

the Briefs

A Publication of the Orange County Bar Association



February 2009
Vol. 77 No. 2

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Florida Supreme Court

Celebrating 75 Years of Excellence

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Hallie L. Zoebel

Legal Aid Society News

Breakfast of Champions
Donna Graf

Evening with the Judiciary

presented by
OCBA Young
Lawyers' Section

The Young Lawyers' Section
of the OCBA invites you to its annual
Evening with the Judiciary. Please join us for
an evening of wonderful cuisine, refreshments,
and conversation at Citrus Restaurant.

For further information and RSVP, please contact
Kim Healy – khealy@kdbzlaw.com, 407-422-2472;
or Melanie Andre – mfa@aswmpa.com, 407-210-2796;
or mail the form below and payment to:
Kim Healy, 25 East Pine Street, Orlando, FL 32801.

WHEN

Wednesday, February 18th
5:30 pm

WHERE

citrus
RESTAURANT

Citrus Restaurant
821 North Orange Avenue

PRICE

\$35; \$30 (for Government
Lawyers and Solo Practitioners)

RSVP

Wednesday, February 11th

Names of Attendees*:

*Please print names as you want them to appear on nametags.

Firm Name: _____

Address: _____

Phone: _____ Amount Enclosed: \$ _____

JESSICA HEW

for

OCBA PRESIDENT - ELECT



“FOR 13 YEARS, I’VE SERVED
AT ALMOST EVERY LEVEL OF
THE OCBA. NOW I’M READY
FOR THE NEXT BIG STEP.
PLEASE VOTE FOR ME AS YOUR
NEXT PRESIDENT - ELECT.”

JESSICA HEW. A PROVEN LEADER FOR THE OCBA.

- OCBA Treasurer, 2008-Present.
- Served as OCBA Secretary, 2007-08.
- Served as Inaugural Co-editor of OCBA’s *The Briefs* Magazine, 2005-07
- OCBA Executive Council 2003-Present.
- Received the OCBA President’s Award for Outstanding Service, 2005-06.
- Received the OCBA Outstanding Executive Council Member Award, 2004-05.
- Inaugural Strategic Planning Chair, 2008-Present.
- Received the OCBA Award of Excellence as a Member-at-Large, 2004-05.
- Served as OCBA’s Inaugural Social Committee Chair, 2004-05.
- Citizens Dispute Settlement Mediator, 1998-2000.
- *Guardian Ad Litem*, 1997-98.

For more information on qualifications or to discuss platform or issues,
please contact Jessica at 407-647-4455 or jessica.hew@burr.com

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the Briefs

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DEADLINE INFORMATION

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

Copy - 1st of the month prior to the month of publication

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

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

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President's Message • Law Week

February 2009

Each year Law Day is celebrated on the first day of May. Law Day is, of course, a national celebration promoted and sponsored primarily by the ABA and other voluntary bar associations. Fifty-one years ago, President Eisenhower proclaimed the first Law Day a "day of national dedication to the principle of government under law." Although the ABA and many voluntary Bar Associations will celebrate Law Day on May 1, 2009, we at the Orange County Bar Association are overachievers. We can't see fit to confine our celebration to a single day... or even a single month for that matter. The OCBA has "Law Day" events planned for March, April and May of this year – a special year during which the ABA and the OCBA will celebrate the 200th anniversary of Abraham Lincoln's birth with **Law Day 2009: A Legacy of Liberty**. I encourage each of you to consider participation in these events.

Before I describe our Law Day events for you, I would like to thank **Catrina M. Chapin** for chairing the OCBA's Law Day celebrations. Catrina is a paralegal with Roetzel & Andress, LPA. I would also like to thank OCBA Executive Council members **Paul Scheck** and **Jessica Hew**, past-OCBA Law Day Chairs **Lissa Bealke** and **Lori Spangler**, Judges **Faye Allen** and **Bob LeBlanc** and the entire **OCBA Paralegal Committee**. The following Law Day Programs would not be possible without this great collaborative effort.

•**Pathways in Law Program** – Members of the judiciary developed this program, which is specifically targeted at crime prevention. More than 90 children affiliated with the Office of Farmworker Ministry are expected to participate in this program, which includes a mock trial program at the Orange County Courthouse and a special tour of the Orange County Jail. Look for further details about this program, which will take place during the month of March 2009.

•**LawSuits** (clothes drive benefitting the Community Service Center of Central Florida) – At our 2009 **Professionalism Luncheon**, to be held at the Ballroom at Church Street on **March 26, 2009**, the OCBA will collect suits and business attire for the Community Service Center of Central Florida. The clothing collected will be used for the Community Center's Job Rehabilitation Program participants. At this luncheon, the OCBA will award the **2009 Lawrence G. Mathews Young Lawyer Professionalism Award**, the **2009 William Trickel, Jr.**

Professionalism Award and the **2009 James G. Glazebrook Memorial Bar Service Award**.

•**Goldilocks Mock Trials**

– Please consider volunteering for the Goldilocks Mock Trials. Details on this annual favorite will be available at a later date. The Goldilocks Mocks Trials will be conducted by members of the judiciary, attorneys and others in the legal profession for elementary-aged students in our community. All rise for the matter of *Wolf v. Pig!*

•**A Day in the Life of a Judge** – On **April 30, 2009**, judges from the Ninth Judicial Circuit will host students from the Office of Farmworker Ministry and the Parramore Kidz Zone for a special job shadowing program. Following a morning at the Courthouse, each participant will accompany his or her judge to the Orange County Bar Association's Luncheon as our special guest.

•**Law Day Luncheon** – At the **April 30, 2009**, luncheon of the Orange County Bar Association,

we will celebrate Law Day and present the **2009 OCBA Liberty Bell Award**. The Liberty Bell Award recognizes a person, persons or an organization that has promoted a better understanding of the rule of law, encouraged a greater respect for law and the courts, stimulated a sense of civic responsibility and contributed to good government within the community. In addition, children, their parents and their teachers will be invited to the luncheon and will be recognized for winning entries in our countywide poster and essay contests.

•**DUI Mock Trial Program** – On **May 6, 2009**, a special DUI Mock Trial will be held at the Orange County History Center for several groups of local high school students. The mock trial will be conducted by members of the judiciary, attorneys and others



Tad A. Yates



continued page 8



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Chief Justice Peggy A. Quince was born in Norfolk, Virginia, in 1948. She is married to Fred L. Buckine, attorney-at-law, and they have two daughters, Peggy LaVerne, a graduate of Florida A&M University, and Laura LaVerne, a graduate of the University of Central Florida. Justice Quince graduated in 1970 from Howard University with a B.S. degree in zoology. She received her J.D. degree from the Catholic University of America in 1975. While a law student, she was active in Phi Alpha Delta Law Fraternity and the Black American Law Students Association and she received an award for her work with Catholic's Neighborhood Legal Services Clinic. In 1999, she received

an honorary Doctor of Laws degree from the Stetson University College of Law. In 2004, she received an honorary Doctor of Laws degree from St. Thomas University School of Law.

Justice Quince began her legal career in Washington, D.C. as a hearing officer with the Rental Accommodations Office administering that city's new rent control law. In 1977 she entered private practice in Norfolk, Virginia, with special emphasis in real estate and domestic relations.

She moved to Florida in 1978 and opened a law office in Bradenton, Florida. There, she practiced general civil law until 1980. In February, 1980, Justice Quince began her tenure with the Attorney General's Office, Criminal Division. As an assistant attorney general, she handled numerous appeals in the Second District Court of Appeal, the Florida Supreme Court, including death penalty cases, the Eleventh Circuit Court of Appeals, and the United States Supreme Court. Her thirteen-year tenure at that office included five years as the Tampa Bureau Chief. Additionally, three years were spent handling death penalty cases exclusively, on direct appeal and in post-conviction proceedings.

Justice Quince is a member of The Florida Bar, Virginia State Bar, the National Bar Association, the Tallahassee Women Lawyers, and the William H. Stafford Inn of Court. She is an active member of the Govern-

ment Lawyers Section, the Criminal Law Section, and the Equal Opportunity Section of The Florida Bar. She is a former member of the George Edgecomb Bar Association, the Hillsborough County Bar Association, Hillsborough Association of Women Lawyers, and the Tampa Bay Inn of Court. Justice Quince's former Florida Bar activities include membership on the Gender Equality Committee, the Criminal Law Certification Committee, and the Executive Councils of the Government Lawyers and Criminal Law Section.

Presently, Justice Quince is on the executive counsel of the Appellate Section of The Florida Bar and is the Supreme Court liaison to the Workers' Compensation Committee, the Judicial Ethics Advisory Committee, and the Supreme Court's Family Court Steering Committee. She has lectured at a number of Continuing Legal Education programs on issues involving search and seizure, probation and parole, use of peremptory challenges, postconviction relief, professionalism and ethics, and the independence of the judiciary.

In 1993, Justice Quince became the first African-American female to be appointed to one of the district

continued page 8

**The February Luncheon is Co-hosted by the
Paul C. Perkins Bar Association**

*The Ballroom at
Church Street*

11:45 a.m. - 1:00 p.m.

225 S. Garland Avenue

Orlando, FL 32801

Please RSVP to reservations@ocbanet.org by
Friday, February 20, 2009

Main Entrance: Garland Avenue between
Church Street and South Street

**To ensure a proper luncheon count, RSVPs
and CANCELLATIONS are requested no
later than Friday, February 20, 2009.** The
OCBA is happy to provide 11 luncheons
as part of your member benefits, but no-
shows incur additional charges for the Bar
and walk-ups cannot be guaranteed a seat.
Please keep us up-to-date on your reserva-
tion status!



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General Magistrate
Howard D. Friedman

Undoubtedly we live in stressful times. Many of us have seen our investments in the market take a big hit. We hope those we have chosen to lead can come up with the best plan to boost consumer confidence and help our American industries remain competitive and superior in the world market. Until

the economic recovery theories become implemented – or metaphorically, until the rubber hits the road—we weather through the tribulations of this global recession.

Many of us are now re-evaluating our investment strategies and retirement plans. On top of this, many of us have to deal with the uncertainty in our revenues and job security. As a result, many of us are on edge. Now, when something doesn't go well in our practice, we may be quicker to get angry and upset. We all know in our law practices things will not always go right. You've all heard we call it the "practice" of law, because it is not to be confused with perfection (or words to this effect). When things go wrong, who should bear the brunt of our frustration?

Well, where this all leads is. . . We, as professionals, must take into account that we should try not to beat up on each other and also consider that our adversaries and colleagues all share, in some fashion, the effects of this recession.

We must consider that during these challenging economic times, which we all hope are fleeting, our professionalism must remain a constant component of who we are as attorneys. We shouldn't blast people because we're angry about something else. We need to be mindful of this classic *passive-aggressive* attribute. This economic recession will

pass and become a faded memory. In the meantime we will all find a way to endure. We must consider that our reputation for professionalism in the community must as well endure.

It just makes good business sense to be collegial with your adversaries. You are more likely to receive client referrals from fellow attorneys if you have a good reputation for professionalism. Although perhaps some attorneys may not rely substantially on attorney referrals, burning your bridges and limiting your potential client base is not typically sound business judgment. So, it is in your own self-interest to avoid needlessly taking someone's head off.

As uncertain as these times may be for us, consider that we are blessed as attorneys with intelligence and savvy that comes along with the territory. We have the ability to establish a practice merely by hanging up our shingle and having a go at it. If we find the right niche, we can do quite well. Remember, there are many highly educated people without this luxury.

I hear the talking heads describe why we're in this global recession in terms of fear, corporate greed, trade deficit, oil dependence, regulation or lack thereof, or any combination of these things. Like most everyone else I can come up with my version of what we need to do to improve this sluggish economy. I'll commit to this and hope you will too – I will strive to not be part of the problem, but rather part of the solution.

In the context of professionalism and professional practice, being part of the solution means simply treating others as you would reasonably expect to be treated. Honesty and integrity should be considered a given. If you desire to be part of the solution in the context of legal professionalism, conduct yourself consistently with the ideals of professionalism set forth in the OCBA Rules of Professionalism, Professional Courtesy and Courtroom Decorum.

Well, I must leave you now and return again to my Bloomberg.com webpage obsession and check on the market. Have a great month everyone.

Submitted by **Magistrate Howard D. Friedman**, chair of the OCBA Professionalism Committee. Magistrate Friedman has been a member of the OCBA since 2005.

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OCBA Luncheon

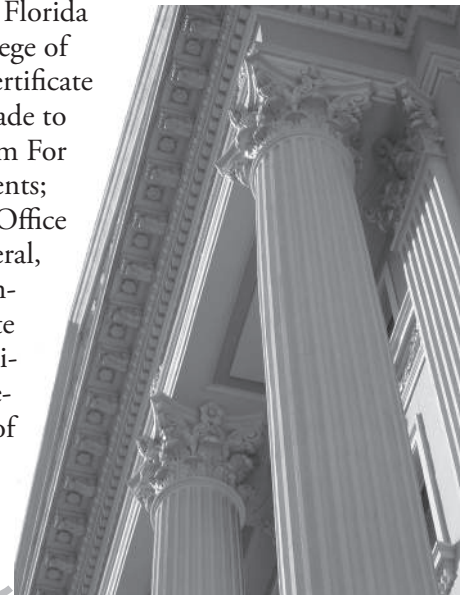
continued from page 5

courts of appeal with her appointment by Governor Lawton Chiles to the Second District Court of Appeal to a term effective January 4, 1994. She was retained in office by the electorate in November 1996. On December 8, 1998, Justice Quince was appointed by the late Governor Lawton Chiles and Governor-elect Jeb Bush to the Florida Supreme Court.

Justice Quince is a member of New Hope Missionary Baptist Church. Her civic and community activities include membership in Alpha Kappa Alpha Sorority, Inc., Jack and Jill of America, Inc., the Urban League, the NAACP, and The Links, Inc.

Justice Quince has received the following honors and awards: Florida Commission on the Status of Women, 2007 Florida Women's Hall of Fame Award; American Bar Association Commission on Women in the Profession, 2006 Margaret Brent Women Lawyers of Achievement Award; 2006 Rickards High School Outstanding School Volunteer Award; 2005 Key to the City of Winter Haven; 2005 Richard W. Ervin Equal Justice Award; 2004 Key to the City of Panama City, Florida; 2004 Catholic University of America, Columbus School of Law, Black Law Student Association Alumni Achievement Award; 2004 Lee County Association for Women Lawyers and the Lee County Bar Association Award for dedication to the promotion of equality in law and outstanding service as a distinguished member of the Florida judiciary; 2002 Florida Bar Equal Opportunities in the Profession Award; 2002 Florida Girls State Award; 2003 Helping Hand Award; 2003 Southern Women in Public Service Pacesetter Award; 2003 Florida Girls State Award; 2003 Pioneering the Future in our Community Award; 2003 Outstanding Jurist and Howard University Alumna Award; 2001 William H. Hastie Award from the National Bar Association Judicial Council;

National Bar Association Presidential Achievement Award; Girl Scouts, Woman of Distinction Award, 2001; National Bar Association Women Lawyers Division Jurist Award for Outstanding Leadership Achievements and Dedicated Service to the Community At Large; Florida Chapter of the National Bar Association for Service on the Bench; Virgil Hawkins Bar Association Award for Community Service and Advancement of Equal Justice Under Law; Virgil Hawkins Bar Association Certificate for Achievement in Jurisprudence; Fort Lauderdale High School Award for participating in the School Law Magnet Program; Broward County School Board Appreciation Award for Inspiration and Devotion to Our Youth; Award of Distinguished Service and Continuing Commitment to the People of Florida from the Fort Lauderdale B'nai B'rith; Proclamation from the Broward Board of County Commissioners stating February 28, 1999, as "The Honorable Peggy A. Quince Appreciation Day;" Hillsborough County Sheriff's Black Advisory Council Appreciation Award; Lakeland NAACP Award for Contribution to Civil Rights; African-American Production Company Personal Achievement Award; Paul C. Perkins Bar Association Appreciation Award; Florida State University College of Law Appreciation Certificate for Contributions made to Summer Law Program For Undergraduate Students; Certificate from the Office of the Attorney General, Florida Crime Prevention Training Institute for Exemplary Contributions to Crime Prevention in the State of Florida.



