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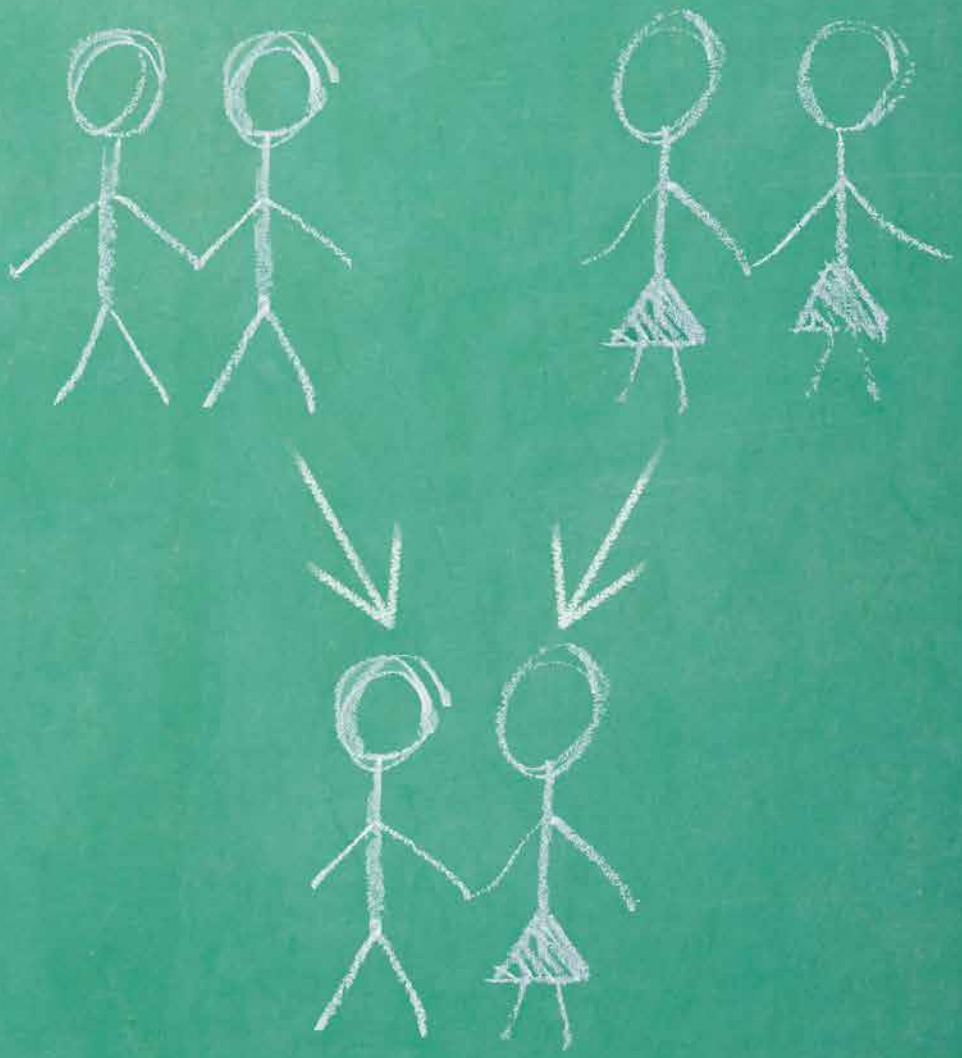

SEXUAL ORIENTATION CONVERSION THERAPY:

Can the Government Ban a "Cure?"

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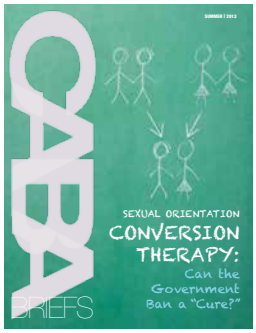
"LAWYERS ON THE RUN"

56 THE EVENT, WHICH WAS HELD ON APRIL 20, 2013, AT TROPICAL PARK, HAD OVER 500 PARTICIPANTS, AND RAISED APPROXIMATELY $25,000!

ON THE COVER



32 SEXUAL ORIENTATION CHANGE EFFORTS
The Ninth Circuit Court of Appeals soon will address the constitutionality of California's first-of-its-kind ban on gay conversion therapy for minors. The controversial therapies stem from the now widely discredited belief that homosexuality is a curable disease.

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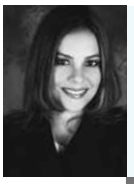

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CABA BRIEFS

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CABA Briefs is published quarterly by the Cuban American Bar Association, Inc. ("CABA"). CABA is a non-profit voluntary bar association founded in 1974 by lawyers of Cuban descent. CABA's members include judges, lawyers, and law students of all backgrounds interested in issues affecting the Cuban community, as well as broader legal and human rights issues impacting minority communities as a whole. CABA's mission is to promote equality of our members; increase diversity in the judiciary and legal community; serve the public interest by increasing awareness to the study of jurisprudence; foster respect for the law; preserve high standards of integrity, honor, and professional courtesy among our peers; provide equal access to and adequate representation of all minorities before the courts; facilitate the administration of justice; build close relationships among our members; provide mentoring and scholarship to law students nationally; and support the indigent community through the funding and administration of an effective pro bono legal assistance project and other community programs. Currently, CABA has in excess of 2,000 members in our organization.
To submit an article or ad to CABA Briefs, please contact Jorge A. Pérez Santiago at cababriefs@hotmail.com.

Jorge A. Pérez Santiago
Editor-in-Chief

Briefs Committee

PRESIDENT'S MESSAGE

"To the wrongs that need resistance, To the right that needs assistance, To the future in the distance, Give yourselves." Carrie Chapman Catt

Remarkably, we are midway through 2013! It has been a great year thus far and we have a lot of great events planned for the remainder of the year. Since the last issue of *Briefs* was published, CABA has been hard at work. On **April 20, 2013**, CABA held its 2nd annual 5K Run/Walk "Lawyers on the Run" to raise funds for our Pro Bono Project. A special thanks to our Title Sponsor, **City National Bank**, who continues to provide support and resources to CABA and its members.

On **May 1, 2013**, CABA was pleased to celebrate Law Day with various other local voluntary bar associations at the North Dade Justice Center. This year's theme, "Realizing the Dream, Equality for All," was particularly important to CABA. CABA, as an organization, remains committed to the core tenets of its mission—equality, diversity, civility, access, opportunities, and understanding. The national ideal of equality under the law remains a challenge, but it is one of which we can never lose sight in order to achieve justice in our legal community. On **May 9, 2013**, CABA, in conjunction with the Dade County Bar Association and sponsored by **Sabadell United Bank**, hosted a 4-Hour CLE titled, "My Shingle— the Ins and Outs of Opening Your Own Practice." The CLE was well attended and provided great insight to our members on what is needed to open a law practice successfully.

