



The Briefs

A Publication of the Orange County Bar Association



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31 Fla. L. Weekly D1900a (Fla. 5th DCA 2006)
Dismissed sunshine law challenge to school rezoning plan.

Florida Emergency Physicians-Kang & Associates, M.D., P.A. v. Parker,

800 So. 2d 631 (Fla. 5th DCA 2001)
Protected liability on multi-million dollar medical malpractice action.

Miller v. Jacobs & Goodman,

699 So. 2d 729 (Fla. 5th DCA 1997)
Declared liquidated damages clause of attorney employment agreement void and unenforceable.

Wenzel v. Boyles Galvanizing Co.,

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

Boyles v. Mid-Florida Television Corp.,

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

Whigham v. Shands Teaching Hospital,

613 So. 2d 110 (Fla. 1st DCA 1993)
Reinstated multi-million dollar medical malpractice action against blood bank.

Petry v. Petry,

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

Caiazza v. Tuff Realty Corp.,

805 So. 2d 29 (Fla. 5th DCA 2001)
Protected ownership of two multi-million dollar Florida corporations.

Owen v. Owen

867 So. 2d 1222 (Fla. 5th DCA 2004)
Reversed imputation of income with directions to reduce by 50%.

Pixton v. Scotsman,

924 So. 2d 37 (Fla. 5th DCA 2006)
Reversed dismissal of negligence action for failure to comply with RCP 1.070(j).

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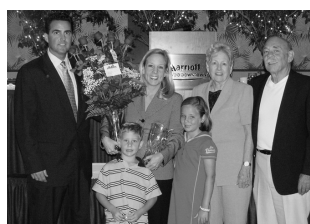
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The Briefs

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DEADLINE INFORMATION

Deadline for September Edition: 08/1/2006
The deadline for each edition will be the first day of each month. If that day falls on a weekend or holiday, the deadline will be the last working day prior.

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Satire's Powerful Effect on the Bar

Thomas P. Wert

Last month, we were treated to a fine example of one of the most effective, and often times entertaining, instruments of change: satire. I am referring, with utmost respect, to Judge

Presnell's June 6th Order compelling two Tampa attorneys¹ to convene at a neutral site for a game of "rock, paper, scissors" to resolve a discovery dispute. Rather than spend valuable time reviewing briefs and holding hearings, the Court chose to artfully expose these two lawyers' imprudence. I believe the result had a greater affect on them, and the bar in general, than any reasonable sanction the Court could have entered on the knuckleheads in question. Meanwhile, we all got a good chuckle and a valuable lesson: cooperation, compromise, courtesy and professionalism are an integral part of our system of justice. The message was clear: work out petty differences amongst yourselves or risk being treated like a child.

Satire has always been a great contributor to American culture, public opinion and reform. One of Abraham Lincoln's most lethal weapons in his famous political debates was satirical rhetoric. Through tactful ridicule, he exposed Stephen Douglas as a "toothless" lion on death's door. Thomas Nast brought down political corruption in New York City in the 1800s with his political cartoons and, ultimately, became known as the "Father of American Caricature." In the 20th Century, satirical literature and cartoons molded public opinion and, eventually, resulted in legislation concerning significant issues such as the regulation of the meat packing industry, women's suffrage and child labor. It seems that often times the truth is best revealed through ridicule.

We have all seen the powerful effect of satire firsthand in one form or another. When I was in law school, there were a number of issues concerning certain professors' teaching and grading methods that irked the student body. It was generally agreed that these practices were hindering the students' ability to compete with graduates from other law schools for jobs. But tenure and, perhaps, good old-fashioned inertia kept the administration from instituting any changes. That's when satire reared its irreverent head. A cartoon began appearing in the law school's newspaper called *Random Thoughts* which lampooned the sacred cow professors. Some of the sacred cows complained and tried to censor the cartoons. But, the law school administration and the students welcomed the debate. It's kind of hard to ignore the protections of the First Amendment in a law school setting. Slowly, reforms began to take place and by the time I graduated, teaching and grading methods had improved. Heck, even I got a job.

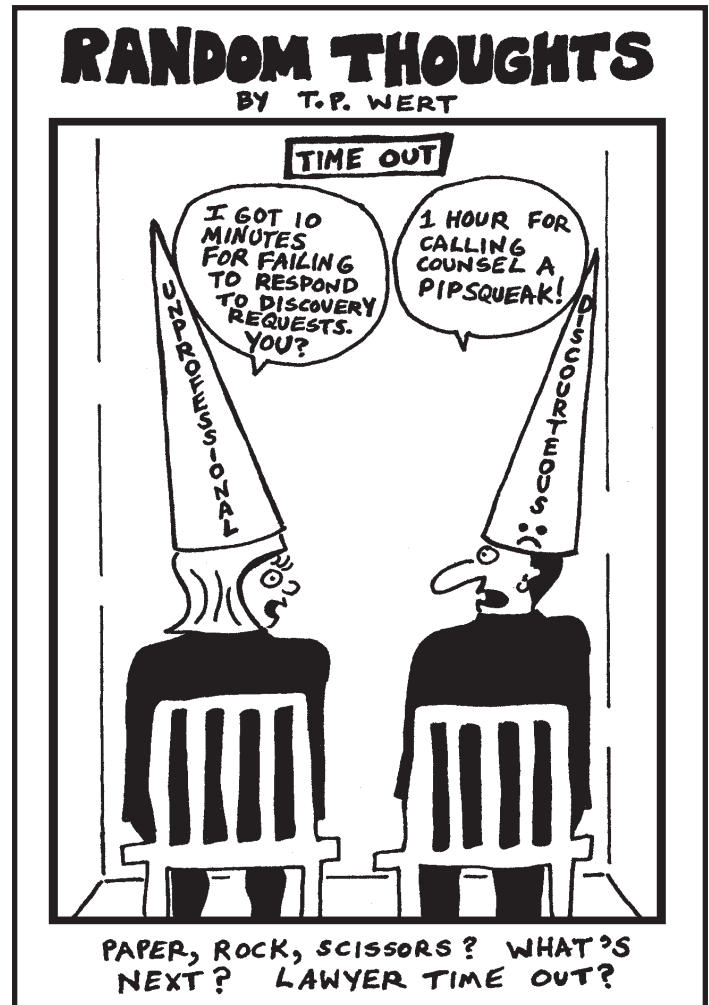
Parody and satire are not strangers to the legal profession, of course. Telling lawyer jokes seems to have become a hobby of sorts for many Americans. Marc Galanter, author of "Lowering the Bar - Lawyer Jokes and Legal Culture," estimates that there are some 500 lawyer jokes floating around at any time. The cornerstone of the Emmy award winning television show *Boston Legal* is the mockery of self-impressed and ethically-challenged attorneys. Many think lawyer jokes go too far.

There is certainly some validity to the notion that lawyers are often turned into scapegoats for an over-regulated and highly litigious society.

But rather than whine about being picked on, I think we need to see satirical jabs at lawyers as a wake up call. We need to call out bad behavior when we see it and make every effort to rectify it without court intervention. The judiciary can help out also by nipping discovery and other abuses in the bud at the outset with reasonable but stringent sanctions. We also need to look in the mirror and lead by example. Every time we encounter a situation where we could become the subject of scorn or ridicule by making a discourteous or unprofessional choice, we need to think about whether we would like our actions to be made the subject of a joke, a satirical cartoon or, as we saw last month, an order likening us to children broadcast around the globe on CNN.

¹ After reading the Order and laughing hysterically out loud, I hurried to the OCBA Membership Directory and was more than pleased to find that the subject lawyers were not affiliated in any way with our organization.

Thomas P. Wert is a partner with Roetzel & Andress, LPA. He has been a member of the OCBA since 1993.





Editor's Note

————— *Jessica K. Hew*

Professionalism is an organizational goal for which the OCBA strives. A clear example of the commitment to professionalism is the monthly article from the OCBA Professionalism

Committee that appears in each issue of *The Briefs*. Last month, we were pleased to reproduce an Order by the Honorable Deb S. Blechman of the Ninth Circuit. As Judge Blechman explained, she wanted to bring an awareness of and a stop to a trend of *unprofessional behavior* in her courtroom caused by, perpetrated by and continued by attorneys appearing before her.

As in our May issue, this month we have a follow-up piece to Judge Blechman's Order. In a now nationally known, and commented upon, Order, the practice of law has now become child's play. If you have not had the opportunity to review the Order, it is reproduced beside this column. Although the Honorable Gregory Presnell, Orlando Division United States District Court Judge, was invited but declined to make any comment on the Order for *The Briefs*, it is clear that *unprofessional behavior* is alive and well, and becoming an unwelcome local trend. OCBA's Professionalism Committee, via Dennis Wall, has commented upon the Order in this edition. See Page 7.

While the attorneys in Judge Presnell's case are in Tampa, it is reported, amazingly, that their offices are in the same building four floors apart. Was it really necessary to file a motion with the USMD to resolve this? What happened during their MDLR 3.05 required pre-filing conference? What was wrong with the neutral location of the court reporter's office? Was the dispute of where to have the location of the Fed. R. Civ. P. 30(b)(6) deposition substantively important to the case? Do you think the parties appreciated the costs associated with the dispute? How further has the opinion of attorneys and the judicial system fallen in the public opinion based on the actions of two attorneys? These are but a few questions that address *professionalism*, based solely on the actions of two attorneys.

Think before you act; as attorneys, your actions can speak louder than words.

Note: When practicing in the Orlando Division of the USDC, practitioners are reminded to refer not only to the Federal Rules of Civil Procedure 30 and 45, but also to the Court's Local Rules. In dealing with deposition location disputes, consult Middle District Local Rule 3.04 and the Middle District Discovery Handbook at Sections I and II.

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

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

**AVISTA MANAGEMENT, INC.,
d/b/a Avista Plex, Inc.,**

Plaintiff,

-vs-

**Case No. 6:05-cv-1430-Orl-31JGG
(Consolidated)**

**WAUSAU UNDERWRITERS
INSURANCE COMPANY,**


Defendant.

