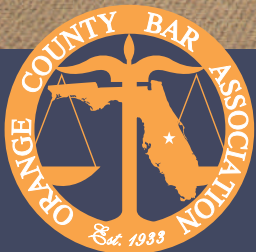


the Briefs

A Publication of the Orange County Bar Association



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Front: Thomas A. Zehnder, Frank M. Bedell, Diego “Woody” Rodriguez,
Tad A. Yates, Kristyne E. Kennedy

Back: Elizabeth F. McCausland, Meenakshi A. Hirani, Kimberly D. Webb,
Paul J. Scheck, Wiley S. Boston, Ryan E. Davis, William C. Vose, Vivian P. Cocotas,
Esther M. Whitehead, Nicholas A. Shannin, Gary S. Salzman.

Not shown: William D. Umansky

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

**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".

Savoie v. Southeast Bank, N.A.
529 So. 2d 1275 (Fla. 5th DCA 1988)
Reversed and remanded mortgage
foreclosure for exercise of option
to purchase.

Petry v. Petry,
768 So. 2d 8 (Fla. 5th DCA 2000)
Reversed conversion of rehabilitative
alimony to permanent alimony.

**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.

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

Winn v. Winn,
669 So. 2d 1155 (Fla. 5th DCA 1996)
Reversed "woefully inadequate"
permanent alimony.

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

Rykiel v. Rykiel,
795 So. 2d 90 (Fla. 5th DCA 2000)
Reversed dissolution judgment due to
excessive awards against husband.

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

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As I write my first president's message I am reminded that it was not so long ago that I left the comforts of Tallahassee, where I had enjoyed the thrill and excitement of the Florida Senate and FSU home football games, to move to Central Florida and be closer to my wife's family in Winter Park. I still remember attending my first OCBA luncheon and the intimidating feeling of walking into a room full of strangers who shared a palatable camaraderie, but with whom I had seemingly little in common other than the practice of law. After all, I did not know a single person in the room and my firm at the time, although supportive of the bar, did not have any members who were actively involved in bar work.

I had been practicing less than four years, had been in town less than five months, and did not know a soul. But the backbone of any strong civic organization is a good program for its newest members, and the OCBA's Young Lawyers Section (YLS) is second to none. Thanks to the introductions and encouragement of members like **Yvette Rodriguez Brown** and **Jamie Moses**, I was soon plugged in to my first committee assignment. That first committee meeting feels like it was ages ago, but it's only been ten years.

The YLS hosted an annual Dinner with the Judiciary. My "job" was to meet the judges and direct them to their respective tables. A seemingly easy task, except I had no knowledge of who they were or what their temperament would be like. Luckily, our judiciary is always encouraging our young lawyers, and the evening was not only a great organizational success, but I discovered that getting involved in bar work was actually fun and rewarding. I made some new friends in that committee, including OCBA leaders like **Vivian Cocotas**, **Keersten Martinez**, **Tom Wert**, **Jessica Hew** and **Anne Marie Kim**, and I soon joined another committee that helped organize a day of fun for the kids that reside at the Great Oaks Village. After that event I was hooked. One opportunity led to another and I took them, never knowing exactly where they would lead me but having fun along the way.

This story is not much different than that of my parents. They came to the United States, leaving the comforts of all that they knew and had in Cuba, never expecting to be in the States for more than a few years. Their expectations were to return to their native country but, as fate would have it, that would never happen. In fact my father never returned, but along the way he met my mother, and they always encouraged me to apply myself in every opportunity as if it were my last.

I am not used to writing about myself in such an open manner, but I do so to remind all lawyers – young or old – that the bar has plenty more to offer than free lunches, a great facility for mediations, and a sharp monthly publication. We offer opportunities for every person to get involved, get to know their colleagues, and make lifelong friends. We offer opportunities to serve the community. We offer opportunities to become better practitioners. This year, as an Executive Board, we will be seeking your help on a number of opportunities in which you can become involved.



Diego "Woody" Rodriguez

Everyone is familiar with the splashy and colorful *The Briefs* publication, which this year will be managed by our co-editors **Kimberly D. Healy** and **LaShawnda K. Jackson**.

But we need volunteers who will help with our electronic communications, namely our website and our email blasts. By year's end we hope to introduce members to a more interactive way to check on upcoming events and provide the public better access to the services the OCBA offers. In addition to the paid techies and designers we need to hire to run the website, we are looking for volunteers to help us a few hours a month to contribute content for these electronic mediums.

We also have almost 20 substantive committees, some of which have a solid foundation and others that need some organizational assistance. Each committee offers its participants an opportunity to publish articles in *The Briefs*, organize a CLE, or even organize a social event that will foster collegiality in that practice area.

In late October, we will be pairing up with the members of our judiciary and organizing our first ever Bench-Bar Conference in which members of the judiciary will be setting aside their busy schedules to talk to our OCBA members about the best practices and procedures in their courtrooms. It's a program that will help make us all better advocates for our clients. These seminars, hosted over three days at the OCBA's Bar Center, will be organized by the talented duo of **Meena Hirani** and **Penelope Perez-Kelly**, both former presidents of other local voluntary bar associations. The Bench-Bar Conference will span a number of different disciplines, including civil practice, criminal practice, and family law. The conference will also provide another unique opportunity for members to get involved. Whether you contribute by helping outline the topics that should be covered in a particular session or by serving as a host for the afternoon receptions, you will come away from this a better lawyer for having been involved.

Finally, we are looking for volunteers to help us establish a list of the best service providers for our members. With more than 3,000 members, we will use the strength of our numbers to negotiate discounts and establish partnerships and sponsorships that are meaningful to you. Whether you are a sole practitioner or a growing firm, we hope you will find value in the relationships we enter into on the organization's behalf in the coming year. Over the years, we have had a great partnership with **Charlie Kiester** and **Westlaw**, which provides a discount to new subscribers. But we need your input in helping us

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Professionalism Committee

Remarks upon Receiving the 2009 William B. Trickel, Jr. Professionalism Award

Mary Anne De Petrillo

I want to express my great gratitude and thanks to the Professionalism Committee for this award for which I am most humbled. I accept it on behalf of all public interest lawyers who strive to practice law in the most professional manner.

I cannot imagine a higher honor as a lawyer than to receive the professionalism award from this bar association where I have practiced law for over 25 years in this my 31st year of practice.

Being asked to speak at the bar luncheon and knowing those remarks would be published in *The Briefs* was the only downside of the award to me. While a million ways to approach the topic came to mind, trying to narrow them down to something which others might enjoy reading is an entirely different thing.

I became an attorney because I believed and still believe that there is no higher calling. It is an honor to be a member of the profession that is instrumental to assuring a civilized society. We help citizens settle their differences without violence or fear of violence.

When I was young I was very influenced by the lives of heroic people I read about. It led me to believe that one person alone could make an extraordinary impact on the world around them. I also grew up in the sixties at a time of both great turmoil but also great promise. My parents and teachers told me stories about how lawyers went to court to stop racial and sexual discrimination and to protect people's right to vote. It was also a time of turbulence and social upheaval, riots and assassinations, the war in Vietnam and the draft so many of my male friends had to worry about.

It was therefore natural that I would want to be a lawyer. I saw lawyers as defenders of justice and fairness. They were essential to protect our form of government and Bill of Rights. They insured that differences among citizens would be resolved in a non-violent way.

When I was a child I did not realize one did not become and remain a hero without others. I thought I would live a very solitary life. I did not appreciate until later the essential contribution made by others.



In my case, the efforts and supports of so many people throughout my life made me not only a better lawyer and professional, but also the person I am.

I am the sum of what I have learned from many others throughout my life. I continue to learn and be inspired by them.

So it is necessary I give credit to those who have made me a better person and attorney. First to get credit should be my wonderful parents who through their example showed me the importance of volunteering and service to country. Next in line for credit would be the nuns and Catholic school teachers who taught me, among other things, the importance of social justice, the importance of scholarship and learning, and that a woman could be and do anything.

Spending seven years in a Jesuit college and law school taught me the value of regular rigorous self examination of every decision I make. That made me unable to escape responsibility for the choices I make no matter how small or seemingly inconsequential. This is probably the greatest lesson I have ever learned.

I am also very thankful to have had as a mentor in the early years of my legal career, the late Christopher Ford. He was a brilliant lawyer and wonderful man who passed away way too young. He was the best the bar has to offer with the highest ethical standards. He was a great *pro bono* attorney. He used to joke he represented the rich so he could represent the poor. He insisted every client be treated with the highest respect no matter their circumstances.

When I became the executive director of Legal Aid in 1985, I was entrusted with the care and growth of our local bar's greatest treasure, the bar's own public interest law firm. Over the years our law firm has grown from a firm of four attorneys to a firm of 18 lawyers. During that time we have strived to provide the highest quality of legal work to as many low income families and children as possible. Our staff has had the great privilege of working with the very best local lawyers who donate their time as *pro bono* attor-

neys. Our *pro bono* effort adds the equivalent of an additional 10 plus attorneys to our staff.

There are a few people who deserve some extra recognition. I would like to thank **Mike Walsh, Joe Durocher** and **Russ Troutman** for their ongoing support and mentorship.

I would like to thank also **Judge Sally Kest** and **Chuck Stepter** who have devoted so much time to Legal Aid.

I would like to thank young *pro bono* lawyers who offer so much for the future. In particular, I would like to thank the attorneys and staff of Legal Aid who have worked hard to ensure we have one of the highest quality and most professional law firms in Orange County. I want to thank especially those who have worked alongside me for over twenty years: **Cathy Tucker, Angel Bello-Billini, Susan Khoury, Hillary Lyals, Joann Tucker-Hall, Mandy Silvestris, and Milly Gonzalez.**

I must thank, too, the wonderful man who has been my other half for most of my adult life, John De Petrillo. He has kept me grounded and happy. I also thank my son David who makes me proud and has rarely given me a moment of grief, along with his wonderful wife Kelly and their daughter Skyler. Many thanks as well to my five siblings, including my brother Bob who is here today. No one can point out your need for a lot more improvement better than your siblings!

Professionalism to me is a commitment to support the rule of law. It requires a willingness to work toward resolving disputes between parties and advocating for our clients' legal interests. It requires scholarship and continued learning. It requires one to constantly and rigorously examine the choices we make both before and after the fact so we can not only take responsibility for our actions but also make even better choices going forward. It requires our voluntary efforts to use our legal skills to ensure everyone, despite their poverty and circumstance, has access to the court system to resolve their disputes and secure their rights. It requires us to treat everyone with respect whoever they may be. It also

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President's Message

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identify and negotiate other similar partnerships and sponsorships in the other aspects of your practice. Whether you help us to find a quality printer, a better cell phone plan, or a discount to our OCBA members for a particular process server, we could use your help and talents to make the bar a better organization for all our members.

But all of these opportunities begin with you getting involved. If any of these interest you, just send me an email at woodyocba@aol.com and tell us how you want to enhance your membership experience.

Just remember this: had I stayed at my desk and never gotten involved, the organization would have evolved regardless. Some other talented young lawyer would have led. Someone else would have served as a host at the judicial dinner. Someone else would be writing this column. We have plenty of great leaders and the success of our organization is almost guaranteed because of the depth of talent from which we can draw. In fact, this past year our president, **Tad Yates**, not only overcame the challenges of an economic downturn, but he somehow kept us significantly under budget. So, had I not been involved the only one who would have lost out would have been me, and my experiences as a lawyer would not be as rich and rewarding as they have been these past ten years.

Thank you for the opportunity to serve and our board looks forward to making this an even better bar.

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

Professionalism Committee

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requires one to set an example for others and for our profession. Professionalism is a learned behavior. It requires us to be heroes.

All of the people mentioned and the members of this great bar association contribute to who I am and who I will become and for that I am most grateful.

Thank you.

Mary Anne De Petrillo is the Executive Director of the Legal Aid Society of the Orange County Bar Association, Inc. She has been an OCBA member since 1984.

Attention OCBA Members - No June Luncheon!

Every two years, the Orlando community serves as host to our other colleagues from around the state at The Florida Bar's Annual Meeting. This year the meeting will be held at the Orlando World Center Marriot from June 24, 2009 to June 27, 2009. In years past, the OCBA has forged ahead with a June luncheon that traditionally competes with a previously scheduled Florida Bar luncheon, creating conflicts for our OCBA members and poor attendance for our featured speakers.