President's Message

continued from page 3

in the legal profession. Following the mock trial demonstration, students will view a documentary entitled "Jane: A Film," in which Jane Dwyer details her harrowing experience of having driven into a concrete embankment at the end of the old Seven Mile Bridge in the Florida Keys; her life-threatening injuries and painful recovery; the five-year prison sentence she served for the unintentional death of her boyfriend, who was a passenger in the vehicle; and the unusual consequences of having

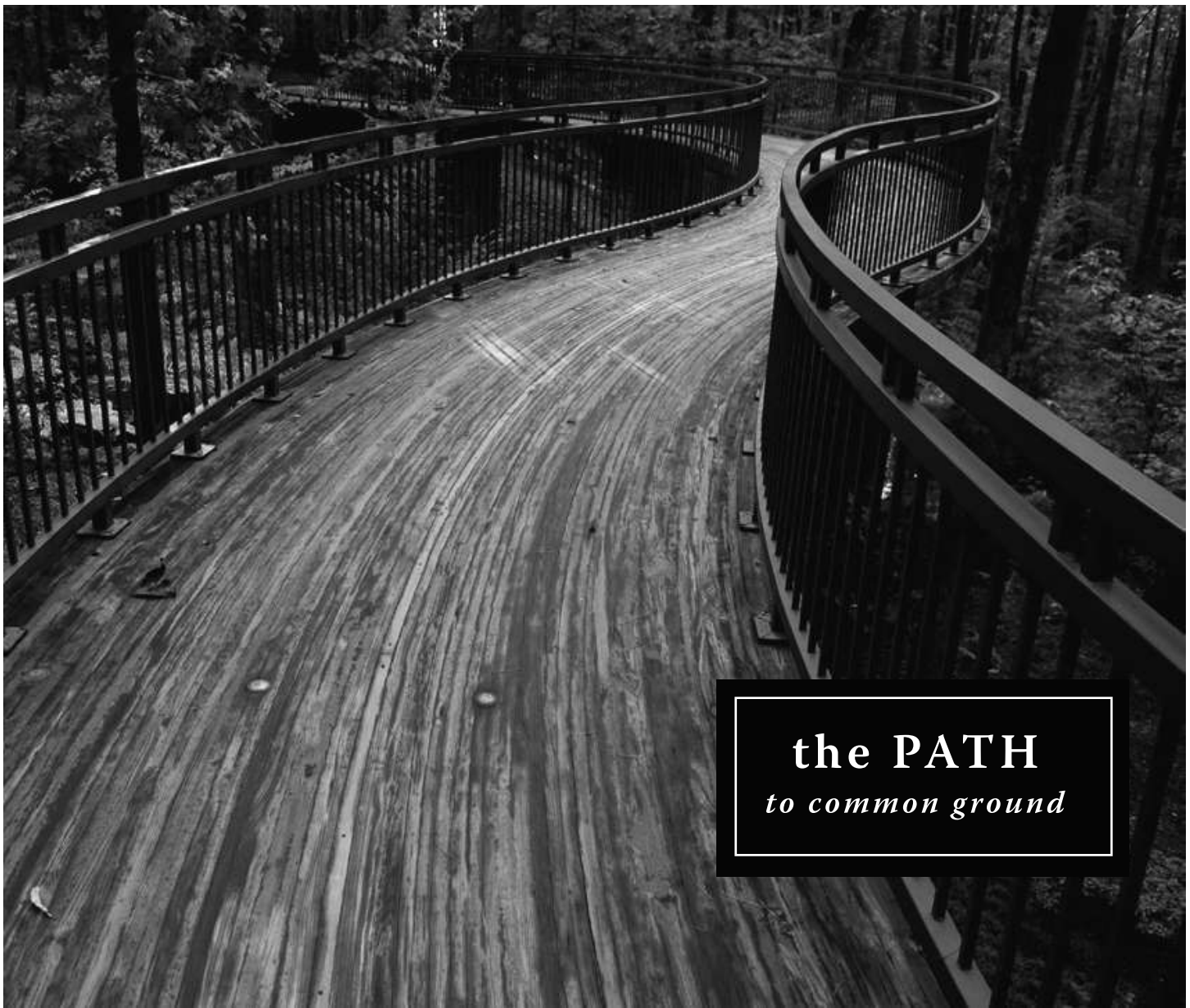
lost her driving privileges for life. Immediately following the documentary, Ms. Dwyer will hold a Q&A session for the students.

•Naturalization Ceremony -

A special Naturalization Ceremony will be held in honor of Law Day, as immigrants to the Central Florida area pledge their Oath of Allegiance in a moving ceremony, which will be held at the Orange County Convention Center. We will provide additional information on this event as it becomes available.

A final thanks to **The Foundation of the OCBA** and its President, **Tom Wert**. The Foundation, in keeping with its mission of educating the public about our justice system and the rule of law, generously supports these various Law Day events. For more information on our three months of "Law Day" programs, please contact Law Day Chair Catrina Chapin at cchapin@ralaw.com. I hope to see you at our next luncheon and at our various Law Day events.

Tad A. Yates is a partner with Kirkconnell, Lindsey, Snure and Yates, P.A. He has been a member of the OCBA since 1994.



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MONDAY - TUESDAY, FEBRUARY 9 - 10, 2009

The Precautionary Principle Academy is a forward-thinking event designed to engage members of the legal and environmental communities in discussions about the Precautionary Principle and to outline the practical implications of the Precautionary Principle as the basis for local and state laws. National experts from the Science and Environmental Health Network (SEHN) lead the Precautionary Principle Academy: Carolyn Raffensperger, M.A., J.D., and Ted Schettler, M.D., M.P.H. At this participative event, they discuss scientific and legal uncertainty,

present case studies, and investigate local applications. A panel of local lawyers and decision-makers, featuring Robert Guthrie, Esq., Senior Assistant County Attorney, Orange County; Anthony J. Cotter, Esquire, Shareholder, Gray Robinson, P.A. (confirmed); Linda W. Chapin, Director, The Metropolitan Center for Regional Studies (invited); and Lori Cuniff, CEP, Manager, Orange County Environmental Protection Division (invited), addresses the intersection between the Precautionary Principle and local environmental concerns.

6.5 CLE CREDIT HOURS AVAILABLE

MONDAY, 5:00 - 8:00 P.M.: Reception (Orlando Museum of Art)

TUESDAY, 8:30 A.M. - 3:45 P.M.: Academy (Lunch provided)
Harry P. Leu Gardens, Camellia Room
1920 N. Forest Ave., Orlando, FL

REGISTRATION INFORMATION: \$30 general public; \$80 attorneys seeking CLE credit.
Free for students/faculty, and administrators of St. Thomas University, Barry University and Miami Dade College.
Register by e-mail at cej.reg@gmail.com
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Upcoming Events

Feb. 25, 2009..... Business Partner Expo
1:00- 3:00 p.m. Church Street Ballroom
contact: msimonson@mdwccg.com

Mar. 13, 2009..... Spring Education Retreat
Downtown Marriott
contact: susan.ruberti@lowndes-law.com

May 18-21, 2009.. ALA Annual Educational Conference
& Exposition
New Orleans, Louisiana
www.alanet.org



www.cfcala.org

For membership information, please contact
June Coffman at JGCoffman@littler.com

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***Mitchell v. Metropolitan at
Lake Eola LLC,***

947 So. 2d 1263 (Fla. 5th DCA 2007)
Reduced lis pendens bond from
\$600,000 to \$20,000.

McGhee v. Volusia County,

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

Acadia Partners, L.P. v. Tompkins,

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

Wenzel v. Boyles Galvanizing Co.,

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

Boyles v. Mid-Florida Television Corp.,

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

Hamlet v. Hamlet,

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

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

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

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

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

Layeni v. Layeni,

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

Thomas v. Fusilier,

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

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Y2K: The New Century, The New Millennium and Beyond!¹

(Part One of a Two-part Series)

Jessica K. Hew

Where were you at the historic turn of the century, which coincided with the beginning of and the promise of a new millennium? Were you in a bomb shelter awaiting the apocalypse? At Times Square in New York City? Sitting by your computer waiting for it to *literally explode*? At the international dateline to be the first to experience the new millennium? *Where were you?*

The Orange County Bar Association (OCBA) was awaiting the millennium, just as the rest of us were. Fully dedicated to the membership and its professional demeanor, the OCBA was moving toward the future with aplomb. Where were we? More importantly, *where are we going?* Since 2000, the practice of law continued on its evolutionary path. We have seen many changes to our practices, and there will likely be many more to come.

Changes to the Practice

On the forefront at the millennium was the concept of **multidisciplinary practice** for lawyers in step with the evolution of the practice of law as a "profession" versus that of a "business."² This dichotomy of "profession" versus "business" saw career changes for some of our members.³

Marina Nice Pittman went from her law practice to working at Rollins College with its grant programs, and then Orlando Regional Healthcare System as the Foundation's Chief Financial Officer, managing the Planned Giving Program and grants. **H. Richard Bates** went to Romania, where he performed missionary work. Prior to moving and discussing his prior mission trips with his family, Richard stated, "During each of those visits, we felt increasingly the call of God in our lives to commit ourselves fully to ministry in Romania."⁴

Randall Ellington founded the Strategic Financial Group, Inc., focused on estate planning, retirement and business succession. **Stephanie Howell**, after leaving her litigation practice to be a lobbyist, went to Baker & Hostetler's



Orlando office...but in marketing. **Carol Shannin** went to work for the Orange County Public Schools for the law magnet program. According to Carol, "Teaching was a

rewarding alternative to practicing law. I was able to put my legal training to good use in education and still devote time to family."

Incidentally, the American Bar Association (ABA) found that at that time more than three-fourths of all young lawyers were satisfied with practicing law, although large firm associates were less satisfied than their small firm counterparts.⁵

Multidisciplinary practice, however, is the integration of lawyers or legal services into non-lawyer or partly non-lawyer owned businesses, wherein there is a "share" of legal fees by lawyers and non-lawyers - which is prohibited under the ethical rules. Hotly debated by the ABA during its study of the issue for changes in the Model Rules of Professional Conduct,⁶ the Florida Bar also participated with the ABA's study⁷ and solicited the OCBA for its opinions.⁸ Both the ABA and the Florida Bar ultimately recommended that multidisciplinary practices were inconsistent with the core values of the legal profession.⁹ Despite the ABA and Florida Bar's findings as to lawyers' participation in multidisciplinary practices, both approve lawyers' participation in ancillary businesses¹⁰ provided that such businesses conform to the applicable ethical rules.¹¹

Although **alternative dispute resolution** (ADR) has been with us prior to the 2000s, new steps have been taken to ensure ADR will remain a viable option for our clients, thus creating a new pathway for attorneys. The Florida Supreme Court set up its own ADR organization in 1986, the Florida Dispute Resolution Center,¹² to help with ADR in Florida courts. The Florida 5th District Court of Appeal instituted and adopted a mediation program, which they

first tested as a pilot program in 2001.¹³ Not only did these programs help maintain the courts' dockets and allow the parties' assisted mutual self-determination of their dispute(s), it opened up a sub-category of practice areas for attorneys. Many OCBA members are now full-time mediators and/or arbitrators, and others (like myself) maintain these practice(s) with a traditional law practice. The OCBA Judicial Relations Committee even offered attorney and/or jurist mediation to handle disputes of a sensitive and confidential nature between or amongst them.¹⁴

Business Court in the Ninth Judicial Circuit was the ground-breaking pilot program for the Florida State Courts. Approved in 2003, the Business Court was designed to streamline business litigation matters to allow for effective and efficient use of time through greater court involvement.¹⁵ Initially staffed by the **Honorable Renee Roche**, Judge Roche remained on the Business Court bench until December of 2008. Prior to her rotation to the Family Law Division, the OCBA and the Florida Bar recognized her many contributions to the creation and refinement of the Business Court for the Ninth Circuit, and then across the State, at the November 2008 OCBA luncheon. These contributions included her efforts implementing the Ninth Circuit's Business Court Procedures, which are similar to those of the local Federal Court.¹⁶

Another change to the Orange County courts was the addition of the Magistrate program.¹⁷ Funded by the Florida Legislature in 2004, the Ninth Circuit started with the appointment of an **Administrative General Magistrate** and subsequently added five more magistrates. The magistrates hear items referred from the Civil Division judges, as well as matters in the Domestic Relations, Mental Health and Juvenile Dependency Divisions. After a hearing on a disputed issue, a magistrate issues a Report & Recommendation to the referring circuit judge and the parties for further action. The magistrates have become a vital key in assisting with and efficiently implementing case management, especially given the burgeoning caseload of the judiciary.

Technological Advances

A big evolutionary item for the OCBA and the practice of law is technology. Remember the introduction to the then-futuristic cartoon, *The Jetsons*? It is becoming reality. Really - I am just awaiting my "Rosie" to help clean up my office (it needs it!).

At its debut in 1999, the **Orange County Courthouse's Courtroom 23** was described as "the most technologically advanced courtroom in the world."¹⁸ Courtroom 23 allowed for many functions never before seen in Orange County: evidence presentation systems, Internet and remote broadcast, real-time court reporting, desktop technology, plasma monitors, video annotation, video conferencing, digital court reporting, computer legal research, advanced audio and touch screen integration (it has also since evolved to include additional capabilities).¹⁹ On the heels of Courtroom 23, the **Honorable Lydia Gardner**, Clerk of Court for the Ninth Circuit and Orange County, began to implement a plan for electronic filing as early as 2000.

The Middle District Clerk of Court led the way for local **electronic filing**, however. In 2003, it was announced that electronic filing of documents with the United States Middle District of Florida would begin in July of 2004.²⁰ And, it did! Today, electronic filing has changed the practice of law. Remember late afternoon mad dashes to the courthouse to get that document filed timely? No more. Electronic filing allows you to file 24/7, even on holidays (and I've done that!), and you can do it from the convenience of your own computer. No running required.

Although Lydia Gardner hoped to follow in the fall of 2004, electronic filing was first introduced to her office via the Business Court in March of 2006.²¹ Electronic filing of documents for circuit civil cases, excluding probate, mental health, guardianship and family court domestic relations and domestic violence cases, and documents relating to them were permitted to be filed as of January of 2007, and initial case filings were subsequently also permitted as of July of 2008 for the same types of circuit civil cases. The **Judicial Calendering System** made it on-line, though, in December of 2003.²² The system allowed easier coordination of hearings by allowing counsel to review the judge's available hearing schedule, coordinate available dates, and confirm the selected date with the judicial assistant. Voila! A hearing is scheduled. Legal assistants across Central Florida rejoiced (at least mine did!) in the time savings and efficiency in securing hearing time.

Building on a Foundation

In 2000, the **Honorable Patricia Fawsett** (a Past-President of the OCBA), who had been planning for the acquisition of land and the construction of a new Federal Courthouse, came closer to her goal: the new facility was finally commissioned and set for a target completion date in 2007.²³ The new **Federal Courthouse** was dedicated on September 21, 2008, with Supreme Court Justice Clarence Thomas in attendance.²⁴

The U.S. General Services Administration gave an acknowledgment of gratitude to Judge Fawsett for "...her commitment and dedication to a building of outstanding quality that is a tribute to the role of the judiciary in our democratic society and worthy of the American people."²⁵

Judge Fawsett was not only instrumental in getting a courthouse built, but along the way she also secured art and culture - literally within the courthouse's walls.

The Art in Architecture Program was literally integrated into the courthouse walls, allowing the Federal Courthouse to serve as a location of art in public places.²⁶ The walls of the courthouse contain six laminated blown art glass windows by the late artist, Al Held. At the top of the grand staircase, a 20x50 foot *Untitled* window faces east and bathes the multi-storied white interior atrium in beautiful color. The remaining five windows, each also *Untitled*, are intermittently located along the south atrium wall at ground level, adding to the kaleidoscope of color from its grand sister.

The tragic terrorist attacks on September 11, 2001, meant more stringent security measures in place for both the State and Federal courthouses. Remember trying to get to Monday *ex parte* hearings at the Orange County Courthouse while waiting in line with the juror pool? The security lines became long - waiting to get through security could last longer than your hearing. In a joint effort between the OCBA and



Photo: Steve Graves

the Orange County Courthouse Court Administration and Security, **Court Access Cards** for the Orange County Courthouse were the answer. Court access cards, still issued through the OCBA, allow applicants who are pre-screened via a background check to use a separate security process and entrance for access to the courthouse.