On **May 14, 2013**, CABA's Board of Directors had the opportunity to meet, greet, and network with Hispanic Law Students Association members from the University of Miami School of Law at a cocktail hosted by UM Law at the School's Faculty Lounge prior to the Board Meeting. It was a great opportunity for the students to unwind after their finals that had recently concluded and celebrate with CABA's Board Members. On **May 15, 2013**, on behalf of a unanimous Board of Directors, CABA sent a letter to Members of the Senate Judiciary Committee opposing any and all amendments to S.744, the "Border Security, Economic Opportunity and Immigration Modernization Act," that: (1) provide for indefinite detention of immigrants; (2) abridge judicial review of immigration proceedings; or (3) eliminate a reasonable path to citizenship for deserving undocumented immigrants currently in the United States. Among other things, CABA's letter emphasizes its concern for basic and procedural due process issues inherent in the proposed amendments of S.744. To view a copy of the letter, please visit CABA's website at www.cabaonline.com.

CABA's Young Lawyers Committee held a Joint Professional Associations Young Lawyers Happy Hour at Club 50 at The Viceroy on **May 16, 2013**. This event brought together young professionals from CABA, DCBA, Puerto Rican Bar Association, FIBA, YCPA's and RCA Miami. On **June 6, 2013**, CABA celebrated "El Día Del Abogado" at the Cuban Heritage Collection at the Richter Library on the University of Miami Campus. If you have not had the opportunity to visit the Cuban Heritage Collection, I encourage you to do so. The Collection collects, preserves, and provides access to numerous mementos relating to Cuba and the Cuban diaspora from colonial times to the present. This was a very special evening during which we recognized and commemorated several of CABA's own Past Presidents, including:

Osvaldo Soto, Luis Figueroa, Mario Goderich, and **Jose "Pepe" Villalobos**, all of whom practiced law in Cuba before immigrating to the United States. The journeys travelled by each to continue their legal careers in the United States are worthy of repeating and memorializing for future generations to recognize.

CABA's Chispa Intern Program has commenced its inaugural year on **June 10, 2013**, with a law student from Florida International University interning for two (2) months this summer at CABA's Pro Bono Project for one month and at the Eleventh Circuit Court of Miami Dade County for one month. A special note of thank you and recognition is extended to **Judge Beth Bloom** for assisting CABA in coordinating the Chispa Program and to **Judge John Thornton** who will be overseeing the intern. On **June 18, 2013**, CABA held a Summer Solstice "Membership Appreciation" Networking Happy Hour sponsored by **Brickell Motors**. CABA is grateful and appreciative of its members and enjoys being able to get together and celebrate with one another.

CABA's Pro Bono Project, under the leadership of Executive Director, **Lesley Mendoza**, has continued to soar to new heights. CABA's Pro Bono Project remains busy at work helping the neediest members of our community who cannot otherwise afford adequate legal representation. The Project has increased its efforts related to its Foreclosure Defense Project and continuously has maintained office hours on designated dates at the Miami-Dade County Law Library to provide needy homeowners facing the potential loss of their homes with counsel and advice. Additional matters of representation worthy of noting include the following:

Assistance with a family law matter where a 3-year-old asthmatic child had been abducted to Cuba by her father. The young mother was unrepresented and did not know where to turn. CABA's Pro Bono Project immediately got to work. After a series of various meetings, conferences, strategic planning sessions, calls, and emergency hearings, the child finally was reunited with her mother at the airport upon arriving back to Miami. We were fortunate to have several attorneys assist us in the process, but a special recognition goes out to family law practitioner, **Elena De Socarraz**, who went above and beyond the call of duty in making sure the mother had the best possible representation, as well as CABA Board Member, **Yara Lorenzo**, who oversaw every aspect of the case.

The Third District Court of Appeal issued a recent opinion, *Santos v. Flores*. This is a case in which a single mother filed a petition seeking permanent child support for her two (2) severely autistic children. The trial court granted the relief, but limited the child support until the children reached the age of 25 on the grounds the mother could not amend her petition. Through the coordination of CABA's Pro Bono Project, Jorden Burt attorneys, **Sonia Escobio O'Donnell** and **Clifton R. Gruhn**, filed an appeal of the trial court's decision to deny the mother's motion to amend. The appellate court reversed the trial court's decision, and, premised on judicial efficiency, ordered permanent relief for the disabled children.

The success of CABA and its Pro Bono Project is reflected in the strength of our referral attorneys, members, friends, law firms, institutions, and organizations that have demonstrated their commitment to our future by volunteering their time, efforts, and monetary donations. We welcome your assistance in any manner you can provide. I encourage each and every one of you to give back to our community and profession, as well as support CABA's Pro Bono Project, by contacting Lesley Mendoza at lesley@cabaonline.com or at (305) 458-2003. For additional information, you can also visit CABA's Pro Bono website at www.CABAProBonoProject.com.

I look forward to the coming months and encourage you, our members, to remain active in CABA, our profession, and our community.

In your service, I remain,

Sandra M. Ferrera
President

EDITOR'S MESSAGE

Dear colleagues:

I hope this issue is a joy to read, thought provoking, and prompts us to carefully consider our past so we can continue building a more prosperous future.

Special thanks go out to our amazing Articles Editors, Eric J. Eves and Kristina Maranges. This issue is rife with substantive articles that required their fastidious nature to kick into overdrive to ensure a quality product was distributed to our readers.

In this quarter, CABA celebrated "El Dia Del Abogado" by honoring several of CABA's own Past Presidents, all of whom practiced law in Cuba before immigrating to the United States. Continuing with that theme, this issue of *CABA Briefs* shares: (1) the trials and tribulations Jose "Pepe" Villalobos overcame to become an attorney in Florida; and (2) success stories of prominent Cubans in our community. Personally, I have a special affinity for Pepe's story because it reminds me of my father's.

My father, Juan C. Pérez-Morales, was 14 when he and his family left Cuba for Spain in 1971. After a few years spent adapting to his new life in Spain (then still operating as a dictatorship under Generalísimo Francisco Franco), he and his family immigrated to the United States in search of democracy and opportunity. Although he was 18 and a would-be rising senior, he was expected to start high school in Miami as a freshman. Unprepared to go through the high school travails once again and needing to provide for his family, he worked on the assembly line of a manufacturing plant for billiards tables—when prompted he will proudly explain the steps and procedures to create a flawless billiards table—and attended night classes to learn English and prepare for the GED. Ultimately, after overcoming several other barriers I omit in the interests of brevity, he became a doctor specializing in infectious diseases. He now begrudgingly accepts that his two sons, Juan C. Pérez, Jr. and myself, are both attorneys.