This year we are canceling our June luncheon and encouraging all our members to attend one of the many Florida Bar lunches scheduled during that week at the Orlando World Center Marriot. The schedule includes lunches by the Family, Business, Elder, International and Equal Opportunities Sections of The Florida Bar, as well as two signature lunches - one honoring Florida's Judiciary and the other honoring those Florida Bar members who have been practicing for 50 years. Ironically, the second lunch is sponsored by the Young Lawyers Division so old and new alike come together in a very unique luncheon. I encourage you to visit The Florida Bar's website and RSVP for some of these events which do not require conference registration, and then I invite you to join us in July as we start our 2009-2010 speaker's series.

—Woody Rodriguez

OCBA Luncheon Schedule

July 23, 2009

August 20, 2009

September 24, 2009

October 22, 2009

November 19, 2009

January 21, 2010

February 18, 2010

March 25, 2010

April 22, 2010

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Introduction

Corporate counsel, insurance agents, risk managers and even private litigation counsel are largely ignoring intellectual property insurance and the critical role it can play in protecting the company from copyright, trademark, and patent infringement claims and loss of IP value. The overwhelming majority of insurance agents who sell coverage do not understand IP exposure or the coverages that exist for patents, trademarks, trade dress, and copyrighted material. IP lawyers who entered the practice before the late 1980s may well be unfamiliar with IP insurance. This article discusses briefly the history of IP coverage, critical coverage issues, malpractice concerns for lawyers, and current conditions in the market for prospective IP insurance purchasers.

When will IP insurance become the norm?

The interplay of intellectual property claims and insurance has been historically incongruous, painful, and uneven. Lloyd's syndicates wrote IP coverage and were clobbered with patent infringement claims in the 1980s triggering tremendous aversion for patent risks generally.

Fortunately there is enough demand for IP coverage to rekindle interest and willingness over time to revisit better approaches to underwriting the risk.

The well-known and central characters in the U.S. commercial insurance industry have yet to embrace, underwrite, and train agents to offer IP coverage for foreseeable exposure as a well-appreciated everyday business risk. The

commercial general liability policy, ("CGL") as revealed below, is a reluctant, limited, and problematic source of IP coverage. Recently, broader forms of IP coverage have surfaced in "cyberliability" or Internet commerce policies, or have been historically offered in a limited way to technology accounts, however loosely defined. For many businesses, there has been no effort by agents and brokers to assess in broad terms the need

for IP coverage and no training to teach them how to address that exposure. There are hidden agent and attorney malpractice claims in some IP infringement cases where coverage was ignored.

IP Coverage in Standard CGL Forms

Unless the client is a large corporation with diverse operations and has a sophisticated broker working on its behalf, or is engaged in some form of advertising, software development, media or publications-related business, many small to midcap businesses are unlikely to have any form of specialty IP coverage. For many small to midcap size businesses, the CGL is their primary liability policy and source of IP coverage. Before 2001 and under the "Personal and Advertising Injury" section of coverage Part B in the CGL, courts found coverage for unfair competition, copyright, trademark, and trade dress infringement and dilution claims, and in rare cases, patent infringement. In 1986, ISO revised the CGL form to replace "unfair competition" with the phrase "misappropriation of advertising ideas and style of doing business" while eliminating the trademark, service mark, and trade name exclusion, thus implying that claims related to trademarks would be included under the 1986 revision. This language gave rise to frequently successful arguments that some trademark and trade dress claims were covered offenses under the CGL. *Adolpho House v. Travelers*, 2001 U.S. Dist 14489 (S. D. Fla. 2001)(discussing evolution of CGL form). For many years prior to 2002, "advertising injury" was defined to include:

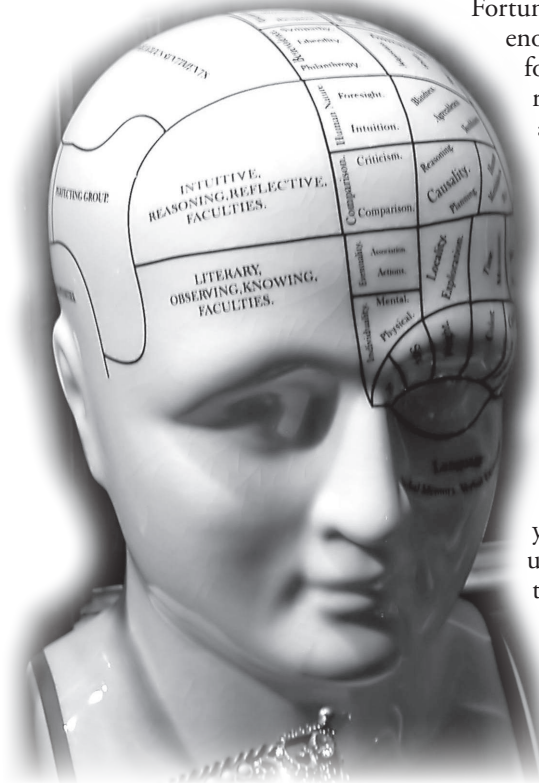
- c. misappropriation of advertising ideas or style of doing business
- d. infringement of copyright, title, or slogan.

Parts "c" and "d" in the definition of advertising injury in the ISO general liability form have been the source of much litigation. Many courts have held that subsection "c" or "d" are broad enough to encompass copyright, trademark, or trade dress violations. Curiously, on a rating basis, Coverage Part B accounts for only 2% of the charged premium – it is essentially a free coverage. This fact underlines some of the problems in the current approach to IP risk.

The duty to defend patent infringement was debated and insureds had some limited success shoe-horning patent infringement claims into the old CGL policy language. However, the law eventually gravitated toward the carrier and absent those situations where the patent infringement claim was combined with trade dress claims or other covered offenses, courts held patent infringement claims would not independently trigger coverage under the CGL definition of advertising injury. See e.g., *Transcontinental Ins. Co. v Jim Black & Assoc.*, 888 So.2d 671, 677 (Fla. 2d DCA 2004); *Gencor Industries, Inc. v Wausau Underwriters Ins. Co.*, 857 F. Supp. 1560 (M.D. Fla. 1994).

ISO Narrows the Copyright Coverage

The most recent CGL policy forms have added an "IP exclusion." ISO changed the definition of "advertising injury" to eliminate subparts "c" and "d" above. The policy now provides coverage for infringement of "copyright, trade dress or slogan in your advertisement," implying that trademark claims are not



covered but trade dress claims directly arising from the insured's advertising may be. *America's Recommended Mailers, Inc. v. Maryland Casualty Co.*, 2008 U.S. Dist. LEXIS 72681 (E.D. Tex. 2008) (trade dress but not trademark claim fell within ambit of coverage).

The CGL since 1998 provides coverage for "infringement upon another's copyright, trade dress or slogan in your advertisement." Unlike trademark and patent infringement, copyright infringement was an expressly enumerated offense starting with the older ISO forms from the mid-'80s and continues to do so. Yet here too there are problems. Carriers argue under the post-1998 forms that the copyright infringement is only covered if the insured's advertising was itself the source of infringement. The material itself (e.g., software, house plans, CDs), if found to infringe a copyright, is arguably not covered under later forms. By adding the prepositional phrase "in your advertisement" in the definition section of advertising injury, the carriers were then able to argue more compellingly that the copyright infringement had to be "in" the advertisement. Coverage, underwriters say, was not intended for infringing products but for advertising material with infringing content. This is a subtle but huge distinction to be sure.

Current CGL forms limit IP coverage to those offenses, including "the use of another's advertising idea in your advertisement" or "infringing upon another's copyright, trade dress or slogan in your advertisement." Moreover, in the current CGL, there is an expressly written IP exclusion excluding coverage for any other damages due to intellectual property litigation except for "infringement of copyright, trade dress or slogan in your advertisement." See Coverage Part B, Exclusion "I."

The underwriting intent to avoid IP exposure unrelated to advertising injury is made apparent from the exclusions in the latest CGL forms. There is an exclusion for **Insureds in Media and Internet Type Businesses** with a saving provision affording them some coverage for false arrest, malicious prosecution, and wrongful eviction or entry into premises. Significantly, there is no trade dress, copyright, libel, or slander protection for these kinds of companies. There are liability exclusions in coverage part B for **Electronic Chatrooms or Bulletin Boards** and **Unauthorized Use of Another's Name or Product**. There is an exclusion for **Breach of Contract**, except liability arising from an implied agreement to use "another's advertising idea in your advertisement." *Sigma Tech Sales, Inc. v. Travelers Indemnity Company*, 2009 U.S. Dist. LEXIS 13170 (S. D. Fla. Feb. 18, 2009) (mere mention of advertising in the complaint did not trigger duty to defend; breach of contract exclusion applied). The IP exclusion for "**Infringement of copyright, patent, trademark or trade secret**" has a "give back" provision noted above that provides that the exclusion "does not apply to infringement in your advertisement of copyright, trade dress or slogan," which is arguably just another way of reaffirming the intent of the insuring agreement in the CGL.

Why Not Tender the Complaint?

Perhaps the most common problem with litigants (and surprisingly insurance agents and attorneys) is a failure to tender an infringement claim to the carrier. Some litigators arguably commit malpractice by failing to investigate coverage and for failing to tender the lawsuit in a timely fashion, if at all. The carrier does not have an obligation to pay defense costs until the lawsuit is tendered. Tender means only placing the carrier on notice of the claim. The carrier has no obligation to pay pre-

tender legal expenses. *Elan Pharm. Research Corp. v. Employers Insurance*, 144 F.3d 1372, 1382 (11th Cir. 1998) (applying Georgia law court held carrier did not owe \$519,000 in pretender legal expense). Because tender is so simple, the rule protecting the carrier from pre-tender legal expense has the salutary affect of encouraging insureds to give early notice of claims. *Id.*

Recognizing these limitations in the CGL and sensing a demand for true IP coverage, alternative markets have developed to offer more than just "advertising" based IP coverage and to address patent infringement and invalidity problems.

Patent Related Insurance Coverage

The market for patent coverage is cyclical. Stand alone patent infringement policies offered in the past by IPISC, SAMIAN Underwriters, Swiss Re, or other markets usually come in the following types:

Offensive or abatement coverage - pays approved litigation expenses incurred in enforcing IP rights against infringers. The insurer pays the plaintiff as insured to sue others.

Defensive infringement coverage - like more traditional coverage, this pays legal expenses associated with defending against a claim of patent (or trademark or copyright infringement) and for damages or indemnity up to stated limit.

Asset Protection or Collateral Protection - insures IP value when offered as collateral or security for a loan or a mechanism for insuring the value of IP assets purchased. This may include coverage that insures certain representations of IP validity in loan documents or M&A documents.

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Florida Rule of Appellate Procedure 9.130(a)(3)(C)(iii) allows for the interlocutory appeal of orders that determine the right to immediate monetary relief or child custody in family law matters. Obviously, whether an order meets these criteria depends on whether the order (1) determines the right to immediate monetary relief or (2) determines the right to child custody and (3) involves a family law matter. Sounds simple, but actually it is not.



The order you wish to appeal must actually make such determinations. Preliminary orders are not reviewable under this Rule. For example, an order denying a party's motion to dismiss a petition for modification of custody is not appealable under this Rule. Such an order merely allows the parties to proceed; it does not actually "determine the right to child custody." *O'Connor v. O'Connor*, 447 So. 2d 1034 (Fla. 4th DCA 1984). See also *Brulte v. Brulte*, 967 So. 2d 1087 (Fla. 1st DCA 2007); *Owen*

v. Owen, 427 So. 2d 264 (Fla. 5th DCA 1983). Relatedly, an order denying a mother's objection to a hearing to modify visitation was not an appealable non-final order under the Rule. The order did not determine any issue other than the party's right to proceed. *Grasso v. Mulholland*, 835 So. 2d 361 (Fla. 5th DCA 2003).

Conversely, if such preliminary order has the effect of awarding immediate monetary relief or child custody, it will be appealable under this Rule. For example, in *Chase v. Chase*, 519 So. 2d 637 (Fla. 2d DCA 1987), the trial court struck the husband's pleadings and determined the wife's need for and the husband's ability to pay were "taken to be established." In addition to finding the order determined the former wife's right to immediate monetary relief, the court also found the order involved the right to child custody. Interestingly, however, the order under review never actually awarded custody of the child to the mother. The court found, however, it "impliedly determined" the former wife should have custody of the minor child and, thus, was an appealable non-final order. *Id.* at 638.