The new Federal Courthouse was not the first legal-related building Judge Fawsett was instrumental in building - the first one was the OCBA's original building. After four years of planning, the original OCBA building was

demolished in 2002 and reconstructed. The new two-story **OCBA building** houses administration and office facilities, a conference center with a kitchen, and smaller rooms for meeting space. The building was completed in 2003 and is used frequently by OCBA members for OCBA and personal functions. It is also used by other legal groups, local community groups and individuals for events, meetings, mediations and arbitrations.²⁷

While our membership thrived and the OCBA was winning local, statewide and national recognition, support for the OCBA also changed. Do you know what the **Orange County Bar Auxiliary** (Auxiliary) was? It was a hold-over support organization for the spouses (translation: wives) of members of the OCBA. With the changing faces of the OCBA membership, the Auxiliary was phased out. Instead, we now have a diverse and unified OCBA working together toward a common goal. "We Can Do It!"²⁸

Within the OCBA, support has never waned for its members. Remember the **OCBA Standards of Professional Courtesy?** They continue to be the benchmark of the minimum professional courtesy recommended in certain disputed situations and are adopted by the Ninth Judicial Circuit Civil as a part of their Local Rules.²⁹

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Y2K:The New Century

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Reporting date for your continuing legal education (CLE) credits approaching? Not to fear! The OCBA's many **substantive law committees**³⁰ routinely prepare and present seminars which can fulfill your every hour of need for credit. These seminars may be obtained from the OCBA, which also maintains a list of non-OCBA sponsored CLE.³¹ OCBA's very active committees help provide these CLEs as well as substantive articles for *The Briefs* and professional networking within your practice area.

Need some social networking opportunities? The OCBA's **monthly luncheons** have seen not only lawyer *a cappella* groups (who raise money for *pro bono* services),³² but many informative

keynote speakers including judges, politicians, elected officials, businessmen, coaches, military officers, athletes, Florida Bar presidents, sports analysts, educators, communications experts, economists, and many others. Let's not forget the standing-room only, wait-listed, inaugural **Social Committee's** first event: The Wine & Cheese

Social in 2005. I had the honor of chairing the incredible initial Social Committee, working with **Kristyne Kennedy** as the Event Chair for the 2005 Wine & Cheese event. That event foreshadowed great things to come; the Social Committee continues to hold quarterly events that should not be missed!

Another important addition to the OCBA in the 2000s was its current Executive Director, **Brant Bittner**, in December of 2003. Brant came to us, via the OCBA Selection Committee with approval of the Executive Council, with 30 years of management experience. Brant (whose wife, Linda Bittner, is an attorney and OCBA member) has strong marketing and public communications skills. Upon his hiring, Brant stated, "Working with our leadership and Bar members, I look forward to continuing to uphold and increase the [OCBA's] national reputation for service and excellence."³³

Brant's effective service to the OCBA led to his invitation to serve on the ABA and the National Association of Bar Executives' Program Committee, which selected program speakers for future ABA conferences. Brant was among only 20 state and local bar leaders chosen to participate. Not only that, Brant is our very own "Michael Phelps"! In 1988, Brant won the World Master's Swimming Championship for the 800 meter freestyle in Brisbane, Australia, his mother's hometown. The record held for about five years. Brant also swam for the University of Florida. (Okay, I'll do it – if just this once... "Go Gators!" Happy, **Tom Zehnder**)³⁴

One of the OCBA's most remarked-upon changes thus far in the 2000s (I am proud to say) is what you are reading now, *The Briefs*. Formerly a black and white newsletter with many loose pages of flyers stapled within it, **Tad Yates** (my then-co-editor) and I planned for and implemented a new and fresh *The Briefs* in 2005 at the request of then-President, **Bill Sublette**. Moving away from a black and orange theme of mostly announcement materials, in

January 2006 the newsletter became a four-color glossy magazine with substantive information and more photos. Even better, it was to be self-supporting in terms of cost - we've even made a profit on it! During the transition from newsletter to magazine, however, **Connie Becerra** retired from the OCBA after *decades* of service. Connie was instrumental in *The Briefs* throughout her tenure with the OCBA.

Integrated in the Community

The Briefs is one way the OCBA is inclusive within our legal community. Each month, *The Briefs* provides a forum for other legal organizations to publish their news via the **SideBar** column that I author.³⁵

Florida Agricultural & Mechanical University Law School (FAMU) was introduced to our local legal community; FAMU gave Orlando local access to two law schools, the other being **Barry University**, which was established in the 1990s. Both law schools are encouraged to participate with the OCBA, and they do.

The OCBA supports its local community, both with legal and non-legal services. Although Law Day is officially May 1st of each year, the OCBA's Law Day was traditionally a "Law Week" to allow time for all of its activities. Today, OCBA's **Law Week** is so successful that it runs over *months*. OCBA's Law Week has received national recognition, including the ABA's 2005 Outstanding Law Day Activity Award, which was awarded based on the number and breadth of the programs and activities offered.

To kick off 2009 Law Week, I am reviving the dormant **LawSuits**. OCBA members are encouraged to bring their used business attire to the March 26, 2009, luncheon, for an acknowledged receipt for the donation. These clothing items will then be placed within the Community Service Center of Central Florida's (CSCCF) Clothes Closet. CSCCF gives those items to graduates of CSCCF's job rehabilitation program who are in need of

appropriate business attire. Law Week will also feature its traditional programming, including educational programs (such as **mock trials**) for students, participating in the **naturalization ceremony** for new United States citizens, and the **OCBA Law Day Luncheon** featuring the student winners of the Law Day Poster and Essay Contest.³⁶

The OCBA's **Young Lawyers' Section (YLS)** has also continued to be a vital part of the OCBA, organizing innovative programs with

other charities on behalf of the OCBA. A few charitable programs with whom they participate are the American Cancer Society (participates with a happy hour to benefit the organization in conjunction with an all night walk-a-thon infield camping experience), Habitat for Humanity (young lawyers literally hammering, painting, planting, and performing construction and manual labor), and SeniorsFirst (a multitude of projects – clothing drives, holiday present collections, fundraising, etc.). There are also individual projects throughout the year, such as the Rock Lake Backpack Project (providing school supplies to the poorest public school in Orange County). Let's also not forget the **YLS's Scholarship Program**, which continues the tradition of raising funds for a scholarship endowment, to annually award a four-year college scholarship to a deserving Orange County graduate who has faced and overcome adversity. The candidates are so competitive





that sometimes more than one scholarship has been awarded in a given year.

The OCBA still maintains its close ties with the **Legal Aid Society** of the OCBA (LAS). Although OCBA members are required to provide *pro bono* services to the LAS as a condition of their OCBA membership, in 2001 a two-year limitation period was placed on *guardian ad litem* cases due to the length of some cases.³⁷ Independently, the OCBA still implements the Citizens Dispute Settlement mediation program, allowing relatively minor items to be resolved without court intervention and facilitating resolutions prior to the filing of litigation. Relatively new to the OCBA as of 2006 is the **Modest Means** program, which allows low-income clients to be matched with an attorney who has a lower agreed upon rate established by the Modest Means panel. These programs are integral to the OCBA in its commitment to the legal profession and the assurance of options for legal services for the community.

Where Are We Going?

Stay tuned for Part II of Y2K: *The New Century, the New Millennium and Beyond!*, entitled *To Infinity, and Beyond!*³⁸ (Part Two of a Two-part Series), that is scheduled for the March 2009 edition of *The Briefs*. *To Infinity, and Beyond!* will address the current plans of the OCBA and the **Strategic Planning Committee's** (SPC) exciting plans for the future of this great organization. As chair of the SPC, I hope you will join us for the next installment of the 75th Anniversary articles addressing the OCBA's past and its bright future.

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¹Although the change from 1999 to 2000 (January 1, 2000) was hailed as the beginning of the new millennium, *not everyone* subscribed to such a theory, including me. See United States Naval Observatory (USNO) website at <http://www.usno.navy.mil/millennium/whenIs.shtml>. The USNO claims that the beginning of the millennium was on *January 1, 2001, not January 1, 2000*. On a personal note, in Asian societies you are deemed to be one at birth, so this theory of 2001 being the beginning of the millennium is more plausible to my Asian-American heritage sensibilities (and my Chinese immigrant grandparents whole-heartedly support and agree with this).

²See *The Briefs*, Vol. 86, No. 42 at Page 8, for a discussion.

³See *The Briefs*, Vol. 89, No. 45 at Pages 3 to 5, for a discussion on transitioning careers and the experiences of Ms. Pittman and Messrs. Bates and Ellington. My best friend from Tulane Law School practiced law unhappily for 3 years, but is now happily a dermatologist. As a *physician*, she *admits* that the practice of law was harder than her medical practice. My brother, a Texas Board Certified Immigration

attorney, is also much happier spending his summers teaching his kids how to ride their bikes; he is an immigration clinic law school professor and gets *more time off than any attorney should!*

⁴*Id.*

⁵See *The Briefs*, Vol. 93, No. 49 at Page 13.

⁶See the American Bar Association website at <http://www.abanet.org/cpr/mdp/home.html>.

⁷See the Florida Bar website at <http://www.floridabar.org/tfb/TFBComm.nsf/basic+view/9377C1F9B6040EC685256EE70064E686?OpenDocument>.

⁸See *The Briefs*, Vol. 81, No. 37 at Page 4.

⁹See the Florida Bar website at <http://www.floridabar.org/tfb/TFBComm.nsf/basic+view/9598735D2E196A8385256EE70064E683?OpenDocument>; American Bar Association website at <http://www.abanet.org/cpr/mdp/mdp-report10f.html>.

¹⁰Ancillary businesses allow lawyers to participate in non-legal business ventures.

¹¹See the Florida Bar website at <http://www.floridabar.org/tfb/TFBComm.nsf/basic+view/9598735D2E196A8385256EE70064E683?OpenDocument>; American Bar Association website at http://www.abajournal.com/magazine/the_real_deal_breakers/. The Florida Bar recommends that lawyers use an "Affiliated Business Disclosure" form to disclose the lawyer's association with an affiliated business, while using an "Affiliated Law Firm Disclosure" form for the disclosure of the customers of the ancillary business informing them that there is no attorney-client relationship between the lawyer and the affiliated business' customers. Links for these forms may be found at the Florida Bar website at <http://www.floridabar.org/tfb/TFBComm.nsf/basic+view/9598735D2E196A8385256EE70064E683?OpenDocument>.

¹²For a link to the website, go to http://www.flcourts.org/gen_public/adr/adrintro.shtml.

¹³See *The Briefs*, Vol. 98, No. 54 at Page 10; Vol. 136, No. 92 at Page 6.

¹⁴See *The Briefs*, Vol. 114, No. 70 at 7.

¹⁵See *The Briefs*, Vol. 124, No. 80 at 4.

¹⁶The Business Court Procedures are published on the Ninth Judicial Circuit website at <http://www.ninthcircuit.org/research/orders/downloads/Business%20Court%20Procedures.pdf>.

¹⁷See *The Briefs*, Vol. 141, No. 97 at Page 11.

¹⁸See *The Briefs*, Vol. 82, No. 38 at Page 6, citing to *The Orlando Business Journal*, December 10-16, 1999, "Courtroom Takes Legal Proceeding to New Level[.]"

¹⁹See The Ninth Judicial Circuit of Florida website at <http://www.ninthcircuit.org/programs-services/courtroom23/index.shtml>.

²⁰See *The Briefs*, Vol. 125, No. 81 at Page 3.

²¹See The Ninth Judicial Circuit of Florida website at http://www.myorangeclerk.com/ecinfo/Electronic_filing.shtml.

²²See *The Briefs*, Vol. 127, No. 83 at Page 5.

²³See *The Briefs*, Vol. 74, No. 3 at Page 6.

²⁴See *The Briefs*, Vol. 75, No. 11 at Page 11.

²⁵*United States Courthouse, Orlando Florida*, U.S. General Services Administration at inside cover (2007).

²⁶For additional information, including photographs, see *United States Courthouse, Orlando Florida*, U.S. General Services Administration at 21 (2007).

²⁷If you are interested in renting space from the OCBA, contact Marie Bacazehuat, Events Manager, 407-422-4551, Ext. 233.

²⁸The phrase is taken from the Rosie the Riveter "We Can Do It!" illustration by Howard J. Miller. The sign originally debuted during World War II. At the time, women were supporting the war effort and the loss of *manpower* (literally) by working outside of the home, in aircraft factories, shipyards, even military cockpits. The illustration remains as a defiant symbol of female pride and power.

²⁹See *The Briefs*, Vol. 91, No. 47 at Page 9.

³⁰For a list of the substantive committees and chair contact information, see the OCBA website at <http://www.orangecountybar.org/Members/Committees/Default.asp>.

³¹For a list of available continuing legal education programs, see the OCBA website at <http://www.orangecountybar.org/Members/CLE/Default.asp>.

³²See *The Briefs*, Vol. 95, No. 51 at Page 1; Vol. 128, No. 84 at Page 1.

³³See *The Briefs*, Vol. 127, No. 83 at Page 1.

³⁴During the 2002-03 year, Tom Zehnder was the columnist for *YLS: On the Move*, which is still published in *The Briefs*. Controversy began with Tom's first column, wherein he signed off with "Go Gators!"

³⁵*SideBar* first appeared in *The Briefs* in June of 2007 to allow for the inclusion of other legal organizations' information in a fiscally responsible manner for the OCBA.

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Elder Law Committee ● *What is So Special about Special Needs Trusts?*

Navigating the world of planning for a disabled person can be complex and confusing. The purpose of this article is to define special needs trusts, discuss the history of special needs trusts and discuss the case law interpreting special needs trusts. A trust is created when one holds property for the benefit of another. A special needs trust is a trust that provides for a disabled beneficiary who is obtaining or who may be obtaining public benefits in the future. It contains language that protects the beneficiary from jeopardizing benefits received from the government. Most people find it difficult to even contemplate their death and, as a result, planning can be an upsetting experience for families. You need not be wealthy or old to begin considering the need to write a will and a special needs trust if you have a family member who needs government benefits to ensure that he or she receives the care and support necessary over a lifetime when you are gone. The process of proper estate planning for a person with a disability is often misunderstood. For most families with a disabled dependent, the primary goal of planning is to ensure that the person receives a lifetime of care and support that eligibility for governmental benefits can offer.

Two types of planning frequently heard is disinheritance of the disabled child, leaving money to the well child/sibling, to "take care of" the disabled child and "support" trusts. Generally, these are trusts that instruct the trustee to provide for the beneficiary's health education, and maintenance. These trusts could jeopardize benefits for a beneficiary. Neither plan is an advisable planning tool.

A good starting point in this discussion is a brief review of public benefits. Social security disability benefits (SSD or SSDI) are entitlement benefits paid if you have worked a certain period of years and paid into the Social Security system during your working life. Gen-

erally, after two years of receiving SSD, one will qualify for Medicare. Medicare is health insurance for the disabled or persons over age 65.

Supplemental Security Income benefits (SSI) are those benefits that are paid to persons who cannot work or can only work part time due to a disability. If you qualify for one dollar of SSI, you can receive Medicaid in the state of Florida. Medicaid is health insurance for the disabled and poor.

Prior to 1993, a disabled person under the age of 65 who received a direct inheritance, law suit settlement, divorce settlement or other financial windfall, would become disqualified from Medicaid and lose benefits. In August of 1993, Congress passed sweeping changes to this law by enacting the Omnibus Budget Reconciliation Act (referred to as OBRA '93), which changed the Medicaid rules pertaining to assets.

Under the old law, a person could not qualify for Medicaid if he transferred assets to another person within a certain time frame of applying for Medicaid. The only recourse with a financial windfall was to spend down the asset to the requisite amount or wait 30 months (the applicable law at that time) to qualify for Medicaid. Further, Congress eliminated a person's ability to disclaim any inheritance. Previously, if a person with a disability received an inheritance which would jeopardize his or her eligibility for government benefits, he could disclaim the inheritance. With OBRA '93, disclaimers are treated as a transfer of assets and one will lose his or her eligibility for Medicaid if he or she disclaims an inheritance.

Two important exceptions came out in the new legislation which significantly helped individuals with disabilities and parents of persons who are disabled. The first exception allowed an individual with disabilities under age of 65 who receives funds to remain eligible for Medicaid by transferring his



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funds to an irrevocable OBRA '93 trust. The trust is called a payback trust because if any funds remain in the trust when the beneficiary dies, the state is entitled to be paid back for the full amount of the Medicaid monies expended on behalf of the beneficiary before any other beneficiaries can inherit. This trust is referred to as a "d4A" trust, payback trust or first party special needs trust. The second exception allows parents, who require long term nursing home care, to transfer their own funds to an OBRA payback trust for the sole benefit of a child who is disabled and becomes eligible for Medicaid without a waiting period.

