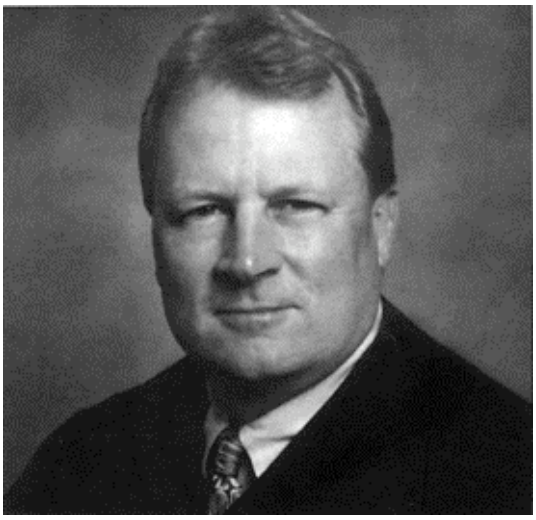
Honorable James D. Whittemore An Oral History



The following is a continuation from December 1998 of an interview with Circuit Judge James D. Whittemore, recipient of the Y. L. S. 1998 Most Outstanding Judge Award. This prestigious prize, called the Robert W Patton Award is a feature of Law Day each year. Conducting the interview is Retired Judge Morison Buck.

Q. We all know that the Chief Judge has total control over who goes to what division. Some of the Circuits like the 6th (Pinellas and Pasco) used to have a mandatory rotation system where you had to go from criminal to civil to juvenile to family law. What do you think of that plan?

A. There's arguments on both sides of that. I practiced in Pinellas County and it was little unnerving to me when you started a case, especially a criminal case, with one judge and you finished with another judge. It took a little bit away from some of you effort because many times your client would end up pleading guilty or no contest, and just about everything you did in front of that judge might have an effect on disposition of the case. So it was a bit unnerving to suddenly walk in and see a new face.

From a judicial perspective, we're lucky in Tampa. Our Chief Judge and majority of judges feel there should be some discretion and that he is best suited to determine the strengths and weaknesses of all of us. As the need arises, he can rotate and reassign, and it's worked out very well, I think for the judges, lawyers and litigants. The other side of the argument if, after speaking with other Judges around the state, sometimes it's healthy for change, particularly if you have a very demanding docket. Sometimes moving around helps to avoid the burnout factor. We've got the best of both the worlds in the 13th Circuit.

Q. Is the motion calendar, which came at a time when I had some involvement with starting, still in place?

A. By administrative order we all have it. I can remember when it was enacted. It was a good thing then, and a good thing now. It affords a regular opportunity for lawyers to get motions heard on an expedited basis. It also frees up a lot of time during the day for more substantive matters and lengthier proceedings. I have a form of that that I utilize in the afternoon for discovery proceedings. I have my own uniform calendar for discovery.

Q. How often do you schedule that?

A. I do that 4 days a week, Monday through Thursday at 4:00, pretty much first come, first served. We usually cap it off at 8 or 10 cases. What it does is free up my

morning for UMC to deal with more substantive matters. It's worked out well, for me anyway, and we've had few complaints, so hopefully the lawyers appreciate it.

Q. Can you think of any motion calendar proceedings that might be improved or modified?

A. One thing I do that helps me from an administrative standpoint. We always know who's going to be there in the morning. Some judges just allow the lawyers to show up, on notice. I'm not sure which way is best, but for me it's better, more orderly to know how many I've got coming in, and that way we avoid having too many in any 45 minute period devoted to that.

Q. How much notice do you require be given on UMC hearings?

A. You've got to give reasonable notice. I'm not sure the Administrative Order addresses exactly how many days. I don't think anything less than five days is reasonable unless there's an agreement. Many times there is an agreement. Generally, lawyers give 7 to 10 days if not 2 weeks notice.

Q. I am interested in your special setting four days a week for discovery matters. What are your notice requirements in those cases?