Discovery orders arising out of child support proceedings are not

reviewable under Rule 9.130. *Blades v. State, Dept. of Revenue ex rel Stewart*, 943 So. 2d 300 (Fla. 3d DCA 2006). Likewise, orders requiring parties to submit to psychological evaluations are not appealable under this Rule merely because the evaluation may be related to a child custody determination. *Abusaid v. Polefrone*, 741 So. 2d 1187 (Fla. 2d DCA 1999). Furthermore, parenting orders such as those requiring parties to keep diaries are not the type of orders contemplated by the Rule, even though the orders may relate to a past or future custody determination. *Grasso, id.*

Interestingly, the appellate courts have demonstrated a willingness to review orders appealed in a piecemeal fashion. Those parts of the order under review which fall in the categories of determining immediate monetary relief or determining child custody will be reviewed and ruled upon. Those that do not will not be considered at that time. For example, in *Grasso*, the Fifth District reviewed and affirmed three visitation orders, but refused to consider a fourth order merely denying the former wife's objection to a hearing on the former husband's motion to alter, modify or extend visitation.

Immediate Monetary Relief

In a family law matter, the monetary issues obviously involve alimony and child support. Orders awarding such monetary remuneration are appealable as non-final orders. *Woodburn v. Woodburn*, 416 So. 2d 875 (Fla. 5th DCA 1982). This includes orders increasing previous awards. See e.g., *Hooper v. Hooper*, 681 So. 2d 833 (Fla. 1st DCA 1996). An order denying a petition for modification of child support is an appealable non-final order although it does nothing more than maintain the status quo. *Chereskin v. Chereskin*, 790 So. 2d 496 (Fla. 5th DCA 2001). Nevertheless, an order vacating a previous alimony or child support award is *not* appealable under this Rule unless a new amount is awarded. Absent a new amount being awarded, orders vacating previous awards can be addressed on final appeal. *West v. West*, 492 So. 2d 830 (Fla. 5th DCA 1986). See also *Shapiro v. Shapiro*, 432 So. 2d 739 (Fla. 4th DCA 1983).

What about attorney fee awards? What about cost awards? The Committee Notes to the Rule specifically state the Rule was "intended to apply to such matters as temporary child custody or support, alimony, suit money, or attorney's fees." The courts of this state have accepted jurisdiction pursuant to Rule 9.130(a)(3)(C)(iii) to review orders awarding temporary attorney's fees and costs. *Kasm v. Lynnel*, 975 So. 2d 560 (Fla. 2d DCA 2008); *Seward v. Seward*, 676 So. 2d 49 (Fla. 5th DCA 1996).

Child Custody

Temporary custody orders are exactly what are envisioned with this Rule. Examples of such orders are:

- (1) a temporary custody order;
- (2) temporary changes in custody pending modification;
- (3) an order changing primary residence;
- (4) an order denying a motion to dissolve a temporary change in custody order;

(5) orders determining visitation rights.

On the other hand, an order denying a father's motion to prevent relocation of the mother and child, but retaining jurisdiction to resolve the visitation issue, was neither a final appealable order (as the judicial labor was not concluded) nor an appealable non-final order because it did not determine child custody. *Dees v. Dees*, 905 So. 2d 1023 (Fla. 1st DCA 2005). The father's only avenue for immediate review would be through a petition for certiorari under Rule 9.100.

Family Law Matter

The courts of this state have limited their review under Rule 9.130 finding it does not allow for immediate review of non-final orders in termination and dependency proceedings because such matters are not family law matters. *In the Interest of A.W.P., Jr.*, 2009 WL 724040 Fla. 2d DCA Mar. 29, 2009); *Guardian Ad Litem Program v. Department of Children and Families*, 972 So. 2d 871 (Fla. 4th DCA 2007). Yet, in a matter which started as a termination proceeding against the mother but transformed (at the mother's request) into an adoption proceeding, the Fifth District determined it had jurisdiction of a non-final order as an adoption proceeding was a "family law matter." *P.K. v. Department of Children and Families*, 927 So. 2d 131 (Fla. 5th DCA 2006).

Issues on the Horizon

What is going to be interesting to see in the future is how the appellate courts treat orders related to parenting plans. Given the scope and breadth of such plans, orders arising out of such plans are going to contain many issues that would not be appealable as non-final orders. Although the appellate courts have demonstrated a propensity to review only those parts of an order which

involve immediate monetary relief and child custody, the possible realm of issues involved in parenting plans has the potential to create orders with multiple issues therein, but only a few that may reviewed pursuant to Rule 9.130. Furthermore, now that the concept of custody has been replaced with contact rights, it is yet to be determined how the appellate courts will analyze jurisdiction under the Rule. Will the courts hold they are constrained by the precise language of the Rule, or conclude the issues are the same but they just have a different label?


Conclusion

Rule 9.130 allows for the interlocutory review of orders in family law matters which determine immediate monetary relief and/or child custody. Because such orders are non-final, motions for rehearing are not authorized and do not toll the time for appeal. The orders being appealed must make specific awards. Furthermore, orders related to the issue of immediate monetary relief or child custody, e.g., discovery orders, are not appealable as non-final orders merely because they somehow relate to a monetary or child custody issue. If the order does not actually determine such issues, it is not appealable as a non-final order. Although a party can seek the discretionary review of the appellate court, obtaining such relief can be difficult.



This article is being submitted on behalf of the Orange County Bar Association's Appellate Practice Committee. **Jamie Billotte Moses** was the founding Chair of the Committee and served as Chair from 2007-2009. Ms. Moses is a shareholder at Fisher, Rushmer, Werrenrath, Dickson, Talley & Dunlap, P.A. and practices primarily in civil appeals and professional liability. She has been a member of the OCBA since 1995.

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Age Does Matter When it Comes to Tire Safety

June is Tire Safety Month – Have You Checked Your Tires Today?

Henry N. Didier, Jr.

As the old adage goes, “there’s a lot riding on your tires.” Many of the safety advances made in recent years, such as Antilock Brakes and Electronic Stability Control are dependent upon good interaction between the vehicle and the road surface. When the tire fails, these safety advances are lost or greatly diminished. The tires on your car or truck are the only contact between your vehicle and the road, and when it comes to vehicle safety, nothing is more important.

Tire Aging

The danger of “aged” tires has been an open secret within the tire industry for years and is only just beginning to come into public view. Aged tires are often unsuspectingly mounted on a vehicle after having served as a spare, being stored in garages or warehouses, or simply having been used on a vehicle that is infrequently driven. In many instances these tires show no visible sign of deterioration and, absent any visible indicators such as dry rot, tires with adequate tread depth are likely to be put into service without consideration of age.

The physical and chemical properties of the rubber and other components in tires change over time, regardless of use. Studies show that tire performance can start to degrade after six years, leading to a greater risk of separation – even if the tire hasn’t been used at all. According to the Massachusetts auto-safety research firm Safety Research Systems, Inc. (SRS), as of June 2008, at least 159 accidents have been linked to tread separation of tires more than six years old, which resulted in 128 fatalities and 168 injuries.

The age of a tire is not readily apparent to the uninformed eye. Many consumers will see a tire and think that it looks brand new, and mistakenly associate the new appearance with recent manufacture. The true manufacture date for a tire can only be determined by decoding the Department of Transportation (DOT) number stamped into the tire’s sidewall. The last four

digits of the DOT code represent the week and year the tire was manufactured. Most drivers and tire consumers don’t know how to do this and, further, don’t appreciate why the tire age could be significant in the first place.

Tire Tread Separation

The tires on your car are a product designed to wear out before they fail because of the serious dangers posed by tire failure. The treads may separate because of a defect that occurred in either the manufacturing or the design process for that tire. For example, the fusing which occurs during vulcanization may not have fused completely or properly. When a radial tire suddenly loses its tread, the driver often loses control of the vehicle. As seen in the Firestone Tires that were widely recalled in 2000, tread separation occurred due to adhesion problems between the steel and rubber in steel-belted radial tires.

Safety experts and NHTSA have taken the position that tires over six years old can be “catastrophic.” This is true even if the tire has not been in service for all of those years. Litigation is ongoing against tire manufacturers and retailers for manufacturing and design defects as well as for tread separations because of tire aging. Keep your family and other passengers safe by routinely checking the tread depth and air pressure of your tire and, until changes are made within the industry, learn

to decode the DOT code on your tires to determine accurate age, and replace tires before they are six years old.



Henry N. Didier, Jr., Managing Partner, Didier Law Firm, P.A., has been an OCBA member since 1996. The Didier Law Firm, P.A. specializes in product safety related claims and represents consumers throughout the State of Florida and nationally in complex product liability cases.



Marital Appreciation of Non-Marital Stock:

Fish or Foul Nicole Park, Stephanie Vanos, Rebecca Palmer & Terry Young

Understanding the Classification of Non-Marital Stock in a Closely-Held Family Corporation (Part II)

Introduction

This is the second part of a two-part article discussing the circumstances when nonmarital stock may be considered a marital asset. The first part of the article discussed and analyzed the necessary steps for practitioners to consider when representing either a “non-shareholder spouse” or a “shareholder spouse” of nonmarital stock in a closely-held family corporation in determining whether there has been appreciation of the stock that is subject to equitable distribution. As discussed, this type of appreciation of nonmarital stock occurs in one of two ways: i) expending marital labor or effort on part of a non-shareholder spouse; or ii) providing some investment of marital funds (e.g., a contribution of capital). This portion of the article discusses whether there is a marital component to “phantom income” from nonmarital stock in a closely-held family subchapter S-corporation.

Investing Marital Funds: Is “phantom income” marital or nonmarital?

In most circumstances, determining whether marital funds were invested in a closely-held family corporation, for purposes of determining whether any portion of the corporation’s appreciation is marital, is a relatively straightforward task. However, Florida courts have not yet considered whether the appreciation of a closely-held family S corporation¹ is marital based on the theory that the corporate income that passes through to the shareholder spouse for income tax purposes, but remains undistributed and is reinvested in the corporation, constitutes marital income. In other words, do retained earnings represent a capital investment by the shareholding spouse, particularly when marital funds pay the taxes associated with the earnings and/or any corporate earnings that are distributed are treated as marital income?

Pursuant to the Subchapter S of the Internal Revenue Code, a subchapter S corporation’s income, deductions, losses, and credits pass through to the shareholders of the corporation, who are then individually taxed on their federal income tax returns in proportion to their pro rata share of the corporation.² Although a subchapter S corporation’s income is taxed to the shareholders, the income is not necessarily distributed to the shareholders. Section 607.06401(3), *Florida Statutes* (2008), prohibits S corporations from making distributions when:

- (a) The corporation would not be able to pay its debts as they become due in the usual course of business; or
- (b) The corporation’s total assets would be less than the sum of its total liabilities plus (unless the articles of incorporation permit otherwise) the amount that would be needed, if the corporation were to be dissolved at the time of the distribution, to satisfy the preferential rights upon dissolution of shareholders whose preferential rights are superior to those receiving the distribution.

The ability of an S corporation to make distributions is also limited by its articles of incorporation.³ A corporation may also choose to forgo distributions to shareholders for other corporate purposes such as reinvesting the earnings into the corporation.