I share these stories to remind all of us to be grateful for the sweat and tears others shed to pave an easier path to success for future generations. Further, I hope these anecdotes inspire us to push through the daily doldrums and dig a little deeper because great feats can be achieved for the community and ourselves through hard work and dedication. It would be a shame for our predecessors to have sacrificed so much only for the baton to pass to generations not willing to continue with the same courage and energy—perhaps we could all give just a smidgeon more effort to both honor our past and create a more flourishing future.

As always, I hope you enjoy reading this issue as much as I have enjoyed putting it together. Please send your comments and suggestions to cababriefs@hotmail.com.

Sincerely,

Jorge A. Pérez Santiago
Editor-in-Chief

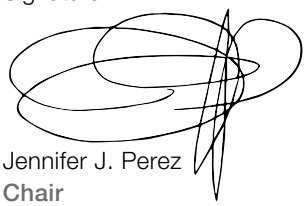
CHAIR'S MESSAGE

They say that every summer has a story. This summer, CABA's story has had many exciting and diverse chapters. From events to interviews to informative pieces, I think you will agree that this issue of *CABA Briefs* is a definite page-turner. Thank you to everyone who has submitted their ideas and to those members who have helped prepare this edition. Enjoy and remember to keep your ideas coming!

If you have any questions or comments, do not hesitate to contact me, jeperez@bupalatinamerica.com, I would love to hear from you!

Thank you,

Signature



Jennifer J. Perez
Chair

LEGAL ROUNDUP

by Elliot B. Kula, Daniel M. Samson, and W. Aaron Daniel Smallwood v. State

A CELLPHONE IS NOT A CIGARETTE PACKAGE.

The "smart phone," a cell phone with capabilities unheard of just a decade ago, has changed our lives forever. It is so much more than our mere cell phones of yesteryear: it is a miniaturized computer that provides a window into the most private and personal aspects of our lives. There is of course the internal hard drive that stores private data locally, but there is also the access it allows to private data stored anywhere and everywhere the internet will take you. And let us not overlook the "apps" that allow quick and easy access to bank accounts, desktop computers, and even nanny cams.

The Florida Supreme Court, mindful of this modern technology, has held in *Smallwood v. State*,[2] that a law enforcement officer may not search the contents or data within an arrestee's cellphone without first obtaining a warrant. And in so holding, the Florida Supreme Court declined to extend the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement beyond simply removing the arrestee's cellphone.[3]

In *Smallwood*, the Florida Supreme Court considered the following certified question of great public importance from the First District Court of Appeal:

> **DOES THE HOLDING IN UNITED STATES V. ROBINSON, 414 U.S. 218 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973), ALLOW A POLICE OFFICER TO SEARCH THROUGH PHOTOGRAPHS CONTAINED WITHIN A CELL PHONE WHICH IS ON AN ARRESTEE'S PERSON AT THE TIME OF A VALID ARREST, NOTWITHSTANDING THAT THERE IS NO REASONABLE BELIEF THAT THE CELL PHONE CONTAINS EVIDENCE OF ANY CRIME?[4]**

The Court answered the question in the negative.[5]

The facts of the case are relatively simple. Mr. Smallwood was arrested for robbing a convenience store at gunpoint, and at the time of the arrest, the arresting officer seized Mr. Smallwood's cell phone and searched its content.[6] On it, the arresting officer found pictures from the day of the robbery, some before and some afterward—pictures of a handgun, bundles of money, Mr. Smallwood and his fiancée holding money, and "an image of hands with engagement rings."[7]

Mr. Smallwood moved to suppress the photographs on grounds that he "had a reasonable expectation of privacy in the data and information" stored on his cell phone, and he argued that the "search-incident-to-arrest exception to the warrant requirement did not apply because the search was not conducted for the purpose of preserving evidence."[8] Indeed, the arresting officer testified that he did not know whether the cell phone contained any evidence at the time he searched its contents.[9] The state, however, analogized the cell phone to a "wallet or a closed container," which an arresting officer is routinely allowed to search incident to the arrest.[10] The trial court denied the motion to suppress; a jury convicted Mr. Smallwood of robbery and possession of a firearm by a convicted felon; and the appeal to the First District followed.[11]

The First District recognized that there was "no uniform view" on whether a cell phone's contents may be searched incident to an arrest, but found guidance in the United States Supreme Court's decision in *United States v. Robinson*,[12] in which the Court held that the search-incident-to-arrest exception permitted "a search and inspection of the contents of personal items found on the arrestee [such as a crumpled cigarette package], even if it is unlikely that the arrestee has a weapon or evidence related to the crime on his person."[13] The First District "expressed great concern about its ruling," commenting that the U.S. Supreme Court could not have contemplated *Robinson's* applicability to present day smart phones when it issued its 1973 opinion,[14] and thus certified the question.

The Florida Supreme Court explained that both the Fourth Amendment to the United States Constitution and section 12 of Florida's Declaration of Rights "guarantee citizens the right to be free from unreasonable searches and seizures,"

but that Florida's search and seizure provision contains a "conformity clause" that dictates "it shall be construed in conformity with the Fourth Amendment to the United States Constitution, as interpreted by the [U.S.] Supreme Court."[15] And so, the Florida Supreme Court began its analysis by considering whether "the decision in *Robinson* is both factually and legally on point with the circumstances of the instant case and whether it is controlling."[16]

Reviewing the facts in *Robinson*, the Florida Supreme Court noted that, during a search-incident-to-arrest, the arresting officer removed a crumpled cigarette package from the arrestee's person and searched its contents to discover *heroin*.[17] And on those facts, the Florida Supreme Court explained, *Robinson* held that such a warrantless search did not violate the Fourth Amendment because "it is reasonable for the arresting officer to search the person arrested in order to remove any weapons," and "to search and seize any evidence on the arrestee's person in order to prevent its concealment or destruction."[18]

The Florida Supreme Court concluded that *Robinson* was inapposite:

> [W]e agree and conclude that the electronic devices that operate as cell phones of today are materially distinguishable from the static, limited-capacity cigarette packet in Robinson, not only in the ability to hold, import, and export private information, but by the very personal and vast nature of the information that may be stored on them or accessed through the electronic devices. Consistent with this conclusion, we hold that the decision of the United States Supreme Court in Robinson, which governed the search of a static, non-interactive container, cannot be deemed analogous to the search of a modern electronic device cell phone.[19]

And with that, the Florida Supreme Court expressed particular concern with the level of access a police officer could gain into an arrestee's private life by searching a cell phone because "many people now store documents on their equipment that also operates as a phone that, twenty years ago, were stored and located only in home offices, in safes, or on home computers."[20]

> *"Justice Lewis, writing for the majority, highlighted the untenable stretch in logic required to apply* **Robinson** *to cellphone searches: "In our view, attempting to correlate a crumpled package of cigarettes to the cell phones of today is like comparing a one-cell organism to a human being."*[21]

