you've got the appropriate experience.

In addition, especially with clients who are inexperienced, explain each stage of your work to help the client understand the process and potential pitfalls along the way. Explain how you'll handle the matter and what you can deliver within the established constraints. Don't over-promise, and be sure to explain what you'll need from the client in terms of time, access, decisions, documents and information. The more you educate clients on the role they play, set appropriate expectations and involve them in the process, the more cooperative they become. You can say something like, "Here's what I'm going to do to help you...and here's what I need you to do to help me..." When appropriate, reiterate these points in your Engagement Letter.

To see how successful you are at inspiring confidence right from the start, keep track of the number of desirable clients who hire you compared to the number of undesirable clients who don't. If at all possible, screen undesirable clients over

the telephone so you aren't spending face time talking to people who don't meet your standards.

From the beginning, track the number of people that call and inquire about working with you. Then, track the number of people that set a first appointment with you. Finally, track the number of people that become paying clients. This will tell you how good you are at the intake conversation and how much trust you have inspired. If eight out of ten desirable clients sign on, your conversion rate is 80% – an excellent score.

If you score lower than 80%, ask yourself how you can improve your conversational skills to gain the trust and confidence of clients early on. Do you listen and fully understand the needs of the client, sympathize when appropriate and then demonstrate your expertise? Or do you shortcut the first two steps in your desire to demonstrate your expertise right away? Remember the old adage, "I don't care how much you know, until *I know how much you care.*" It's the key to building trust.

Trust is critical to the attorney/client relationship from the beginning of an engagement through to the end. It's important to inspire trust with the initial consultation and equally important to maintain it throughout the course of the matter.

Mark Powers, President of Atticus, Inc., and **Shawn McNalis**, Senior Practice Advisor, co-authored *How Good Attorneys Become Great Rainmakers*, *Time Management for Attorneys* and are featured marketing writers for *Lawyers, USA*. Mark founded Rainmakers™, a simple process for attorneys at all levels to stay focused on marketing, creating fresh ideas and on-going accountability to marketing. To learn more about Atticus or Rainmakers™, please visit the Atticus website at www.atticusonline.com or contact the Atticus office at 352-383-0490.

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Speaking Engagements

Anthony J. Diaz, Esquire C.P.A., presented several topics recently, including *To Litigate or Mitigate... That is the Question*, to the OCBA Solo and Small Firm Committee; *Probate Appeals* to the OCBA Estate and Trust Committee; and discussed the litigation implications of estate tax in limbo at the Citrus Club. Mr. Diaz also presented a nationwide webinar for The Advisor's Forum on *The Top Ten Ways to Avoid Estate and Trust Litigation*.

Russell Klemm, Clayton & McCulloh, P.A., was recently the guest speaker for the Orange County Neighborhood Services at their annual Community Workshop. He spoke on the changes to Chapter 720 of the Florida Statutes regarding what can be done to landscaping.

Jill S. Schwartz of Jill S. Schwartz & Associates, P.A., recently presented at Tulane's 28th Annual Multi-State Labor & Employment Law Seminar regarding *Family & Medical Leave Act 2010- Past, Present and Future*. She also participated in a webinar panel for the Florida Chapter of the National Employment Lawyers Association regarding *Winds of Change: New Trends in Sexual Harassment Law at the Eleventh Circuit*.

Larry Smith, Esq., at the invitation of SunTrust Bank and its Diversity Corporate Partners, presented *Diversity and Professionalism: Outlook for the Invisible Minority*, in Atlanta, Georgia, in June. His presentation was part of Pride Month celebrations,

which were cosponsored by the Atlanta GLBT Chamber of Commerce.

Lawrence M. Watson Jr. of Upchurch Watson White & Max presented at the American College of Civil Trial Mediators Annual Retreat and Conference held in Manchester Village, Vermont, in July.

Special Events

Sept. 27 – *YLS Annual Oath Administration and Reception*. 6:00 p.m. Orlando City Hall, 400 S. Orange Ave., Orlando, Florida 32801. Sponsored by Marsh Consumer.