A. Pretty much the same; reasonable notice of at least a week. During jury trials I don't run that docket unless there are emergencies. Sometimes that winds up haunting me but my feeling is that once a jury trial starts it shouldn't be interrupted. When we start at 8:30 or 9:00 in the morning, we go throughout the day and I may set a motion late in the week, thinking that a trial could finish early. I don't know that all the judges do that, but it's a luxury I can afford when I do discovery hearings in the afternoon.

Q. Who is the Administrative Judge in General Civil now?

A. Gaspar Ficarrotta.

Q. Turning to a little different area for a moment. What do you think of the current level of professionalism among lawyers in the Tampa and Hillsborough County Bar?

A. I think overall we've got an excellent reputation for professionalism. I've had many lawyers from Orlando, Jacksonville, Ft. Lauderdale and Miami comment from time to time how comfortable they feel in Tampa when they come to argue motions and try cases. The demands and pressures of the practice are great and they're rising. T think it's not something that's gotten better or worse. I think we've always had a very good atmosphere in Tampa. I have noticed a bit more acrimony, if you will, and I think that's not a product of lack of professionalism as much as it is the demands of the business.

Q. Economic pressures?

A. Economic pressures, time pressures. I do hear war stories from other parts of the state, but I also hear judges say that it's getting better overall, primarily because the judges are involved, the trial associations are also actively involved, the Inns of Court are involved, and I think there is an awareness that we don't have to be anything but professional to be successful and get these cases resolved. So it has worked out well for everyone.

Q. Have you had any experience comparable with what District Judge Bucklew told me a few months ago? She had one case where during voir dire examination a prospective juror said that she didn't trust lawyers and wouldn't believe anything they said, in general. Have you had anything that blatant?

A. Not quite that direct, but I have encouraged jurors on voir dire to ask questions. And I use an analogy when explaining that it's okay to have strong feelings on certain

subjects, including lawyers and law suits. I always get a chuckle about that, and I say that you might not like lawyers but you understand your role as jurors and you should ask the lawyers questions. What I get in return, at least the initial reactions, is a laugh because they understand that not everyone loves lawyers. I can say that, by and large, by the conclusion of the trial those jurors acknowledge and recognize the importance of lawyers in our society. I think it's a tongue-in-cheek kidding. I haven't had anybody say it directly as did Judge Bucklew.

Q. During your service as Circuit Judge have you ever found it necessary to hold a lawyer in contempt for violating any of the rules or canons governing attorneys during a hearing or trial?

A. Once.

Q. (Comment) Without naming names perhaps.

A. (Laughs) I could almost name names. The lawyer wouldn't mind but I happen to know this lawyer very well. It was a situation where his client had possession of an article that was the subject of a lawsuit, for analysis and testing and they wouldn't return it. After a couple of hearings, I had directed that it be returned. The lawyer had some control over the client and the particular piece of machinery. I finally imposed sanctions. Don't recall if I actually held him in contempt or just used the word.

Q. It would have necessarily been indirect, criminal contempt would it not?

A. Eventually I signed an Order that it be returned and it wasn't. Then it became a little more serious and I imposed a fine on a daily basis and the machinery was quickly returned. I don't know if the fine was ever paid. We laugh about it now. Opposing counsel was a good friend. It wasn't anything more than a little bit of a tactical move. With respect to concept of contempt, judges have responsibilities to maintain order. The canons start with that preamble. The use of the contempt power is something you never want to use. I have raised it as a potential consequence on a few occasions. Fortunately I haven't had to exercise it.

Q. Ever had any witnesses or parties in the course of a trial or chambers hearing create any disruption or uproar or other opprobrious behavior that you had to call down?

A. Not too often. We have had from time to time problems with witnesses who are not happy about being here. I do recall not too long ago in a given trail we had a jury trial spectator that I observed in my mind attempting to influence negatively a witness, to intimidate the witness who was very uncomfortable. It was obvious the way the spectator positioned herself that she was attempting to make eye contact with the witness. After taking a break and conferring with counsel, I barred her from the courtroom. I instructed the bailiff to quietly tell the offender to sit in the waiting room. I didn't want to focus on her or embarrass her, and this was all in the presence of the jury. I advised the lawyers that we needed to avoid even the potential risk that a witness would be concerned about testifying.