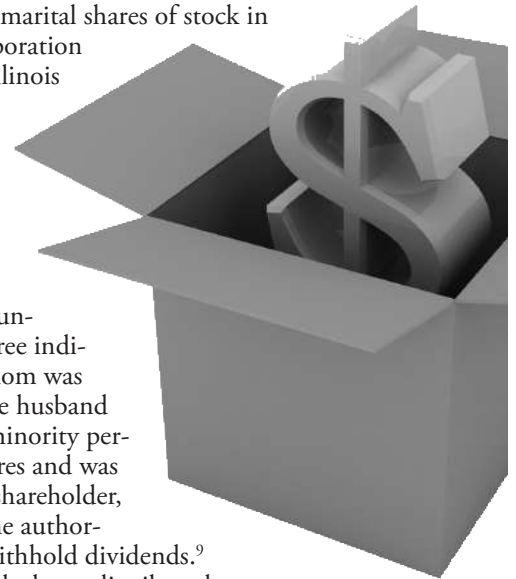
Retained Earnings: Corporate or Shareholder Asset? Although Florida cases have not addressed the issue of whether retained earnings of an S corporation constitute marital property, many other jurisdictions have addressed the issue. For example, courts in Minnesota and Missouri have found that “[r]etained earnings and profits of a corporation are a corporate asset and remain the corporation’s property until severed from other corporate assets and distributed as dividends.”⁴ Courts in North Carolina and Texas have held that “[A]s a general matter, retained earnings of a corporation are not marital property until distributed to the shareholders.”⁵

In determining whether retained earnings are marital property in cases where one spouse is a shareholder in a closely-held family S corporation, other jurisdictions have considered the extent the shareholder spouse controls the corporation and whether the shareholder spouse has the authority to decide whether corporate earnings are distributed or retained.⁶ In a case where the husband’s nonmarital shares of stock in a closely-held corporation were at issue, an Illinois

court concluded that the retained earnings of the corporation were nonmarital.⁷ The court noted that the corporation’s stock was held in unequal shares by three individuals, one of whom was the husband.⁸ The husband possessed only a minority percentage of the shares and was not a controlling shareholder, nor did he have the authority to declare or withhold dividends.⁹ Moreover, although the undistributed corporate income was included on the marital income tax return, the marital estate did not pay the taxes. The husband also received a salary and bonuses for managing the company, and these payments were deemed to be reasonable and fair compensation for the husband’s services to the company.¹⁰ The court noted that only when the shareholder spouse controls the corporate distribution have courts in other jurisdictions found the retained earnings to be marital property.¹¹

A Missouri court has also considered this same issue. In *Hoffmann*, the husband owned a minority interest in a nonmarital closely-held corporation, and the retained earnings of the corporation were at issue.¹² The wife contended that if the board of directors had voted to distribute the corporate profits to the stockholders and officers rather than retain them within the corporation, the income which would have been distributed to the husband would have been marital property.¹³ The appellate court affirmed the trial court’s holding that the retained earnings were nonmarital based on the fact that the husband was a minority shareholder, was one of only four board members, and could not

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Labor & Employment Committee

Employees Raising Harassment Allegations During Investigation May Be Able To Maintain A Retaliation Claim Under Title VII



Title VII of the Civil Rights Act of 1964 prohibits retaliation by employers against employees who report discrimination or harassment. In a decision issued earlier this year, the United States Supreme Court clarified that employees who raise harassment or discrimination allegations during an investigation into another employee's complaint may be able to bring a retaliation claim under Title VII if they are later subjected to an adverse employment action – even though they did not independently make the initial sexual harassment complaint.

In *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 129 S. Ct. 846 (2009), the employer ("Metro") interviewed the plaintiff ("Crawford") as part of its investigation into alleged sexual harassment by its employee relations director. During that interview, when asked whether she had seen any inappropriate behavior, Crawford described several examples of sexually harassing behavior to which she was subjected. Two other employees who

were interviewed also claimed that the employee relations director had sexually harassed them.

Metro did not discipline the employee relations director but terminated Crawford and the two other employees soon after completing its investigation. Metro claimed Crawford had engaged in embezzlement. Crawford filed a retaliation



charge with the EEOC, alleging that Metro had retaliated against her in violation of Title VII by terminating her after she raised sexual harassment allegations during her interview.

The lower courts determined that Crawford was not covered by Title VII because she had not initiated the complaint against the employee relations director or engaged in active, consistent activities

and only answered questions in an investigation initiated by someone else. The Supreme Court disagreed, noting that such a narrow construction of Title VII and the term "oppose" would require "a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question." The Supreme Court looked to how "oppose" is used in everyday conversation and noted that "oppose" can be used to "speak of someone who has taken no action at all to advance a position beyond disclosing it."

Metro argued that protecting Crawford in circumstances such as these – and, in essence, lowering the bar for retaliation claims – would be a disincentive for employers to investigate claims of discrimination or harassment. The Supreme Court was unconvinced, noting that, given the affirmative defenses developed from cases such as *Ellerth* and *Faragher*, the employers have "strong inducement to ferret out and put a stop to any discriminatory activity in their operations as a way to break the circuit of imputed liability."

Employers should continue to conduct thorough investigations upon receipt of discrimination or harassment complaints. Employers should, however, also be mindful of the fact that employees who share examples of harassment or discrimination during investigations may be afforded the same protections under Title VII's anti-retaliation provision as the employee who makes the initial complaint.

John S. Lord, Jr. is a partner with Foley & Lardner LLP. He has been a member of the OCBA since 1995.

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“[O]f all the aspects of social misery nothing is so heartbreaking as unemployment.”

~ Jane Addams, 1910

There are new faces at the Legal Aid door.

They are the newly unemployed – people accustomed to working and earning a decent salary who now find themselves among the ranks of the poor. Imagine working 24 years for the same company and being downsized due to the economy. With house payments, health and insurance costs, and day-to-day living expenses, the savings and retirement funds of the unemployed dwindle to nothing and homelessness becomes a real possibility. Add to that mix several family members, and you can understand the havoc the current economic situation is causing. Failure to make mortgage or rent payments may lead to homelessness through foreclosure or eviction. Likewise, unemployment increases susceptibility to malnutrition, illness, mental stress, and loss of self-esteem, which can lead to depression, anxiety, and other psychiatric issues.

This is the plight of the new influx of Legal Aid’s client applicants - those who had contributed to society, made comfortable livings, paid large tax bills, and supported charities. They certainly never planned to avail themselves of our services. Because they are embarrassed by their circumstances, they often contact us months after they should have filed for unemployment benefits. Of course, unemployment checks won’t provide them the lifestyle to which they were accustomed, but it will keep the power on, provide for food, and cover many basic necessities.

The *Orlando Sentinel*, reporting statistics from the Florida Agency for Workforce Innovation, noted recently that “[m]etro Orlando’s jobless rate climbed to 9.9 percent in March of 2009, up more than three whole percentage points from March 2007, according to the state’s preliminary figures.”

This means Legal Aid has experienced an overwhelming number of new applicants. **Larri Thatcher**, our supervising intake attorney, says, “Often, our clients do not even realize they are eligible for unemployment compensation and have come to us for another legal matter

entirely. We frequently see clients on an eviction matter due to nonpayment of rent and we discover that they have lost employment and did not file for unemployment compensation because they did not think they were eligible or did not know where or how to apply.” In March of 2009, Legal Aid helped 112 new clients with unemployment public benefits legal issues.

Sally McArthur, our staff attorney who handles employment law cases, explains that we have seen large numbers of clients with legal access issues. Our clients often



do not have easy access to computers or familiarity with technology. “Our clients are having a hard time accessing the benefits available to them because the telephone lines are inundated with calls to initiate claims

and to claim weeks once the claim has been entered. They often do not have access to computers and have prepaid cell phones, so they do not have minutes available for long hold times. Also, some employers fight all claims as a matter of course, not just those which are questionable. Many claimants believe that if the initial determination is unfavorable, they are not entitled to benefits, and this is not the case.”

With a grant from The Florida Bar Foundation, we are focusing on access issues related to obtaining benefits, advocacy, and community legal education. We have scheduled workshops and training sessions in churches and the

public library for unemployed workers. If you belong to a civic organization, social services agency, or faith-based organization and would like to set up a workshop for your constituents, please contact Sally McArthur at smcarthur@legalaidocba.org.

If you are interested in learning a new area of law, please check our lunchtime training sessions. On September 1, 2009, a “Public Benefits” training will take place at 111 North Magnolia Avenue, Suite 1000, 10th Floor. Comerica Bank is donating the use of its facilities to the Legal Aid Society, which helps us keep expenses to a bare minimum. The training sessions are free for OCBA members as well as for non-OCBA members who participate in the LAS *pro bono* program. Pre-registration is required for the free lunch and requested for training (or subject to space availability if not pre-registered).

For more information, please email **Catherine Tucker** at ctucker@legalaidocba.org, **Marilyn Carbo** at mcarbo@legalaidocba.org, or **Michelle Erasmus** at merasmus@legalaidocba.org. The complete schedule of lunchtime trainings is available online under the “News” tab at Legalaidocba.org.

For information about serving as a table captain at our *Breakfast of Champions 2009* or to make a donation to the Legal Aid Society, contact Donna Graf, Manager of Development, at dgraf@legalaidocba.org.

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



The Florida Supreme Court, The Florida Bar's Young Lawyers Division and the Florida Pro Bono Coordinators Association announced the attorneys who were recognized for their 2008 *pro bono* work. The annual project is funded by YLD and was established to encourage participation with local organized *pro bono* programs. Each year attorneys who contribute time at three levels, 20 to 49 hours, 50 to 99 hours, and 100 or more hours receive a letter from the Chief Justice and a bronze, silver, or gold pin designating their contribution. The donation of time is based on the hours on cases closed during 2008 and project work in 2008. The letter for the winners of the gold pin is personally addressed by Chief Justice Peggy Quince. This year the letter from Chief Justice Quince and the pin is being mailed by Legal Aid to 322 attorneys who participated through Legal Aid.

The attorneys recognized are listed below:

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Gilchrist, Brian R.
Healy, Kimberly D.
Hirani, Meenakshi A.
Johnston, Abigail M.
Kolos, Chris N.
Magee, James M.
Manglardi, Michael
McDonald, Marybeth
Owens, Gayle A.
Pence, William L.
Reed, Eric C.
Shiple, C. Gene
Sloane, Jeremy S.
Sos, Anthony F.

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Ayers, Grady G.
Ballentine, Chris
Blackwell, Bruce B.
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Colvin, John V.
Colvin, R. Gregory
Dellecker, Robert H.
Dierking, John
Frimmel, Deborah
Giordano-Gilden, Ann Marie
Hepner, Barry W.
Hoftiezer, Mary J.
Ibanez, Silvia S.
Johnson, Lawrence D.
Kern, Joseph G.
Knapp, David C.
Leitch, Dougald B.
Long, Michael E.
Meier, III, George A.
Morgeson, Elizabeth
Morlan, Harold E.
Myers, Jr., Donald A.
O'Neal-Coble, Leslie
Smith, Mimi L.
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Wilson, William B.

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Amos, Joseph
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Bachman, John
Badgley, Jeffrey
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Barice, Carole J.
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Bartholomew, Krista M.
Bartolomei, Matthew P.
Basagoitia, Luis
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Beauchaine, Amy
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Beechner, Laurie
Bello-Billini, Angel M.
Benitez, Alyssa N.
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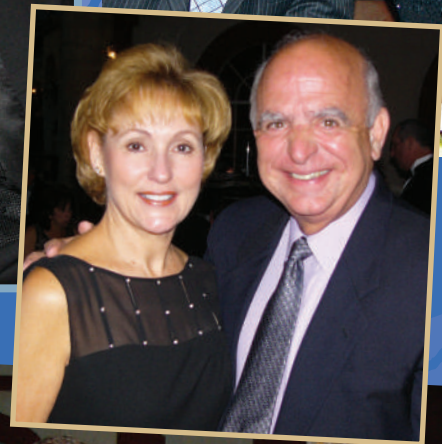
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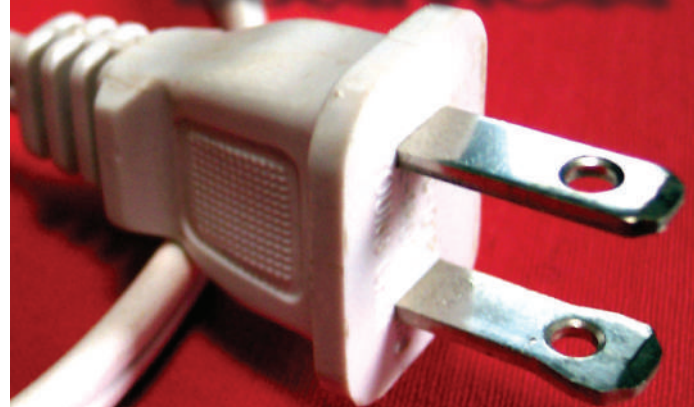
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Insurance Law Committee

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Business Income or Multi-Peril - insures against loss of royalties or licensing fees as a result of invalidity of patent or IP asset. Also, coverage may reimburse the insured for declared value of research and development of patent or an IP asset which is later declared invalid. Under the ambit of multi-peril, one might find a policy will cover business interruption and redesign fees, costs of destruction of infringing merchandise, reshelving or re-supplying with non-infringing goods, damages payable to opposing parties, or

loss of revenue from forfeiture of trade dress. It may also cover loss of trade secret value due to misappropriation.