ORDER

This matter comes before the Court on Plaintiff's Motion to designate location of a Rule 30(b)(6) deposition (Doc. 105). Upon consideration of the Motion – the latest in a series of Gordian knots that the parties have been unable to untangle without enlisting the assistance of the federal courts – it is

ORDERED that said Motion is DENIED. Instead, the Court will fashion a new form of alternative dispute resolution, to wit: at 4:00 P.M. on Friday, June 30, 2006, counsel shall convene at a neutral site agreeable to both parties. If counsel cannot agree on a neutral site, they shall meet on the front steps of the Sam M. Gibbons U.S. Courthouse, 801 North Florida Ave., Tampa, Florida 33602. Each lawyer shall be entitled to be accompanied by one paralegal who shall act as an attendant and witness. At that time and location, counsel shall engage in one (1) game of "rock, paper, scissors." The winner of this engagement shall be entitled to select the location for the 30(b)(6) deposition to be held somewhere in Hillsborough County during the period July 11-12, 2006. If either party disputes the outcome of this engagement, an appeal may be filed and a hearing will be held at 8:30 A.M. on Friday, July 7, 2006 before the undersigned in Courtroom 3, George C. Young United States Courthouse and Federal Building, 80 North Hughey Avenue, Orlando, Florida 32801.

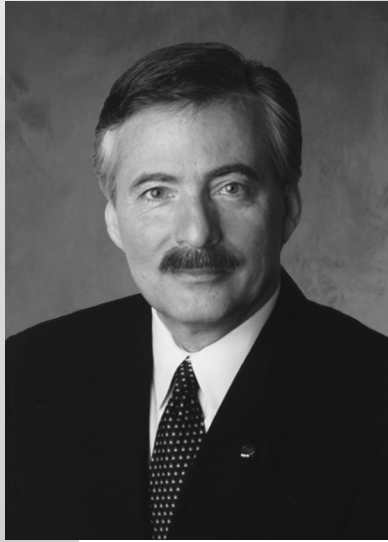
DONE and ORDERED in Chambers, Orlando, Florida on June 6, 2006.


**GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE**

Copies furnished to:

Counsel of Record
Unrepresented Party

OCBA Luncheon Speaker



August 31, 2006



Richard J. Walsh

*Senior Vice President of Corporate Affairs,
Darden Restaurants, Inc.*

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Darden Restaurants, Inc., (NYSE) is the world's largest publicly traded casual dining restaurant organization and one of the 50 largest employers in the United States. Headquartered in Orlando, Darden owns and operates Red Lobster, Olive Garden, Bahama Breeze, Smokey Bones BBQ Sports Bar and the most recent test restaurant, Seasons 52. In 1984, Rick Walsh joined Genral Mills, which spun off Darden Restaurants in 1995. Rick currently serves as Darden's Senior Vice President, Corporate Affairs, and is a member of the Darden Executive Management Team. He received a BA in political science in 1977 and a master's in public policy in 1983 from the University of Central Florida. Locally, he serves on the University of Central Florida Board of Trustees and College of Business Advisory Council of the University. He also serves as immediate past-chairman of the Florida Chamber of Commerce; the SunTrust Bank Administrative Board; Orange County Arts and Cultural Affairs Council and the Orange County Mobility 20/20 initiative.

His interests include collecting Native American and Western art, reading, horses and climbing.

Downtown Marriott Hotel • 11:30 a.m. – 1:00 p.m.

The Legal Aid Society's Annual *Pro Bono* Awards Ceremony will be held during the August Bar Luncheon. Awards will be presented to:

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Government Attorney Award of Excellence

Peter W. Kenny

Individual Awards of Merit

Richard L. Barrett, R. Gregory Colvin, Susan B. Harwood,
Elizabeth A. Lanham-Patrie, Michael Manglardi, Richard D. Sierra and J. Timothy Schulte

Law Firm Award of Excellence

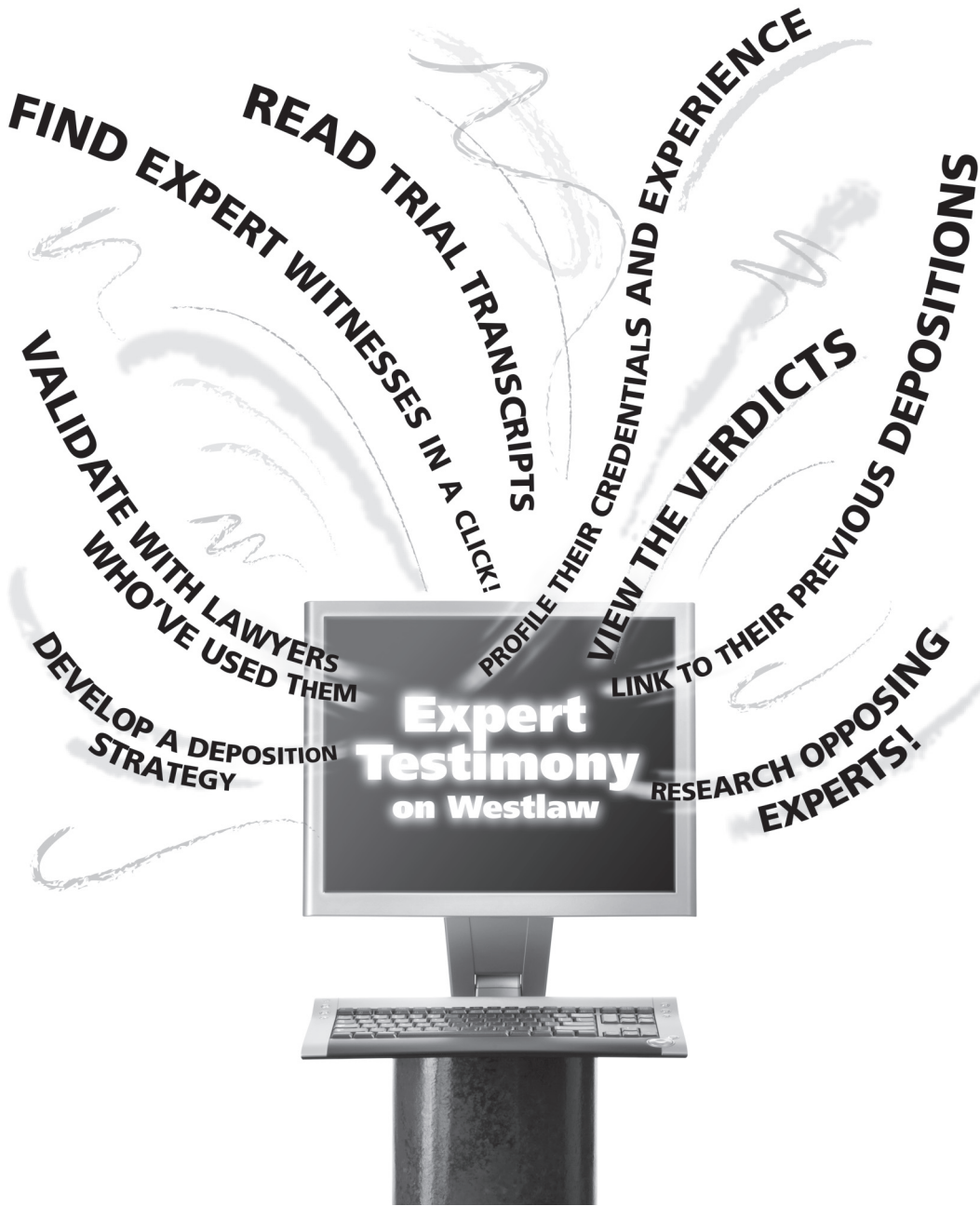
Foley & Lardner, LLP

Judge J.C. 'Jake' Stone Distinguished Service Award

Susan V. Stucker

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To ensure proper luncheon count, RSVPs are requested no later than 48 hours in advance. Those reserving less than 24 hours in advance will not be guaranteed a name badge. If you have made a reservation and find that you are unable to attend, please notify us as soon as possible via e-mail. We appreciate your effort to keep us up-to-date on your reservation status.



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Professionalism Committee

Rock, Paper, Scissors

— Dennis J. Wall



“Rock, Paper, Scissors” has recently regained international renown. All a person has to say is, “the Order in the Rock, Paper, Scissors case,” and many people will know that refers to Judge Gregory Presnell’s recently entered Order, which is republished in this edition of *The Briefs*.

The case was, of course, a Federal Case pending in the United States District Court for the Middle District of Florida: *Avista Management, Inc. v. Wausau Underwriters Insurance Co.* The lawyers are listed on the Court’s online docket. Both firms are located in the same building. The litigious dispute, which the lawyers brought to the Federal Judge for a resolution, was regarding where to take a deposition. According to the Order, this was not the attorneys’ first dispute in that case; rather it was “the latest in a series of Gordian knots that the parties have been unable to untangle without enlisting the assistance of the federal courts.”

Clearly declining the opportunity to function as a parent or as a referee, the United States District Judge ordered the attorneys to resolve their differences or to meet in public in full view, naturally, on the steps of the Federal Courthouse in Tampa to duel in a round of “Rock, Paper, Scissors,” with the winner setting the location of the deposition in question. At this writing, the parties are due to have scheduled this deposition and there is no late-breaking news to report in this column about whether they resolved their differences short of a public viewing of “Rock, Paper, Scissors,” or not.

The inspiration provided by the “Rock, Paper, Scissors” Order for an article on Professionalism is perhaps obvious. Acrimony often seems to be the first rule governing the behavior of lawyers involved in litigation. But the acrimony does not stop there. Many lawyers are plain nasty to one another. Most lousy behavior takes place outside of Judges’ fields of vision, but as recent events suggest, nastiness is not a thing that can be kept hidden forever.

How, then, to reduce nastiness among all kinds of lawyers, to a minimum level acceptable to most lawyers? Two examples from the Orange County Bar Association come to mind: R. Lee Bennett and Michael C. Maher. The similarities between these two highly respected lawyers are striking. They are both from the Orlando area, both have the same religious background at least in their formative years, both are distinguished for their national recognition (Lee Bennett, for example, is a current member of the American Bar Association House of Delegates, and Mike Maher is a past President of the Association of Trial Lawyers of America), and both are about the same age. Personally, I am not going to identify here for public consumption the year in which these two persons were born, regardless of

whether the year is a public record or not, but I can say that both Lee and Mike were rocking in their cradles when President Franklin D. Roosevelt announced that December 7, 1941, was “a date which will live in infamy.”

Their differences are pronounced, in some ways. Their respective political views, for example, could not be further apart. Lee Bennett’s practice areas are generally in the areas of Transactions and Commercial Law. Mike Maher’s practice areas are in Litigation and generally in Plaintiff Personal Injury. Finally, Lee is in a large law firm and Mike is in a smaller firm.