This legislation offered exciting opportunities for lawyers working with disabled persons and their families in the area of guardianship, personal injury, estate planning and elder law planning.

There are three types of "self settled" or "first party" trusts that were defined in the OBRA 1993 legislation. Self settled trusts refer to assets that belong to the disabled persons and not someone else (third-party). The requirements of this first trust are detailed at 42 U.S.C. §1396p(d)(4)(A), which establishes an exception to the general rule which would otherwise define a self settled trust as a transfer resulting in a penalty period being assessed. The general requirements are as follows:

- 1) The trust is funded with the assets of the individual with a disability.
- 2) The trust is established for the sole benefit of the individual with a disability.

- 3) The disabled individual is under age 65 when the special needs trust is funded.
- 4) The individual is disabled as defined in U.S.C. §1382c(a)(3).
- 5) The trust is established by a parent, grandparent, legal guardian, or court. The disabled person may not establish his or her own special needs trust.
- 6) The trust must include a payback provision that will reimburse the state Medicaid from remaining principal and interest at the beneficiary's death.¹
- 7) Statutory liens must be paid before the trust can be funded.²

These types of trusts are commonly used when someone receives a personal injury settlement or award, or when an individual on public benefits receives an inheritance. The two advantages to these type of trusts are that the individual can maintain eligibility for public benefits and medical care reimbursement is deferred until the death of the beneficiary.

The second trust defined in 42 U.S.C. §1396p(d)(4)(B) is known as a Miller trust (named after case law) or Qualified Income Trust or the "d4B" trust. It allows individuals in "income cap" states to qualify for nursing home Medicaid even though their countable income exceeds the applicable income cap. This type of trust is restricted to nursing home Medicaid benefits.

The third trust defined in 42 U.S.C. §1396p(d)(4)(C) is known as a "d4C" trust or a pooled trust. It is a self settled trust that is funded with the assets of the individual. These pooled trusts will be exempted if 1) they are funded with the assets of an individual with a disability, 2) the trust is established and maintained by a non-profit association, 3) a separate account is maintained for each beneficiary of the trust, 4) the trust account is established by the parent, grandparent, legal guardian of the individual, a court or by the individual himself, and 5) the State must be reimbursed for the amount of medical assistance advanced to the individual.³

In the state of Florida and certain other states, if the person establishing it is over age 65, a penalty could be triggered.

In pooled trusts, the funds that are added are accounted for by individuals but are combined for management and investment purposes. The individual signs a joinder agreement in which he or she agrees to the terms of the trust. These non-profit associations administering these trusts are scrutinized carefully by the government, and they must be in compliance to function as administrators of the pooled trust. Each state allows the pooled trust to retain a certain amount of trust assets when they pass away. This is called the "retention amount." The joinder agreement may also allow family members to inherit funds after death, but only after the state is reimbursed. Generally, the pooled trust is used for smaller inheritances and personal injury settlements.

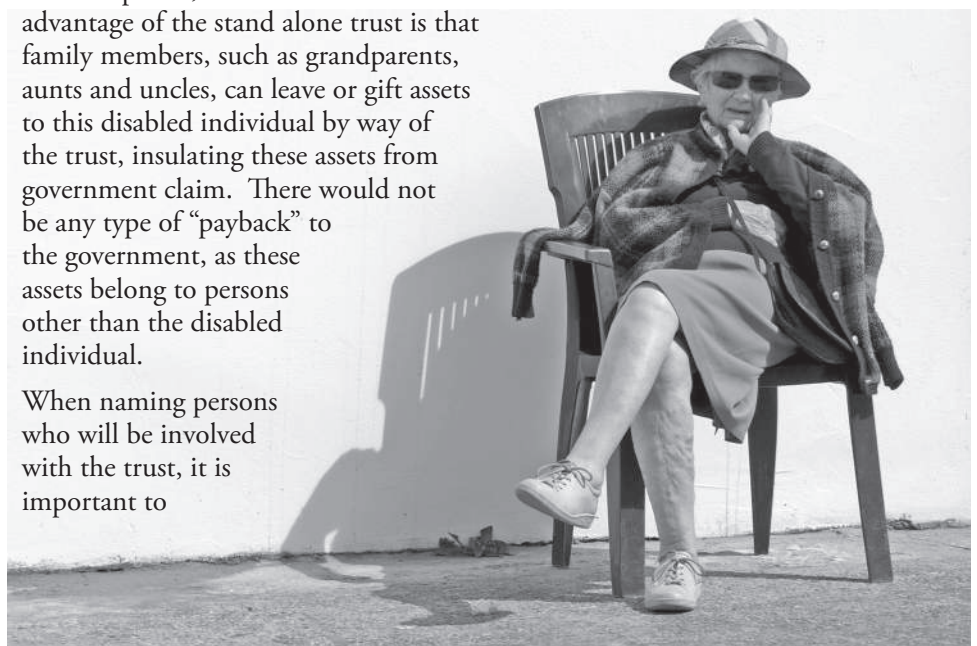
A special needs trust can be created by a third party or someone other than the disabled person. Any individual with capacity can create a special or "supplemental" needs trust. Typically, this trust is used by parents of a disabled child as part of their estate plan. The disabled child is receiving or going to be receiving public benefits, and when they die, the disabled child will receive his inheritance in this trust and not his individual name. Generally, it has been found that parents of disabled children are extremely concerned about health care costs wiping out an inheritance for their child. This trust can be created within a parent's revocable living trust or as a separate, stand alone trust. The advantage of the stand alone trust is that family members, such as grandparents, aunts and uncles, can leave or gift assets to this disabled individual by way of the trust, insulating these assets from government claim. There would not be any type of "payback" to the government, as these assets belong to persons other than the disabled individual.

When naming persons who will be involved with the trust, it is important to

select a trustee who is familiar with special needs trusts, as the tax and administrative rules can be complex. A family member could become overwhelmed with the duties. More and more financial institutions are offering trustee services in this arena. The advantage of using a financial institution is for objectivity, professionalism and knowledge. Sometimes a family member serves alongside a financial institution as co-trustees. The premise of the special needs trust is that the assets are never available for the beneficiary for any item that is provided for by SSI or Medicaid, but only to "supplant" what public benefits cannot provide.

Very little case law in the state of Florida has developed in interpreting these trusts, but elsewhere in the nation, Courts have ruled on issues arising from special needs trusts. An interesting case has been heard in New Mexico, *Hobbs v. Zendeman*, #06-CIV-0985__ F. Supp.__(Dist. N.M., Mar 31, 2008). A minor child suffered a head injury and lives with his parents. His home was purchased by a "d4A" trust; the trust was also paying his mother's monthly caretaker's fee of \$2,200. The child was receiving SSI and Medicaid benefits, but these benefits were terminated by the state Medicaid agency because of the mother's caretaker's fees. They determined that the trusts assets were therefore available. The child filed a Section

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Cham'pi'on noun. 1. One who now acts or speaks on behalf of a person or a cause, a defender; an advocate; a hero.¹

The OCBA Legal Aid Society Board of Trustees, led by Nick Shannin, held its first annual **Breakfast of Champions** on November 12, 2008. The event was developed to assist the Legal Aid Society with its public relations and fundraising efforts. To accomplish its goals, the LAS initiated a Development Committee, chaired by **Jack Lord**, who was ably assisted by Special Events Chair **Bill Umansky** and Team Member **Glenn Adams**. In

addition to giving generously of their time by handling *pro bono* work and serving on the LAS Board of Trustees, they, like so many other OCBA attorneys, also have supported the LAS with monetary contributions.

Glenn Adams, the breakfast's keynote speaker, spoke about the accomplishments of Legal Aid and why funding is crucial to its continued existence. He noted that

[d]uring the past year, we were only able to serve 5,059 new clients out of the 17,491 applicants who sought our assistance. In particular, last year, 5,503 families sought our assistance in family law matters, and we were only able to assist 1,430 of those families.

Bill Umansky spoke eloquently about the nature of poverty:

Poverty is hunger, a lack of shelter, and being sick without care. Poverty is being unemployed, powerless and restrained....Poverty has many faces, changing from place to place and has been described in many ways. Poverty is not a disease and, in light of recent economic times, I believe it has brought home to most of us that we can all be susceptible to poverty no matter our skill, our hard work, our pride and experience. Most often, poverty is a situation people want to escape. Poverty is a call to

action – for the poor and the wealthy alike – a call to change our world so that many more may have enough to eat, adequate shelter, access to education and health, protection from violence, a voice in what happens in their community with Equal Access to Justice.

Attendees also watched a video that featured LAS and OCBA leaders and highlighted some very special individuals who were helped by Legal Aid when they had nowhere else to turn. The video was an in-kind donation from **Gary Yordon** of the Zachary Group. We will use the video presentation in the coming months and years to let our community know who we are and what we do to help Central Floridians see, hear and feel the impact of what the LAS accomplishes every day.

Three hundred and eighty-four people attended our first Breakfast of Champions, and the event made an impression on nearly everyone. Jack Lord leveraged his social networks and cultivated donors from The Arthur I. DuPont Testamentary Trust, Foley & Lardner LLP, John & Carolyn Lord, and the Edythe Bush Charitable

Foundation, to name a few. Personal and corporate donations and pledges ranged from \$5 to \$25,000. With donations still coming in, *part* of our funding gap will be closed.

When we conceived our Breakfast of Champions some people said we would never meet our goal. But they did not account for the forces of Jack, Glenn, Bill and many other

OCBA members. As I looked around the room and saw the passion and outpouring of financial support, I knew the truth of another saying: Whatever we possess becomes of double value when we share it with others.



Bill Umansky, Law Office of William D. Umansky, P.A.



Glenn Adams, Holland & Knight LLP

As I write this, I wonder how to properly thank people who change lives. A plaque seems so insignificant and a handwritten thank you card surely is not enough. What I can say is this: The Legal Aid Society will be a good steward of your donation, whether it's a gift of time, creativity, or money. Simply put, if it were not for the members of the Orange County Bar Association and their capacity to give in so many ways, Legal Aid would not exist.

Health, Happiness and Prosperity in 2009! You are our "Champions."

For more information about making a contribution, please contact Cathy Tucker, Deputy Director/Pro Bono Director, at ctucker@legalaidocba.org, or me at dgraf@legalaidocba.org. Visit www.legalaidocba.org.

Donna Graf is the Manager of Development at the Legal Aid Society. She has been a member of the OCBA since 2008.

¹"champion." *Dictionary.com Unabridged (v 1.1)*. Random House, Inc. 24 Nov. 2008. <[Dictionary.com](http://dictionary.reference.com/browse/champion)> <<http://dictionary.reference.com/browse/champion>>.



Jack Lord, Foley & Lardner LLP



OCBA Membership Directory

RCL Portrait Design will be at the OCBA from March 16 through March 27, 2009, to take your free professional portrait for publication in the OCBA Membership Directory.

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All sittings are free of charge, and the photo you select for the Membership Directory will be published at no charge. RCL will also take additional shots and provide you with an opportunity to purchase a photo package for your professional or personal use.

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We look forward to seeing you at the OCBA Center in March.

(For professional photos, appropriate dress is suggested. Ladies: a bold or bright colored long sleeved outfit. Gentlemen: a dark jacket and tie.)

Celebrating 75 Years of Excellence Highlights of the 2000s

2000:

- The (Fake) Millennium¹
- Multidisciplinary Practices Addressed
- New Federal Courthouse Plans Commissioned

2001:

- The (Real) Millennium²
- Increased Courthouse Security Measures Due to the Terrorist Attacks on the United States
- *Guardian ad Litem* Cases Restricted to Two-year Service Terms

2002:

- FAMU School of Law Opens
- Demolition of Original OCBA Building

2003:

- Business Court Begins
- Ninth Circuit Judicial On-line Calendaring System Begins
- New OCBA Building Completed
- Brant Bittner Becomes OCBA Executive Director

2004:

- Ninth Circuit Magistrates Funded
- Middle District Begins Electronic Filing
- OCBA's Social Committee Formed

2005:

- Planning for *The Briefs* Transition Begins
- Connie Becerra Retires from OCBA
- Law Week Wins ABA's 2005 Outstanding Law Day Activity Award
- Social Committee Presents its First Event

2006:

- Business Court Begins Electronic Filing
- *The Briefs* Magazine Debuts
- OCBA's Modest Means Program Implemented

2007:

- Certain Ninth Circuit Civil Cases Begin Electronic Filing on Certain Documents
- *SideBar* Debuts in *The Briefs*

2008:

- Dedication of the New Federal Courthouse

¹See Footnote 1 of the article, *Y2K: The New Century, the New Millennium and Beyond!*

² *Id.*

Y2K: The New Century

continued from page 15

³⁶Details and the schedule for the OCBA's 2009 Law Week will be published in the March 2009 edition of *The Briefs*. An introduction to these forthcoming events may be reviewed in this month's *President's Message*.

³⁷See *The Briefs*, Vol. 95, No. 51 at Page 10.

³⁸Buzz Lightyear, *A Toy Story* (Disney/Pixar TM & © 1995).

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Legal Aid Society ● *A Profile*

News ● *Where There's a Will There's a Way*

Betty Jackson

As I was growing up, my parents – Alex and Callie Godwin – always told me, “Where there is a will, there is a way.” Their words spurred me to action on a cold February morning in 1994, when I awakened to find the car that was critical to sustaining the wellbeing of the three young children in my single-parent household had been unlawfully repossessed. The impact upon our household was devastating because, at that time, I was a high school teacher with limited resources, I had one son with severe asthma, and I had another son who was autistic and was hospitalized with pneumonia.

The collection agent for the finance company responsible for the repossession literally laughed, “Ms. Jackson, if you can’t pay your car note, how in the world do you think you can find the money to pay an attorney to help you get your car back?”

I hung up and called Legal Aid.

That was nearly 15 years ago, and I am still connected in a meaningful way to the organization that came to my rescue with the resources of a dedicated legal assistant, **Millie Gonzalez**, and then staff attorney, **Alana Brenner**. They stood with me throughout the legal process and ultimately placed me back in the vehicle that had been unlawfully removed from our possession.

That act of restoration, supported by the Legal Aid Society at our time of great need, was instrumental in setting a stage for long-term success in the lives of members of the Jackson household. Although I still

consider myself an educator in a broader sense, I am a performance consultant, specializing in human resources and employee development. My children are now adults: Brianna is a sophomore at University of South Florida and is majoring in psychology; Jordan is in his final year at Mid-Florida Tech where he is studying digital printing; and John



Betty Jackson, Lay Trustee of the Legal Aid Society

is a U.S. Navy medic embedded with the Marine Corps’ 26 Battalion and is fighting the global war on terror in the Middle East.

For more than a decade, as a Lay Member of the Board of Trustees, I have been blessed with the opportunity to serve the people of Orange County in support of legal assistance to the poor, the elderly, the working poor, and abused and neglected children. To be a successful board member requires an understanding of the ever-changing needs of our community as the greatest shift in demographics is also impacted by the direct economic indicators of recent history. More than ever, our Legal Aid Society Board of Trustees is required to remain responsive and agile in order to be available to those who will most likely have their legal needs neglected due to a lack of funding. I am committed to assuring that the help that existed for me will continue to be there for others.

Betty Jackson is a Lay Member Board of Trustees Legal Aid Society of the Orange County Bar Association.