What I have founds as a judge, and I think many of the judges here feel the same way, is that people often come to court emotionally upset or angry, and they sense that the judge is going to be fair and will listen and will treat them with respect and dignity, it mitigates against outbursts and inappropriate conduct. So we don't see much of that. You try to nip it in the bud when you see it. How the bailiff treats the people is important. Our bailiffs treat people very respectfully and with dignity. The way the JAs address them is another factor. It's communication more than anything.

Q. What do you expect from attorney with respect to their conduct with opposing counsel in trials and hearings?

A. I've got some fairly strong feelings about that. And I think most lawyers agree, and most judges do. They should not address each other during the course of a hearing unless the judge invites them to. They shouldn't argue across the table with one another. I use an analogy speaking to young lawyers. Why do you want to talk to the lawyer across the table when he or she is not making the decision in the case? You ought to be addressing the decision maker. And that seems to ring true with lawyers. It's unprofessional for lawyers to do that, and I stop it. I think lawyers should now their audience, to know their judge in terms or his or her background. They should understand what particular things this judge may require of them, such as briefs or memos, whether a judge like highlighting of parts of a court opinion. Judge Spicola and I felt strongly enough about the subject of memoranda that we put up a sign in our hearing rooms that all memos or briefs were to be submitted at least two days prior to hearings. That gives us a chance to read them instead of bring given them during the course of the hearing when there is not time to read them. That's a workable solution to not only encouraging briefing, which I do, but also making the time to read and understand it and be prepared for the hearings.

Q. (Comment) For what it's worth, my feeling is that what you've done is a sound practice. I recall years ago a case before Judge Parks, who sat in the very place where you are now. One of the senior lawyers here, a very capable man with a dour personality and soft-spoken, would invariably whip out a memorandum which the other side hadn't seen and was consequently unable to respond to.

Q. Do you have any special techniques in maintaining decorum in your trials?

A. I have gone so far as to draft and utilize a written order of trial procedures that I sign in every case to be tried in front of a jury. It addresses proper decorum, not making speaking motions in the jury's presence, giving legal rather than nonlegal grounds for objections. At pre-trial I always discuss with the lawyers the importance of professionalism in the courtroom, particularly in front of a jury. Citizens expect lawyers to act that way, and I think that is the least we can do. I think if brings about good results. Citizens come away with a good feeling about our system.

Q. Are the civil time standards promulgated by the Supreme Court - something like 10-12 years ago is my guess - still observed?

A. Oh, yes. In fact the Clerk's office alerts us when a case has approached or exceeded the guidelines. So we're conscious of that by a printout issued quarterly. The guidelines are good. They are not hard and fast requirements but they do tell the lawyers, the judge and litigants that the case needs to be moved along. There are extraordinary circumstances, such as multiple parties, complicated issues and things of that nature.

Q. What's your policy in a case where plaintiff's case is beyond the time standards for trial yet plaintiff's attorney requests a continuance after it is set for trial? I remember one or two cases where the lawyers were very resentful of being forced to trial so as to comply with the Supreme Court's directive.

A. I don't have a fixed policy. In fact, rarely do the guidelines come up in those discussions. We're dealing with the reason for the continuance more than the time standards. Time standards are guidelines to keep cases from hanging around gathering dust. The practical side of continuances is just as important if not more so. For example,

if a given witness isn't available, or a plaintiff hasn't reached maximum medical improvement. If it's a good reason and a reasonable request, I think lawyers and judges try to accommodate those seeking continuances, up to a point. There are times in a given case where you have to say no. The way our system is set up in the 13th Circuit the guidelines rarely come into play because we are usually right on the mark, absent extraordinary circumstances as mentioned earlier.

Q. Any thoughts about ways to improve the trial setting process consistent with the RCP and the guidelines or do you think the present system is satisfactory?