Regardless of the differences that separate these two lawyers, and perhaps because of the similarities that they otherwise share, both are deservedly recognized as professional, courteous and competent lawyers. They are each in their own way mentors by their examples. For example, Lee Bennett acted contrary to his own pecuniary interest in a matter in which he had associated co-counsel. An issue arose involving the mutual client’s ability to pay legal fees in that matter. Lee Bennett advised the mutual client to pay first the co-counsel he had associated, before the client even thought about paying his own bill. For example, Mike Maher acted in a way that might appear to be inconsistent with his chosen areas of legal practice, including the redress of grievances, by telling a lawyer who was filing such a case that that lawyer was wrong about the particular defendants.

The professional examples provided by lawyers like Lee Bennett and Mike Maher are too numerous to mention here. The ones that have been mentioned here are mentioned because, in addition to providing a model to follow, they provide hope. Lee and Mike are certainly well respected, and they deserve the highest respect for their demonstrated professionalism and their equally demonstrated competence, but they are not saints. If they were saint-like, it would perhaps be too much to bear for others wishing to follow their examples. Readers of this column can search the backgrounds of both Lee Bennett and Mike Maher to extract what wisdom they can, so as to model their own professional conduct on such examples and perhaps on examples of other fine lawyers, as well. The point here is a simple one: Professionalism among lawyers is not an exclusive characteristic of political persuasion, nor of practice area, nor of the size of one’s law firm. Professionalism comes from within.

In closing, a checklist such as the following may be helpful for lawyers to seek out places, people and situations that are more agreeable than others, perhaps, to

Continued on page 8

Professionalism Committee

Rock, Paper, Scissors

Continued from page 7

professionalism in practice. The checklist can include items similar to these, possibly among others:

- (1) Experience the moment. Ask yourself: "Is this what I want? Is this how I want to practice law?" If you give yourself a negative answer to your own questions of this kind, then ask yourself something more positive like: "How do I want to practice law?" The answer to that question may take longer. It will, in the end, be worth the time it takes to come up with the answer.
- (2) Geographical location may or may not have something to do with the professionalism quandary. Large cities clearly tend to increase the distance between lawyers, and not just literally. Consider meeting your opposing number, or litigation adversary, for breakfast or lunch to talk about things other than the legal issue, which temporarily yokes you together at the given moment. Face-to-face contact can help reduce unnecessary tensions and misunderstandings, of course, but it can also have the opposite effect. Some years ago, for example, Nikita Khrushchev was the Premier of the Soviet Union and he met President John F. Kennedy in Vienna in the first year of Kennedy's presidency. Khrushchev reportedly concluded that, for whatever reason, there would be no crisis if Khrushchev surreptitiously put ballistic missiles in Cuba and then announced it to the world. Not correct, as it turned out, of course. Most of the time, face-to-face meetings are more a positive than a negative before they happen. The results that follow a meeting, however, depend on what took place during the meeting and on what the people participating in the meeting perceive about one another; simply having face time is never alone enough.
- (3) Finally, for present purposes, consider your firm. Perhaps a different law firm would present opportunities to pursue professionalism and ethics, which your present firm perhaps does not.

Other matters can be added to any such checklist for professionalism, of course, as has already been said. The motivation to pursue a professionalism checklist lies within ourselves, and it is available to each of us, if we choose it.

Dennis J. Wall, Dennis J. Wall, P.A., has been a member of the OCBA since 1978.

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Sally Kest is a Board Certified Marital and Family Law attorney with statewide recognition for excellence and achievement. She was named one of the top 50 Female Lawyers in the State of Florida (Florida Super Lawyers, 2006). Last month Florida Trend placed Sally on its coveted "List of the Legal Elite" and Orlando Magazine named her as one of Orlando's "Toughest Divorce Lawyers." Central Florida's 9th Judicial Circuit will be well served by the election of Sally Kest.



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Judicial Investitures

The Hon. Jon B. Morgan, The Hon. Scott Polodna and The Hon. Stefania C. Jancewicz

Two circuit judges and one county judge were invested into office on June 16, 2006, at the Osceola County Courthouse in Kissimmee.

The Honorable Jon Morgan, the Honorable Scott Polodna and the Honorable Stefania C. Jancewicz took their ceremonial oaths of office, with enrobings by their families conferring the authority and symbol of the high office.

Judge Morgan, who was appointed to the Osceola County bench in 1998 by the late Governor Lawton Chiles, graduated from Colonial High School in 1970. He received a bachelor's degree in political science in 1974 and a law degree in 1977 from the University of Florida. He worked as a prosecutor for the Orange-Osceola State Attorney for 18 years, serving as chief of the Osceola division from 1988-1998. He also worked in private practice for a year before his appointment to the county bench. He was appointed to serve on the circuit bench in November 2005 by Governor Jeb Bush. In a statement about his new appointment, Judge Morgan said, "I hope that my experiences as a lawyer and judge over the past 27 years will continue to be a benefit to the court and the people of Central Florida."

Judge Polodna was nominated by the Judicial Nominating Commission to both the county and circuit benches before Governor Jeb Bush appointed him to a circuit seat in April 2006. "I was pleasantly surprised and honored to be nominated for both the Osceola County



Hon. Jon B. Morgan



Hon. Stefania C. Jancewicz



Hon. Scott Polodna

and Circuit judicial openings," he said. The new judge holds a bachelor's degree in psychology and a law degree from the University of Florida. He has taught criminal evidence at Valencia Community College, and served as an Assistant Public Defender for 10 years in the Orange-Osceola Public Defender's Office and as an Assistant County Attorney in Osceola. "It is an absolute privilege and honor to be appointed by Governor Jeb Bush," said Judge Polodna. "I appreciate all of the help and support I received from everyone who had a hand in getting me appointed."

Judge Jancewicz, who grew up in New Jersey, moved to Florida in 1985. She received her bachelor's degree in secondary education/English from Flagler College in 1991 and her law degree from Stetson University. She practiced primarily family law for eight years before she was appointed to be a magistrate in 2004. She was appointed to the Osceola County Court bench in March 2006 by Governor Jeb Bush. "I was incredibly thrilled about my judicial appointment," Judge Jancewicz said. "It was the greatest moment in my professional life. It is both humbling and gratifying at the same time to have reached this goal," she said.

Submitted by Office of Communications and Public Affairs, Ninth Judicial Circuit Court. The Hon. Jon B. Morgan has been a member of the OCBA since 1999; The Hon. Stefania C. Jancewicz has been a member of the OCBA since 2005; and The Hon. Scott Polodna has been a member since 2006.

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Winifred J. Sharp

Fifth District Court of Appeal Judge

Friday, September 8, 2006

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Judicial News

Thanks to the OCBA from "A Place For Children" in the Orange County Courthouse



The Hon. Cynthia Z. Mackinnon

Imagine you are in a Felony courtroom and the State Attorney is giving the factual basis for a plea to a violent sex battery or a gruesome murder. Or that you are in a domestic courtroom and the distraught and weeping victim of domestic violence is asking for an Injunction. Now imagine you are ten years old and the victim (or perpetrator) of the felony or the victim of the domestic violence is your parent or your adult caretaker. Until A Place For Children was established on the second floor of the Orange County Courthouse in 1998, these scenarios had been routine for many years. Babies, toddlers and school children of all ages were a common sight in courtrooms where these events occurred daily.

Judges, lawyers and court personnel were often distracted from their duties by children in the courtroom. It was not uncommon to have an Orange County Deputy trying to attend to or baby-sit a noisy or upset child. Judges could not simply ask a litigant to take a child out of the courtroom if the proceeding was inappropriate for the child to overhear, or the child was noisy. Typically litigants had their children with them because they did not have babysitters available. Once the court moved to the new courthouse in late 1997, shooing a noisy child out into the lobby with its four-story open atrium was not an option. The liability risks were all too apparent.

There was an equally important, if more abstract, reason to get children out of courtrooms. A trip to the courthouse is for many young children their first "civics lesson" - their first opportunity to observe how a branch of their government works. One doesn't have to have a degree in Child Development to know the above scenarios could have lasting impact on a child. Not a good first lesson. And these scenarios are not like pretend TV violence which can be switched off and forgotten, but real-life tragedies and disasters involving their loved ones.

All this changed when, in 1996, Linda Chapin, then County Mayor; Mayanne Downs, then-President of OCBA; Marilyn King, Chair of Healthy Community Initiative and the undersigned realized these situations were just wrong for many reasons. That group began to research places for children in courthouses. Surprisingly, the only state found to have any organized facility was New York. There, the chief judge of the highest court had mandated that all New York courthouses move toward establishing places for children to wait for their caregivers outside of courtrooms. They were in the early stages of placing centers in all courthouses.

The group went to New York and visited facilities in both very urban and rural settings. We talked to many people involved and got lots of materials. We returned realizing the center had to be licensed and meet state standards. We also realized many families in need of drop-off daycare had, in addition to legal problems, multiple needs for health care and social services. Intervention with troubled families by simple referrals could represent cost savings down the line to not just the court system, but to all components of the system.

After nearly two years of work and study, a fully licensed drop-in daycare for families with business in the courthouse opened early in 1998. It was simply called A Place For Children. The Children's Home Society was selected as the operator of the center. A coalition of funders stepped forward.

While there is no charge to a parent, the actual cost for the child is \$9.46 per hour. That cost is borne by Orange County, Court Administration, Children's Home Society and Heart of Florida United Way.

That was eight years ago. In January of this year, A Place For Children surpassed the 20,000 benchmark of children enrolled. The primary destination for parents is Family Court, followed by Criminal, Traffic, Civil, Mediation, Jurors and others. In 2002, the service was also extended to jurors, and over

300 jurors have reserved the service. Approximately 2,500 referrals have been made to a variety of health care and social service agencies for needs ranging from immunization for a child so she could enroll in school to housing assistance for a family living in a van.

After ten years, this innovative program has become an essential component of the operation of the Orange County Courthouse. It has been recognized by the Florida Conference of Circuit Judges as a model program, and studied for replication in many other courthouses around Florida and the country.

This would not have occurred without the vision, leadership and advocacy efforts of, among others, the leaders of the Orange County Bar Association. This is yet another example of why this Bar Association is known as the best Bar Association in the country! On behalf of the Judges, all personnel who work at the courthouse and over 20,000 children and their families who have been served, thanks to the OCBA for your support of this unique program.