The Florida Supreme Court went on to examine further U.S. Supreme Court precedent on the search-incident-to-arrest exception.[22] First noting the twin rationales underpinning the exception—officer safety and preservation of evidence—the Florida Supreme Court recognized that since the U.S. Supreme Court's decision in *Arizona v. Gant*,[23] the search-incident-to-arrest has been limited such that "[i]f there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, *both justifications for the search-incident-to-arrest exception are absent and the rule does not apply.*"[24]

Applying *Gant*, the Florida Supreme Court concluded that "once the electronic, computer-like device was removed

from Smallwood's person, there was no possibility that Smallwood could use the device as a weapon, nor could he have destroyed any evidence that may have existed on the phone."[25] Thus, because law enforcement did not obtain a warrant prior to searching the contents of Mr. Smallwood's cell phone, the search violated the Fourth Amendment, and the images from the cell phone should have been excluded from trial.[26]

An observation necessary to the majority's holding in *Smallwood* was that today's cell phones are not only *quantitatively* different from small physical containers such as cigarette packs, but *qualitatively* different as well. That is, today's cell phones provide access to "vast quantities of *highly personalized and private information*."[27] It was on this point that the majority most vehemently differed from the dissenters, led by Justice Canady and joined by Chief Justice Polston.[28] This point distinguished *Robinson* from the facts of the case and underscored the unreasonableness of a warrantless cell phone search.

But what about devices other than cell phones? What about tablets, i-Pads, or e-readers? The majority's opinion struck a broad tone that should allow it to be applied to searches of other electronic devices of similar breadth, even those yet to be made available by our favorite tech companies (like wristband or headband computers—think Google Glass!). The majority broadened its description of cell phones with phrases like "small portable electronic devices,"[29] "electronic devices that operate as cell phones,"[30] and "interactive, computer-like, handheld devices."[31] Arguably, under the broad language of *Smallwood*, a warrant would be necessary to search any portable electronic device that can store or access large amounts of private information.

While law enforcement in Florida is now required to obtain a warrant before searching your cell phone, as the Florida Supreme Court noted in *Smallwood*, "the [U.S.] Supreme Court has never addressed the specific issue of whether law enforcement officers may conduct a warrantless search of the data on a cell phone as part of a search incident to a valid arrest."[32] In fact, the U.S. Supreme Court has "nonetheless denied certiorari review in cases that have reached diametrically opposite conclusions."[33] Thus, whether law enforcement violated your Fourth Amendment rights when it conducted a warrantless search of your cell phone will depend on which state or federal appellate circuit you find yourself in. **CB**

O'LEARY V. STATE

"IF YOU DON'T HAVE ANYTHING NICE TO SAY, DON'T SAY ANYTHING"—ON FACEBOOK!

In *O'Leary v. State,*[34] the First District Court of Appeal applied section 836.10, Florida Statutes (2011), which criminalizes sending written threats of bodily injury or death, to threats made on a Facebook page.

Mr. O'Leary wrote a message on his personal Facebook page threatening one of his relatives with "death or serious bodily injury."[35] Mr. O'Leary's cousin, a "Facebook friend" who could view Mr. O'Leary's profile and posts, read the threats on Facebook and informed the authorities.[36] Mr. O'Leary was charged with violating section 836.10, which provides that:

> Any person who writes or composes and also sends or procures the sending of any letter, inscribed communication, or *electronic communication* … to any person, containing a threat to kill or to do bodily injury to the person to whom such letter or communication is sent, or a threat to kill or do bodily injury to any member of the family of the person to whom such letter or communication is sent commits a felony of the second degree.

Mr. O'Leary, while reserving his right to appeal, entered his plea of no contest.[37]

The First District recognized that a conviction under section 836.10 required that the defendant write a threat, send the threat, and that the threat be received.[38] But the Court considered the meaning of the words "sending" and "receipt" under the statute in order to determine whether a Facebook posting could meet those definitions.[39]

"Sending," wrote the First District, occurs when "a person composes a statement of thought, and then displays the composition in such a way that someone else can see it."[40] And "receipt" is then accomplished, the First District explained, "[w]hen the threatened individual, or a family member of the threatened individual, views and receives the thoughts made available by the composer."[41] Only by completing both steps is the statement "sent" for purposes of section 836.10.[42]

As to Mr. O'Leary's Facebook post, the First District held that, by composing the threatening message and posting it to Facebook "for viewing [by] all of [his] Facebook friends," Mr. O'Leary sent the threatening missive under the terms of the statute.[43]

> *That is, according to the First District, "[g]iven the mission of Facebook, there is no logical reason to post comments other than to communicate them to other Facebook users."[44] And that mission, which the First District quoted in its opinion, is "to give people the power to share and make the world more open and connected."[45] Thus, Mr. O'Leary effectively sent his threatening post to all of his Facebook friends, and when his cousin viewed the Facebook post, it was received according to the statute and the violation was complete.*[46]

The First District apparently did not find it necessary to recognize any requirement that a defendant intend to communicate the message *to the target*. As long as there is intent to communicate the threatening message, the display of the message in a visible way, and the identifiable target (*or family member thereof*) views the message, section 836.10's elements are met. Relying on the mission of Facebook, the First District appears to have concluded that a defendant must merely form the intent to communicate a threatening message to *someone*.

It would take no leap in logic at all to apply *O'Leary* to threats "tweeted" via one's Twitter account. There's certainly intent to communicate a tweet to the tweeter's followers. But what about someone who is not "following" the threatening tweeter but is able to access the threatening tweet through other avenues? And what about uploading a threatening video to YouTube for the whole internet to see? Is there a sufficient intent to communicate there?

Perhaps the First District will curtail attempts by the State to use *O'Leary* to extend section 836.10's reach to all forms of social media, since it contrasted posting on Facebook—which it considered an act of communication—with the quaint pastime of "writing for [one's] own personal contemplation," in "a private journal, diary, or any other medium that is not accessible by other people."[47] Threats contained in such non-communicative writing as a tweet might possibly not violate section 836.10 if inadvertently received by the target, as they were not sent as defined by the *O'Leary* opinion.
And so there you have it: "If you don't have anything nice to say " CB

MCKENZIE CHECK ADVANCE OF FLORIDA, LLC V. BETTS

CONSUMERS BE FOREWARNED IN THE POST-CONCEPCION WORLD.