None of these standard coverages are offered routinely by mainstream insurers - at least for the time being. IPISC niche carriers, SAMIAN and Media Professionals are operating in this field. While the lack of uniformity may make it hard to compare apples to apples when looking at IP coverage, there are not that many trees in the orchard.

IP underwriters offering patent or trademark coverage might consider more hazardous manufacturers or sellers of short life cycle products, drug and medical devices, sporting goods, health, dietary and non-FDA regulated supplements, toys and games, and imported goods where a conscious disregard for IP rights is not uncommon. Underwriting philosophy is not uniform. One market may require a non-infringement opinion before binding coverage. Another insurer may focus on the product sold, industry competitors, and prior history. Underwriting approaches are fluid.

What is the Duty of the Agent to Insure?

One unfortunate aspect of product evolution is the inevitable risk to agents and brokers - that their current approach to insuring business will prove inadequate. For example, when employment practices (EPL) coverage or long-term disability coverage became popular and affordable in the mid 1980s, a few errors and omissions cases surfaced against agents for failing to recommend these coverages. To the ignorant may come a summons and complaint. To be sure, there have been some errors and omissions claims against agents arising from allegedly inadequate IP coverage. *Bear Wolf, Inc v. Hartford Ins. Co.*, 819 So.2d 818 (Fla. 2002)(agent joined in suit based on

failure of carrier to defend advertising injury claim under GL policy). *Body Systems Technology, Inc. v. Allstate Ins. Co.*, Case No. 01-CA-1698-15-K (18th Jud. Cir. Ct. Fla.)(agent sold policy with unanticipated and not adequately disclosed "Lanham Act" exclusionary endorsement that was narrower than standard CGL exclusions).

When an insured faces liability from an uninsured IP infringement claim, the question becomes whether the agent should have recommended IP coverage from one of the niche markets like IPISC, SAMIAN, Media Professional, or others. See *Bear Wolf, supra*; *Third Eye Blind, Inc. v. Near North Entertainment Ins. Services, LLC.*, 127 Cal App. 4th 1311 (2005). Most jurisdictions recognize liability against agents for failing to recommend coverages that are expressly or impliedly needed by the insured. The circumstances under which the agent assumes a duty to provide insurance advice are hotly debated as courts wrestle with two competing interests. Agents and brokers tout their knowledge and understanding when soliciting accounts, and they are indispensable to the procurement process. Insureds cannot purchase coverage except through a licensed agent and some degree of expertise is to be charged to them for the commission they earn.

On the other hand, there is significant judicial resistance to any rule of law that requires the agent to "recommend everything" in order to protect against post-loss claims that coverage is inadequate. Courts do not generally support efforts by the insured to obtain "coverage" after a loss under the guise of an agency negligence theory where the agent is potentially liable for supposedly desired policy benefits far in excess of what the agent might ever earn as commission. See e.g., *Rogers & Sons, Inc. v. Santee Risk Managers, LLC*, 631 S.E. 2d 821 (Ga. App. 2006)(agent not liable - court critical of insured's failure to read products policy).

If coverage for IP assets becomes more widely known, will we reach the tipping point (as with employment practices and cyberliability forms), where the insurance brokerage community views those products as items to be routinely discussed? Errors and omissions claims against agents and brokers are more likely to occur when there are new products, evolving products and where knowledge of these products grows. For now, in this

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Hearsay



Nicholas A. Shannin

"If there is any period one would desire to be born in, is it not ... when the glories of the old can be compensated by the rich possibilities of the new era?"

-- RALPH WALDO EMERSON

An era has come to pass, and this officially marks the end of the Yates administration. Tad has acquired more than his fair share of monikers in the span of this column, from the literary (Tad "Keats and" Yates), to the look-alike assertion regarding Ferris Bueller, to the sound-alike assertion that started the whole "Blue Doodlebop" thing (that was the last reference, Tad – promise!). As a result of his efforts to make our bar as efficient as possible, he also acquired other nicknames, but now Tad picks up the most coveted of all nicknames ... "Immediate Past President"!



IPP – how can I explain it? I'll take it frame-by-frame it. The I is for Important, the P is for Person, and the last-P... well, that's for Past-Tense! This glorious title means you are still on the board, you still get the laminated pre-RSVP'd nametag for lunches, you are looked to for your "experience and historical perspective," but you are otherwise free from all those 1,000 duties that make the presidency a one-way ticket to seriously reduced billable hours. IPP is a great title to acquire, even if the desert trip must precede the milk-'n-honey destination. Your intrepid "Hearsay" columnist knows this in part because he has traveled a parallel journey with Mr. Yates, having served the same role for the Legal Aid Society this year. I have been grateful to a wonderful LAS board and a fantastic LAS Executive Director, the 2009 William B. Trickel, Jr. Professionalism Award winner, **Mary Anne De Petrillo** (Congrats, Mary

Anne!). But now my duty at the helm of LAS is also done, allowing me to join Tad in acquiring that best-of-all-titles, IPP! Coming soon to a car near you – a bumper sticker reading: "If I knew how much fun being Immediate Past President would be, I would have run for that office first!" Before Tad sailed into the sunset, however, he got to preside over an über-successful OCBA Gala (the evidence of which should appear in this issue in all its pictorial glory). Located at the destination location of

the Gaylord Palms, "Lawyer Prom '09" was a blast enjoyed by masses who came by car, by limo or by ... bus? Yes bus – the hottest ticket was the one acquired through the Young Lawyers Section, which arranged to have a party-on-wheels pick up scores of attendees from downtown, ferry them out and bring them back again – safer, more fun and, as a bonus, better for the environment! (Yes, I'm sure that reducing mass-carpooling was the primary incentive to fund this means of ingress and egress for the Gala!) Among the attendees on the bus – one dapperly dressed **Frank "Sinatra" Bedell**, whose rat-pack-era attire showed that the YLS bus could prove ageless, even if Dean-O never made an appearance! More details doubtless exist in the highly recommended "YLS on the Move" column, written by one of Hearsay's favorite YLS'ers, the eponymously named **Sunny Hillary**. Start your perusal of *The Briefs* here, of course, but then flip to Sunny's column for more details on what the best YLS division in the state is up to!

Regardless of whether one took the YLS bus, a train (oh, that's right, our legislature botched SunRail... sigh), or automobile, the pictures prove that the Gaylord Palms was the place to be.

While the pictures tell a thousand words, there are a few moments Kodak may have missed. The band "The Tremors" rocked the joint, but perhaps not as much as Holland + Knight's **Chris Weiss** did when he showed the Adam Lamberts out there how it's done! But Chris wasn't the only one who commandeered the mic, with Sheriff **Woody Rodriguez** using the sound system to give the appropriate shout-out to our two most awesome of event chairs, **Kristen "Courtney" Cox**, who is now Kristen "American" Idle – congrats to the New Mrs. Idle on her recent nuptials! – and to **Vivian "Woody can't pronounce my last name" Cocotas**. While we are all coo-coo for Cocotas, the unusual syllabic emphasis provided by our new fearless leader will require Vivian's "Hearsay" nickname to remain "Co-Co" forevermore. Aside from the new moniker, Woody's words were spot on, however – Kristen and Vivian did a fantastic job with the Gala and the event proved a winner, with fine food, potent potables, and amazing accommodations to sleep them off if you so desired!

Amazingly, the Gala wasn't the only social event for the OCBA in April. Earlier that month, 75 lawyers and a few friends of lawyers gathered to find out which OCBA'er can play poker with the best of 'em at the OCBA's 5th Annual Texas Hold 'Em Charity Poker Tournament. Barry University law students shuffled up and dealt the cards, hold 'em style, of course, and continued to do so until the wheat and the chaff did part. When the dust settled, it was **Steve "MoneyMaker" Jacobs** who placed ahead of his attorney competition. The lawyers failed to take home the top title, though, losing out to Rob Bamberg of sponsor Pro Serve USA. Congrats to Rob, but c'mon lawyers, we've got to flush away the competition and rectify this matter straight away next year! Two lawyers to thank this year: "Wild" **Bill Umansky** and **Shayne "Gunslinger" Thomas** who chaired the tourney to rave reviews from all!

Next up for social? You got it – the ever popular trivia contest will make its return this summer. Will Broad and Cassell's squad repeat? Or will my "Michael Vick Humane Society" re-emerge to avenge the one-question loss last year? All of this and more will be revealed with details to come! For now, though, we'll return to the world of poker for this month's trivia question: Who made famous the two pair hand of Aces over Eights? First to answer with the tale will see their name in print soon! Returning to the trivia winner's circle this month – Gray Robinson paralegal, April Stringer, who beat out stiff competition to correctly answer that 15 was the required number

of flair pieces per the modern-classic movie *Office Space*. She can proudly claim the prize, including all the flair she wants, but she'd better stay away from my red Swingline stapler, pictured here!



Alright, enough of all this transition – who's ready to settle in for another fun year of great bar activities behind our slate of bold new leaders? Note one other era-change occurs with the June 1 page-flip on the calendar – *The Briefs* is

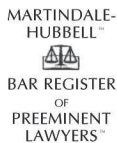
no longer captained by super-eds **Tom "Z-man" Zehnder** or **Kristyne "K2" Kennedy**, who have helped take these *Briefs* to new heights over the last two years (despite seditious Hearsay's best efforts)! Job well done, Z+K². Thanks to **Kim "C'mon, gimme a nickname" Healy** and **LaShawnda** (who still needs no last name) for taking on the challenge of keeping this great publication going (see, e.g., *The Orlando Lawyer* magazine to know that it is no easy task to do so!), while trying to fill the shoes of these super-editors. Godspeed, Kim and LaShawnda!

That's all for now. Until my own transition comes and full IPP status can be truly enjoyed, keep sending your information, look-alikes, pictures or other hearsay-worthy items to me at nshannin@floridalawonline.com or find me through the OCBA page on Facebook. Have a great June, stay cool and see you in July!

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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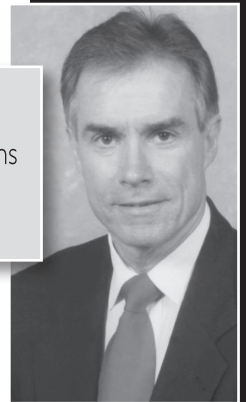
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Sunny A. Hillary

As we move into a new season, the days have been getting longer

and the nights have been getting shorter. The sun is higher in the sky, and as it takes a longer path across our sky, it gives us more daylight. More daylight, combined with more direct rays of sunshine, give us the warm summer season! And, the warm summer season is the perfect time for some of the YLS's greatest events!

At our luncheon on May 21, 2009, **Chelsie Roberts**, former YLS President, handed over the gavel to **Ryan Davis**, the incoming YLS President for 2009-2010. As always, this luncheon was a memorable one. Chelsie reviewed the many fun and charitable events the YLS has participated in over the course of the past year, and past presidents of the YLS came to offer their invaluable advice to Ryan as he quickly takes hold of the reins. Chelsie, we will miss you! Ryan, we welcome you!

And, and congratulations to the new members of the YLS Board of Directors: **Lauren F. Carmody, Eduardo J. Fernandez, Lauren C. Heatwole, Anthony F. Sos, and Jonathan A. Stimler!**

On March 27, 2009, YLS members had an opportunity to demonstrate their excellent networking skills and offer advice on the art of networking to students of Barry University, Dwayne O. Andreas School of Law at the How-To Happy Hour at Tastings. The energy in the air amid the food, drinks, and conversation, reflected the great time students and young lawyers shared. Thank you to **Cinnamon Baker**, Director of Career Services at Barry Law, for organizing this happy hour!