The Honorable Cynthia Z. Mackinnon is a judge in the Ninth Judicial Circuit Court, Civil Division. She has been a member of the OCBA since 1985.



A child's dollhouse offers children an opportunity for imaginative play in a safe and nurturing environment.



Nitza Colon, Director of A Place For Children; Virginia Rodriguez, volunteer; Judge Cynthia Mackinnon; and Arvada Parker, volunteer.



Judge Mackinnon, who was instrumental in establishing the Center and is its biggest proponent, takes a peek at the pint-size dollhouse.



A little boy enjoys the the railroad playstation at A Place For Children.



The Center is well stocked with toys, games and activity stations any child would enjoy.

A Profile: APFC Volunteer Virginia Rodriguez



Virginia Nydia Marrero Rodriguez, a 79-year-young grandmother, has had a very full life. She emigrated from Cuba in the 1960s and endured the heartache and worry of leaving a son behind when Fidel Castro imposed a moratorium on travel by children over a certain age. Yet, in time, she met her future husband, Risler Raul Rodriguez, in Madrid, Spain. They moved to Los Angeles, where their son Diego “Woody” Rodriguez was born, and within six months they relocated to Miami, where Virginia and her husband would later own and run a small print shop for nearly 20 years. Never one to shirk hard work, Virginia, who was a bookkeeper in Cuba, learned all aspects of the business while raising and caring for her family. The birth of granddaughter Ella Grace Rodriguez (now joined by brother Gabriel Keyes) brought Virginia to Orlando in 2002.

Many near octogenarians might think that sitting back and taking it easy would be life’s longed-for dream. But not Virginia. For Virginia, keeping active and engaged in life is its own rich reward. So, when neighbors in her downtown senior residence began talking about their volunteer work with the Foster Grandparents program, she signed on. That was three-and-a-half years ago, and she’s still going strong.

The Foster Grandparents program provides volunteers for a number of daycare centers and nurseries across Central Florida, including A Place For Children (APFC). Although Virginia has never volunteered for or worked with children’s groups, it’s a natural fit that she gives her energy and time to APFC – both her son, Woody, and her daughter-in-law, Heather, are attorneys, and APFC is a flagship program of the Ninth Judicial Circuit Court. Housed in the courthouse, the program offers parents and caregivers – and more importantly, their children – a much-needed break from the adult work that goes on in the Courts. In addition to having a professional staff that provides families with information about and referrals to social services and community resources, volunteers offer much of the TLC that children need in times of emotional upheaval and stress. From doing art projects, to reading stories, to listening to children tell their stories, to joining them in free play and being available for hugs and smiles, volunteers like Virginia become the “soft cushion” children can land on for a couple of hours during difficult times.

In many ways, Virginia is the kind of grandmother many children would like to have: she’s pragmatic, yet loving. She knows that giving something back to others lifts her spirits and keeps her young; she realizes, too, that APFC offers services that, in the long run, save the government money by helping families find the resources they need to be successful. But mostly, she understands that children need unconditional love. As she says, she enjoys helping the children find a bit of happiness while their parents are away.

Thank you, Virginia, for your invaluable contribution!



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Ninth Judicial Circuit Public Defender's News

Eileen Forrester Receives the DuRocher Foot Soldier for the Constitution Award

Submitted by the Public Defender's Office of the Ninth Judicial Circuit

Eileen Forrester, Chief Assistant Public Defender for the Ninth Judicial Circuit, which includes Orange and Osceola counties, was awarded the Joe DuRocher Foot Soldier for the Constitution Award by the Central Florida Association of Criminal Defense Lawyers on Wednesday, June 28, 2006. She is the first woman to receive this honor that recognizes a career in service of defending constitutional rights.

"Eileen truly is a foot soldier for justice," said former Orange/Osceola Public Defender Joe DuRocher, for whom the award is named. "She is one of those quiet advocates who keeps up the fight for rights one case at a time. Our local justice system has benefited from her tireless work on behalf of those who too often seem to be forgotten by justice."

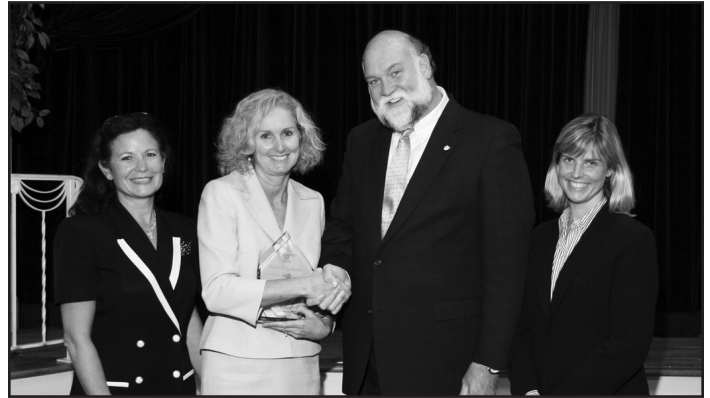
Forrester began her career with the Ninth Judicial Circuit Public Defender's Office in 1981 as the Assistant Public Defender in the juvenile division. Over the years her position in the Public Defender's Office has touched on work in the misdemeanor, traffic, and felony divisions, as well as training countless defense lawyers. She is also the first woman to serve as Chief Assistant Public Defender in the Ninth Circuit.

"I'm honored by this recognition," said Forrester. "Joe is a close friend and mentor, as he has guided me through my entire 25-year career in the Public Defender's Office. I hope to continue Joe's commitment to defending those in need and fighting for what is right. I accept this award on behalf of the entire Public Defender's Office."

Forrester graduated from the University of Florida College of Law in 1981. She and her husband, Warren Lindsey, a partner with Kirkconnell, Lindsey, Snure, & Yates, raise their daughter and two sons in Winter Park.

"I'm so proud of Eileen," remarked Orange/Osceola Public Defender Bob Wesley. "She is a faithful warrior who fights every day to make sure justice is served. We're lucky to have her in our community."

This is the sixth year the award has been given to an outstanding criminal defense lawyer. Past award winners include Don West, Jim Russ, and Steve Mason. The award is named for Joe DuRocher, who served 20 years as the Orange/Osceola Public Defender following a career as a circuit judge and ardent advocate.



From left to right: Rosemary Cakmis, Federal Public Defender's Office; Eileen Forrester, Chief Assistant Public Defender, Orange/Osceola Public Defender's Office; Bob Wesley, Orange/Osceola Public Defender; and Jenifer Davis, Trial Division Chief, Orange/Osceola Public Defender's Office.



From left to right: Joe DuRocher, Former Orange/Osceola Public Defender; and Eileen Forrester, Chief Assistant Public Defender, Orange/Osceola Public Defender's Office.



From left to right: Scott Lindsey, son of Eileen Forrester; Eileen Forrester, Chief Assistant Public Defender, Orange/Osceola Public Defender's Office; Warren Lindsey, husband of Eileen Forrester; and Megan Lindsey, daughter of Eileen Forrester.



American Bar Association

The Commission on the American Jury: Strengthening the American Jury System



————— *Sandra Day O’Conner*
Honorary Chair, ABA Commission on the American Jury

Jury service is probably one of the two most important duties that a citizen is called upon to perform. One duty is to vote and the other is to respond to the call for jury duty when called.

I used to be a trial judge, sitting in a trial court of general jurisdiction in my home state of Arizona in the Phoenix area, and in that capacity I had many juries resolve cases that were assigned to me. I was impressed through the years with the people who responded to the call for jury service. It was my experience that in almost every instance they served with great dedication and with a desire to do the best job they could with the case. Many of the people summoned had never been in a courtroom before.

The jury system in this country is one of the most enduring aspects of the legal system as a whole. By the eighteenth century, juries in England and in pre-Revolutionary America looked a good deal like they do today – except that only white male property owners were allowed to serve on juries. It took a long time for that to change. Juries continued to be composed entirely of white property-owning men until about 1860 when the first African Americans were allowed to serve on juries. Sex discrimination had a similarly sorry history in this country. It was only after women secured the right to vote in 1920 that they had any serious hope of serving on juries. As late as 1949, a Massachusetts statute allowed trial judges to exclude women from any trial in which the judge thought women would likely be embarrassed by hearing the testimony. In 1966 three states still had statutes excluding women from jury service. Even in states where women had the nominal right to serve on juries, some states had a system that upheld affirmative registration plans, in

which men were automatically subjected to jury service, but women had to affirmatively register a desire to serve on juries to be eligible. That system wasn’t overruled until 1975 in a case in the United States Supreme Court, only six years before I joined the court.

There are several jury issues today that particularly demand our attention. Jury service varies widely from state to state and even from city to city. Often the conditions in which juries serve are not very attractive. Sometimes jurors are not treated well on arrival in the courthouse. Jury selection needs to be shorter and more efficient. Jurors need to be able to make notes in the courtroom, and pass along questions to the judge. Simple instructions are needed. We need to make these improvements so that citizens see jury service as a privilege rather than a burden.

Solving these problems requires serious effort and commitment on the part of lawyers, judges, legislators, and interested citizens. It is well worth the effort to try to preserve a properly operating jury system. I am pleased that the American Bar Association, representing so many of the nation’s attorneys, decided to take this on as a project. I’m optimistic that if the membership of the ABA and people in every state start to make some changes, we’re going to end up with a better system than we’ve had in the past, one that will continue to serve us well in the new century.

—————
Sandra Day O’Connor has served as Associate Justice of the Supreme Court of the United States for 24 years.

—————
“Strengthening the American Jury System” by Sandra Day O’Connor, published in *The Commission on the American Jury: A Year in Review*. © 2005 by the American Bar Association. Reprinted with permission.

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ABA Commission on the American Jury

Juries in Civil Litigation

ABA Commission on the American Jury

Jurors work hard and appear to “get it right” the vast majority of the time. They are dedicated and they do justice. Nonetheless, some commentators have asked whether a system that worked very well for simple disputes in rural England can work in multimillion dollar disputes involving highly complicated matters.

This section looks at a number of issues raised by complex litigation, beginning with whether such cases should be tried before a judge instead of a jury.

Should Trial by Jury Be Eliminated in Complex Cases?