Brianna Jackson



Jordan Jackson



John Jackson



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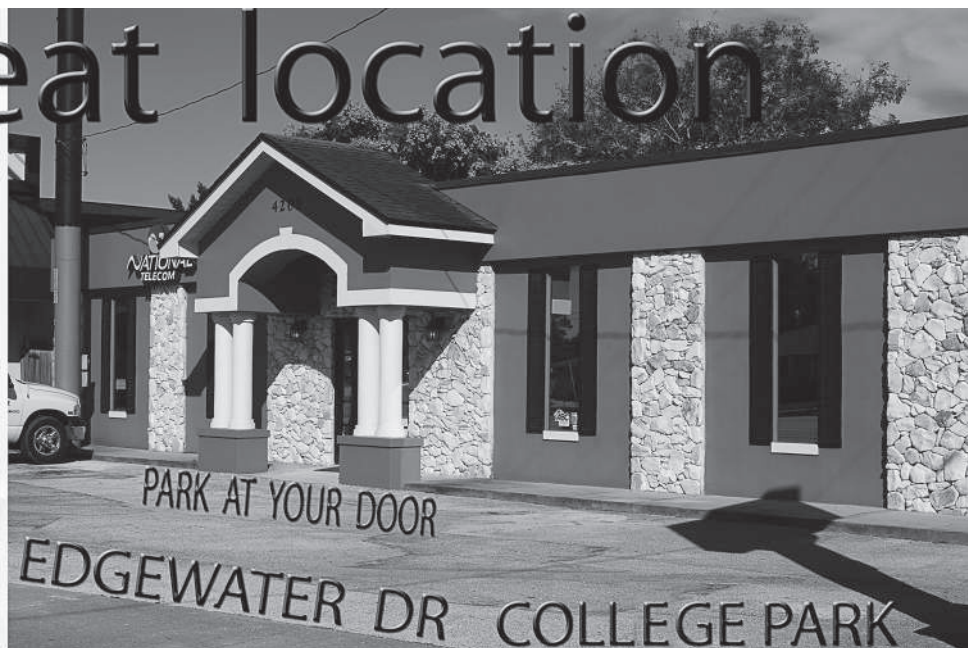
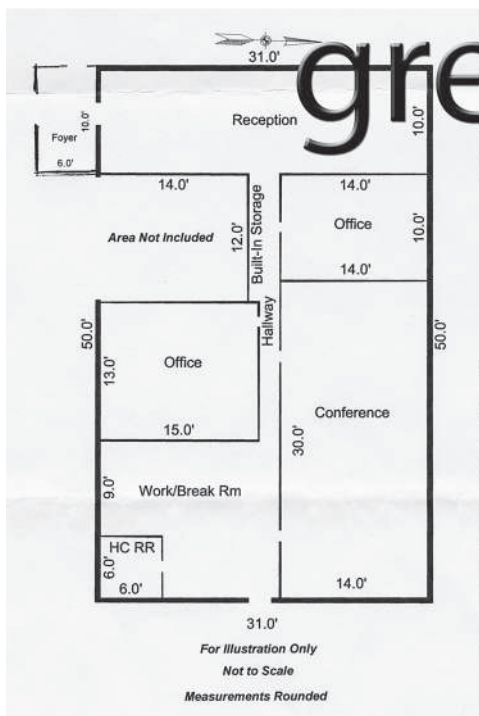
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The OCBA Appellate Practice Committee "adopted" a child from Devereux for the holiday season. Pictured with the goodies are Jamie Billotte Moses (Chair), Nick Shannin and Jessica Hew.



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Appellate Practice Committee

● The Comparatively Rational World ● of Appellate Attorneys' Fees

Last month, I wrote about the subject of appellate costs – a zany area in which the rules are often counterintuitive and the results sometimes appear arbitrary. By comparison, the world of appellate attorneys' fees seems quite ordinary and rational. To be sure, there are still pitfalls – rules that bring woe to those who run afoul of them – but they are relatively easy to remember. Nevertheless, the law of appellate attorneys' fees will sometimes display an odd quirk, as if to show its more carefree sibling, the law of appellate costs, that it too can go a little crazy now and then.

Appellate attorneys' fees are governed by rule 9.400(b) of the Florida Rules of Appellate Procedure. The rule requires a party seeking appellate attorneys' fees to file a motion to that effect in the appellate court. A trial court cannot award appellate attorneys' fees without being granted authority to do so by the appellate court.¹ There are few, if any, exceptions to that rule. For example, even if an award of attorneys' fees is purportedly mandatory by statute (such as in cases under the Government in the Sunshine Law), a trial court cannot award appellate attorneys' fees if the appellate court did not authorize the award.² Similarly, there is no exception for fees awardable under an offer of judgment or proposal for settlement; even in those cases, there must still be a motion for appellate attorneys' fees filed in the appellate court.³

And remember that the request for appellate attorneys' fees must indeed be made in a separate motion; it is improper and ineffective to include such a request within the appellate brief itself.⁴ That motion must be served no later than the date the reply brief is served – even when the opposing party is the party serving that brief.⁵ A motion for appellate attorneys' fees can properly be denied solely because it was not timely served.⁶ The courts are serious in their insistence upon timely service of a motion for appellate attorneys' fees. For example, if a reply brief is filed late – and the court, on motion, allows it to be filed tardy – that does not necessarily mean that a motion for appellate attorneys' fees, filed with that brief, will also be deemed timely. The Fifth District Court of Appeal has held otherwise.⁷

The service deadline for a motion for appellate attorneys' fees presents a potentially problematic situation for an appellant who wishes to file a motion for appellate attorneys' fees under section 57.105 of the Florida Statutes based on something in an appellee's answer brief. The appellant's reply brief is due 20 days after service of the answer brief,⁸ but the appellant cannot properly file its motion until after it has given 21 days of its intention to do so.⁹ In other

words, compliance with the statutory requirement could render the motion untimely under rule 9.400(b). The reported decisions have not yet addressed, let alone resolved, this dilemma, but they are aware of its existence. If you are confronted with it, one approach may simply be to move for an enlargement of time to file the motion for appellate attorneys' fees – and explain that you are statutorily prohibited from filing your motion under section 57.105 within the time period prescribed by rule 9.400(b).¹⁰

The motion for appellate attorneys' fees must specify the legal ground for the recovery of appellate attorneys' fees. Rule 9.400(b), by itself, provides no basis for the recovery of appellate attorneys' fees; the entitlement must instead arise from some other source, usually a statute or a contractual provision. Be aware that the motion can (and probably will) be denied if the legal basis for the recovery of fees is not adequately set forth in the motion.¹¹

And don't make the mistake of thinking that a right to appellate attorneys' fees will exist at the appellate level when no ground existed for the recovery of fees at the trial level. That's just not true.

On the flip side, don't think that the appellate court will automatically grant appellate attorneys' fees merely because the trial court granted fees. That's not true either. It's a brand new fight at the appellate level. The appellate court may or may not agree with the trial court's resolution of questions concerning entitlement to attorneys' fees – and the appellate court certainly isn't bound by the trial court's determinations on issues of that nature.

If you are the appellate level and the opposing party files a motion for appellate attorneys' fees, you probably should file a timely response to the motion. Any objection to the motion must be raised in that response.¹² A motion for appellate attorneys' fees could essentially be granted by default if it is not timely opposed. In addition to the obvious grounds for opposing a motion – such as untimeliness of the motion, the movant's failure to adequately identify the basis for the recovery of fees, or the substantive inappli-



John R. Hamilton

cability of the statute or contractual provision upon which the movant has relied—look for other grounds for opposing the motion. For example, make sure that the contractual or statutory ground for the recovery of attorneys' fees also extends to attorneys' fees incurred on appeal.¹³ Or if the movant is seeking attorneys' fees based upon an unaccepted proposal for settlement under rule 1.442 of the Florida Rules of Civil Procedure, look for some basis for arguing that the proposal was invalid or ineffective.¹⁴

But one argument that you should not make in opposition to a motion for appellate fees is that the moving party somehow waived its right to recover appellate fees because it failed to file a timely motion for attorneys' fees in the trial court under rule 1.525 of the Florida Rules of Civil Procedure. That failure may bar a party from recovering fees in the trial court, but it has no bearing on that party's ability to recover appellate attorneys' fees.¹⁵

Once the appellate court has granted a motion for appellate attorneys' fees, it usually entrusts the trial court with the authority to adjudicate the actual amount to award.¹⁶ But there is no particular time frame within which the trial court must make that determination. For example, there is not a 30-day time limit (or other time limit) for filing a motion in the trial court to determine the amount of appellate attorneys' fees.¹⁷ In fact, unlike awards of appellate costs, the actual award of appellate attorneys' fees must usually await the conclusion of the entire case in the trial court in any event – after the ultimate prevailing party in the entire case can be determined.¹⁸

This concept – that further proceedings will occur in the trial court after an appellate proceeding is concluded – leads to the appellate phenomenon known as “provisional” or “conditional” awards of appellate attorneys' fees. The idea is that a party moves for, and obtains, an order from the appellate court allowing the moving party to recover the attorneys' fees incurred in the appeal if, but only if, that party is ultimately the prevailing party at the conclusion of the case. If the statutory or contractual basis for the recovery of appellate attorneys' fees requires a party to be the “prevailing party” in the case (as most do), then a party cannot recover its appellate attorneys' fees until the case is concluded – and it has indeed achieved the status of ultimate “prevailing party.”

A somewhat counterintuitive quirk that arises in this context is that a party can lose an appeal yet still successfully move for a provisional award of appellate attorneys' fees.¹⁹ In other words, a party need not be the prevailing party in an appellate proceeding to recover the attorneys' fees incurred in that appeal.²⁰ Attorneys who are unaware of

this principle miss opportunities for their clients. They frequently file motions for appellate attorneys' fees in which they request an award of fees only if their clients prevail – without adding that their clients should also be granted a provisional award of fees even if the other party prevails in the appellate court.²¹

Be aware that some special rules come into play in domestic relations cases governed by Chapter 61 of the Florida Statutes. Formerly, the appellate court had the exclusive authority to make an award of temporary appellate attorneys' fees necessary to enable an appellant to prosecute an appeal; however, the party requesting temporary appellate fees typically needed to satisfy the court that the appeal was brought in good faith and that there were reasonable grounds to believe that the appeal might be successful.²²

But the statute, section 61.16(1), was amended in 1994 to allow trial courts to make such awards. An implementing amendment to rule 9.600(c) of the Florida Rules of Appellate Procedure followed.²³

These provisions can be invoked only while an appeal is pending; they become unavailable after the appeal is concluded. At that point, a party is entitled to appellate attorneys' fees only if that entitlement has otherwise been established under rule 9.400(b).²⁴ The question is apparently open as to whether a party can “lose” its temporary appellate fees if it

does not follow its rule 9.600(c) motion in the trial court with a motion in the appellate court under rule 9.400(b).²⁵

Further, awards of appellate attorneys' fees in domestic relations cases under Chapter 61 are generally not governed by a “prevailing party” standard. Instead, unless the court says otherwise, those awards are made according to the “need and ability to pay” standard. That determination is generally made by the trial court, along with the amount of any award.²⁶

In all cases, once a trial court makes an actual award of appellate attorneys' fees, the procedure for obtaining appellate review is the same as the one that governs appellate review of awards of appellate costs.²⁷ Specifically, the party seeking review must file a motion for review in the appellate court within 30 days after rendition of the order.²⁸ That 30-day filing deadline is jurisdictional, and it is not subject to a five-day mailing rule.²⁹

A judgment for appellate attorneys' fees, like any other money judgment, can be stayed pending appellate review. The method for doing so is prescribed by rule 9.310(b)(1)

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Appellate Practice Committee

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of the Florida Rules of Appellate Procedure. Assuming the judgment for appellate attorneys' fees contains no non-monetary component, the party seeking the stay will be required to post a supersedeas bond for the amount of the judgment, plus twice the statutory rate of interest.³⁰

If a party erroneously seeks appellate review of a judgment for appellate attorneys' fees through a notice of appeal rather than a motion for review, it is unclear whether that party will be barred from obtaining review. Arguably, appellate courts are required to treat a notice of appeal as the equivalent of a timely-filed motion for review if an appeal is erroneously filed from an order awarding appellate attorneys' fees.³¹ But the First District Court of Appeal has, on at least one occasion, refused to do so (in the context of appellate costs).³²

The appellate court's review of the award of appellate attorneys' fees will be governed by the familiar abuse-of-discretion standard of review.³³ The amount of attorneys' fees, even appellate fees, is largely discretionary with the trial court, and its determination will generally not be disturbed unless no reasonable jurist could reach the decision that the trial court reached.³⁴

Finally, be aware that law of the case can likely be created by the appellate court's disposition of a motion for review of a judgment for appellate attorneys' fees.³⁵ Thus, there may be long-term consequences to a motion for review beyond the mere determination of whether a judgment for appellate attorneys' fees will remain intact in the amount that the trial court awarded. That consideration should certainly be taken into account in determining whether to file a motion for review.

See, I told you. Other than some of the principles that are peculiar to domestic relations cases and the one strange principle that potentially allows the recovery of appellate attorneys' fees even in appeals that you lose, the rules governing appellate attorneys' fees are rather simple and straightforward. In most instances, the procedure for recovering appellate attorneys' fees boils down to four basic requirements: (1) file the right thing (2) at the right time (3) in the right court (4) with the right information in it. The vast majority of blown opportunities to recover appellate attorneys' fees can be traced to a mistake in one or more of those four areas. Don't make any of them.

John R. Hamilton is a partner with Foley & Lardner LLP. He has been a member of the OCBA since 1991.

³¹See *Hollub v. Clancy*, 706 So. 2d 16, 19 (Fla. 3d DCA 1997) (fees for prior interlocutory appeal); *Garcia v. Garcia*, 570 So. 2d 357, 359 (Fla. 3d DCA 1990).

³²See *School Bd. of Alachua County v. Rhea*, 661 So. 2d 331, 332 (Fla. 1st DCA 1995),

review denied, 670 So. 2d 939 (Fla. 1996).

³³See *Respiratory Care Services, Inc. v. Murray D. Shear, P.A.*, 715 So. 2d 1054, 1056 (Fla. 5th DCA 1998).

³⁴See *McCreary v. Florida Residential Property & Cas. Jt. Underwriting Ass'n*, 758 So. 2d 692, 696 (Fla. 4th DCA 1999).

³⁵See Fla. R. App. P. 9.400(b). Presumably, in extraordinary writ cases, the counterpart would be the due date for the reply to the response to the petition. The rule is somewhat deficient in failing to contemplate the possibility that attorneys' fees could be recoverable in extraordinary writ cases.

³⁶See *Lobel v. Southgate Condo. Ass'n, Inc.*, 436 So. 2d 170, 171 (Fla. 4th DCA 1983).

³⁷See *Barrett v. Barrett*, 951 So. 2d 24, 24 (Fla. 5th DCA 2007). In such a case, a party could (and should) ask for leave to file both the reply brief and

the motion for appellate attorneys' fees out of time. The court may allow both; the deadline for service of a motion for appellate attorneys' fees is not jurisdictional, and it will likely be a rare case in which the other party has been prejudiced by the moving party's failure to serve the motion by the deadline established by the rule. I still recall, with little fondness, a case in which a district court of appeal allowed opposing counsel to file a motion for appellate attorneys' fees on the day of oral argument, even though the deadline for the motion had long since passed.

³⁸See Fla. R. App. P. 9.210(f).

³⁹See § 57.105(4), Fla. Stat. (2008).

⁴⁰My discussion of section 57.105 motions at the appellate level should not be construed as a suggestion from me that those motions should be frequent or encouraged. My opinion is otherwise. Perhaps I've merely been lucky, but I have rarely been involved in appellate proceedings in which I thought someone crossed that line.

⁴¹See *Hembd v. Dauria*, 859 So. 2d 1238, 1240 (Fla. 4th DCA 2003); *Sumlar v. Sumlar*, 827 So. 2d 1079, 1086 (Fla. 1st DCA 2002); *Lehigh Corp. v. Byrd*, 397 So. 2d 1202, 1205 (Fla. 1st DCA 1981) ("If a statutory ground exists, the motion should refer to the statute, as well as specifying the appropriate sections and subsections of the statute, along with the year of the statute"). It is insufficient to simply cite rule 9.400(b) or to cite only to another court's order. See *United Servs. Auto. Ass'n v. Phillips*, 775 So. 2d 921, 922 (Fla. 2000) (motion must "specify the particular contractual, statutory, or other substantive basis for an award of fees on appeal").

⁴²See *Specialty Restaurants Corp. v. Elliott*, 924 So. 2d 834, 838 (Fla. 2d DCA 2005).

⁴³See § 59.46, Fla. Stat. (prevailing party fees provisions construed to include fees of prevailing party on appeal "[i]n the absence of an expressed contrary intent"); see, e.g., *Starkey v. Linn*, 727 So. 2d 386, 388 n.3 (Fla. 5th DCA 1999) (construing § 742.045, Fla. Stat., and holding that it does not provide a basis for recovering appellate attorneys' fees).

⁴⁴See *Barrero v. Ocean Bank*, 729 So. 2d 412, 414 (Fla. 3d DCA 1999).

⁴⁵See *Superior Protection, Inc. v. Martinez*, 930 So. 2d 859, 860 (Fla. 2d DCA 2006).