Oct. 1 – *YLS Annual Charity Golf Tournament*. 8:00 a.m. shot-gun start. Reunion Golf Resort and Club, Wyndham Grand Resort, 7599 Gathering Dr., Reunion, FL 34747.

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

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

Seminars

Sept. 3 – *Update on Residential Foreclosure Mediation Process in Florida*. Paralegal Section Seminar. 11:30 a.m.-1:30 p.m. OCBA Center. CLE: 2.0. Speakers: Judge Lawrence R. Kirkwood; David Torre, Esq.; Kim Homer, RMFMP Consultant. Fee: \$20/OCBA members; \$25/non-members. Sponsored by Re-Quire Title Tracking. Register: <http://events.constantcontact.com/register/event?oeidk=a07e2ywp7nj80288324>.

Sept. 14 – *Domestic Violence in Family Law*. LAS Lunchtime Training. 12:00 p.m.-1:30 p.m. Comerica Bank, 111 N. Magnolia Ave., Ste. 1000, Orlando, FL 32801. CLE: pending. Speaker: Tenesia C. Hall. Contact Cathy Tucker at ctucker@legalaiddocba.org or Marilyn Carbo at mcargo@legalaiddocba.org.

Sept. 17 – *Family Law Trial Advocacy*. Family Law Committee Seminar. 12:00 p.m. OCBA Center. CLE: 4.0 pending. Contact Marie at marieb@ocbanet.org. Sponsored by Marsh Consumer.

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

Sept. 28 – *Making the Forever Family: Adoption Finalization in Dependency*

Cases. LAS Lunchtime Training. 12:00 p.m.-1:30 p.m. Comerica Bank, 111 N. Magnolia Ave., Ste. 1000, Orlando, FL 32801. CLE: pending. Speaker: Stephanie Stewart. Contact Cathy Tucker at ctucker@legalaiddocba.org or Marilyn Carbo at mcargo@legalaiddocba.org.

Sept. 28 – *Agreements Not To Compete – The Basics*. Solo & Small Firm Committee. 12:00 p.m.-1:00 p.m. OCBA Center. Speaker: Richard Swank. Contact Marie at marieb@ocbanet.org.

Oct. 2 – *Litigation Strategies and Solutions: Practical Information for Effectively Trying Your Cases During These Trying Times*. Paralegal Section Seminar. 7:30 a.m.-5:00 p.m. Embassy Suites, Orlando. Speakers: Judge John M. Kest; Ralph Losey, Esq.; James Hauser, Esq.; Nicholas A. Shannin, Esq.; Peggy Bingham; Lissa Bealke, FRP. Fee: \$139 (OCBA members); \$119 (students). Register at: <http://events.constantcontact.com/register/event?oeidk=a07e2ytrqigd78d3cd3>

Oct. 7-8 – *OCBA Second Annual Bench Bar Conference*. For details, please see full-page announcement in this issue of *The Briefs*, or visit the OCBA website at orangecountybar.org for more information and registration form.

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

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

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

Supreme Court Cases

continued from page 24

due to the guidelines. What neither side seemed to address was that *Booker* was not fully retroactive, so under the dissent's theory apparently only defendants lucky enough to have grounds for a sentencing modification would benefit from the new partial retroactivity for *Booker*. Justice Stevens' rationale would create.

***Magwood v. Patterson* (June 24, 2010)**

After Mr. Magwood was sentenced to death and exhausted his state remedies, he filed a federal petition for writ of habeas corpus. He was successful and was resentenced, but unfortunately he was sentenced to die again. He in turn filed another federal petition for writ of habeas corpus and raised claims that he had not on his first petition, but perhaps could have. At issue was whether this new petition was "second or successive," and thereby barred by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. §2244(b). Justice Thomas, writing for the Court and joined by Justices Scalia, Stevens, Breyer and Sotomayor, found that it was not a "second or successive" claim because, after interpreting the statute, it was a new judgment that was being challenged. Justice Breyer, joined by Justices Stevens and Sotomayor, wrote a brief concurring opinion regarding the one subsection of the Court's opinion with which they did not join. Justice Kennedy wrote the dissent and was joined by Chief Justice Roberts and Justices Alito and Ginsburg. The dissent would have found his claim to be "second or successive" because it raised claims that he could have, but did not, in his first petition.