Both Harvard Law School Dean Edwin Griswold and Chief Justice Warren Burger questioned whether jurors can cope with some of today’s complex litigation. Some federal courts have also asked whether the requirements of due process might in some cases be better service by a bench trial:

Hugh H. Bownes, a judge on the U.S. Court of Appeals for the First Circuit, looked at this issue in an article from the *Franklin Pierce Law Center Law Review*:

“In an action for treble damages under the antitrust and antidumping laws do the parties have a right to a trial by jury without regard to the practical ability of a jury to decide the case properly?” (*In Re Japanese Electronics Products Antitrust Litigation*, 631 F.2d 1069 [3rd Cir. 1980]). In finding that the Seventh Amendment did not apply to a complex case that a jury could not decide properly, the court relied on another constitutional guarantee, the right to due process of law. It held in effect that the due process guarantee trumps the Seventh Amendment because trial by jury is but one specific way of seeing to it that all parties receive due process of law.

There is no suggestion that the right to a jury should be curtailed in criminal cases because of complexity in cases involving, for example, organized crime or securities fraud. Why a jury is competent to decide a complex case where a person’s life or liberty are at stake, but is incompetent to decide the same case where that same person’s property is at stake, is not clear to me.

“The opponents of the use of juries in complex civil cases generally assume that jurors are incapable of understanding complicated matters. This argument unnecessarily and improperly demeans the intelligence of the citizens of this Nation.” (*In Re U.S. Financial*

Securities Litigation, 609 F.2d 441, note 2, at 429-430 [9th Cir. 1979]). Even assuming that the anticipated length of an extremely complex trial might lead to juries which do not have professionals or other highly educated people on them, juries are still, in general, as capable as judges at discerning the facts and applying them to the law as enunciated by the judge. With respect of factual issues, it is unlikely that one judge has any special competence that makes him superior to the collective ability of twelve jurors. By what criteria shall a judge decide that a case is too complex for a jury to understand? If the judge can understand the issues, he should, with the help of the attorneys, be able to explain them to a jury. If he can’t understand the issues, does it necessarily follow the jurors are as stupid as he is?

The civil jury system is part of the fabric of our way of life. Before we abandon it, even partially, we should understand fully what we are giving up. (From “Should Trial by Jury Be Eliminated in Complex Cases?” *Franklin Pierce Law Center Review* www.piercelaw.edu/risk/vol11/winter/bownes.htm)

Partly as a result of concerns about complex trials, the practice of conducting jury trials has changed and continues to change. Judges and lawyers are increasingly sensitized to the danger of cases that are present so complexly that jurors cannot understand them. In a modern jury trial, it is the judge’s role to take steps to make issues clear and have the evidence presented in such a way that a layperson could understand it. The judge does not present evidence, but the judge can take certain steps, generally prior to the trial and outside the courtroom, to encourage the attorneys to employ techniques to clarify the facts and issues.

Juries and Punitive Damages

Policy debates over punitive damages have raged for several decades. Those finding such damages generally excessive have focused on personal injury disputes, particularly in the areas of product liability and medical malpractice. However, the Rand Institute for Civil Justice has conducted research indicating that “almost half of all punitive damage awards were made in cases in which the damages were financial, rather than personal in nature. Moreover, these verdicts, which we call *financial injury verdicts* to distinguish them from personal injury verdicts, are far more likely to include an award of punitive damages.

Continued on page 20

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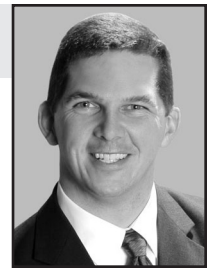
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Remember Howard Dean?

In 2004, Howard Dean ran for the Democratic presidential nomination. He raised a mountain of money, tirelessly worked the campaign trails, and was the early leader in the nomination race. But do you remember the key elements of his platform? Remember what issues mattered most to him?

Maybe not. *But you remember the scream.*

Dean had a point that he wanted to make. He wanted his point to be memorable. It was. Unfortunately, whenever anyone mentions the name “Howard Dean,” the first thing that comes to many minds is that scream.

Many lawyers make the same mistake when they try to emphasize important points in their presentations.

How do you change your voice when you want to emphasize important points in your presentation? If you’re like many lawyers, you raise your voice or shout when you want to emphasize a point.

You might think that you’re being effective when you raise your voice. Perhaps you’ve heard about the importance of vocal variety in your presentation style, so you know how important it is not to be monotone when you speak. So why not shout? What better way could there be for you to emphasize an important point? Certainly it will make that point stand out, right?

It will, but not the way you want it to stand out.

When you shout, your audience recoils. Even if they don’t physically recoil from you, they will mentally lean back in their chairs to push away from you. Regardless of whether it’s an individual listener, a jury of six, or an audience of hundreds, your audience doesn’t want to be yelled at.

There’s a better way to emphasize your point with vocal inflection.

Lower your volume, and speak softly.

That’s right. **Drop** your voice, and your audience will lean in to better hear you. It may seem counter-intuitive, but

when you lower your volume, your audience will actually pay more attention to what you say.

Really?

Yup. The next time you speak to an audience or to an individual, try lowering your volume when you make an important point. Then watch how they react. Rather than recoiling from you (like they do when you shout), they’ll lean in a little closer. They’ll cup their ears and focus their attention on you.

One reason this technique works is because it creates the illusion of intimacy. Do you remember the last time someone whispered to you? Remember turning your body and leaning closer to them, so you could better hear? Didn’t the whisper create a small zone of intimacy that excluded everyone else who wasn’t intended to hear the message?

Although you won’t actually be whispering, lowering your volume creates that same feeling of intimacy. When you lower your voice, you’re telling your audience, “This is intended exclusively for you. Not everyone is privy to this information.”

Don’t you like receiving exclusive invitations? Don’t you like the feeling of being in the inner circle, having access to information that others don’t know about? Don’t you pay more attention to those secrets?

So does your audience.

Before your next presentation, review your notes and ask yourself, “What is the most important point I want my audience to remember?” When you reach that section of your presentation, pause for a moment and wait for your audience to go quiet. Mark Twain said, “Some people will believe anything, if you whisper it to them.” Drop your voice and quietly share your most important point - your audience can’t wait to hear what “secrets” you have to share.

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Orange County Bar Association



OCBA Treasurer Jamie Billotte Moses was recognized at June's Bar Luncheon for her outstanding service as President of the Florida Bar's Young Lawyer Division. Tom Wert presented roses and a crystal vase, while Jamie's son Bennett, daughter Ashley, and parents Jim and Sherry Billotte shared in the moment.



The Honorable Stefania C. Jancewicz was invested as Judge in the Osceola County Court on June 16, 2006. Traditionally, OCBA presents new judges with a crystal gavel, which Judge Jancewicz received from OCBA President-Elect, Gene Shipley, at the ceremony held in Kissimmee.



The Orlando Federalist Society Lawyers Division hosted the seminar, "Trajectory of the John Roberts Court," in June. Professor Doug Kmiec, former Dean of Catholic University School of Law in Washington, D.C., addressed the group of about 50 attendees. Pictured is Robert Sirianni, President of the Federalist Society's Orlando chapter.

Five years ago, when I moved back to Orlando from South Florida, I found myself pleasantly surprised by the level of courtesy and professionalism among Central Florida attorneys. It made me feel good to be home, where I was once again encountering so many people who were considerate and kind! Last month I had a similar eye-opening experience when I went back to Iowa for my high school reunion – having been away for many years, I had forgotten how genuine the people are there. Back in the land where the tall corn grows and nobody notices the brand of your sunglasses, you see the kind of courtesy that is always genuine and has no ulterior motive (the kind where other drivers politely let you pull in front of them when you need to!). These hard-working, decent people were a great reminder of what it means to be courteous. Back in Orlando, I returned feeling grateful to live and work in a place where we are big enough to have malls with more than three stores and airports with more than two gates, but not so big that we have a shortage of good people who are still hard working and decent. And from what I hear, everyone else was very hard at work back here while I was off on the farm pondering life! So, here's what's up...

Congratulations to Carlton Fields Shareholder, **David Cannella**, who was selected for inclusion in *Orlando Business Journal's* "40 under 40" award winners for 2006! This award recognizes professionals under the age of 40 who are influencing their industries and the Central Florida community. **Frank Bedell**, with Winderweedle, Haines, *et al.*, has been named Secretary of the Trial Lawyers Section of The Florida Bar, in line to be Chair in 2008. Bedell was also reappointed as Trustee of the Florida Supreme Court Historical Society. Baker & Hostetler Of Counsel **Laurie J. Levin** has been elected Chair-Elect of the Florida Bar Health Law Section.

YLS Board Member **LaShawnda Jackson**, with Rumberger, Kirk and Caldwell, has been elected President of the Paul C. Perkins Bar Association. Congratulations to LaShawnda and to **PCPBar**, which was selected as Affiliate Chapter of the Year by the Virgil Hawkins Florida Chapter of the National Bar Association. **Hal Kantor**, with Lowndes, Drosdick, *et al.*, has been named the Chair of the United Arts of Central Florida, a community-based fundraising and advocacy organization for local arts and culture. **Kenneth Murrah**, of Murrah, Doyle and Wigle, was recently elected to the Emory University Gift Planning Advisory Council. Baker & Hostetler partner, **Jeffery Jonasen**, has been elected to the office of President for the Central Florida Council, Boy Scouts of America. The law firm of **deBeaubien, Knight, Simmons, Mantazaris & Neal, LLP** recently received The Florida Bar Young Lawyers Division Michael K. Reese Quality of Life Award. **Yvette Rodriguez Brown**, partner, accepted this award on behalf of the firm.

Meanwhile, **Nick Shannin**, of McDonough, Wieland & Shannin, demonstrated once again that he is much more than just a talking head, when he recently became board certified in appellate law. And a big congratulations to the OCBA's busiest couple, **Heather and Woody Rodriguez**, who welcomed the newest addition to their family, Gabriel Keyes Rodriguez, on June 21, 2006.

Kristyne Kennedy



OCBA members who were listed among the "Florida Legal Elite" in the July issue of *Florida Trend* magazine included: **Richard Lee Barrett**, with Barrett, Chapman & Ruta, P.A.; **Frank M. McDonald, Jr.**, with Carlton Fields; **Susan McKenna**, with Jackson Lewis LLP; and **Denis Durkin, James Etscorn, Richard Fulton, Jerry Linscott, Patrick Muldowney, and Kevin Shaughnessy**, all with Baker & Hostetler. The third annual list was compiled through a peer nomination process involving all of Florida's practicing attorneys. In addition, **Gary Sasso**, with Carlton Fields, was selected as one of Florida Legal Elite's "Top Managing Partners: Head of the Firm."