⁴⁶There are exceptions—usually when the lower tribunal, such as an administrative body, is not equipped to adjudicate the issue of appellate attorneys' fees. Moreover, as a pure matter of jurisdiction and authority, the appellate court certainly can determine the amount of attorneys' fees to be awarded, after requiring the submission of supporting evidence (which will usually be affidavits)—although the amount of the fees can also be the subject of a stipulation. See *Sierra v. Sierra*, 505 So. 2d 432, 434 (Fla. 1987). One could possibly object to proceeding on the basis of affidavits. See *Locke v. Rooney*, 508 So. 2d 467, 468 (Fla. 1st DCA 1987) (provisionally granting appellant's motion for appellate attorneys' fees and giving parties 20 days to either file a stipulation of amount or affidavits as to value of services on appeal; remanded to deputy commissioner to determine fees if no response filed within 20 days or if either party objects to proceeding by affidavit).

⁴⁷See *Computer Task Group, Inc. v. Palm Beach County*, 809 So. 2d 10, 11-12 (Fla. 4th DCA 2002).

⁴⁸There is an exception. If appellate attorneys' fees were awarded as a sanction under section 57.105, the prevailing party is entitled to an immediate award of appellate attorneys' fees and need not await the ultimate outcome of the case in the trial court. See *Bridgestone/Firestone, Inc. v. Heron*, 828 So. 2d 414, 418 (Fla. 1st DCA 2002), review dismissed, 920 So. 2d 626 (Fla. 2005).

⁴⁹This principle was first announced in the groundbreaking decision in *Aksomitas v. Maharaj*, 771 So. 2d 541 (Fla. 4th DCA 2000) (en banc), review denied, 790 So. 2d 1105 (Fla. 2001). The Supreme Court of Florida has seemed (arguably) to agree with



Aksomitas. See *Brass & Singer, P.A. v. United Auto. Ins. Co.*, 944 So. 2d 252, 253 n.3 (Fla. 2006). Further, obtaining the provisional award of appellate attorneys' fees is only part of the battle. The trial court still has the power not to award those fees if it finds that the appeal was not "reasonably necessary." See *JPG Enterprises Inc. v. Viterito*, 841 So. 2d 528, 530 (Fla. 4th DCA), *review denied*, 855 So. 2d 621 (Fla. 2003).

²⁰Again, there are exceptions. For example, the rule is inapplicable to situations in which the entitlement to fees arises under section 627.428 of the Florida Statutes, because that statute, by its terms, requires an insured to prevail in an appeal before it has an entitlement to appellate attorneys' fees. See *Brass & Singer, P.A. v. United Auto. Ins. Co.*, 944 So. 2d 252, 254 (Fla. 2006); *Progressive Express Ins. Co. v. Miami Dade Health & Rehab Servs.*, 922 So. 2d 221, 222 (Fla. 3d DCA 2005), *review dismissed*, 954 So. 2d 28 (Fla. 2007); *Nationwide Mut. Ins. Co. v. Nu-Best Diagnostic Labs, Inc.*, 810 So. 2d 514, 516 (Fla. 5th DCA 2002).

²¹A response to a motion for appellate fees may be particularly appropriate when the movant has not made an *Aksomitas*-based argument in its motion. It is worth pointing out to the appellate court that the movant has asked to be awarded fees only if it prevails.

²²See *Boyer v. Boyer*, 588 So. 2d 615 (Fla. 5th DCA 1991), *review denied*, 599 So. 2d 654 (Fla. 1992); *Miller v. Miller*, 586 So. 2d 1315, 1316-17 (Fla. 5th DCA 1991).

²³See Fla. R. App. P. 9.600(c)(3).

²⁴See *Kasm v. Lynnel*, 975 So. 2d 560, 563 (Fla. 2d DCA 2008).

²⁵See *id.* at 565 n.1.

²⁶See *White v. White*, 695 So. 2d 381, 382-83 (Fla. 4th DCA 1997) (on rehearing en banc).

²⁷Rather than cite back to the discussion of this point in last month's article, I decided to make this article more self-contained, which necessarily led me to repeat some of what I wrote last month. I apologize to those whom I've offended with that approach.

²⁸See Fla. R. App. P. 9.400(c); *Bell v. U.S. Acquisition Co.*, 734 So. 2d 403, 412-13 (Fla. 1999). Moreover, there is, of course, an exception. If the judgment taxing appellate attorneys' fees contains other matters that can properly be the subject of a separate, independent appeal (and they are in fact appealed), then the award of appellate fees can be raised as an additional point in that appeal. See *Specialty Restaurants Corp. v.*

Elliott, 924 So. 2d 834, 838 (Fla. 2d DCA 2005); *Starcher v. Starcher*, 430 So. 2d 991, 993 (Fla. 4th DCA 1983). This exception actually applies quite frequently, because an award of appellate attorneys' fees is often contained within a final judgment in which the other claims and issues in the case are resolved as well.

²⁹See *Bell v. U.S. Acquisition Co.*, 734 So. 2d 403, 412-13 (Fla. 1999).

³⁰See generally Philip J. Padovano, Florida Appellate Practice § 12.4 (2007-08 ed.). The rules governing stays pending review are slightly different in the Second District. See *Platt v. Russek*, 921 So. 2d 5, 7-8 (Fla. 2d DCA 2004).

³¹See *Pellar v. Granger Asphalt Paving, Inc.*, 687 So. 2d 282, 284 (Fla. 1st DCA 1997); see also Fla. R. App. P. 9.040(c) ("[i]f a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought").

³²See *Browning v. New Hope South*, 785 So. 2d 732, 733 (Fla. 1st DCA 2001) ("We decline to approve appellant's theory that the notice of appeal should be treated as a motion for review").

³³See *Lone Star Industries, Inc. v. Liberty Mut. Ins. Co.*, 688 So. 2d 950, 952 (Fla. 3d DCA), *review denied*, 698 So. 2d 838 (Fla. 1997).

³⁴See *General Cap. Corp. v. Tel Service Co., Inc.*, 239 So. 2d 134, 135-36 (Fla. 2d DCA), *cert. denied*, 240 So. 2d 815 (Fla. 1970); see generally *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980).

³⁵See *Borack v. Orovitz*, 963 So. 2d 802, 804 (Fla. 3d DCA 2007), *review denied*, 980 So. 2d 1070 (Fla. 2008).



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Hearsay

Time is too slow for those who wait, too swift for those who fear, too long for those who grieve, too short for those who rejoice, but for those who love, time is eternity.

~ Henry Van Dyke



Nicholas A. Shannin

Listen. Nick Shannin has come unstuck in time. With renewed apologies to Vonnegut, I have found this column to be a unique, unidirectional, time-travel device. How so? When you read this column, I will have returned from our Nation's Capital, having had the opportunity to witness history. Maybe. You see, present me is still at the nascent dawning of the New Year and right now I can't know what I will actually see with the Family Shannin up in The District. But future me – the one you can e-mail right now – has already gone and returned, having seen Obama take the stage. Or ride in the parade after. Or maybe I was just in the general vicinity of it all. Either way, I was there. Even though I haven't gone yet. Gotta love this time travel thing!

Normally, the time-travel dilemma inherent in all "Hearsay" columns – or really any column, other than one in the *Weekly World Sun* ["Earth in Peril from Alien Space Litter!"] – often becomes moot because the purpose of the column is usually not to go forward, but to go back. Reporting on what was seen and heard (preferably out-of-court and not intended for the truth of the matter asserted) is entirely the focus of "Hearsay." But it was a quiet December. Although this year many parties were either limited or cancelled altogether, the pre-planned holiday affair at the home of **Carlos Diaz Arguelles** and **Maria Tejedor** proved to fill the void. Sponsored by friends of the Central Florida Trial Lawyers, er, Justice Association, the evening was a festive open-air occasion with much merriment for all. Last word on the fete regards a pleasant conversation with **Simon "and Simon" Wiseman**, who was still

trying to perfect that British accent he's been working on. A few more listen-ins on BBC Radio 1 and you'll have it spot on, I say. Cheers!

Back stateside, a few new kudos to mention: **Michael L. Moore** was recently appointed as the Chairman of the Florida Bar Association Grievance Committee "D" in the Ninth Judicial Circuit in and for Orange and Osceola County Florida for 2008-2009. **Kristyne Kennedy** was elected to the Board of Directors of the Central Florida Human Resources Association, as Director of Legislation. The Central Florida YMCA announced that **J. Jeffrey Deery** is the 2009 Youth Scholarship Chair committed to raising \$3.75 million to benefit less fortunate kids by providing them with the area's leading health, wellness, education and prevention programs at one of 27 local YMCA Family Centers.

And "Hearsay" gives a hearty *huzzah!* to **Mayanne** "Ms. President-Elect Designate" **Downs** for getting the City Beautiful back into the center square by winning outright election to the post of President-Elect Designate for the Board of Governors for The Florida Bar. For those who don't understand the historical significance of this, the last Orlandoan to hold the office was **Russell "Leon's got nothing on me" Troutman**, who proudly served for the 1961- 62 term. Orange County is too important, too central and too vital

to this state's continued success to allow another fifty years to pass before the next Orlando bar leader serves in this capacity. Way to grab the banner and represent proudly for the original "OC." Way to go, Mayanne! Good luck and Godspeed!

Speaking of attorneys representing our city on a big scale... do you get any bigger than **Tom "Citrus Sports Rules" Wert**, whose mug was simultaneously transmitted into all of our living rooms in his "crazed lawn-painting fan" ad for the two Citrus Sports bowls? Okay, in HD that was a little scary, granted, but still - way to put your sweat and Orange and Yellow paint to good use for our community! His big line, by the way, was "Yes!" - exclaimed with an emphatic elbow pump. Alastair Cooke had never seen such thespian skills on display!

Ok, enough kudos for now. Let's talk trivia! Congratulations go to **Jamie** "My Irish won a Bowl Game?" **Moses** and **Bill** "My Rice Owls won a Bowl Game?!" **Davis** for being the two football fans to correctly recall the third team to play a Thanksgiving Day home game prior to the NFL network: the pre-deserted-to-the-desert St. Louis Cardinals. What, you want a trivia question for this month too? You got it: If you have a band with Amy Wilson on Vocals, Tom Petty's Bassist, Joan Jett's Drummer, William

Wallace on Bagpipes, all introduced by Entertainment Tonight's hostess, would your poker hand beat a straight?

Since I've room to spare, I'll go ahead and close the loop on an earlier bit of "Hearsay" about the "Hearsay" guy, where I relayed my exciting project with West Orange Habitat for Humanity to build a home for Sergeant Joshua Cope, Iraq veteran and amputee. Well, I can relay the great news that this mission really was accomplished - prior to Christmas I had the honor of emceeing an event with more than 400 attendees to witness the passing of the keys to



Mayanne Downs, King, Blackwell, Downs & Zehnder, P.A.



Nick Shannin presents keys to a new home to Sergeant Joshua Cope and his wife Erica at the dedication ceremony for the West Orange Habitat for Humanity Home at Last project.

Sergeant Cope, West Orange County's newest resident. Many thanks to the firms who generously donated to this cause, or who have otherwise contributed or worked with Habitat to make events like this possible. In a year with less to cheer about for many, this was a spectacular example of people doing good for a great result, and I was glad that I got to be a small part of it.

I have faith in my fellow lawyers that next month I'll have more good tidings and other interesting tidbits of hearsay to distribute to everyone. Can't happen without you relaying it to me though, so send in your messages by e-mail, Facebook or conversation hearts to nshannin@floridalawonline.com so we can get it into the next issue or so. I'll warn you in advance, however: the next issue is March, so get ready for the Guinness references aplenty and we'll see you right here.

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

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Get to know Frank Bedell...

- Chair, Trial Lawyers Section of The Florida Bar (7,000+ members)
- Former President, YLD of The Florida Bar (22,000+ members)
- Chair, Annual Meeting Committee for 2003 Florida Bar Convention in Orlando
- Recipient, Florida Bar President's Award of Merit
- Member, OCBA Executive Council since 2005
- Co-chair, OCBA Lawyer Referral Service Committee and Modest Means Committee
- Recipient, Award of Excellence from the Legal Aid Society of the OCBA
- Former Member, Florida Bar Board of Governors Executive Committee
- Former Representative, YLD Board of Governors for Florida Bar
- Trustee, Florida Supreme Court Historical Society

YLS *on the move*

Events Galore!

This past holiday season was a difficult one for all of us. With the growing economic tensions, it was more difficult than normal to have a stress-free holiday with all the food, fun and gifts that many of us may have started to take for granted. Nonetheless, the YLS saw its members and colleagues step up once again this year and help those who are a little less fortunate. We want to send a huge thanks to all of you who volunteered your time and made donations to those in need during the holiday season. Your support and dedication during the holidays, and year-round, are invaluable.

YLS was incredibly proud to support two successful events this holiday season: **Seniors First**, a clothing drive to benefit senior citizens, which ran throughout the season, and **Holidays in January**, a big party celebrating the children of the Downtown and Parramore Boys & Girls Club, which took place on January 15, 2009. Our gratitude goes out to **Allison Imber** and **Molly Young** who organized these events, respectively.

Several YLS members also assisted with the **Angel Tree Project** benefiting Rock Lake Elementary, a project organized by the Central Florida Association of Women Lawyers (chaired by **Melissa Cupps** and **Kellie Symons Hall**). Rock Lake is a local school to which many low-income

families send their children, and the toy donations – including nearly 40 bicycles! – and clothing donations may have been the only new items these children received this year.

Back in November, several YLS members also participated in the **Orange County Teach-In** at Rock Lake Elementary, which was organized by our very own **Melanie Shoemaker**. The volunteers each taught two classes ranging from second to fifth grades. Not only did we educate the students about our profession, we empowered them to follow their dreams. For instance, the book “The Places You’ll Go” by Dr. Seuss was read to the students to let them know that each one of them has a bright future ahead.

In December, we were very honored when the Rock Lake students presented the YLS with an award in appreciation of YLS’s dedication to the success and happiness of its students and school. The school credits our volunteer efforts with the Back Pack Project, Angel Tree Project, and Teach-In as contributing to their “A” school standing.

In January, many YLS members attended **The Florida Bar Young Lawyers Divisions’ Affiliate Outreach Conference**, which took place at the Orlando Hard Rock Hotel. This event drew young lawyers and law

students from across the state together to apply for grant money, compete for YLD awards, and network. Our YLS applied for several grants, and we are optimistic that our proposals will be as successful as they have been in years past. Grants from the The Florida Bar YLD help support our local YLS charitable endeavors throughout the year.

In conjunction with the YLD AOC, YLS hosted its **January Happy Hour** at **Jimmy Buffett’s Margaritaville** at Universal CityWalk and, of course, a great time was had by all!

The YLS recently teamed up with the **Orlando Magic** to provide “a night of magic” at the January 27 game against the Indiana Pacers. The Magic provided discounted tickets to YLS members and guests, and our group took over a section of the lower bowl. We hope this event becomes an annual one!

We are pleased to announce that YLS will host its annual **Evening with the Judiciary** reception on **Wednesday, February 18, 2009**, at **Citrus Restaurant**, 821 North Orange Avenue, Orlando. Festivities begin at 5:30 p.m. Join local judges, fellow attorneys, and guests for this much-anticipated evening of wonderful food, fun, and conversation. The



cost is \$35 (\$30 for government attorneys and solo practitioners). Please RSVP by **Wednesday, February 11**.

RSVP forms have been sent in YLS and OCBA email blasts, but if you didn’t get one or need another, see the inside front cover of *The Briefs*! Questions? Don’t hesitate to contact event chairs **Kim Healy** (khealy@kdbdzw.com) or **Melanie Andre** (melaniefandre@msn.com).

Our February social event will be a joint **Bowling Night** with the Seminole County YLS. Again, keep your eyes peeled for further information in your YLS email blasts, or contact **Maria Hale** (maria@bradfordlaw.com) directly.

Our January luncheon featured a mediation CLE presented by attorney **Dave Henry** of Allen, Dyer, Doppelt, Milbrath & Gilchrist, P.A. Many thanks to Mr. Henry for sharing his expertise and enthusiasm! YLS hopes to feature additional CLEs at future luncheons, and we welcome your comments on particular topics in which you would be interested.

The YLS **February Luncheon** will take place on **February 19, 2009** at 11:45 a.m. Email your RSVP to ocbayls@gmail.com. The cost is \$18 if you RSVP on or before February 13, or \$20 at the door;

\$10 for sole practitioners, law students, government attorneys, and judges.

If you want to find out more about our section and its committees and events, please call me at 407-841-2330 x111 or email me at blabutta@addmg.com. If you are not receiving the YLS email blasts, send an email to me or ocbayls@gmail.com to sign up.