***Skilling v. United States* (June 24, 2010)**

Mr. Skilling was convicted of several counts alleging his misconduct in the Enron scheme. He raised two issues on appeal: 1.) That an impartial jury was not seated because of the pretrial publicity; and 2.) That his conspiracy to commit "honest-services" wire fraud conviction should be overturned. Justice Ginsburg wrote the opinion of the court. On the first issue, she was joined by Chief Justice Roberts and Justices Scalia, Thomas, and Kennedy in finding that there was no presumption of juror prejudice nor any actual bias. On the second issue, she was joined by Chief Justice Roberts and Justices Stevens, Breyer, Alito and Sotomayor in finding that Mr. Skilling's "honest-services" conviction should be overturned because the statute was only meant to reach schemes to defraud involving bribes and kickbacks - anything further than that being void by vagueness. There was a hodgepodge of concurring and dissenting opinions. *Black v. United States* and *Weyhrauch v. United States*, also decided that day, both involved the latter issue in this case and were decided in the same manner.

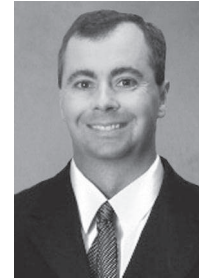
***Sears v. Upton* (June 29, 2010)**

Mr. Sears challenged the effectiveness of his counsel's representation during the sentencing phase of his death penalty trial. The issue was not whether or not his lawyer's investigation and performance was deficient, but rather whether it was prejudicial to the outcome of the sentencing. The per curiam opinion outlines the mental health mitigation which was developed during the post-conviction proceedings. Instead, at sentencing, counsel presented evidence that this episode was

completely out of character and that Mr. Sears' family and friends would be devastated if he were sentenced to death – without investigating the mental health issues outlined in the Court's opinion. Perhaps the cause of the issue was the state court's language: by saying it was impossible to tell whether a different theory would have changed the outcome of the case it implied that they didn't make the effort of weighing the new evidence's chances of changing the outcome. Justice Scalia, joined by Justice Thomas, argued that the lower court's language did show that they followed the law and weighed the evidence in assessing whether it would cause a different outcome and accused the Court of substituting its own judgment on the application of those facts to the law. The Chief Justice and Justice Alito would have simply denied the petition for a writ of certiorari.

Interesting note: Justice Thomas did not ask a single question during oral arguments the entire term.

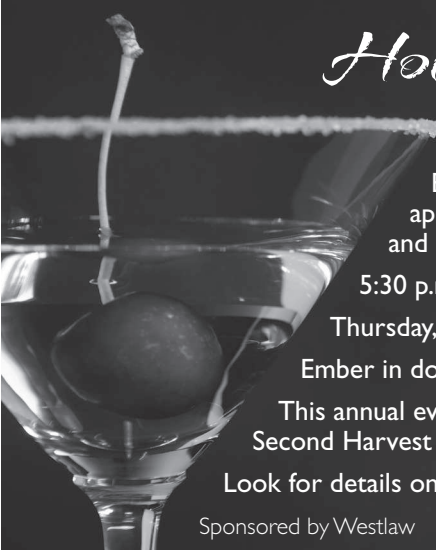
Will Jay is a Board Certified Criminal Trial Attorney with Carsten & Ladan, P.A. He has been a member of the OCBA since 1996.



ANNOUNCEMENTS *Cont'd*

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

Oct. 28 – *Claims, Trends and Risk Mitigation*. 2:00 p.m.-4:00 p.m. OCBA Center. Speaker: Stephen Lang, Senior Vice President, Business Unit Leader, Marsh Consumer. Sponsored by Marsh Consumer. Contact: Marie at marieb@ocbanet.org.