Many of our members were also listed in the first issue of *Florida Super Lawyers* 2006, chosen by their peers and through independent research in a process designed to identify lawyers who have attained a high degree of peer recognition and professional achievement. Listed among the Top 100 *Super Lawyers* were **Darryl Bloodworth** and **Charles Egerton**, with Dean Mead; **James G. Brown**, with Ford & Harrison; **Miranda Fitzgerald, Hal Kantor** and **Terry Young**, all with Lowndes, Drosdick, *et al.*; **Jules S. Cohen**, with Akerman Senterfitt; **Jeffrey Keiner**, with GrayRobinson; **Leslie O'Neal-Coble**, with Greenberg Traurig; **Kevin Shaughnessy** with Baker & Hostetler; **Michael R. Walsh**, Attorney at Law; and **Christopher Weiss**, with Holland & Knight. The Top 50 Female *Super Lawyers* included **Lauren Detzel**, with Dean Mead; **Miranda Fitzgerald** and **Julia Frey**, with Lowndes, Drosdick, *et al.*; **Sally Kest** of Kest Family Law; **Leslie O'Neal-Coble**, with Greenberg Traurig; **Cynthia Brennan Ryan**, with Holland & Knight; and **Kay Wolf**, with Ford & Harrison.

Don't forget to RSVP for the next big OCBA social event, our **Fall Joint Happy Hour** with CFAWL, YLS, and PCPBAR on **Thursday, September 14, 2006 at 5:30 p.m.!** (location t.b.d.) This happy hour was a big hit last year, so plan to stop by, say hello to friends and enjoy a cocktail or a bite to eat. Mark your calendars for future OCBA events including the Texas Hold 'Em Poker Tournament on **November 16, 2006** and the Winter Wine & Cheese Reception on **January 25, 2007**. For more information about any of these Social Committee events, contact me at (407) 246-8449 or kennedyk@jacksonlewis.com. Also, plan to attend the YLS's annual charity Golf Tournament at Orange County National's Panther Lake course on **September 8, 2006**. Contact Chelsie Roberts at croberts@fordharrison.com or Maria Hale at mhale@fisherlawfirm.com for more information.

Until next month, keep sending all of your news, updates, and other information to me at kennedyk@jacksonlewis.com or fax (407) 246-8441! And remember those folks in Iowa (or maybe your own home town) walking around waving to each other and being nice for no reason at all, who live by some of those very basic principles we sometimes forget: be on time, work hard, be honest, help others (even if nobody thanks you for it), love your family, don't be greedy, take responsibility for your actions, be considerate of others and always appreciate the good things you have.

Kristyne E. Kennedy is an associate with Jackson Lewis LLP. She has been a member of the OCBA since 2001.



LaShawnda Jackson, Paul C. Perkins Bar President; Wiley Boston, YLS President; and Kimberly Webb, CFAWL President, enjoyed the opportunity to work together at the OCBA annual retreat in June. The OCBA officers and executive council, along with officers of affiliated organizations, meet annually to discuss the direction of the Bar and plans for its future.



Daniel Caligiuri, Senior Vice President of Trammell Crow, presents Tom Wert with a check for the OCBA at its June retreat. Trammell Crow supports the OCBA through a business agreement that is beneficial to both the company and the Bar.



YLS held its Annual Law Clerk Reception this year on July 13th at the Orlando Museum of Art. The event was a huge success as more than 150 law clerks, attorneys and judges gathered to mingle and enjoy cocktails and appetizers. Many thanks to Orlando's dedicated law clerks!

While punitive damages are awarded in less than four percent of all civil jury verdicts, there is a 1 in 7 chance of a punitive award in disputes arising from contractual or commercial relationships including, for example, disputes arising from insurance or employment contracts or from unfair business practices.” (“Punitive Damages in Financial Injury Jury Verdicts,” statement submitted to the Judiciary Committee of the United States Senate by Stephen Carroll, Institute for Civil Justice, June 24, 1997.) Other Rand Institute research has looked at whether jurors can compartmentalize compensatory and punitive damages, whether jurors treat corporate and individual defendants differently, and trends in civil jury verdicts. See <http://www.rand.org/icj/research/juries.html> for more on this research.

The U.S. Supreme Court has examined the issue of arguably excessive awards on several occasions in recent years, in an effort to determine the standards mandated by the Due Process Clause and provide guidance to lower courts. One of the leading cases is *BMW v. Gore*:

The Alabama state courts have assessed the defendant \$2 million in “punitive damages” for having knowingly failed to tell a BMW automobile buyer that, at a cost of \$600, it had repainted portions of his new \$40,000 car, thereby lowering its potential resale value by about 10%. The Court’s opinion, which I join, explains why we have concluded that this award, in this case, was “grossly excessive” in relation to legitimate punitive damages objectives, and hence an arbitrary deprivation of life, liberty, or property in violation of the Due Process Clause.

... The reason flows from the Court’s emphasis in *Haslip* [*Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 1991] upon the constitutional importance of legal standards that provide “reasonable constraints” within which “discretion is exercised,” that assure “meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages,” and permit “appellate review [that] makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition.”

This constitutional concern, itself harkening back to the Magna Carta, arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal process, but of arbitrary coercion. Requiring the application of law, rather than a decisionmaker’s caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself.

...[It is especially important that courts review] a

jury-determined punitive damages award. That is because one cannot expect to direct jurors like legislators through the ballot box; nor can one expect those jurors to interpret law like judges, who work within a discipline and hierarchical organization that normally promotes roughly uniform interpretation and application of the law. Yet here Alabama expects jurors to act, at least a little, like legislators or judges, for it permits them, to a certain extent, to create public policy and to apply that policy, not to compensate a victim, but to achieve a policy-related objective outside the confines of the particular case. (*BMW of North America, Inc. v. Gore*, 517 US 559 [1996], Justice Breyer, with whom Justice O’Connor and Justice Souter join, concurring.)

In 2003, the Court held, in *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408, that the Utah Supreme Court erred in reinstating a \$145 million punitive damages award. The U.S. Supreme Court held that this was excessive and in violation of the Due Process Clause of the Fourteenth Amendment. The Court held that “this case was used as a platform to expose, and punish, the perceived deficiencies of State Farm’s operations throughout the country. However, a State cannot punish a defendant for conduct that may have been lawful where it occurred.... Nor does the State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of its jurisdiction.”

Justice Kennedy’s decision for the majority cited the 4 to 1 ratio of punitive to actual damages outlined in *Gore*, noting that “single-digit multipliers are more likely to comport with due process, while still achieving the State’s goals of deterrence and retribution, than awards with ratios in the range of, [as] in this case...145 to 1.”

Expert Witnesses and the Jury

Another issue is expert scientific testimony in civil trials. The rule through most of the twentieth century was that evidence not supported by the scientific community was not admissible. For example, under *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923), polygraph evidence was inadmissible for want of its general acceptance in the scientific community.

In *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the U.S. Supreme Court reexamined the issue of expert scientific testimony. Justice Blackmun’s opinion for the majority held that “general acceptance”

is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence – especially Rule 702 – do assign to the trial judge the task of ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence

Continued on page 24



YLS on the Move!

Back to School

Judith A. Garabo

It's been a long time since I graduated from law school, longer than I would ever admit in public, but every year I lament the fact that I'm not in school anymore (particularly around football season). This time of year, though, it's a little more tolerable because I'm not facing the back-to-school blues that always tended to cast a grey cloud over the end of an otherwise enjoyable summer.

As we close in on the end of summer, if you're still looking for ways to beat the heat, a frosty beverage is always the answer. I'm a proponent of a frosty beverage as the answer to many of life's other questions as well, but that's another story entirely. If you're similarly inclined, the **End-of-Summer Pub Crawl** is scheduled for **August 11, 2006**. This time the Young Lawyers take Church Street by storm. RSVP in advance and show up on time so you don't miss out! More details to come, but you can always contact me with any questions or if you want to reserve tickets.

July brought another spectacular and well-attended **Law Clerk Reception** at the Orlando Museum of Art. Thanks to generous firm sponsorships and the hard work of Lauren Heatwole and Taylor Kessel and the rest of their committee, the event was fabulous. Everyone had a great time grooving to the sounds of Dr. Otto Gomez and his band.

Summer law clerks also had a chance to meet local attorneys at July's **Afternoon at the State Courthouse**, which was followed by the **Young Lawyers Happy Hour at Suite B**. As in years past, the Afternoon at the Courthouse was tremendously successful and offered the summer associates and new attorneys alike a glimpse into the mechanics of the state court system from an up-close-and-personal standpoint.

Can we talk golf for just a minute? I am not afraid to admit that I'm an abysmal golfer. I play so infrequently that even if I do improve my game, by the next time I play, I've forgotten everything I had learned. However, I enjoy the game, largely because it gives me yet another excuse to go shopping for cute Lilly Pulitzer golf outfits and pink golf shoes. But what better way to spend a sunny day than sweating, driving around in a non-air-conditioned golf cart, drinking beer and adding new profanity to your vocabulary? It certainly beats working. For the golfers and the non-golfers alike, the **15th Annual Young Lawyers Section Charity Golf Tournament** will be held at Orange County National's Panther Lake course on Friday, **September 8, 2006**. Tee off is at 8:00 a.m. Last year was a sell-out, so make sure you sign up early to reserve your spot! For player and sponsor information, contact either Chelsie Roberts at croberts@fordharrison.com or Maria Hale at mhale@fisherlawfirm.com.

Join us in August for our monthly Luncheon at the Citrus Club on **Thursday, August 17** from 11:45 a.m. to 1:00 p.m. RSVP in advance to OCBAYLS@gmail.com. Cost is \$18 in advance and \$20 at the door. This month, we're

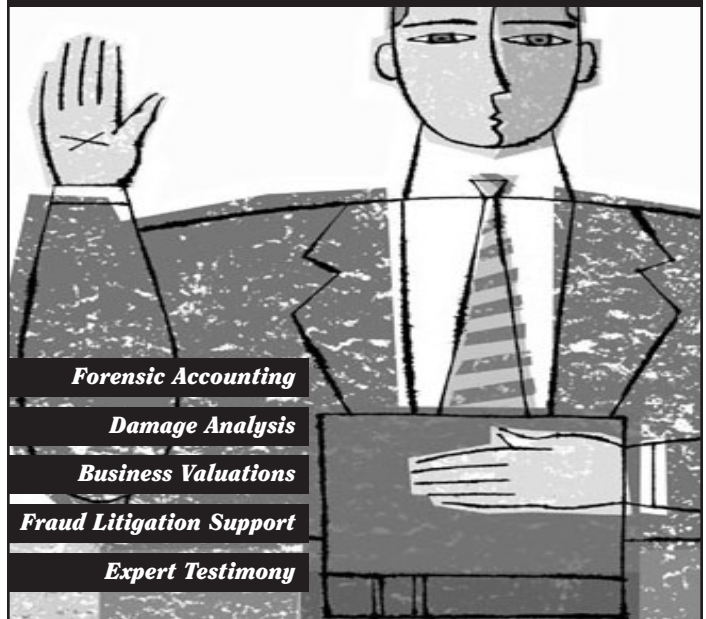
trying something different and opening up our forum to the candidates for Orange County Commission, so please join us for a lively debate and the opportunity to get some insight into the future of Orange County.