The 12th Annual Orange County Bar Association Gala on April 18, 2009, at the luxurious Gaylord Palms Resort & Convention Center, was a huge success! Nearly 300 OCBA members and guests dressed to the nines and enjoyed an elegant evening filled with award-winning cuisine, a premium open bar, and entertainment by the Tremors. A big thanks goes to co-chairs **Kristen Cox** and **Vivian Cocotas**

for organizing another fantastic Gala!

The annual Relay for Life® on May 2, 2009, at Lake Island Park in Winter Park was another success! Co-chairs **Amber Neilson** and **Samantha Powers** organized an '80s themed happy hour at Scruffy Murphy's in College Park on the eve of the walk to pump up the team and raise money for the American Cancer Society.

On May 31, 2009, members of the YLS gathered at Great Oaks Village for another fun afternoon with the kids. Since 1924, Great Oaks Village has been home to thousands of children between the ages of 6 and 18 who were removed from their homes due to abuse, neglect, or abandonment. Great Oaks Village is a wonderful campus that offers educational, counseling, and recreational services and independent living preparation to the children.

LaShawnda Jackson and committee members organized this special time between the children and participating YLS members. Be sure to join us next year - it's a fantastic way to give back to the community!

As a reminder, the annual YLS Law Clerks' Reception is coming up in July. As one of the biggest events of the year, it

is a wonderful opportunity for law clerks in and around Orange

County to meet and talk to local attorneys and judges. If you are interested in helping to plan this year's Law Clerks' Reception, please email **Jacquelynn Jordan** at jordanjm@lowndes-law.com.

The YLS June Luncheon will take place on June 18, 2009 at 11:45 a.m. at the Citrus Club. Email your RSVP to ocbayls@gmail.com. The cost is \$18 if you RSVP on or before June 15, 2009, 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 407-388-1900 or email me at sunny@brownstonelaw.com. If you are not receiving the YLS email blasts, send an email to me or ocbayls@gmail.com to sign up.



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



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Statutory Amendments Make Guardian Advocacy More Accessible

Vanessa J. DiSimone

Substantive changes to Section 393.12, Florida Statutes (2008), and the unveiling of forms and procedures on the Ninth Judicial Circuit Court's website by Judge Lawrence R. Kirkwood are heightening the community's awareness of guardian advocacy and striving to make the process more accessible to those who most need a guardian advocate.

Guardian advocacy is a process for families, caregivers, and friends of individuals with a developmental disability to obtain a guardianship without declaring the individual incompetent. According to Section 393.063(9), Florida Statutes (2008), a "developmental disability" is defined as a "disorder or syndrome that is attributable to retardation, cerebral palsy, autism, spina bifida or Prader-Willi syndrome; that manifests before the age of eighteen; and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely."

Typically, the guardian advocacy process is sought when the developmentally disabled person turns eighteen and the natural or adoptive parents no longer have legal authority to act on the person's behalf. "Since the passage of HIPPA laws and the national attention garnered by the Terry Schiavo case, people have a greater understanding that just because they are a mother or father, no person or entity must accept the fact that they can act or make decisions on behalf of their adult child," states Judge Kirkwood, the Orange County Circuit Court judge who oversees guardian advocacy proceedings.

Guardian advocate appointments are governed by Section 393.12(2), Florida Statutes, which was significantly revised on July 1, 2008. Under the new version of the statute, "a circuit court may appoint a guardian advocate, without an adjudication of incapacity, for a person with developmental disabilities, if the person lacks the decisionmaking ability to do some, but not all, of the decisionmaking tasks necessary to care for his or her person or property..." Previously, the developmentally disabled person had to "lack capacity" rather than "decisionmaking ability" to perform such tasks, making the proceeding a determination of capacity governed by Florida Statutes, Chapter 744.

Another critical change under Section 393.12(2), Florida Statutes (2008), is that "a person who is being considered for appointment" as a guardian advocate need not be represented by counsel unless the guardian advocate is delegated any rights regarding property other than the right to be the representative payee for government benefits, such as social security. Judge Kirkwood believes this statutory amendment, along with the filing forms and step-by-step outline of the guardian advocacy process he has developed and posted online at the Ninth Judicial Circuit Court's website, will make guardian advocacy accessible to greater numbers of individuals. "Since I first began presiding over the probate court approximately six years ago, a lot of people have told me that they simply could not afford to hire an attorney to complete the guardian advocacy process," explains Kirkwood. "Now there are *pro bono* options available to them, unless guardian advocacy of the property is being sought, in

which case legal representation is required." These property rights include, but are not limited to, a pending lawsuit, estate matter, or other income or property right coming to the person with a developmental disability.

Judge Kirkwood also encourages Orange County attorneys and paralegals to use the online forms and procedures as they navigate their way through the evolving guardian advocacy process. The first step in the process is the filing of an Application and Petition for Appointment as Guardian Advocate, along with the applicable filing fee (\$120.00 for guardian advocate of the person and \$285.00 for guardian advocate of the person and property). While the legislature made few changes to the petition requirements with its 2008 amendments, the petition must now detail the relationship of the proposed guardian advocate to any healthcare, residential, or other service provider for the developmentally disabled individual. Fla. Stat. Section 393.12(3)(2008).

According to Section 393.12(5), Florida Statutes (2008), the court, within three days of the filing of a "Pro se" Petition for Appointment of Guardian Advocate, must now appoint an attorney from the registry pursuant to Section 27.40, Florida Statutes, to represent the person with a developmental disability and ensure that his or her best interests are protected. The court-appointed attorney must have completed a minimum of eight hours of education in guardianship. However, "the court may waive this requirement for an attorney who has served as a court-appointed attorney in guardian advocate proceedings or as an attorney of record for guardian advocates for at least 3 years." Fla. Stat. Section 393.12(5)(a)(2008). The individual with a developmental disability may substitute his or her own counsel for the attorney appointed by the court. However, such counsel may not also represent the person seeking appointment as guardian advocate.

Under the revised Section 393.12(4)(a), Florida Statutes (2008), the proposed guardian advocate must give notice of filing of the Petition for Appointment of Guardian Advocate to the following individuals: the person with a developmental disability (verbally and in writing); the next of kin of the person with a developmental disability; the health care surrogate designated by an advance directive if the person with a developmental disability has created one; and an agent under a durable power of attorney, if the person with a developmental disability has one. A copy of the Petition for Appointment of a Guardian Advocate must be served with the notice, which shall state when the hearing will be held on such petition.

At the hearing, if the court deems the appointment of the guardian advocate necessary, it will enter an Order Appointing Guardian Advocate, which, under the revised Section 393.12, Florida Statutes (2008), must provide the reasons for the selection of the guardian advocate. Such order also specifically

may grant the guardian advocate any or all of the following delineated powers and duties: to determine residence; to consent to medical, dental, and surgical care and treatment; to make decisions about the social environment or other social aspects of the person with a developmental disability's life; and to act as representative payee of government benefits or to seek such benefits. The person with a developmental disability retains all legal rights except those which the court gives to the guardian advocate.

Letters of Guardian Advocate will also be issued at the hearing. Section 393.12(7), Florida Statutes (2008), now contemplates that a person who is the subject of a petition to appoint a guardian advocate may already have an advance directive or durable power of attorney in full force and effect at the time the guardian advocacy proceeding is initiated. As a result, the court must determine whether a valid advance directive or durable power of attorney does, in fact, exist. The court must also determine the sufficiency of these instruments. "A guardian advocate may not be appointed if the court finds that the advance directive or durable power of attorney provides an alternative to the appointment of a guardian advocate which will

sufficiently address the needs of the person with a developmental disability." Fla. Stat. Section 393.12(7)(a)(2008). If a guardian advocate is appointed, the court must include in its order and letters of appointment how the guardian advocate will affect any advance directive or durable power of attorney.

Another major statutory change is the inclusion of a provision that outlines the process for the restoration of rights of an individual with a developmental disability. Fla. Stat. Section 393.12(12)(2008). "Any interested person, including the person with a developmental disability, may file a suggestion of a restoration of rights with the court." *Id.* The suggestion must state that the person with a developmental disability is currently capable of exercising some or all of the rights given to the guardian advocate, and it must include evidentiary support for such claim. Such evidentiary support includes a signed statement from a medical, psychological, or psychiatric doctor who has evaluated the person with a developmental disability. If no evidentiary support can be accessed, then the petitioner may state a good faith basis for the suggestion.

Information detailing the entire guardian advocacy process – from the filing of the initial petition to the restoration of rights – can be found at www.ninthcircuit.org. Click on "For Attorneys," then "Court Forms" under the Information section, and then "Probate-Guardian Advocate." The website also features all of the forms needed for the appointment of a guardian advocate as well as the filings required after court appointment.

These guardian advocacy resources were unveiled on the Ninth Judicial Circuit Court's website following Chief Judge Belvin Perry, Jr.'s issuance of an order vacating the administrative order that had governed the appointment of guardian advocates in Orange County since 1996. In his 2008 order, Chief Judge Perry declared that the Florida Legislature's substantial amendments to Section 393.12, Florida Statutes (2008), eliminated the need for a local administrative order governing the guardian advocacy process. Judge Kirkwood explains, "The intent behind making the guardian advocacy forms and procedures available online was to crystallize for the legal community and the general public the extent of what the legislature did to transform the guardian advocacy process and to make available the necessary tools to accomplish that purpose."

Vanessa J. DiSimone is an associate with Winderweede, Haines, Ward and Woodman, P.A. She has been a member of the OCBA since 2003.



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Marital Appreciation of Non-Marital Stock

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unilaterally declare or withhold dividends.¹⁴ Moreover, there was no evidence of collusion with other board members to defraud the wife by minimizing dividends.¹⁵

Sole or Controlling Shareholder - A Wisconsin court has considered the issue of retained earning in a case where the shareholder spouse was the sole shareholder in a nonmarital closely held S corporation.¹⁶ The court held that the retained earnings should be included in the marital estate when the shareholder spouse paid income taxes on the retained earnings and had “full access, control and right to the undistributed income.”¹⁷

However, even if a shareholder spouse is the controlling shareholder in a closely-held family S corporation, the owner spouse may still have an argument that the retained earnings should not be considered marital because the earnings were used for a corporate purpose and not retained merely to shield assets from equitable distribution.

The Florida Supreme Court’s discussion in *Zold* may provide some guidance in this circumstance.¹⁸ Although *Zold* was not a case about equitable distribution, and therefore was not a case about classifying retained earnings as either marital or corporate, it did consider whether “pass-through” income that has been retained by an S-corporation constitutes income under Chapter 61. The Court ultimately concluded that “undistributed ‘pass-through’ income that has been retained by a corporation for corporate purposes does not constitute income within the meaning of chapter 61.”¹⁹

In *Zold*, the Court held that the shareholder spouse carries the burden of proving that the undistributed pass-through income was properly retained for corporate purposes and not for the improper purpose of avoiding alimony, child support or attorney’s fees obligations by reducing the amount of income available to the shareholder spouse.²⁰ In determining whether pass-through income was used for a corporate purpose, a court may look to section 607.06401(3), *Florida Statutes*, cited above, to determine whether the S corporation at issue is prohibited from making distributions. The *Zold* court also expressly recognized circumstances in which distributions may be permitted under the statute, but may not be made due to other financial responsibilities of the corporation.²¹

In the context of determining whether retained earning are marital in cases where the shareholder spouse is a controlling shareholder who authorizes distributions, Florida courts may look to the considerations enunciated in *Zold* to determine whether the pass-through income was retained for a corporate purpose, presumably making it nonmarital, or whether the pass-through income was retained for a noncorporate purpose, presumably making it marital.

IV: Conclusion

The classification of nonmarital stock in a closely-held family corporation involves a multi-step process, with the initial burden on a non-shareholder spouse to establish that the stock has increased in value and that such increase is the result of marital funds or labor. Florida law requires that there be “substantial evidence” that the owner spouse’s labor “contributed significantly” to either the establishment of the family business or its appreciation

in value. With respect to the investment of marital funds, practitioners may often find a clear-cut case of whether marital funds were directly invested into the corporation. However, in cases involving S corporations, Florida courts may also consider pass-through income, which has been retained by the S corporation, to be an investment of marital funds if distributions of the S corporation have been utilized as income and/or marital funds have paid the taxes associated with the pass through earnings. Practitioners may need to cite out-of-state case law and utilize the guidelines outlined in *Zold* to persuade a court in connection with this novel issue in Florida.