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5:30 p.m. to 7:30 p.m.
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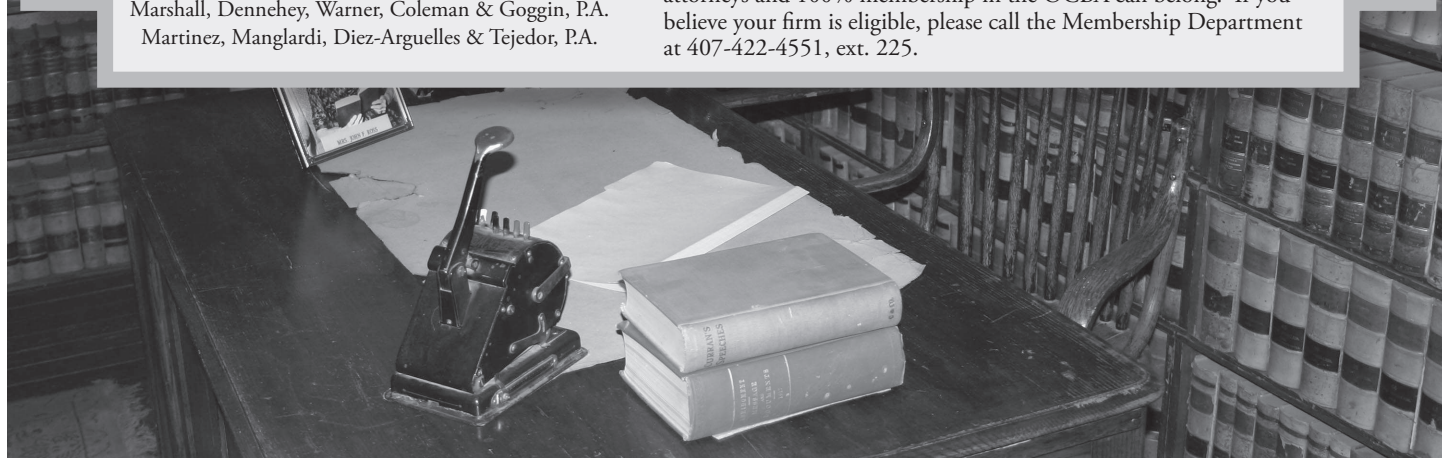
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OCBA CALENDAR

September - October 2010

OCBA Luncheon

Deborah C. German, M.D.
Dean of the UCF College of Medicine

Thursday, September 30, 2010

RSVP by Friday, September 24, 2010 to:
reservations@ocbanet.org

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September

- 2 Federal Judicial Relations**
12:00 p.m. • Judge Conway's Chambers
- 3 Paralegal Section Seminar**
Update on Residential Foreclosure Mediation Process
12:00 p.m. • Bar Center
- 6 Office Closed - Labor Day Holiday**
- 8 Estate Guardianship & Trust Committee**
12:00 p.m. • Bar Center
- Judicial Relations Committee**
12:15 p.m. • Courthouse 21st Flr. Conference Rm.
- Executive Council Meeting**
4:00 p.m. • Bar Center
- 9 Social Security Committee**
12:00 p.m. • Bar Center
- 10 Family Law Executive Committee**
11:45 a.m. • Houlihan's
- Workers' Compensation Committee**
11:45 a.m. • Smokey Bones
- 14 LAS Lunchtime Training**
Domestic Violence in Family Law
12:00 p.m. • Comerica Bank
- 15 Insurance Law Committee**
12:00 p.m. • Bar Center
- 16 YLS Luncheon**
11:45 a.m. • University Club
- Appellate Practice Committee**
12:00 p.m. • Bar Center
- 17 Family Law Committee Seminar**
Family Law Trial Advocacy
12:00 p.m. • Bar Center
- 21 Professionalism Committee**
12:00 p.m. • Bar Center
- 22 Labor & Employment Committee**
12:00 p.m. • Please contact chair.
- 23 Brown Bag Lunch with Judge J. M. Kest**
12:00 p.m. • Courthouse
23rd Flr. Judicial Conference Rm.

- 24 Bankruptcy Law Committee**
Cancelled
- 27 Oath of Administration & Reception**
6:00 p.m. • Orlando City Hall
- 28 LAS Lunchtime Training**
Making the Forever Family: Adoption Finalization in Dependency Cases
12:00 p.m. • Comerica Bank
- Solo & Small Firm Committee Seminar**
Agreements Not To Compete – The Basics
12:00 p.m. • Bar Center
- 29 Business Law Committee**
12:00 p.m. • Please contact chair.
- Labor & Employment Committee**
12:00 p.m. • Bar Center
- 30 OCBA Luncheon**
Deborah C. German, M.D.
Dean, UCF College of Medicine
11:30 a.m. • The Ballroom at Church St.