Finally, the **Young Lawyers Section Scholarship Committee** is seeking applications for its annual scholarship, which recognizes outstanding high school seniors who wish to attend Valencia Community College for two years and then one of the 11 State universities. Applicants are sought who are in need of financial assistance to further their educational pursuits, and a four-year scholarship will be awarded to an Orange County high school 2006 graduate or GED recipient. Please contact Lisa Geiger at lisajgeiger@yahoo.com or 407-380-0907, or download an application form www.orangecountybar.org.

As always, please feel free to drop me a line if you have any questions about the YLS or if you want to disseminate any information to our membership at large. As your Communications Coordinator, I'm happy to include any public announcements you wish to make in our sporadic email blasts. As always, if you're not receiving the blasts, please email me at ocbayls@gmail.com and make sure that your spam filter is set to accept emails from that address.

Judith A. Garabo is an associate with the firm Greenberg Traurig, P.A. She has been a member of the OCBA since 1999.

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Joe Johnson has worked his way up. He has been a police officer in Indiana, a Florida State Trooper, prosecutor, and currently an attorney in private practice for a decade. Joe Johnson is married and a father of three boys. His Honduran wife, Aurora, now a U.S. Citizen, helped him to learn Spanish. Mr. Johnson was born in Indiana in 1963, but has now lived in central Florida for 20 years. He has experience in criminal and civil law and business experience as a sole practitioner.

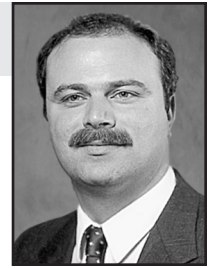
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Homeless Advocacy Project

Michael Resnick, Esq.



For more than 15 years the Legal Aid Society has operated a Homeless Advocacy Project for the purpose of assisting persons in resolving their legal concerns. The Project fulfills its mission by having approximately 25 Orange County Bar Association attorneys meet with the homeless every month, at 16 homeless shelters throughout Orange County, to assess their legal needs and to provide them with legal assistance where appropriate. Each request for formal legal assistance from a homeless person in a shelter generates an application for legal assistance that is reviewed by a staff attorney at the Legal Aid Society, who then makes a formal determination as to how the legal needs of the applicant can best be met (i.e., appointment of a *pro bono* attorney, referral to government agency, etc.). As one can imagine, providing legal assistance to the homeless can be a very challenging and daunting task, albeit a very rewarding one. The most common requests for legal assistance from the homeless include: helping obtain birth certificates and other identification for employment purposes, social security disability, child support, divorce, criminal matters, landlord/tenant disputes, alternative housing, small claims disputes, personal injury claims, and immigration. During calendar year 2005, the Homeless Advocacy Project received 355 applications for legal assistance from the homeless. Moreover, the Homeless Advocacy Project provided legal

advice or assistance to an additional 727 homeless persons who chose not to complete an application for legal assistance. As a result, the Project provided legal assistance to a total of 1,082 homeless persons, representing more than 15% of the entire homeless population in Orange County!

The attorneys who are currently members of the Homeless Advocacy Project are: Bruce Gibson, Eric Robinson, Lori Smith, Michael Tyson, Sharon Stedman, Phillip Bonus, Angela Ferguson, Brian Duckworth, David Holbrook, Richard Bogle, Laura Robinson, Ava Doppelt, William Rogner, Matthew Bartolomei, Joe Scalo, Matthew Pardy, Barbara Cowherd, Thomas Egan, Gene Boger, Randall Bolinger, Ingrid Keller, Norman Hull, Greg Swartwood, Roberta Fox, and Anna Adams Holbrook, *to whom we extend our sincere appreciation for all their wonderful efforts on behalf of the Legal Aid Society and the Homeless Advocacy Project!!*

If you are interested in becoming a member of the Homeless Advocacy Project in fulfillment of your pro bono requirements with the Orange County Bar Association, please call the Legal Aid Society at (407) 841-8310, extension 3133.

Michael L. Resnick is an attorney with the Legal Aid Society of the Orange County Bar Association. He has been an OCBA member since 1999.

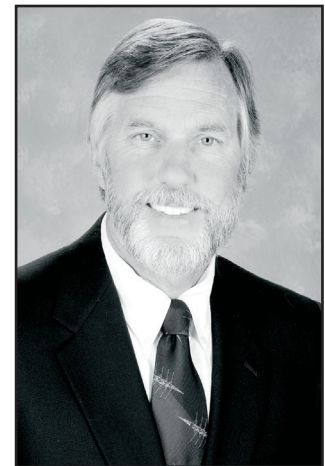
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based on scientifically valid principles will satisfy those demands.

...Ordinarily, a key question to be answered ... is scientific knowledge that will assist the trier of fact will be whether [the theory or technique] can be (and has been) tested.

... Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication.... [S]ubmission to the scrutiny of the scientific community is a component of 'good science,' in part because it increases the likelihood that substantive flaws in methodology will be detected.

...Additionally, in the case of a particularly scientific technique, the court ordinarily should consider the known or potential rate of error...

Respondent expresses apprehension that abandonment of "general acceptance" as the exclusive requirement for admission will result in a "free-for-all" in which befuddled juries are confounded by absurd and irrational pseudoscientific assertions. In this regard, respondent seems to us to be overly pessimistic about the capabilities of the jury and of the adversary system generally. Vigorous cross-examination, presentation of

contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.... These conventional devices, rather than wholesale exclusion under an uncompromising "general acceptance" test, are the appropriate safeguards where the basis of scientific testimony meets the standards of Rule 702.

The Rand Institute for Civil Justice has examined trends in the federal courts in the decades since the *Daubert* decision. "Critics argue that judges and juries do not have the training to evaluate scientific information properly and that 'bad' science is unduly influencing their decisions. Others worry that clumsy efforts to screen expert evidence can wrongly exclude novel science.... The findings show that judges have been taking their new role seriously and applying stricter standards to determine what sort of expert evidence is admissible. The analysis also found that plaintiffs and defendants have responded to the change in admissibility standards."

Several websites keep up with expert evidence in the wake of the *Daubert* decision. See www.daubertontheweb.com, www.daubertexpert.com, and www.dauberttracker.com.

"Juries in Civil Litigation," by the ABA Commission on the American Jury, published in *The Commission on the American Jury: A Year in Review*. © 2005 by the American Bar Association. Reprinted with permission.

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Rainmaking

Rainmaking 101 – Lesson 2

Mark Powers



Hopefully you have read Lesson Number One in last month's edition and have started to identify the "ideal" client types for each of your practice areas. Though it may sound simple, recognizing whom you best serve is an important first step in building a successful practice. Here's why: the quality of your practice – and how much you enjoy working in your practice – is directly correlated to the quality of your clients.

If you, like many of your colleagues, have stocked your practice with clients that aren't a good fit – you'll spend much of your career feeling frustrated and unappreciated. In addition, you'll never realize your income potential. Our research has shown that if you were to apply Pareto's Principle, also known as the "80/20 rule" to your client base, you would probably find that 80% of your income comes from 20% to 40% of your clients! In this lesson you will learn the power of this principle and how to apply it to your practice.

Most of you know from your own experience that all clients are not created equal – but haven't yet learned to trust your instincts during the intake process. You may recognize that the client that darkens your door with a page ripped out of the phone book is not quite the same as those sent by your best referral source – but you give everyone the benefit of the doubt. Don't. Become more rigorous in your screening procedures. Carefully selecting the clients you work with not only improves your morale, it minimizes collection problems and has the added benefit of protecting you against malpractice problems in the future.

The Four Client Types

There are four levels of client types. We call them "A", "B", "C" and "D" clients. Each level is judged on certain general criteria: the ability to pay; having needs consistent with your expertise; their ability to cooperate; their opinion of attorneys in general; whether they are high or low maintenance; their ability to be satisfied with services rendered; and the likelihood of sending more work or quality referrals. In addition, practice-specific criteria should also be developed that relate to the viability of the prospective client's case.

In this ranking system, which you can custom fit to your particular practice areas, "A" and "B" matters are the good, "C" matters are the bad, and "D" matters are downright ugly.

Who Are Your "A" and "B" Clients?

Our studies show that the "A" and "B" clients for most practice areas typically comprise 20% of your client base. Hidden among the other clients you serve, they are usually a small, quiet, but vitally important group. How important are they? As mentioned before, they will generate a hefty 60%

- 80% of your revenues and only take up 20% - 40% of your time. In addition, they pay their bills; appreciate the value of the work you do for them; cooperate with you; show up on time and send quality referrals. In short, these are the clients you actually enjoy working with! They are the low maintenance clients that bring you the kind of matters that fit your expertise. They are not crisis driven and they trust your opinion. These are the clients that tend to get lost in the shuffle as you scramble to handle the constant demands of your "C" and "D" clients.

The Next Step

If you find you have stocked your practice with "C" and "D" clients – conduct a "housecleaning." Most attorneys are appalled to discover how many problematic clients they work with. But there is a solution – follow the steps listed below to conduct your own "housecleaning". If you have any doubt during this process and begin to vacillate on whether or not a client is appropriate for you – ask your staff. "C" and "D" level clients often treat your staff poorly or take up an unreasonable amount of their time.

1. Rank your current clients and consider referring out, closing, or letting go of all the "D" and most of the "C" clients.
2. You can do this in person, over the telephone, or by letter. Your bar will typically have sample disengagement letters that you can use. If the issue is nonpayment, you are not ethically bound to continue work for a client that is not paying you. (*Litigators must be careful here – confer with your trial judge.*)
3. Avoid working with more "C" and "D" clients! Refine your intake selection so you don't admit them in to your practice in the first place!