Bridget Heffernan Labutta is an associate with Allen, Dyer, Doppelt, Milbrath & Gilchrist, P.A. She has been a member of the OCBA since 2006.



Students and YLS volunteers - including Melanie Shoemaker, Jack Adams, Jaisen Stango and Will Jay - at the 2008 Orange County Teach-In at Rock Lake Elementary School

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YLS members participated in the Angel Tree Project benefiting Rock Lake Elementary, which saw dozens of bicycles (and helmets!) given out to students for Christmas.

Elder Law Committee

continued from page 17

1983 action in the Federal District Court in New Mexico. The Judge ruled that the state of New Mexico could inquire about the administration of the special needs trust and could impose restrictions like the limitation on payments to his caretaker mother.

In sum, payment of a salary to Plaintiff's mother for caretaker service, while certainly in the Plaintiff's best interests, is not for his sole benefit as contemplated by 42 U.S.C. §1396p(d)(4)(A). The court held that it provides too much direct financial benefit to Plaintiff's family, the entity that is liable for Plaintiff's medical expenses if his trust is not excluded as a resource.

This case is currently on appeal to the Tenth Circuit. We could very well see more of this type of litigation in the upcoming years, as Medicaid, due to budget cuts and shrinking government assets, becomes stricter on what is and is not allowable expenditures from these trust assets. To date, there have not been any significant cases arising in the state of Florida.

Hallie L. Zobel, Esq., is an associate with Estate Planning & Legacy Law Center, PLLC. She has been a member of the OCBA since 1992. The author would like to acknowledge Bradley J. Frigon, Esq. and Theresa M. Varnet, Esq. for their contribution to this article.

¹42 U.S.C. §1396p(d)(4)(A)

²42 U.S.C. §1396p(a)(1)

³42 U.S.C. §1396p(d)(4)(C)

The New Franchise Disclosure Document:

The Next Generation in Franchisee Protection

Installment #1: Some Background and an Introduction to the New Rule Neal J. Blaher

In the wake of the economic boom that followed the end of World War II, franchising increasingly became the route of choice for those who wished to pursue the American Dream of starting their own business.¹ With more extensive use of franchising in the 1950s and 1960s came abuse of the system and investment scams that only dashed many of these dreams. States enacted laws to address the problems, but their impact was limited, particularly given the increasingly interstate nature of franchise systems. A more concerted effort by the former Midwest Securities Commissioners Association² resulted in the adoption of the Uniform Franchise Offering Circular (UFOC) on August 27, 1974.³

As the states were formulating a uniform template for disclosure in the 1970s, the Federal Trade Commission (FTC) entered the fray, eventually enacting "The Franchise Rule."⁴ The Franchise Rule mirrored NASAA's creation of a regulatory scheme based exclusively on disclosure by requiring franchisors to provide potential franchisees, in a clear and concise written document, with certain prescribed information about the business opportunity being offered.⁵ However, the Commission went further in requiring that the document be furnished at least 10 business days prior to the signing of a franchise agreement or the payment or exchange of money, and in any event prior to any face-to-face meeting that delved into the details of the business.⁶

The UFOC became the disclosure document of choice in the 1980s and 1990s, as its continued revision and evolution took place.⁷ It required each and every franchisor to provide information on 23 specific categories of information.⁸ The intent was to give a potential franchisee the information necessary to make an informed decision about the business opportunity he or she was assessing and evaluating.

Although perhaps 30 years in the making, the logical union between the FTC's Franchise Rule and NASAA's UFOC finally came to pass in 2007, with the effective date of a revised Franchise Rule, including the adoption of virtually all elements of the UFOC.⁹ This new FTC document has its own name: The Franchise Disclosure Document (FDD).

The first installment of this article discusses the revised FTC Rule, and sets the stage for next month's installment by identifying the types of disclosures mandated by the states' original UFOC. Next month's installment will then describe the FTC's changes to the UFOC in formulating the new FDD, and will include a critique of those changes.

The Starting Point: The 3 Elements of a Franchise

If it looks like a duck, walks like a duck, and acts like a duck, it is a duck. This well-known, well-worn expression offers an

important warning to those who offer business opportunities and want to know the extent of their liability under the franchise laws. If a particular business opportunity contains the three elements of a franchise, it is a franchise, regardless of what the parties call it, or how they try to characterize it.

The three franchise elements include: (1) the seller's licensing of a trademark or trade name; (2) the purchaser's payment of at least \$500 within the first six months of operation; and (3) the seller's substantial assistance to, or substantial control over, the offered business opportunity.¹⁰ If all three elements are met, the business opportunity will be deemed a franchise, and thus subject to state and federal franchise laws and regulations.

UFOC: The Original Disclosure Document

The original 23 items of NASAA's UFOC can be logically grouped into 10 categories:

1. Experience and qualifications of the franchisor's principals;
2. Recent and relevant litigation and bankruptcies of both the franchisor and its principals;
3. An estimate of all start-up costs, including the flat, initial franchise fee, and ongoing royalty and advertising fees;
4. Restrictions and parameters imposed on the franchised business, such as sources of purchasing merchandise, fixtures and equipment, and permissible and impermissible products and services;
5. The parties' respective obligations under their contracts;
6. The geographical scope and limitations of the territory granted by the franchisor;
7. Trademarks, copyrights and patents that come with the franchised business;
8. Provisions for renewal, termination, transfer and dispute resolution;
9. Earnings claims (optional and usually not included); and
10. Statistics as to prior (terminated), existing and anticipated franchise and company-owned outlets, including contact information to allow franchisees to conduct due diligence.

The New FTC Rule

The FTC's 2007 Rule adopts these disclosure requirements from the UFOC, effective on a voluntary basis as of July 1, 2007. The changes became mandatory on July 1, 2008.¹¹ As



OCBA member Patrick Muldowney presents a token of appreciation to U.S. Secretary of Labor Elaine L. Chao, guest speaker at the Central Florida Human Resources Association (CFHRA) dinner in December. Patrick is the immediate past president of the Association.



previously noted, the new Rule makes changes both to the original FTC Rule's disclosure requirements, as well as to portions of NASAA's UFOC disclosure form, renamed the FDD.

The requirement of providing the disclosure document prior to signing a contract or paying any money has been changed from 10 *business* days to 14 *calendar* days.¹² The requirement of providing the document prior to any meeting between the parties at which details of the opportunity are to be discussed has been eliminated altogether.¹³ This latter change is attributed to the greater access to information that is made available to potential franchisees through franchisor websites.

Consistent with the conversion from "business" days to "calendar" days, the franchise agreement must be furnished 7 *calendar* days before contract signing, rather than the prior requirement of 5 *business* days.¹⁴ In addition, the new 7-calendar day clock may start to run once the "generic" version of the franchise agreement that is included as an exhibit in the disclosure document has been furnished to the potential franchisee, provided that no material changes are made to the generic agreement in the actual version presented to the franchisee for signature.¹⁵

Next month, we will examine the FTC's adoption of the UFOC, and the changes

it made to that document in formulating its own, substantially similar but re-titled, FDD.

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¹Statement of Basis and Purpose Relating to Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, Chapter II, FTC, August 22, 1974, *Business Franchise Guide* (CCH) ¶6302, at 9205 (2007).

²The Midwest Securities Commissioners Association was the predecessor of the North American Securities Administrators Association (NASAA).

³Statement of Basis and Purpose Relating to Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, Chapter V(M)(2), FTC, August 22, 1974, *Business Franchise Guide* (CCH) ¶6364, at 9376 (2007).

⁴16 CFR §436. The Franchise Rule was promulgated on December 21, 1978. It became effective on October 21, 1979.

⁵The basis for the Rule was the Commission's jurisdiction to enforce the prohibition in Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45, against unfair or deceptive acts or practices. Thus, the Rule deems it an unfair or deceptive act or practice to fail to furnish a prospective franchisee with the prescribed disclosure, "accurately, clearly, and concisely stated, in a legible, written document." 16 CFR §436.1(a), *Business Franchise Guide* (CCH) ¶6191, at 9135 (2007).

⁶The original Rule mandated delivery of the disclosure document "at the earlier of the time for making of disclosures or the first 'personal meeting'." The Franchise Rule, 16 CFR §436.1(a), FTC, 1979, *Business Franchise Guide* (CCH) ¶6191, at 9135 (2007). The "time for making of disclosures" was defined as 10 business days before the earlier of the prospective franchisee's execution of a franchise agreement and the

payment of "any consideration in connection with the sale or proposed sale of a franchise." 16 CFR §436.2(g), FTC, 1979, *Business Franchise Guide* (CCH) ¶6192, at 9146 (2007). A "personal meeting" is a face-to-face meeting "held for the purpose of discussing the sale or possible sale of a franchise." 16 CFR §436.2(o), FTC, 1979, *Business Franchise Guide* (CCH) ¶6192, at 9147 (2007). Not just any face-to-face meeting triggers this provision, however. The Commission's Interpretive Guides recommend that franchisors use "common sense precautions" and consider such factors as whether the franchisor actually states at the meeting that it is ready to discuss a possible sale at that time; whether the meeting was initiated by the prospective franchisee rather than the franchisor; and whether the content of the meeting extended beyond a brief and generalized discussion of the opportunity and included earnings claims. Interpretive Guides to Franchising and Business Opportunity Ventures Trade Regulation Rule, 44 Fed. Reg. 49966, IC1, FTC, August 24, 1979, *Business Franchise Guide* (CCH) ¶6222, at 9157 (2007).

⁷See, e.g., Informal Staff Advisory Opinion 94-1, FTC, Jan. 28, 1994, *Business Franchise Guide* (CCH) ¶6457, at 9637 (2007) (recognizing the Commission's approval on December 30, 1993, of NASAA's 1993 amended UFOC).

⁸Guidelines for Preparation of the Uniform Franchise Offering Circular and Related Documents, NASAA April 25, 1993, *Business Franchise Guide* (CCH) ¶5750 to 5782, at 8411-8461 (2007).

⁹Statement of Basis and Purpose, 72 Fed.Reg. 15444, 15449, FTC, March 30, 2007, *Business Franchise Guide* (CCH) ¶6056, at 9078 (2007).

¹⁰See 16 CFR §436.2(a), *Business Franchise Guide* (CCH) ¶6192, at 9144 to 9145 (2007).

¹¹Disclosure Requirements and Prohibitions Concerning Franchising, The Franchise Rule, 16 CFR Part 436, 72 Fed.Reg. 15444, FTC, March 30, 2007, *Business Franchise Guide* (CCH) ¶6011, at 9011 (2007).

¹²Statement of Basis and Purpose, 72 Fed.Reg. 15444, 15468-15469, 16 CFR §436.2(a), FTC, March 30, 2007, *Business Franchise Guide* (CCH) ¶6061, at 9103 to 9104 (2007).

¹³*Id.*

¹⁴Statement of Basis and Purpose, 72 Fed.Reg. 15444, 15470-15471, 16 CFR §436.2(b), FTC, March 30, 2007, *Business Franchise Guide* (CCH) ¶6061, at 9105 to 9106 (2007).

¹⁵*Id.*

Side Bar

The holidays have come and gone, but the legal community here in Orlando is still in full swing. From celebratory receptions to networking picnics ... from topical lectures to continuing legal education, it's all here. Take a look at what's going on!

The **Federal Bar Association** (FBA) invites you to attend a Welcome Reception for Recently Appointed Federal Officers: **Judge Mary S. Scriven, U.S. Attorney A. Brian Albritton** and **Public Defender Donna L. Elm** on **February 4, 2009**, in the Federal Courthouse Atrium from 5:30 p.m. to 8:30 p.m. For reservations please contact **Sheri Jones** at (407) 418-6452 or sheri.jones@lowndes-law.com. The FBA also hosted a special seminar to review the 2007-08 U.S. Supreme Court term and consider what issues might be considered during the 2008-09 U.S. Supreme Court term. Our local legal professors, **Professor Patricia Broussard** and **Professor Terri Day**, well regarded in the field, discussed *Heller's* Second Amendment decision, *Bournedienne's* Guantanamo Bay case, and the criminal sentencing opinions of *Begay*, *Gall*, and *Kimbrough*.

The **Hispanic Bar Association** (HBA) announced and installed its new officers. The installation, held at the Disney Yacht and Beach Club Convention Center on January 17, 2009, recognized the following: President **Cindy Duque**; President-Elect **Felix Aguilu**; Treasurer Karla Valladares; Secretary **JoAnn Guerrero**; Community Services Chair Jose Garcia; Bylaws Chair **Felipe Guerrero**; Fundraising Chair Nichole Sbert; Membership Chair **Laura Pichardo**; Judicial Relations

Chair Marcio Valladares; Public Relations Chair **Corina Castillo-Johnson**; and President Ex-officio **Andrea Caro**.

The **Paul C. Perkins Bar Association** (PCP) co-sponsored the CLE, *Foreclosure Defense*, with the Community Legal Services of Mid-Florida in January.

The **Central Florida Association of Women Lawyers** (CFAWL) will hold its annual Professional Women's Exchange on **February 26, 2009**, at 6:00 p.m. at the Lowndes Shakespeare Theater in Loch Haven Park. Please hold the date of **March 26, 2009**, for CFAWL's annual **Judicial Reception** at the I.W. Phillips House at the Courtyard at Lake Lucerne at 5:30 p.m. CFAWL members **Barbara Leach** and **Melanie Shoemaker** will host a "Table for 8" small group dinner on **March 18, 2009**.

The **Central Florida Gay and Lesbian Law Association** (CFGALLA) participated in "A Day Without a Gay" program on December 10, 2008, International Human Rights Day. Also during December, the group saw the



Jessica K. Hew

film, *Milk*, and a production of the Orlando Gay Chorus, *Twisted Tinsel – Holidays from a New Angle*, followed by dinner. The Central Florida Diversity Picnic will be held on **February 28, 2009**, at the Stetson University College of Law, Tampa Law Center. The event allows law students from diverse backgrounds to establish mentoring relationships with attorneys and members of the judiciary from Central Florida. For more information, contact Tony Cabassa at lcabassa@tsg-law.com.

If you have any legal organizational news to share, please email Jessica K. Hew at jessica.hew@burr.com.

Jessica K. Hew is a partner with Burr & Forman LLP (formerly Graham, Builder, Jones, Pratt & Marks, LLP). She has been a member of the OCBA since 1995.

New Committee!

The OCBA announces the formation of its newest committee, the **In-House Counsel Committee**

Save the Date!

On March 4, 2009,

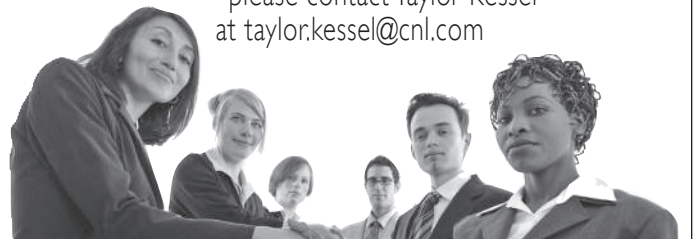
the committee will hold its first seminar:

"The Exploding Realm of Employment Legislation: What Every In House Counsel Needs to Know"

presented by

Susan K. McKenna, Esq.
Jackson Lewis LLP

For more information about the seminar or participating on this committee, please contact Taylor Kessel at taylor.kessel@cnl.com



Presentation Skills ● *Are You Involving* for Lawyers ● *Your Audience?*

It's no secret that your audience's minds can wander. Just poke your head into any boardroom or courtroom shortly after lunch and you'll see audience members mentally "checking out" and letting their brains wander away. The important question you need to ask is,

"How can I keep their minds focused on my presentation?"



Elliott Wilcox

One solution is to get your audience more involved in your presentation. When they are *actively* engaged in your presentation, it's impossible for their minds to wander away. One of the best ways you can get them involved is by turning them into demonstrative aids during your presentation so that they are forced to participate.

For example, let's say that you want them to envision sizes or distances. You could physically engage them in your presentation by asking them to use their own bodies as a measuring device:

- "How big was the rock that he threw at the car? If you were to make a fist with your right hand, that's about the same size."
- "How close were the two cars as they raced down the highway? Just a few inches away from each other. If you reach out towards the person seated in front of you, that's about how close the cars were."
- "The child was delivered 16 weeks early, so she was *incredibly* small. Cup your hands together to form a bowl – she could have fit right there in your hands."

By forcing them to use their own bodies as measurement instruments, they become an integral part of your presentation. Once you've engaged their bodies, their brains will quickly follow.