Since *AT&T Mobility, LLC v. Concepcion,*[48] use of class action waivers, or agreements to individually arbitrate claims, has been an effective method for insulating parties (predominantly large corporations) from costly class-action litigation. In Concepcion, the United States Supreme Court held that the Federal Arbitration Act preempts states from "conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures."[49] In other words, states cannot prevent the enforcement of bilateral, individual agreements to arbitrate, even where "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system."[50]

Meanwhile, the Florida Supreme Court was due to issue its decision in *McKenzie Check Advance of Florida, LLC v. Betts.*[51] Before *Concepcion*, the Fourth District Court of Appeal certified the following question of great public importance:

WHEN ASSERTED IN A CLAIM INVOLVING A VIOLATION OF FDUTPA OR ANOTHER REMEDIAL STATUTE, DOES A CLASS ACTION WAIVER IN AN ARBITRATION AGREEMENT VIOLATE PUBLIC POLICY WHEN THE TRIAL COURT IS PERSUADED BY EVIDENCE THAT SUCH A WAIVER PREVENTS CONSUMERS FROM OBTAINING COMPETENT COUNSEL?[52]

The Florida Supreme Court declined to answer this certified question, which it considered moot after *Concepcion*, and in a unanimous opinion held that "even if the Fourth District is correct that the class action waiver in this case is void under state public policy, this Court is without authority to invalidate the class action waiver on that basis because federal law and the authoritative decision of the United States Supreme Court preclude us from doing so."[53]

McKenzie arose out of a class action filed against McKenzie Check Advance, LLC, ("MCA"), a payday lender.[54] The plaintiffs alleged violations of various Florida consumer protection statutes, including the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") and the Florida Consumer Finance Act.[55] But one of the named plaintiffs had previously signed arbitration agreements with MCA that contained class action waivers, which "explicitly stated that the arbitrator shall not conduct class arbitration."[56]

The trial court, following an evidentiary hearing to consider whether these class action waivers left parties "without a viable means of seeking redress," ruled that the class action waivers were unenforceable as void against public policy because they frustrated the remedial purposes behind FDUTPA and the other Florida statutes at issue.[57] The trial court based its ruling on expert testimony that "the complex nature of [payday loan cases] and the small amount of potential recovery" made it impossible for consumers to find competent attorneys willing to take such cases.[58] As a result, the trial court denied MCA's motion to compel individual arbitration, and MCA appealed to the Fourth District, which affirmed and certified the question.

The plaintiffs argued that MCA's class action waivers violated Florida public policy by preventing consumers from retaining competent representation, which in turn prevented them from vindicating their statutory rights under FDUTPA and other consumer protection laws.[59] Thus, argued the plaintiffs, because the class action waivers defeated the purpose of these remedial statutes, those waivers were unenforceable.[60]

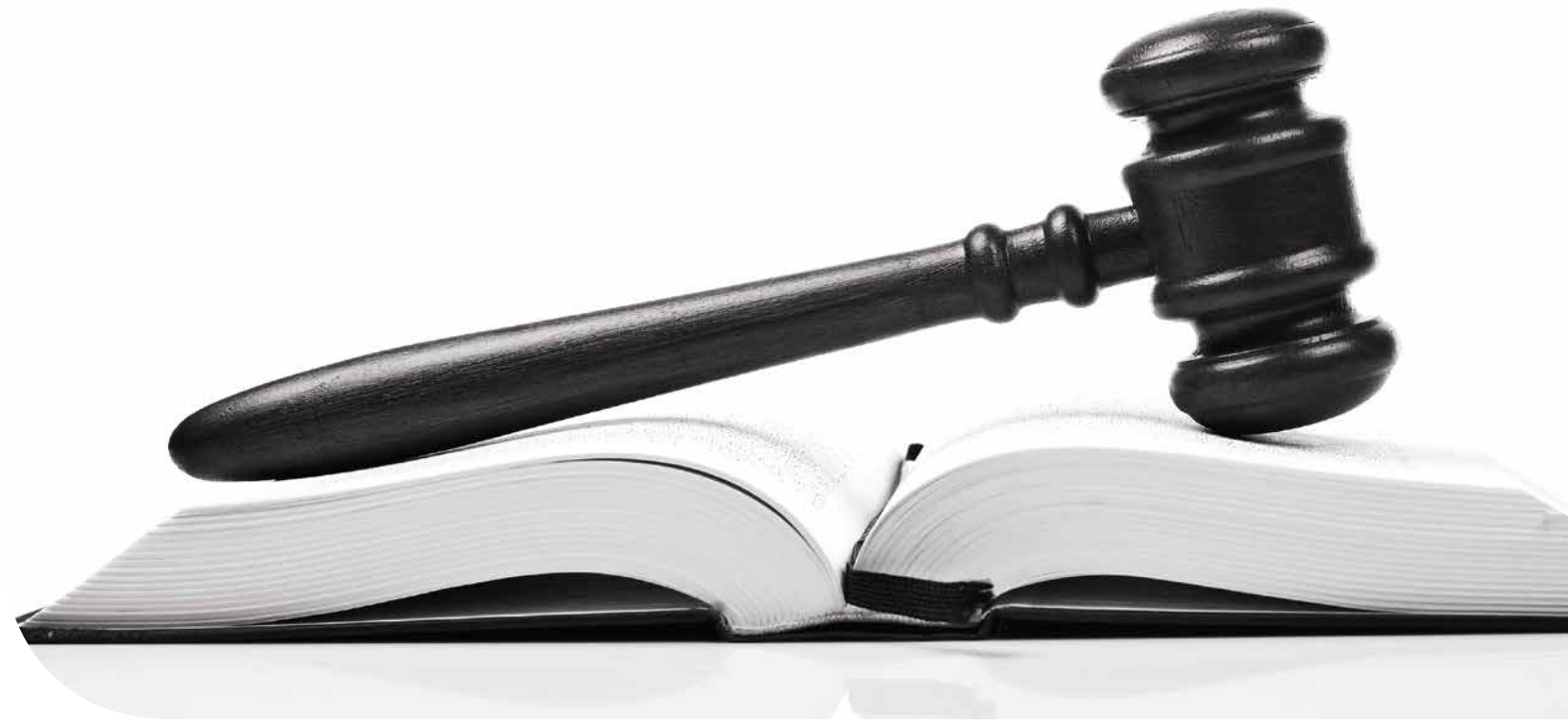
The Florida Supreme Court agreed with the plaintiffs that ordinarily "[u]nder Florida law, a contractual provision that defeats the purpose of a remedial statute violates public policy and is thus unenforceable."[61] But it declined to rule on the merits of this argument, holding instead that "to the extent that Florida law would invalidate the class action waiver on this basis, the Federal Arbitration Act ("FAA") preempts Florida law under the facts presented here."[62]

In reaching this holding, the Florida Supreme Court rejected the plaintiffs' contention that *Concepcion* did not disturb "long-standing Supreme Court precedent dating back to *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985), that statutory claims are arbitrable only if the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum," and therefore a class action waiver like the one here "cannot be enforced if it would prevent parties from vindicating statutory rights."[63] The Court reasoned that this "vindication-of-statutory-rights" analysis referred to by the plaintiffs arose only in cases involving statutory rights derived from *federal* statutes; whereas, *Concepcion* "involved the issue of whether *state* law was preempted by the FAA."[64] Thus, the Court drew a distinction between statutory rights derived from federal statutes, and those derived from Florida laws. According to the Court, the *Mitsubishi* "vindication-of-statutory-rights" analysis does not apply to rights provided by Florida statutes.[65]

> *"McKenzie essentially eliminates consumers' right to redress in complex cases involving many small claims because any amount of recovery will be dwarfed by the cost to individually arbitrate. If an arbitration agreement contains a class action waiver, the claims must be brought individually."*

After *McKenzie*, attempts to invalidate agreements to arbitrate in cases involving claims seeking to vindicate state statutory rights is accomplished only through "generally applicable contract defenses"—*i.e.*, defenses that do not "derive their meaning from the fact that an agreement to arbitrate is at issue."[66] And for claims based on Florida law, attempts to invalidate class action waivers through a vindication-of-statutory-rights analysis will fail.