October

- 1 YLS Charity Golf Tournament**
8:00 a.m. • Reunion Golf Resort and Club
- 2 Paralegal Section Major Seminar**
Litigation Strategies and Solutions
8:15 a.m. • Embassy Suites, Orlando
- 7 2nd Annual Bench Bar Conference**
8:45 a.m. • Bar Center
- Lawyers for Literacy Spelling Bee**
6:00 p.m. • Sonesta Hotel
- 8 2nd Annual Bench Bar Conference**
8:30 a.m. • Bar Center
- Family Law Executive Committee**
11:45 a.m. • Houlihan's
- Workers' Compensation Committee**
11:45 a.m. • Smokey Bones
- 12 LAS Lunchtime Training**
Cutting Edge Landlord Tenant Law Regarding 3-Day Notices
12:00 p.m. • Comerica Bank
- 13 Estate Guardianship & Trust Committee**
12:00 p.m. • Bar Center
- Executive Council Meeting**
4:00 p.m. • Bar Center
- 14 Brown Bag Lunch with Judge J. M. Kest**
12:00 p.m. • Courthouse
23rd Flr. Judicial Conference Rm.
- Social Security Committee**
12:00 p.m. • Bar Center
- 15 Family Law Committee**
JA/MA Appreciation Luncheon
12:00 p.m. • Bar Center
- 19 Professionalism Committee**
12:00 p.m. • Bar Center
- 21 YLS Luncheon**
11:45 a.m. • Location: TBA
- Appellate Practice Committee**
12:00 p.m. • Bar Center
- 26 LAS Lunchtime Training**
ICPC: Out-of-State Placements for Dependent Children
12:00 p.m. • Comerica Bank
- Solo & Small Firm Committee Seminar**
Landlord/Tenant Basics
12:00 p.m. • Bar Center
- 27 Business Law Committee**
12:00 p.m. • Please contact chair.
- Labor & Employment Committee**
12:00 p.m. • Please contact chair.
- 28 OCBA Luncheon**
Justice Jorge Labarga
Florida Supreme Court
11:30 a.m. • The Ballroom at Church St.
- Claims, Trends and Risk Mitigation**
2:00 p.m. • Bar Center
- 29 Bankruptcy Law Committee**
12:00 p.m. • Bar Center



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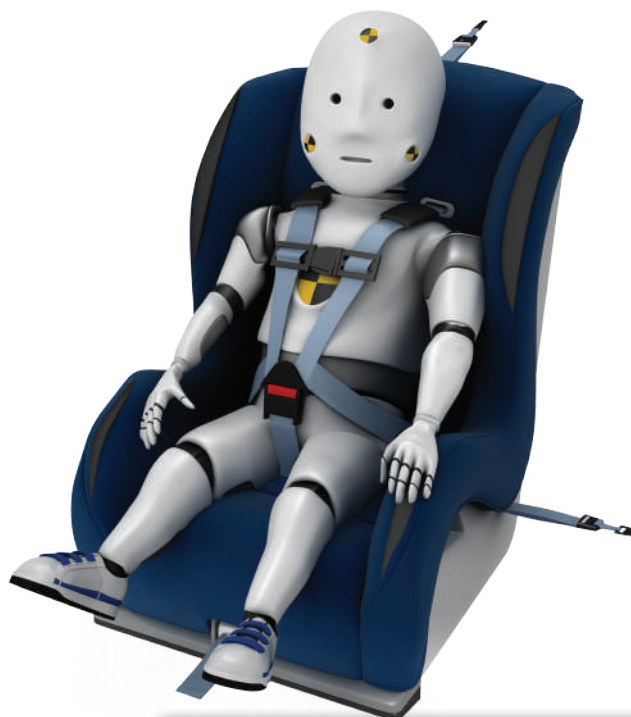
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