Even if your presentation doesn't involve distances, you can still get them physically involved. Let's say that you need your audience members to understand a foreign concept. One of the best ways to help them understand an unknown object is by comparing it to something they already understand:

- "The material was soft and spongy, but it had a dense core underneath. If you touch your forefinger against the tip of your nose and press until you feel the cartilage, you'll get an idea what it feels like."
- "There were two different types of hinges we'll be talking about. The first one is like your knee – it can bend or straighten, but it's not designed to rotate. The other type of hinge is more like your shoulder joint – it is more flexible and can rotate around."

By forcing your audience to actively participate in your presentation, you're guaranteed to engage them and keep them interested in what you're saying. But don't limit this technique to those times when you're standing behind a lectern and giving a formal presentation. You can also use this technique in the courtroom during direct examination when you present the testimony of your witnesses. Here are three

examples of how you could use this interactive technique to enhance a witness's testimony:

Help them understand foreign terminology. Imagine that you're examining a doctor who is describing a broken bone. You could involve the audience by having the doctor show the jurors how to locate the same bone on their own body: "The bone that was broken in Johnny's forearm was the ulna. If you hold your left arm out in front of you in the 'thumbs-up' position, when you touch your left forearm, the bone on the bottom side of your forearm (the pinkie side) is the ulna."

Emotionally engage them. "The first thing we do when we find the patient on the ground is check for a pulse to see if he's alive. We don't check the wrist. Instead, we check the carotid pulse. It's easy to do. Just take your index and your middle finger and place them right **here**, in the hollow between the windpipe and the large muscle in the neck. That's it. Press lightly until you feel a pulse. When I placed my fingers against his neck, I couldn't feel anything, so I knew I had to start CPR."

Show them how to conduct a procedure. If you were examining the treating physician who conducted a knee jerk reflex test on your client, you could get the doctor to instruct the jurors how their legs should be positioned, how he conducts the test, how and where he strikes the knee, what the expected results should be, what your client's results were, etc. Done well, your jury will feel like they're in the examination room with him when he performs the evaluation. As he describes the reflex test, some of them will probably even try tapping their own knees. (An additional benefit of turning your jurors into visual aids or demonstrative aids is that your aids will **definitely** be allowed back into the jury room.)

To be a successful presenter, it's essential that your audience listens to what you say and remembers what you say. If they're not engaged and actively listening to you, they may miss your most important points. For your next presentation, think of three different ways to actively engage your audience in your presentation. Once you accomplish that, you'll hold their attention for your entire presentation, and your success as a presenter will be ensured!

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Elliott Wilcox is the editor of *Trial Tips Newsletter*. To get a free copy of his special report, "The Ten Critical Mistakes Trial Lawyers Make (and How to Avoid Them)," visit www.TrialTheater.com.

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Rainmaking ● Public Relations Campaign

● PART 1

The need to have a well thought out plan for public relations and community involvement is no longer restricted to large firms with hefty budgets. Even small and mid-sized firms stand to benefit enormously when they increase their profile in the community and gain exposure to potential clients and referral sources.

Take the small firm attorney in upstate New York who focuses his practice on estate planning and elder law. Recently, he was asked to join the board of the local Alzheimer's Association. Not only is he passionate about the fundraising work done by the association, being a board member constantly puts him in front of his target market. His desire to give back to the community is satisfied, and his position exposes him to people who need his expertise.



Mark Powers



Shawn McNalis

This article will be the first in a series of three which will attempt to explain the art of public relations. In the first article we'll explore one of the easiest pieces of the PR puzzle -- community relations. In the next we'll discuss how to effectively use a press release and develop reporters to increase your media presence. Finally we'll talk about how to have the press seek *your* opinions.

It's important to understand what public relations, or "PR," means. In

relationship to your firm, it is the ability to increase Top-of-Mind Awareness (TOMA) within your targeted community and generate a positive public image for the firm using print, radio, TV or community events.

The *non-media*-related activities, which we'll discuss here, include becoming an active, high-profile member of your community by sponsoring local events such as concerts or contests, for example, or volunteering for a community cause. Fundraising efforts for charity, participating in committees and being a board member are also tried and true ways to gain more exposure. These activities and associations present a positive picture of you as a supporter of the community in contrast to paid promotional activities that are only law firm or practice-related.

Most of your PR efforts should be aimed at cultivating more desirable referral sources, while other efforts should focus on increasing your contact with potential clients. It is essential that you understand who your targeted market is, what journals they read, what they care about and where they go for information.

We work with a real property attorney in Florida who works primarily with high net worth buyers in a popular seaside community. He joined not only the country club in his area, but also accepted a position on the local hospital board. Both positioned him to be in contact with doctors, hospital administrators, golf fanatics, retirees and corporate executives -- all potential clients.

Typically, attorneys are welcome additions to any board they join. If you are interested in joining a local board, casually inquire with friends, family, partners and referral sources that are active in the community. Very often one of them will be on a board, or know of a board seeking new members. They can then submit your name for consideration.

If joining a board isn't for you, there are many alternatives. For example, another one of our clients, who is very charitable by nature, partners with a local organization that funds scholarships for children. Another attorney sponsors a bike safety day in which he and his team join with a charity and pass out helmets to needy children. There are endless opportunities out there -- you just have to find those that work for you and your firm.

To get started, read through the sample goals below and ask yourself what kind of PR objectives you could formulate to support the growth of your practice and attract good clients:

- This year, each partner will join the board of a community or charity organization.
- This year, our firm will sponsor two tables at the annual Cancer Society Dinner and invite twenty select clients and referral sources to join us.

Whatever you and your firm decide to take on in the way of community or charity events, make it something you can be authentically excited about. You'll be energized by participating in causes you truly support and drained by those you don't.

Once you find something you think will be a good fit, join a committee, offer to sponsor an event or raise money. Make a small investment of time and money to test the waters and evaluate whether or not you've found a good cause. We think you'll find that doing good will not only benefit the community, it will benefit your firm as well.

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

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Dellecker, Wilson, King, McKenna &
Ruffier's annual holiday party in November
raised \$5,000 for the March of Dimes.



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New Shareholders

Richard Blackstone Webber, II - *Zimmerman Kiser Sutcliffe*

Speaking Engagements

Jill S. Schwartz of Jill S. Schwartz & Associates, P.A., recently presented "Mediation in the Public Sector" to the 34th Annual Public Employment Labor Relations Forum sponsored by the Florida Bar.

Kellie Symons of ShuffieldLowman, and other attorneys at the firm, presented a seminar held at Colonial Bank for small business owners entitled, *From the Inception to Succession: The Journey of a Small Business Owner*.

Louise B. Zeuli, Esquire, of Louise B. Zeuli, P.A., recently presented a seminar on *Titling Property: Does it Matter?* to the professional staff of Glickstein, Laval, Carris, P.A., a Certified Public Accounting firm in Maitland, Florida.

Published

Dennis Wall of Winter Springs and Orlando announced the publication of "CAT Claims: Insurance Coverage for Disasters" online and in print by Thomson West. Dennis co-authored the book in response to recent hurricanes and other catastrophes. Thompson West has also published the Third Edition of "Litigation and Prevention of Insurer Bad Faith."

Seminars

Feb. 13 - Product Liability Seminar. *From Road to Courtroom: A Diverse Seminar on Product Safety Innovations and Trucking Litigation, and the Effective Use of Life Care Planning and Structured Settlements.* 9:00 a.m.-1:00 p.m. (registration: 8:30 a.m.). OCBA Center. 4.0 CLE (pending) Speaker: Henry Didier. Fee: \$35. Please register by **Feb. 6**; contact Marie at marieb@ocbanet.org. Sponsored by Delta Settlement Solutions.

Mar. 4 - OCBA In-House Counsel Committee. *The Exploding Realm of Employment Legislation: What Every In-House Counsel Needs to Know.* 5:30 p.m.-6:30 p.m. OCBA Center. 1.0 CLE (pending). Presenter: Susan K. McKenna, Esq., Jackson Lewis LLP. Networking reception to follow at Citrus. Please RSVP to Taylor Kessel at taylor.kessel@cnl.com by **Feb. 18**. Sponsored by Jackson Lewis LLP.

Mar. 27 - Electronic Evidence Seminar - *Understanding Electronic Evidence.* 10:30 a.m. - 1:30 p.m. (registration: 10:00 a.m.). OCBA Center. 3.0 CLE. Presenter: Russ Davis, Vestige, Inc. Fee: \$45. Please register by **Mar. 20** to Marie at marieb@ocbanet.org. Sponsored by Vestige, Inc.

News to Note

LawSuits (clothes drive benefitting the Community Service Center of Central Florida) - The OCBA will collect suits and business attire at its March 26 luncheon. The clothing will be used for the Center's Job Rehabilitation Program participants.

2009 Florida High School Mock Trial State Finals - Mock trials will be held March 26-28, 2009, at the Orange County Courthouse. CLE is available for participating attorneys. For information about volunteering as a judge, please contact program director Tiana McGlockton at tmcglockton@flrea.org.

The Barry University School of Law's Juvenile Justice Center has received a \$100,000 grant from the John D. and Catherine T. MacArthur Foundation to lead efforts in helping to reform juvenile justice issues through the State of Florida's newly created Models for Change Juvenile Indigent Defense Action Network.





Judge Leon Cheek III and Judge Alan Apte were among those who attended the Legal Aid Society's Breakfast of Champions fundraising event in December.

100% CLUB

Congratulations to Members of the OCBA's 100% Club!

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Florida Board of Governors' Children's Holiday Party

On December 11, 2008, Santa Claus made a special trip to Orlando to brighten the holidays for 58 children in need. **John G. White**, President of the Florida Bar Association and The Florida Bar Board of Governors (BOG), donned a Santa suit and handed out presents to the delighted children.

The holiday party is a BOG annual event created to ensure that needy children receive Christmas gifts. Earlier in the year, Santa's wish lists were sent to 52 board members, who then shopped for special gifts for "their child." Orlando representatives **Dan DeCubellis**, **Scott McMillen**, and **Mayanne Downs** participated in the holiday event, and OCBA President **Tad Yates** and Florida Bar Foundation Executive Director **Jane Curran** welcomed the children and their families.

After the gift giving, everyone enjoyed singing and refreshments, with cookies donated by Albertsons. One child told his mom that he "wanted cookies for dinner every night," and later was heard saying, "Mommy, there is a Santa Claus, there really is!"

Thanks to the generosity of Santa, his 52 merry helpers, **Brant Bittner**, OCBA Executive Director, **Mary Ann De Petrillo**, LAS Executive Director, and **Susan Kohury**, LAS Guardian Ad Litem Program Director, the holidays turned into a merry time for some very special children!



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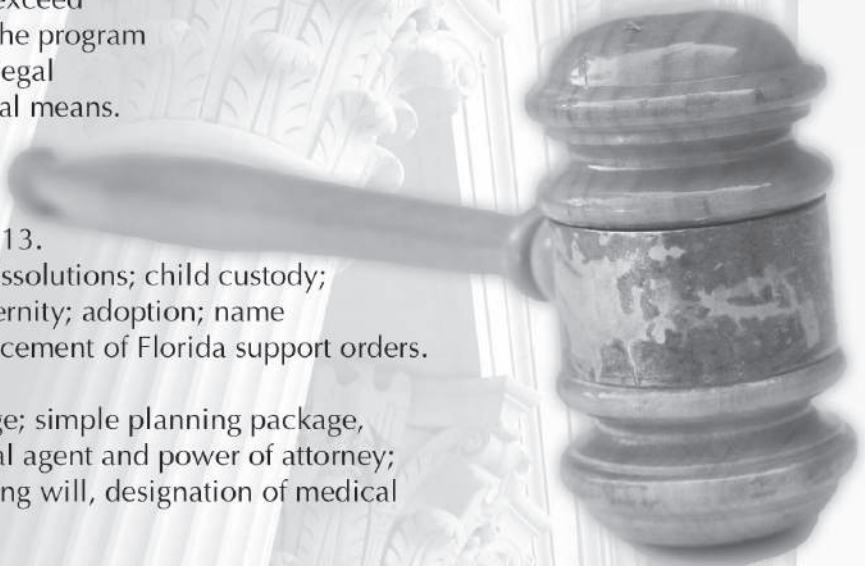
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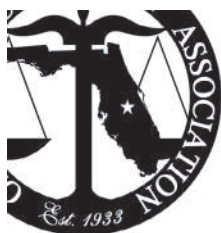
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OCBA CALENDAR

FEBRUARY-MARCH 2009

OCBA Luncheon

Thursday, February 26, 2009

The Honorable Peggy A. Quince
Chief Justice, Florida Supreme Court

RSVP by February 20 to:
reservations@ocbanet.org

*The February Luncheon is Co-hosted by the
Paul C. Perkins Bar Association.*

February

4 Criminal Law Committee
12:00 p.m. • Courthouse
23rd Flr. Judges' Conference Rm.

**6 Immigration Law Updates
for Attorneys**
9:00 a.m. • Bar Center

10 Executive Council Meeting
4:30 p.m. • Bar Center

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

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

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

Social Security Committee
12:00 p.m. • Bar Center

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

YLS Executive Board Meeting
5:30 p.m. • 300 S. Orange Ave., #1300

13 Product Liability Seminar
9:00 a.m. • Bar Center

Workers' Compensation Committee
11:45 a.m. • Smokey Bones

17 Professionalism Committee
8:00 a.m. • Bar Center

Social Committee
6:00 p.m. • TBA

18 Insurance Law Committee
12:00 p.m. • Bar Center

19 YLS Luncheon
11:45 a.m. • Citrus Club

Appellate Practice Committee
12:00 p.m. • Bar Center

20 Family Law Committee
12:00 p.m. • 425 N. Orange Ave., #2310

25 Labor & Employment Law Committee
12:00 p.m. • Bar Center

Business Law Committee
1:00 p.m. • Location varies.
Contact Chairperson

26 OCBA Luncheon
Chief Justice Peggy A. Quince
Florida Supreme Court
11:30 a.m. • The Ballroom at Church St.

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

March

4 Criminal Law Committee
12:00 p.m. • Courthouse
23rd Flr. Judges' Conference Rm.

**In-House Counsel Committee
Seminar**

*The Exploding Realm of Employ-
ment Legislation: What Every In-
House Counsel Needs to Know*
5:30 p.m. • Bar Center

10 Executive Council Meeting
4:30 p.m. • Bar Center

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

Judicial Relations Committee
12:15 p.m. • Courthouse
21st Flr. Conference Rm.

12 Social Security Committee
12:00 p.m. • Bar Center

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

YLS Executive Board Meeting
5:30 p.m. • 300 S. Orange Ave., #1300

13 Workers' Compensation Committee
11:45 a.m. • Smokey Bones

17 Professionalism Committee
8:00 a.m. • Bar Center

Social Committee
6:00 p.m. • TBA

18 Insurance Law Committee
12:00 p.m. • Bar Center

19 YLS Luncheon
11:45 a.m. • Citrus Club

Appellate Practice Committee
12:00 p.m. • Bar Center

20 Family Law Committee
12:00 p.m. • 425 N. Orange Ave., #2310

25 Business Law Committee
1:00 p.m. • Location varies.
Contact Chairperson

26 OCBA Luncheon
Professionalism Award Winners
11:30 a.m. • The Ballroom at Church St.

**27 Understanding Electronic
Evidence Seminar**
8:00 a.m. • Bar Center

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

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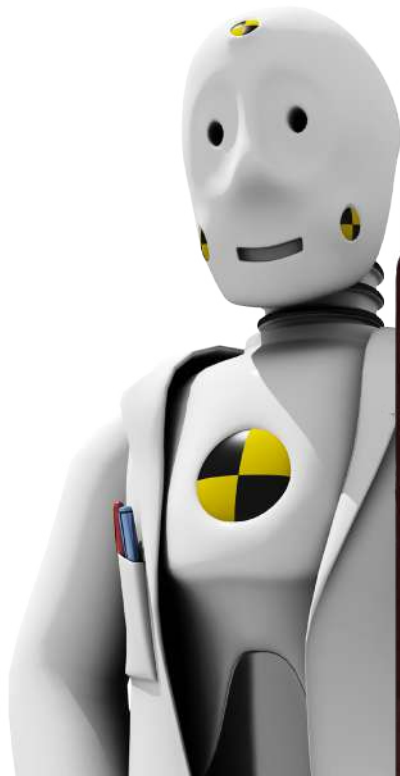
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