A. Well, we all do it a little differently. Some judges only set trials for the next 60 days. Some of us set trials up to six and eight months into the future. I'm not sure which system works best. Lawyers don't complain. I think there's one tool that is helpful and that's case management. It's a non-adversarial hearing. You can come in and discuss what jury dates are available, what discovery remains to be accomplished, what problems you may encounter in trying a case, the length of the case. It's a very good way to have an informal discussion about setting the case on the trial docket, and being certain it would be reached. For example, you wouldn't want o put a 1998 case on the jury trial docket that same year. It probably wouldn't be reached because there are older cases and they would have priority generally. At the same time, with case management, if you've got a particularly pressing case that needs to be tried, you can let the judge know about it, the lawyers can discuss it and now with our Trial Division, cases expected to last more than a week can easily be transferred to Trial Division and set for a date certain.

Q. Incidentally, are you now requiring mediation in all cases before being set for trial?

A. I do. They are given the choice of mediation or arbitration. My policy requires every case to be either mediated or arbitrated.

Q. Is there an Administrative Order out on that procedural option?

A. Not that I'm aware of. That's left to the individual judges. The Rules of Civil Procedure embody mediation. Most judges in Tampa require it.

Q. do you have an opinions about the propriety of lawyer advertising, especially in prime time television?

A. Well, I don't know that I have an opinion. I recognize the business importance of advertising, and have spoken with many lawyers who swear by its product and its results. It's probably a necessary evil.

Q. Some people think it has perhaps contributed to the public's disdain many times for the legal profession. Heard anything about that?

A. I've heard that argument in one of our Inns of Court meetings. We put on a presentation abut advertising. That's one of the concerns not only of lawyers but non-lawyers. On the other hand, I've had non-lawyers say that if you don't know a lawyer and you have a legal problem, it's an excellent way to become familiar with what lawyers are out there in a given field. I think the print advertising in phone books and other media can be valuable to the public. Television advertising seems to be mostly personal injury or workmen's compensation, and perhaps the injured party sitting at home or in a hospital bed who may feel they have a case or cause of action is helped by the fact that there are lawyers making themselves available. I never engaged in advertising and didn't have to. Back then it just didn't happen very often.

Q. Some might call it puffery?

A. (Laughs) Well...

Q. (Comment) I understand there are mixed views on the subject. There's probably less than a half-dozen firms that are seen on television in this immediate area.

A. The money that's spent is mind-boggling. I do know that I've seen the statistics of television stations in Tampa and I think most lawyers would be astonished of how thousands, hundreds of thousands of dollars are spent in Tampa by certain law firms on advertising on an annual basis. One firm spends in excess of a million dollars.

Q. (Comment) The Supreme Court has apparently given them a rather free reign to talk about "We've done more trials than anybody else. Therefore, you ought to come to us."

A. There are some regulations and restrictions and the Bar is active in trying not so much restrict as to insure that the advertising is fair, truthful and not misleading.

Q. Winding down, and if you have anything else you'd like to say?

A. I do want to make one comment because this will be published. You noted that I was recently honored (Law Day 1998) by receiving a very prestigious award. I didn't get a chance at the time to thank the Young Lawyers and membership of the Bar. I do want to say that it is a privilege to serve as a judge and that award means an awful lot to me and my family.

Q. One final question. Do you have any advice to young lawyers who are just starting their career in the practice?

A. Yes. My advice is to get active in the Bar Association, become involved. You will broaden the amount of people you know, but will also broaden your experience. You'll see a lot of different lawyers and learn from them. My advice is to watch, listen and learn from other lawyers. Go to court and sit and watch. Just sit in hearing rooms. Take an hour or two each week. Sit in the back of the room and watch what goes on. It's amazing how much will be learned. It's almost like being there and doing it, the next best thing to experience. One thing, because of the pressures of billable hours and getting the work done, lawyers lose sight of the fact that you learn by doing it in the courtroom and watching other lawyers doing it. There's nothing worse than being up there for the first time without having that perspective. Find a mentor or mentors, and learn from them. You always learn, as you know. To this day, we're still learning; even senior lawyers and judges. Not a day goes by when you don't learn something.

- Morison Buck