Indeed, the Fourth District has already applied *McKenzie* to compel individual arbitration of such complex, small-award claims. *In Citibank (South Dakota), N.A. v. Desmond*,[67] the defendant in a credit card debt collection action brought counter-claims alleging violations of the Florida Security in Communications Act. Citibank moved to compel arbitration, and the defendant sought to invalidate the arbitration agreement.[68] The trial court denied the motion to compel arbitration based upon a showing that the class action waiver prevented the defendant and others similarly situated from vindicating their statutory rights. *Id.* But the Fourth wrote that "the Florida Supreme Court rejected this very argument," and reversed with instructions to grant Citibank's motion to compel arbitration.[69] CB



ROCKET GROUP, LLC V. JATIB

E-FILING PERILS, AND FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.420'S ADDED LAYER OF PROTECTION FOR SENSITIVE DOCUMENTS.

The recent advent of electronic filing in Florida's courts has significantly facilitated public access to judicial branch records, a right granted under article I, section 24(a) of the Florida Constitution. Now, most documents filed in court will be quickly accessible in electronic form to anyone with an internet connection.

> *"This increased ease of access is mostly a good thing. It promotes transparency and accountability in the judicial branch, thereby continuing to ensure citizens are afforded fairness and due process. But with this increased ease of access comes the potential for grave privacy intrusions. Attorneys now more than ever must take care to follow the appropriate steps to ensure confidentiality when filing court documents, or they could inadvertently expose their clients' trade secrets, health records, financial records, or other protected information to anyone who wants it. (And in the process expose themselves to sanctions!)"*[70]

Florida Rule of Judicial Administration 2.420 provides the steps and procedures necessary to ensure confidentiality of court filings. It mandates that the "public shall have access to all records of the judicial branch of government," except as provided in the rule.[71] And in order to obtain a confidentiality order allowing documents to be filed under seal, filers must demonstrate that the documents fall into one of the exemptions from public access provided under rule 2.420(c).

In *Rocket Group, LLC v. Jatib*,[72] the Fourth District Court of Appeal addressed one of these public access exemptions when it granted certiorari review of a non-final discovery order "granting the plaintiff's motion to compel better responses to a first request for production."[73] This seemingly innocuous order, in fact, mandated that "[n]o documents shall be required to be filed under seal," and compelled production of "the [defendant] company's corporate income tax returns, financial statements, and internal documents concerning corporate governance."[74]

The plaintiff sued Rocket Group, LLC—the company he co-founded—when management disputes led to deadlock.[75] At the hearing on the plaintiff's motion to compel, the parties agreed that the information sought was confidential, but the plaintiff suggested he would sign a stipulation "allowing him to use the documents only for purposes of this litigation."[76] Rocket Group insisted, however, on a court order of confidentiality, "explaining that if a confidential document were attached to a court filing, such as a pleading, it would be available to the public."[77] Following the hearing, the trial court granted the motion to compel, but refused to require any document to be filed under seal.[78]

The Fourth District straightened that out. The Court held that the trial court's order departed from the essential requirements of law by

> compelling Defendant to produce all the requested documents without first entering a confidentiality order that would provide a means for the parties to handle those confidential documents that they may attach to court filings, and in declining to allow any such documents to be filed under seal, pending the prompt filing of a rule 2.420 motion to determine the confidentiality of records.[79]

The Court concluded that while the business records at issue were not explicitly exempted from public access, rule 2.420 permits courts to determine any court record "to be confidential if doing so is necessary 'to avoid *substantial injury to a party* by disclosure of matters protected by a *common law or privacy right*' . . . or to '*comply with established public policy* set forth in the Florida or United States Constitution or statutes or Florida rules or case law.'"[80] Thus, even though certain court records may not fall into explicit categories of confidentiality under the rule, the court can still determine that records are confidential upon a proper motion from the filer.[81]

Such a "Motion to Determine Confidentiality of Court Records" is made according to subsections 2.420(d)(3) and (e)(1).[82] Upon such a motion, the court is required to hold a hearing, unless the parties agree on confidentiality.[83] But "even if the parties were to agree to the sealing of documents," under the rule, *"the trial court still must make the determination."*[84] While the parties in *Rocket Group* agreed that the business records were confidential, the trial court never determined that confidentiality for itself.[85] Instead, it accepted the parties' stipulations that they were confidential, and then having done so *refused to allow filing under seal.*[86] What the trial court should have done, consistent with rule 2.420's dictates, was make an independent determination of confidentiality.[87] And the trial court further erred by issuing its blanket order precluding any and all documents from being filed under seal without first allowing "the prompt filing of a rule 2.420 motion to determine the confidentiality" of the individual records at issue.[88]

Rule 2.420 should be a tool in every trial attorney's discovery toolbox. And pay particularly close attention to subsection 2.420(e), which sets forth the procedure for filing a "Motion to Determine Confidentiality of Court Records." The motion must identify the court records at issue with as much specificity as possible (without disclosing confidential information, of course).[89] The motion must also include the bases on which confidentiality is asserted, as well as supporting legal authority.[90] For criminal cases, the rule provides slightly different requirements for motions aimed at protecting confidential informants, plea agreements, and substantial assistance agreements, but is the same for any other purpose.[91]

Based on the Fourth District's opinion in *Rocket Group*, it appears that a rule 2.420 motion can be filed subsequent to a hearing on motions to compel production, adding another layer of protection against the improper disclosure of sensitive information. And remember: if filed in good faith, a trial court must hold a hearing on the motion.

And, as *Rocket Group* demonstrates, in addition to discovery orders, orders on rule 2.420 motions present another avenue for interlocutory review through certiorari petitions. Failure to adhere to rule 2.420 is a departure from the essential requirements of law and will merit certiorari relief when production of confidential information has been compelled without protection.[92] CB

[1] Elliot Kula, board certified in appellate practice, and Daniel Samson are the principals in Kula & Samson, LLP, and together with their associate W. Aaron Daniel and of-counsel Arthur J. England, Jr., the firm works collaboratively with trial lawyers to provide appellate services and trial strategy consultation.