When the appreciation of nonmarital stock held in a closely-held family corporation is at issue, practitioners should consider setting a preliminary hearing to resolve its classification as marital or nonmarital. This practice will eliminate unnecessary expert fees and costs associated with establishing the value of the stock in cases where the appreciation of the stock is passive and not the result of marital labor or funds.

All authors are with Lowndes, Drosdick, Doster, Kantor & Reed, P.A. **Nicole Park**, an associate, has been an OCBA member since 2005; **Stephanie Vanos**, a senior associate, has been an OCBA member since 2004; **Rebecca Palmer**, a partner, has been an OCBA member since 1994; and **Terry Young**, a partner, has been an OCBA member since 1976.

¹An S corporation is a corporation that has elected to be taxed pursuant to Subchapter S of the Internal Revenue Code. See *Zold v. Zold*, 911 So.2d 1222, 1225 (Fla. 2005).

²See 26 U.S.C.A. §§ 1363 and 1366 (2008).

³See § 607.06401(1), *Florida Statutes* (2008).

⁴*Robert v. Zygmunt*, 652 N.W.2d 537, 543 (Minn. Ct.App.2002)(citing *Hoffmann v. Hoffman*, 676 S.W.2d 817, 827 (Mo. 1984)).

⁵*Allen v. Allen*, 607 S.E.2d 331, 336 (N.C.Ct.App.2005) (citing *Thomas v. Thomas*, 738 S.W.2d 342, 344 (Tex.App.1987)). See also *Craig-Garner v. Garner*, 77 S.W.3d 34, 38 (Mo.Ct.App.2002).

⁶*Gottsacker v. Gottsacker*, 664 N.W.2d 848, 856 (Minn.2003). See also *Joynt v. Joynt*, 874 N.E.2d 916, 918 (Ill.App.Ct.2007); *Hoffman*, 676 S.W.2d at 827.

⁷*Joynt*, 874 N.E.2d at 919.

⁸*Id.*

⁹*Id.*

¹⁰*Id.* at 919-920.

¹¹*Id.* at 919.

¹²*Hoffman*, 676 S.W.2d at 826.

¹³*Id.* at 827.

¹⁴*Id.*

¹⁵*Id.*

¹⁶*Metz v. Keener*, 573 N.W.2d 865 (Wis.Ct.App.1997).

¹⁷*Id.* at 868.

¹⁸*Zold v. Zold*, 911 So.2d 1222 (Fla. 2005).

¹⁹*Id.* at 1231.

²⁰*Id.* at 1233.

²¹*Id.* 1232.



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Insurance Law Committee

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IP coverage to main street business does not usually exist except in extremely rare factual settings where the history of the account, nature of the business, or the importance of IP assets warrant a closer look at IP exposure.

Conclusion

While there are new and important niche markets for IP insurance on a first and third party basis, the insurance industry as a whole has yet to embrace, underwrite, and offer IP coverage for foreseeable exposure as a well-appreciated and properly underwritten business risk. The CGL policy is a poor and frequently litigated source of coverage. *Sigma Tech Sales, supra.*

Intellectual property value and infringement claims are still not well appreciated by agents and many underwriters. Over time one hopes that the insurance industry will provide a wide variety of IP coverages as stand alone policies or endorsements to CGL package policies in the same way the industry offers employment practices and products/completed operations, and business interruption. Coverage Part B is an absurdly thin source of IP coverage for which insurers essentially collect no premium. The IP insurance markets are few, but if the demand remains and agents become more knowledgeable, we may yet see a paradigm shift in the way the insurance community approaches IP exposure.

David Henry is a partner with Swartz Campbell, LLC. He has been a member of the OCBA since 1989.



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Presentation Skills ● Conquer Your Fear of for Lawyers ● Speaking in Public



Elliott Wilcox

Two months ago, when you agreed to speak, you thought it would be a great opportunity to market yourself and meet potential clients. But now, standing offstage as they introduce you, your mouth goes dry, your palms sweat, and your knees are trembling. The feeling of anxiety increases, and you ask yourself, “*Why did I agree to do this?*”

Afraid to speak in public? You’re not alone. The *Book of Lists* ranks “Speaking Before a Group” as the worst human fear. It shouldn’t be that way. Unless you’re saying some final words before your execution, you don’t have much to fear about public speaking. I’ve listened to thousands of speeches, including hundreds of first timers, and I’ve never seen a speaker pass out, burst into flames, or die of fright. So why do people get nervous, even terrified, when asked to speak?

When you conquer your fear of public speaking, you will enjoy three benefits. First, you will increase your credibility, because people will presume you’re an expert. Second, you’ll market yourself and increase exposure for yourself, your firm, or your message. Finally, you’ll enjoy the adrenaline rush and personal satisfaction that comes from knowing your words made a difference in someone’s life. Here are a few tips for controlling your nervousness the next time you speak to a group.

The audience is not your enemy. The audience wants you to succeed. Think back to the last time you were an audience member. When the speaker first took the stage, did you want him to fail? Or did you want the speaker to be entertaining, mesmerizing, educational, witty, charming, and at the top of his game?

Your audience feels the same way. You were invited to speak because they want you to share something of value with them. They want to learn something, to be entertained, to grow, to feel better, safer, or smarter. They want you to succeed. Even in enemy territory, they don’t want your speech to fail. Imagine a Florida Gator fan listening to a speech by Bobby Bowden or a die-hard Democrat listening to George Bush. Despite the inherent hostility, they probably still want to be entertained, inspired, or educated. If you were stuck in the seat for the full hour anyway, wouldn’t you rather see a speaker succeed?

Remember, even if they disagree with your message, the audience still wants you to succeed.

Be a Boy Scout. The Boy Scouts have a simple motto: “Be Prepared.” If you’ll follow that advice, you can eliminate the most common cause of a speaker’s nervousness. Many speakers get nervous because they’re not confident about what they’re going to say. Investing extra time in your preparation yields a tremendous payoff. Spend extra time to practice your speech, anticipate possible questions or objections, and know who you’re speaking to. When you feel confident about your material, you’ll stop worrying about what you’re going to say

and can focus on how you’ll help your audience.

Talk to only one person in the audience. Do you feel comfortable speaking to one person? Could you present your speech to one person?

Would you get flustered or forget your speech if there was only one person in the audience? No? Then what difference should it make if they’re surrounded by hundreds or thousands of people?

Start by picking out someone in the front, making eye contact, and having a one-on-one conversation. If you only talk to one person the entire speech, he’d feel uncomfortable, the rest of the audience would feel neglected, and your speech would be ineffective. To avoid that, talk with him for only a moment, then pick someone in the back left corner, and talk to him for a little while. Then shift to the front left or the back right corner, continuing to work your way around the room, always making eye contact with just one person, having a one-on-one conversation, and then moving on.

This technique has two benefits. First, you won’t feel overwhelmed by the size of the audience, because you’re only talking to one person at a time. Second, everyone in the room will get the impression you’re talking directly to them. They’ll feel a connection between themselves and the speaker. When they feel that connection, they listen more attentively and retain more of your message.

Remember, they want you to succeed. Many members of the audience will even envy your courage. Speak to your new friends in the audience, and you’ll conquer your fear of speaking.

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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.



Rainmaking ● *What a Difference a Year Makes: Have a Yearly Marketing Retreat to Assess the Health of Your Marketing Efforts*

Portions excerpted from the upcoming book, *The Twenty-One Rainmaking Assets*, by Mark Powers and Shawn McNalis

As we mentioned in the first part of this series, holding an annual marketing retreat means you are forced to step off the treadmill for a few hours each year to fine-tune your marketing efforts and plan for the coming year. By doing this you dramatically increase the effectiveness and strategic value of your client development efforts. In the first article we discussed why these retreats are valuable, who should attend, and what you should examine in your efforts to check the health and validity of your current marketing efforts. This part of the series will focus on how to set up a retreat and create a successful agenda.

When to Schedule the Retreat

The best way to make sure that the retreat actually happens is to schedule the time well in advance. To do this, identify several potential dates – or ask your secretary or office manager to identify them for you, then meet with the rest of the potential attendees to arrive at a mutually convenient time. It's best to plan the coming year in early fall: September, October, or November. Avoid December if possible due to the overload of extra activities most attorneys experience during the holidays. If you are unable to find a date in the fall, the beginning of the new year will also work well. In fact some firms prefer holding their retreats in early January because of the optimism and renewed enthusiasm they feel at the beginning of the year. Whatever date you decide upon should be far enough out so that all of those invited will be able to attend.

Retreat Facilitators

Keep in mind that good retreat facilitators become booked up well in advance during the most popular months. Once you commit to a date try to hire a facilitator right away since it may be difficult to locate one at the last minute.

We recommend you find someone with experience in leading group discussions and skilled at setting marketing strategies. Find someone who can be objective and keep things moving in a productive and constructive manner. If you don't have anyone in mind, talk to attorneys in your area who have done retreats before or search on-line for a qualified person. Potential facilitators are often professors in business schools, practice advisors or consultants to law firms. You should be able to interview them over the phone or meet with them in person to see if there is a match.

For the best results, it is imperative that your facilitator has the skills and experience to do the following:

- Educate and bring credibility to the idea of marketing, especially for reluctant or first-time marketers
- Share ideas that other firms have undertaken so the firm is not spending extra time re-inventing the wheel
- Manage the group discussion appropriately, drawing out new ideas from the participants
- Give realistic feedback on the validity of the proposed marketing plans.

It is generally a good idea to have an outside professional moderate your marketing meeting. An authentic evaluation of the entire team's strengths and weaknesses is best done by an outsider who may assign a pre-retreat assessment. If you are tempted to lead your own retreat, or have your firm's best rainmaker take charge, keep in mind most *intuitive* rainmakers do not entirely understand what it takes to develop new clients. They often do what they do well, but unconsciously, and have a hard time breaking down the process and making it understandable or in some cases, appealing, for the other personalities in attendance.

Of the many different disciplines required of an attorney, marketing can be the most difficult to adopt. Bringing in an outside retreat facilitator provides the opportunity to educate the inexperienced and to bring the group together to brainstorm in ways that are not possible on an individual basis.

If your marketing retreat is going to emphasize client development education – and most of them should – ask the facilitator to focus on the principles of *relationship-based* marketing with an emphasis on how this type of marketing is the least complicated, the least expensive and the most ethical and effective way to conduct a marketing campaign. It should be made clear to those who are inexperienced that *relationships* form the basis for referrals.

Prior to the Retreat

Assignments in advance of a retreat are an excellent way to motivate your group into action and most good facilitators will ask for work to be done up front. Fortunately, people are much more likely to complete a pre-work assignment if they have to face the facilitator and the rest of the group at the retreat and admit that they failed to carry out their assignment.

In order to discuss the successes and failures of the past year, the following assignments should be given to your office manager, marketing assistant, the marketing partner or team members most closely involved with keeping client development statistics. Ask them to:

- **Prepare** a report on the following data: the number of inquiries generated by different referral sources, including print ads and those referrals generated by clients; the percentage of phone inquiries that converted to in-office consultations and the percentage of consultations that converted to paying clients. This will allow you to compare referral sources and analyze advertising expenditures.
- **Create** a list of marketing activities from the prior year. This will allow you to analyze what worked and what didn't.
- **Prepare** a report on the productivity of your Web site as a referral vehicle, and identify additional work to be done.



Mark Powers



Shawn McNalis

- **Compile** a Client Service Innovation report in which any improvements to client care are listed along with feedback from clients or team members about their effectiveness. This will allow you to gauge the effectiveness of your current client service program and plan for future improvements.
- **Compile** a list of potential referral sources by name or profession that the firm might target for cultivation. This will allow you to pinpoint actual individuals or types of professionals to focus on in your marketing plan.
- **List** opportunities for cross-selling between partners, where applicable. This will allow you to focus on introductions as part of your marketing plan.

Set Marketing Objectives

Your overall objective in hosting a marketing retreat is to come away with a client development plan that is well-thought out and, ideally, agreed upon by the team. In fact, one of the most valuable aspects of holding a retreat like this is to have your team help to create the client development plan. They are much more likely to implement that which they helped create.