Fortunately, "C" and "D" clients don't sneak into your practice unannounced. They usually arrive waving several red flags. And you welcome them in. Often because you need the money – hoping that uneasy feeling you felt upon meeting them was just heartburn. Ironically, the client that you take because you need the money ends up taking your time and not paying you for it. Begin to trust that uneasy feeling – it might be trying to tell you that you are getting involved with the wrong kind of client.

Mark Powers is the President of Atticus, Inc. and a regular contributor to The Briefs. Mark co-authored "The Making of a Rainmaker: An Ethical Approach to Marketing for Solo and Small Firm Practitioners" and founded Rainmakers™, a simple process for attorneys at all levels to stay focused on marketing, creating fresh ideas, and on-going accountability to marketing. To learn more about Atticus or Rainmakers™, please visit the Atticus website at www.atticusonline.com or contact the Atticus office at 352-383-0490.

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Felice A. Dizon – *deBeaubien, Knight, Simmons, et al.*

Andrew J. Gorman – *Fisher, Rushmer, et al.*

Kimberly E. Lorenz – *Fisher, Rushmer, et al.*

Chris M. Morrison – *GrayRobinson*

F. Lee Morrison - *GrayRobinson*

New Partner

Richard L. Barry - *McEwan, Martinez & Dukes, P.A.*

Speaking Engagement

Michael T. Haire, with the law firm of *Fisher, Rushmer, Werrenrath, Dickson, Tally & Dunlap, P.A.*, presented the topic “Update on Florida Construction, Insurance and Homestead Law Affecting Community Associations” to the Space Coast Condominium Association at its May meeting in Cocoa Beach.

Neal McCulloh, *Clayton & McCulloh*, recently was the guest speaker for Space Coast Condominiums Association at their monthly meeting, speaking on “Updating Your Documents: Whether, Why, How and When” in Cocoa Beach.

Brian S. Hess, Joseph C. Staynoff, and Arlene-Frances Ring, *Clayton & McCulloh*, recently were the guest speakers for the Coalition of Port Orange Homeowner’s Association’s Directors Conference. They presented on legal issues facing community association board members in Port Orange.

Dennis J. Wall, an award-winning author, has just written the 2006 Supplement to his book, “Litigation and Prevention of Insurer Bad Faith,” in its Second Edition, published by West Publishing Company. Online and in print, the 2006 Supplement adds more than 120 cases, statutes and other citations of authorities to the 3,300 cases, statutes and authorities already cited in the book.

News to Note

From the Orange County Clerk of Courts, Criminal Division: Please file all Civil & Criminal Appeal pleadings directly with the **Criminal Division, Room 210** (front counter), Orange County Courthouse. If mailing pleadings, please send to: Criminal Division – Appeal Team, Room 210, 425 N. Orange Ave., Orlando, FL 32802-4994. For more information, contact Jodi Hurtado, Supervisor, Criminal Division, at 407-836-2259.

The Florida Supreme Court’s Standing Committee on Fairness and Diversity will hold a public meeting on Friday, August 18, 2006 in Orlando (location TBA). For further information or to sign up to speak or submit written

comments, contact Debbie Howells, Office of State Court Administrator, 500 S. Duval St., Tallahassee, FL 32399; (850)922-4370; osca@flcourts.org. Persons with disabilities who need an accommodation should contact Ms. Howells at least five days prior to the hearing. TDD is through the Florida Relay Service, 711.

The Guardian ad Litem Program, Transitions Project of the Legal Aid Society, will present “Training on Independent Living Law For Guardian *ad Litem*s” on Thursday, August 31 from 1:30 p.m. to 4:30 p.m. immediately following the Bar Luncheon at the Downtown Marriott. The seminar is free; materials will be provided; CLE is pending. Learn more about the laws intended to safely transition foster youth to adulthood, recent legislative changes, and specific advocacy strategies and required procedures. The seminar is designed for current or prospective Orange County Guardian *ad Litem*s and/or their staff members working on GAL cases. RSVP to Derek Frye at 407-841-8310 or dfrye@legalaidocba.org.

Family Law Practitioners, Judges and Magistrates: Please plan to attend the Orange County Bar Association Family Law JA Luncheon on Thursday, September 21st at 12:00 p.m. at the Ivanhoe Plaza (soon to be Sheraton) Hotel, 60 S. Ivanhoe Blvd., Orlando, FL 32804. Cost: \$29 per person. Please RSVP by Friday, September 15th to Mary at mary@nardiandnardi.com or 407-426-8203.



Literary Society 2006-2007 Reading List

Meetings start at 12:00 p.m. at the Zimmerman, Kiser & Sutcliffe office, with the exception of June, which will start at 11:30 a.m.

Sept. 13 – Balzac’s *Pere Goriot* (Meredith Cohen)

Oct. 11 – Isabel Allende’s *Zorro* (Dennis Wall)

Nov. 8 – J.M. Coetzee’s *Disgraced* (Dottie Green)

Dec. 13 – Lewis Carroll’s *Alice In Wonderland* (Robert Hoofman)

Jan. 10 – Erskine Caldwell’s *Tobacco Road* (Robert Mansbach)

Feb. 14 – Henry James’ *The Ambassadors* (Karen Jennemann)

Mar. 14 – Thomas Mann’s *Death in Venice* (Ann Palmer)

Apr. 11 – B.C. Pierre’s *Vernon God Little* (Scott Willett)

May 9 – Margaret Atwood’s *The Blind Assassin* (Maria Hinds)

June 13 – Graham Greene’s *The Heart of the Matter* (Jules Cohen).



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LITIGATION ASSOCIATE - Young, dynamic Orlando law firm seeks attorney with 2-5 years of experience in construction and commercial litigation. Excellent academic/work experience. Excellent work environment and opportunity for growth. Fax resume and cover letter to: 407-426-9304.

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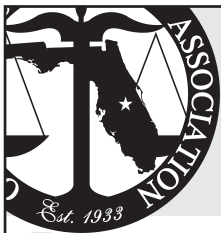
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2006

August - September Calendar

OCBA Luncheon • August 31, 2006

**Rick Walsh, Sr. Vice President,
Darden Restaurants**

RSVP by August 29th to reservations@ocbanet.org

August

- 1** **OCALSS Meeting**
5:30 p.m. • Bar Center
- 3** **Elder Law Committee**
12:00 p.m. • Bar Center
- OCBA Paralegal Committee**
5:30 p.m. • Bar Center
- 4** **CFAWL Luncheon**
11:30 a.m. • Citrus Club
- Criminal Law Committee**
12:00 p.m. • Bar Center
- 8** **Executive Council Meeting**
11:30 a.m. • Bar Center
- 9** **Estate Guardianship & Trust Committee**
12:00 p.m. • Bar Center
- 10** **Legal Aid Society Executive**
8:00 a.m. • 100 East Robinson
- Young Lawyers Board Meeting**
5:30 p.m. • Bar Center
- 11** **Workers' Compensation Committee**
11:45 a.m. • Bar Center
- Diversity Committee**
12:00 p.m. • 255 S. Orange Ave., Ste. 1401
- 15** **Professionalism Committee**
8:00 a.m. • Bar Center
- Legal Aid Society Board**
11:45 a.m. • 100 E. Robinson St.
- 16** **Solo & Small Firm Committee**
12:00 p.m. • Bar Center
- 17** **Paul C. Perkins Bar General Meeting**
12:00 p.m. • Bar Center

Young Lawyer Section Luncheon
12:00 p.m. • Citrus Club

Health Law Committee
6:00 p.m. • GrayRobinson
301 E. Pine St., Ste. 1400

18 **Family Law Breakfast Meeting**
8:00 a.m. • 425 N. Orange Ave., Rm. 2310

22 **Technology Committee**
12:00 p.m. • GrayRobinson
301 E. Pine St., Ste. 1400

23 **CFACDL**
11:45 a.m. • Sorosis Club

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

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

28 **CFAWL Board Meeting**
12:00 p.m. • Bar Center

30 **Business Law Committee**
12:00 p.m. • 255 S. Orange Ave., Ste. 1401

31 **OCBA Luncheon**
Rick Walsh – Darden Restaurants
11:30 a.m. • Downtown Marriott

Legal Aid Free Seminar
1:30 p.m. • Downtown Marriott
Contact Susan Khoury:
407-841-8310, ext. 3137

September

1 **CFAWL Bar Luncheon**
11:30 a.m. • Citrus Club

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

5 **OCALSS**
5:30 p.m. • Bar Center

7 **Elder Law Committee**
12:00 p.m. • Bar Center

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

8 **Workers' Compensation Law**
11:45 a.m. • Bar Center

Diversity Committee
12:00 p.m. • 255 S. Orange Ave., Ste. 1401

The 15th Annual YLS Section Charity Golf Tournament
8:00 a.m. Shotgun Start
Orange County National

12 **Executive Council**
11:30 a.m. • Bar Center

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

Family Law Executive Board Committee
12:00 p.m. • Bar Center

Judicial Relations Committee
12:15 p.m. • Orange County Courthouse, 21st Floor Conference Room

14 **Legal Aid Society Executive**
8:00 a.m. • 100 E. Robinson St.

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

Fall Happy Hour
5:30 p.m. • TBA

15 **Family Law Committee**
8:00 a.m. • 425 N. Orange Ave., Room 2310

19 **Professionalism Committee**
12:15 p.m. • Bar Center

Legal Aid Society Board Meeting
11:45 a.m. • 100 E. Robinson St.

International Law Committee
12:00 p.m. • Rissman, et al.
201 E. Pine St.

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Orlando Sentinel
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Affairs, Darden Restaurants
Growing Up Together
Thursday, August 31, 2006



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President and Chief Executive Officer,
Orlando Regional Healthcare System
Will Healthcare As We Know It Survive?
Thursday, September 28, 2006



FRANCISCO R. ANGONES
President-Elect Designate,
Florida Bar
Lawyers' Impact In American History
Thursday, October 26, 2006



**U.S. SENATOR
MEL MARTINEZ**
A Washington Update
Thursday, November 30, 2006



**THE HONORABLE
BARBARA J. PARIENTE**
(tentative)
Chief Justice, Florida Supreme Court
Thursday, January 25, 2007



LORENZO PHILLIPS
Principal, Jones High School (Retired)
Our Kids Can Succeed
Thursday, February 22, 2007



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Chief Executive Officer,
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NFL Hall of Fame Football Player,
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