[2] No. SC11-1130, at *21 (Fla. May 2, 2013).
[3] *Id.* at *21–*22.
[4] *Id.* at *1.
[5] *Id.*
[6] *Id.* at *2–*3.
[7] *Id.* at *4.
[8] *Id.* at *5.
[9] *Id.* at *7.
[10] *Id.* at *5.
[11] *Id.* at *6-*7.
[12] 414 U.S. 218 (1973).
[13] *Smallwood,* at *8 (citing *Robinson*, 414 U.S. at 459).
[14] *Smallwood,* at *9.
[15] *Id.* at *10–*11.
[16] *Id.* at *11.
[17] *Id.* at *12 (citing *Robinson*, 414 U.S. at 221–23).
[18] *Smallwood,* at *12–13 (citing *Robinson*, 414 U.S. at 226).
[19] *Smallwood,* at *15.
[20] *Id.* at *14.
[21] *Id.* at *16.
[22] *Id.* at *18.
[23] 556 U.S. 332 (2009).
[24] *Smallwood,* at *19—*20 (emphasis in original) (citing *Gant*, at 339).
[25] *Smallwood,* at *19—*20
[26] *Id.* at *21–22.
[27] *Id.* at *16 (emphasis added).
[28] *Id.* at *15–18.
[29] *Id.* at *14.
[30] *Id.* at *15.
[31] *Id.* at *16.
[32] *Id.* at *18 n. 5 (emphasis removed).
[33] *Id.*
[34] 109 So. 3d 874 (Fla. 1st DCA Mar. 18, 2013).
[35] *O'Leary,* 109 So. 3d at 875.
[36] *Id.* at 875, 877.
[37] *Id.* at 875–76.
[38] *Id.* at 876.
[39] *Id.* at 876–77.
[40] *Id.* at 877.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.* at 875 n. 1 (internal quotation marks omitted).
[46] *Id.*
[47] *Id.* at 877.
[48] 131 S. Ct. 1740 (2011).
[49] *Id.* at 1744, 1753.
[50] *Id.* at 1753.
[51] No. SC11-514 (Fla. Apr. 11, 2013).
[52] *Id.* at *2, n. 2.
[53] *Id.* at *3.
[54] *Id*
[55] *Id.*
[56] *Id.* at *5.
[57] *Id.* at *5–6 (internal quotations omitted).
[58] *Id.*
[59] *Id.* at *14.
[60] *Id.*
[61] *Id.* at *13.
[62] *Id.* at *14.
[63] *Id.* at *17-*18.
[64] *Id.* at *18 (emphasis added).
[65] *Id.* at *20, *20-24.
[66] *Id.* at *9.
[67] No. 4D12-1745 (Fla. 4th DCA May 29, 2013).
[68] *Id.*
[69] *Id. at* *3–4.
[70] See Fla. R. Jud. Admin. 2.420(e)(6).
[71] Fla. R. Jud. Admin. 2.420(a).
[72] No. 4D13-134 (Fla. 4th DCA May, 29 2013).
[73] *Id.* at *1.
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.* at *2.
[78] *Id.*
[79] *Id.* at *4.
[80] *Id.* at *3 (quoting Fla. R. Jud. Admin. 2.420(c)(9)(A)(vi)–(vii)).
[81] *Rocket Group,* at *3.
[82] *Id.*
[83] *Id.* (citing Fla. R. Jud. Admin 2.420(e)(2)).
[84] *Rocket Group,* at *3 (emphasis added).
[85] *Id.* at *2–3.
[86] *Id.* at *3.
[87] *Id.* at *4.
[88] *Id.*
[89] Fla. R. Jud. Admin. 2.420(e)(1)(A).
[90] Fla. R. Jud. Admin. 2.420(e)(1)(B)–(C).
[91] Fla. R. Jud. Admin. 2.420(f)(1)–(3).
[92] *Rocket Group, at* *4.

WHAT'S HAPPENING WITH THE FLORIDA BAR?

Source: Florida Bar Department of Public Information and Bar Services

2013 Annual Voluntary Bar Leaders Conference

VOLUNTARY BAR LEADERS FROM AROUND THE STATE HEADED TO CLEARWATER BEACH TO LEARN, NETWORK AND SHARE SUCCESSES AND CHALLENGES FACING ATTORNEYS WHO VOLUNTEER IN THEIR LOCAL BAR ASSOCIATIONS.

The 2013 Voluntary Bar Leaders Conference was July 19-20 at the Sheraton Sand Key. Hosted by the Clearwater Bar Association, the conference included keynote speaker Eric Papp who presented "Leadership by Choice" as well as a breakout session on "Building High Trust Teams and Prioritizing." Other topics included effective pro bono programming, membership and membership benefits, tax filings and forms compliance and recruiting and connecting with you lawyers. The registration fee for the conference was $175 and included CLE credit, meals and a special social networking event and dinner at the Clearwater Marine Aquarium. To learn more about the conference visit www.floridabar.org/voluntarybars or contact Maria S. Johnson at 850-561-5648 or email mjohnson@flabar.org.

E-Filing The Florida Court e-Filing Authority Board's discussions to set up a backup service through a second provider have been accelerated and should be in place by September 1, 2013, following a widespread failure by an Internet provider on May 7, 2013. Work is progressing on adding e-service to the portal, with a tentative start date of September 1.

Request e-Filing Support
for Attorneys & Paralegals
by sending an e-mail to
support@myflcourtaccess.com
or by calling 850-577-4609.

Commission to Study Future of the Profession President Eugene Pettis has set up a special commission to spend the next three years studying the "future practice of law" called "Commission 2016: Comprehensive Study of the Future Practice of Law." Board member Jay Cohen will serve as administrator for the commission. Pettis stated that he discussed the idea with former President Gwynne Young and President-elect Greg Coleman. "It will be a commission that will focus on the critical issues . . . that are going to impact the practice of law. This commission is one that is going to travel at least over three administrations. We have the name Commission 2016," Pettis told the board. "It's going to be a comprehensive study of a few areas of law." He also noted the commission has four committees to consider the following issues:

- **Technology.** That committee, headed by Coleman, will look "at technology in every possible fashion from the impact of the cloud, privacy issues, to client expectations, and how with technology we can interact with the courts. We talked about the hours spent traveling to court for a five-minute hearing and how with the technology that's available those hearings could take place at your desk over a computer." Pettis said he expects to include court administrators, judges, and other players in the legal system on this committee, which will seek to make law practice more efficient.
- **Legal education.** Board member Ray Abadin will chair this committee, with Nova Southeastern Law Professor Debra Curtis serving as vice chair. "The ABA is really hot on legal education and they have a task force coming out with a preliminary report in August on legal education," Pettis said. Topics to be studied include the three-year model of law school, accreditation standards, different levels of accreditation, ways to decrease the costs of law school, and the proliferation of law schools.
- **Bar admission.** Board member Lanse Scriven will chair this committee. Pettis said it will look at reciprocity, pro hac vice, licensing of nonlawyers to do some tasks now considered legal work, and national and international firms that want to practice in Florida.
- **Pro bono and legal services.** Board member Adele Stone, a former president of The Florida Bar Foundation, will chair this group.