Your plan should contain a variety of client development activities from the larger annual events you might host to the small weekly actions each attorney will undertake. It should target the number of new clients each practice area will attract as well as the new referral sources it will cultivate. Your plan should contain enhanced client service initiatives as well, given that many of the best referrals will come from your clients. Generally speaking, the better the service, the greater the number of referrals.

Listed below are examples of initiatives we typically find in a marketing plan generated by small to mid-sized firms.

Cultivate Referral Sources to Increase Referrals 20%

- **Increase the time spent with referral sources**
 - a. Strategy: Each attorney will dedicate 3 lunches a week to cultivating referral sources.
 - b. Strategy: Purchase season tickets and offer them to different referral sources.
 - c. Strategy: Use marketing lunches to introduce referral sources to one another (this is especially useful if you don't have a lot of business you can send them

– and only applies when referrers are not competitors).

- **Thank referral sources for referrals they send**
 - a. Strategy: Attach thank you cards to new file when opened and present to attorney.
- **Refer business to referral sources, whenever possible**
 - a. Strategy: Reward referral sources by sending business, whenever possible.
- **Conduct satisfaction interviews to see how well your sources think you're taking care of their referrals**
 - a. Strategy: Use your marketing lunches to check-in with referral sources on their perception of your service.


Improve Service to Provide Better Care and Earn More Referrals

- **Make clients feel more welcome and taken care of during each visit to your office**
 - a. Strategy: Offer clients a selection of beverages when they arrive.

- **Enhance your level of communication with clients**
 - a. Strategy: Each client receives a check-in call on a regular (weekly, monthly) basis.
- **Build more rapport with key clients**
 - a. Strategy: At the conclusion of each large case or matter, invite the client out to lunch to get to know them better and get feedback on performance.

This list is not exhaustive and just represents a sampling of initiatives which may or may not reflect your needs. In the final part of this series we'll give you sample initiatives for the firm that wants to build its reputation and raise its profile.

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 marketing 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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Transitions

Stewart L. Colling of *Colling Gilbert Wright & Carter LLC* passed away on April 28, 2009. Mr. Colling had been a member of the OCBA for 23 years.

William G. Mateer of *Mateer & Harbert, P.A.* passed away on April 27, 2009. Mr. Mateer had been a member of the OCBA for 47 years.

Speaking Engagements

Jon H. Gutmacher - spoke at the Orlando Tea Party at Lake Eola on March 21, 2009, regarding the Second Amendment; presented Second Amendment and self-protection issues for the Northwest Orange Republican Women's Federation on April 16, 2009, in Apopka; and presented a seminar on firearm, weapons, and self-defense issues for the Indian Hammock Hunt & Riding Club in Okeechobee on April 18, 2009.

Seminars

June 9 - Immigration Topic. LAS Lunchtime Training. 12:00 p.m.-1:30 p.m. Comercia Bank, 111 N. Magnolia Ave., Ste. 1000, Orlando, FL 32801. CLE pending. Speaker: Charles Conroy. Details: ctucker@legalaidocba.org or mcarbo@legalaidocba.org.

June 19 - YLS An Afternoon at the State Courthouse. The program is designed to provide new and upcoming legal professionals with practical advice for practicing in the Ninth Judicial Circuit. Registration: 1:00 p.m.; program: 1:30 p.m.-4:00 p.m. Orange County Courthouse, Jury Assembly Room, 425 N. Orange Ave., Orlando, FL. CLE pending. Fee: \$10. RSVP and send payment by **June 12** to Mike Remensnyder, 880 N. Orange Ave., Orlando, FL 32801 (miker@ocbanet.org). Details: Jonathan Stimler at jstimler@lseblaw.com.

June 19 - Get to Know Your Judges. OCBA Family Law Committee Seminar. 12:00 p.m. 425 N. Orange Ave., # 2310, Orlando. Speaker: Judge Lisa T. Munyon. Details: Marie at marieb@ocbanet.org.

June 23 - Education Advocacy 101 for GALs. LAS/GAL Lunchtime Training. 12:00 p.m. - 1:30 p.m. Comercia Bank, 111 N. Magnolia Ave., Ste. 1000, Orlando, FL 32801. CLE pending. Speaker: Sarah Wallerstein Koren. Details: Susan Khoury at skhoury@legalaidocba.org.

June 30 - Appellate Virgins. Solo & Small Firm Committee Seminar. 12:00 p.m. OCBA Center, 880 N. Orange Ave., Orlando, FL 32801. CLE: 1.0. Speakers: David A. Beyer and Richard Swank. Details: Marie at marieb@ocbanet.org.

July 14 - Amendments and Updates on the New Parenting Law. LAS Lunchtime Training. 12:00 p.m.-1:30 p.m.; Comercia Bank, 111 N. Magnolia Ave., Ste. 1000, Orlando, FL 32801.

July 17 - Get to Know Your Judges. OCBA Family Law Committee Seminar. 12:00 p.m. - 425 N. Orange Ave., # 2310. Orlando. Speaker: Judge Renee A. Roche. Details: Marie at marieb@ocbanet.org.

July 28 - Sexual Abuse Treatment. LAS/GAL Lunchtime Training. 12:00 p.m. - 1:30 p.m. Comercia Bank, 111 N. Magnolia Ave., Ste. 1000, Orlando, FL 32801. CLE pending. Presented by The Healing Tree. Details: Susan Khoury at skhoury@legalaidocba.org.

July 28 - Starting and Managing Your Own Law Practice. Solo & Small Firm Committee Seminar. 12:00 p.m. OCBA Center. CLE: 4.0 pending. Details: Marie at marieb@ocbanet.org.

Mark Your Calendar

Nov. 12 - Breakfast of Champions. Legal Aid Society fundraiser. Find out more about this event and other ways you can support the Legal Aid Society by contacting Donna Graf, Manager of Development, at 407-841-8310, ext. 3150.



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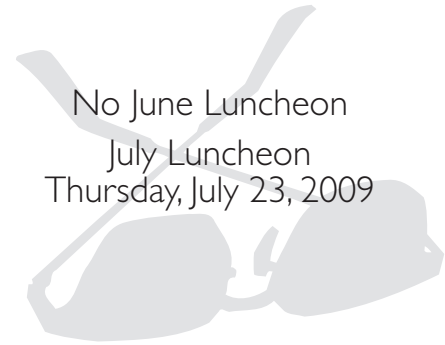
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OCBA CALENDAR

JUNE - JULY 2009



No June Luncheon
July Luncheon
Thursday, July 23, 2009

June

- 2** *The Legal Professional's Guide to Microsoft Word Seminar*
9:00 a.m. • Bar Center
- 3** *Criminal Law Committee*
12:00 p.m. • Courthouse
23rd Flr. Judges' Conference Rm.
- 9** *LAS Lunchtime Training*
Immigration Topic
12:00 p.m. • Comercia Bank, 10th Flr.
- Executive Council Meeting*
4:30 p.m. • Bar Center
- 10** *Estate Guardianship & Trust Committee*
12:00 p.m. • Bar Center
- 11** *Real Property Law*
Meetings cancelled until further notice
- Social Security Committee*
12:00 p.m. • Bar Center
- OCBA Paralegal Committee*
5:30 p.m. • Bar Center
- 12** *Family Law Committee*
Executive Meeting
11:45 a.m. • Houlihan's
- Workers' Compensation Committee*
11:45 a.m. • Smokey Bones
- 16** *Professionalism Committee*
8:00 a.m. • Bar Center
- Social Committee*
12:00 p.m. • Bar Center
- 17** *Insurance Law Committee*
12:00 p.m. • Bar Center
- 18** *YLS Luncheon*
11:45 a.m. • Citrus Club
- Appellate Practice Committee*
12:00 p.m. • Bar Center
- 19** *Family Law Committee Seminar*
Get to Know Your Judges
12:00 p.m. • 425 N. Orange Ave., #2310

- Young Lawyers Section*
An Afternoon at the State Courthouse
1:00 p.m. • 425 N. Orange Ave.
Jury Assembly Room, 1st Flr.
- 23** *LAS Lunchtime Training*
Education Advocacy 101 for GALs
12:00 p.m. • Comercia Bank, 10th Flr.
- 24** *Business Law Committee*
1:00 p.m. • Location varies.
Contact Chairperson
- Labor & Employment Law Committee*
12:00 p.m. • Bar Center
- 26** *Bankruptcy Law Committee*
12:00 p.m. • Bar Center
- 30** *Solo & Small Firm Committee Seminar*
Appellate Virgins
12:00 p.m. • Bar Center

July

- 1** *Criminal Law Committee*
12:00 p.m. • Courthouse
23rd Flr. Judges' Conference Rm.
- 2** *Federal Judicial Relations Committee*
12:00 p.m. • Judge Conway's Chambers
- 3** *Bar Closed for Independence Day*
- 8** *Estate Guardianship & Trust Committee*
12:00 p.m. • Bar Center
- Judicial Relations Committee*
12:15 p.m. • Courthouse
21st Flr. Conference Rm.
- Executive Council Meeting*
4:30 p.m. • Bar Center
- 9** *Social Security Committee*
12:00 p.m. • Bar Center
- OCBA Paralegal Committee*
5:30 p.m. • Bar Center
- 10** *Family Law Committee*
Executive Meeting
11:45 a.m. • Houlihan's
- Workers' Compensation Committee*
11:45 a.m. • Smokey Bones
- 14** *LAS Lunchtime Training*
Amendments and Updates on the New Parenting Law
12:00 p.m. • Comercia Bank, 10th Flr.
- 15** *Insurance Law Committee*
12:00 p.m. • Bar Center
- 16** *YLS Luncheon*
11:45 a.m. • Citrus Club
- Appellate Practice Committee*
12:00 p.m. • Bar Center
- 17** *Family Law Committee Seminar*
Get to Know Your Judges
12:00 p.m. • 425 N. Orange Ave., #2310
- 21** *Professionalism Committee*
8:00 a.m. • Bar Center
- Social Committee*
12:00 p.m. • Bar Center
- 22** *Labor & Employment Law Committee*
12:00 p.m. • Bar Center
- 23** *OCBA Luncheon*
11:45 a.m. • The Ballroom at Church St.
- 28** *Solo & Small Firm Committee Seminar*
Starting and Managing Your Own Law Practice
12:00 p.m. • Bar Center
- LAS/GAL Lunchtime Training*
Sexual Abuse Treatment
12:00 p.m. • Comercia Bank, 10th Flr.
- 29** *Business Law Committee*
1:00 p.m. • Location varies.
Contact Chairperson
- 31** *Bankruptcy Law Committee*
12:00 p.m. • Bar Center

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



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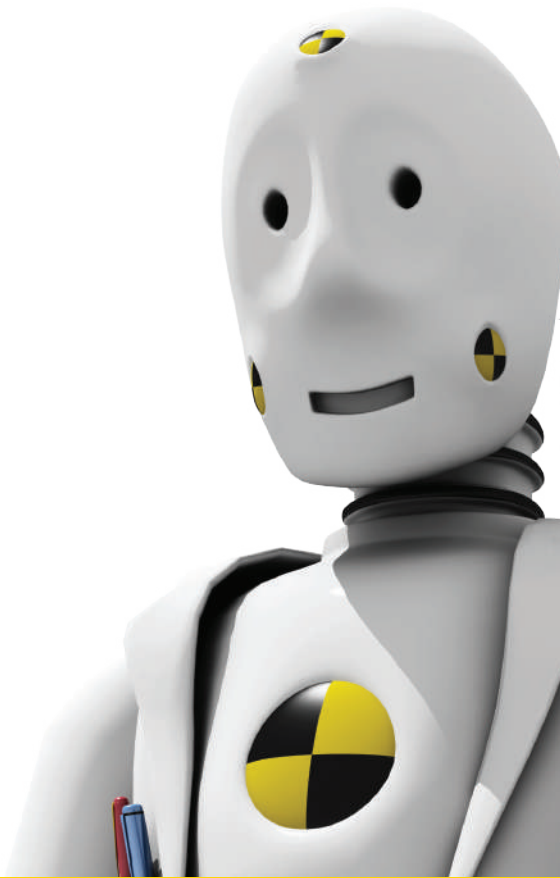
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Tire Safety Pop Quiz



Q: Which of these tires can put you at risk for a tread separation due to their age?

- A. Tires over six years old
- B. Your unused spare tire
- C. Old tires with good treads
- D. All of the Above**

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