Florida Bar Leadership Academy Fellows The Florida Bar trained 59 "fellows" for future leadership roles within the legal profession as part of the inaugural class of its Leadership Academy. The Bar received 263 total applications for the year-long program.

Approved by The Florida Bar Board of Governors in January, the program's goal is to reach out to lawyers from across Florida and help give them the skills and resources needed to become leaders not only in the legal profession but in their communities. Florida Bar President Eugene Pettis said he seeks to leave a legacy of leaders for The Florida Bar and Florida. "I believe the demand will be great and the experience will be priceless," Pettis said about The Florida Bar's newly minted Leadership Academy.

The program will include six meetings at locations throughout the state beginning at the Bar's Annual Convention, June 26-29 in Boca Raton. The curriculum will focus on developing skills and networking opportunities within the legal profession and having the fellows create projects to put their new skills to use.

Bar offers 15 free online office management CLEs More than 164,000 hours of CLE credit have been earned by Florida Bar members through 15 free online law office management CLE programs offered by The Florida Bar through its website. Overall, the courses have been accessed more than 65,000 times. The courses can be found by going to the Bar's website.

Executive Director John F. Harkness, Jr., in a brief report to the Board of Governors in April, said that Bar members would be reminded in an email on the availability of the courses, which cover topics ranging from handling trust accounts to issues related to protecting confidential information in election court filings.

The Florida Bar's Midyear Meeting The Florida Bar's Midyear Meeting will be held on January 23-25, 2014, at the Hilton in the Walt Disney World Resort in Orlando, Florida.

Voluntary Bar Center Do not forget to visit the Voluntary Bar Center page for resources specific to voluntary bars, voluntary bar events calendar, voluntary bar directory, and more. CB

BISHOP LEO FRADE

EVANGELIST AND CONVICTED FELON?

by Jane Muir, Esq.

Although they may be separate, there have been occasions in the history of the United States when church and state found one another at odds. Leo Frade, the Bishop of the Episcopal Diocese of Southeast Florida, has spent his life promoting humanitarian goals. Governments in two countries have opposed his efforts, but so far, he has prevailed with the help of the legal system. In a special "Red Mass," a Holy Eucharist in honor of the Legal Profession, he described his appreciation for attorneys because of his experiences, including a federal criminal conviction under the Trade with the Enemy Act.

Born in Havana, Cuba on October 10, 1943, Bishop Frade grew up in a staunchly Methodist home. As a teenager at a youth conference he felt a strong call to serve God. After that event, he left for the Sierra Maestra Mountains. At the time, Fidel Castro had returned from exile in Mexico, and was hidden in the rugged Sierra Maestra where he sought to recruit guerillas to join his cause by broadcasting on the radio. Frade and his fellow missionaries must have lived in the same type of rustic conditions as the guerillas did then, but with different goals: one to bring peace and the message of God's love to the poor, and the other to bring war and the message of the revolution. "The guerillas paraded down the middle of the road carrying coffins on their shoulders," recounted Frade. "The first coffins were painted with the word, 'Missionaries' and the second coffins said, 'Friends of Missionaries' so we had to get out of there."

Once he had returned to Havana, the Methodist Church helped Frade leave Cuba in 1960, to attend Asbury College, a Methodist-affiliated school in Kentucky. Kentucky was experiencing almost as much upheaval as Cuba was in 1960. The Civil Rights movement was in full swing, as activists sought to desegregate the American South. Coming from Cuba, he had little experience with any racial bias: Frade found the situation reprehensible. "We had black students from Africa, studying theology, and nobody had any problem with them. But when anyone mentioned bringing American black students into the student body, they wouldn't hear of it." He explained, "I could not understand the hypocrisy of the

administration, to study and preach love and devotion to God and then to reject students for their color."

Frade's civil rights activism cost him the scholarship at the end of his junior year, and he went to work in New York, where his family was then living. He worked as a General Sales Manager for an international cargo airline. "Back then I was selling space in the sky. Now, I get to give it away," Frade quipped. During that time, he found the Episcopal Church. He remembers fondly where he began to feel a call during an Easter Sunday service at the Cathedral of St. John the Divine in New York City.

In 1969, the year that the Diocese of Southeast Florida was formed, he moved to Miami, where he continued his journey as a layman in the Episcopal Church. In Miami he attended Biscayne College, today's St. Thomas University. He was prepared for confirmation by Bishop Leo Alard, presented by Canon Max Salvador and confirmed by Bishop Ervine Swift. After a few years, his vocation was renewed and he went to the School of Theology of the University of the South, in Sewanee, Tennessee where he received his Master of Divinity degree.

Once ordained, he moved to Louisiana, where he continued his ministry at Grace Episcopal Church as Curate. In the spring of 1980, Cuban-American parishioners of Grace Church implored Father Frade to help arrange for a boat to bring their relatives from Cuba. Although the priests first considered the idea impractical, they changed their minds because their parishioners, like other Cuban-Americans, were paying extortionate prices to cross the Florida Straits in small, unsafe boats, only to find, upon arriving in Mariel, that they were forced to return with criminals, the mentally ill, and other undesirables, rather than the relatives for whom they had come. Frade and his group recognized they could avoid these problems by chartering a large, safe vessel at an affordable per-passenger price. Because Father Frade had previously dealt directly with Cuban officials through his participating in the Cuban Political Prisoner Program, sponsored by the Episcopal Church and arranged in coordination with the Immigration and Naturalization Service and United States Customs, he believed he could negotiate an agreement that would enable them to bring home the relatives without also being forced to provide transportation to other passengers.[1]

The plan was met with immediate overwhelming response. Six hundred and fifty people attended a meeting with the priests at Grace Church on May 3 to organize the rescue mission. They estimated that, with costs, they needed to request $800 per passenger. Within forty-eight hours, the necessary minimum of $170,000 was collected. Eventually $215,000 was raised. The priests told the subscribers that they could not guarantee that anyone would be brought back or any money refunded.[2]

They put the money in suitcases, and found a boat that would suit their purposes in Massachusetts. "They thought we must be criminals, showing up with suitcases full of cash to buy this boat," Frade said. Ultimately, the seller was satisfied that the sale was legitimate, and the boat was rechristened the "God's Mercy." The priests hired an experienced crew and medical professionals, and fitted the boat with $10,000 in additional safety equipment.[3]

Aside from outfitting their boat, Frade negotiated with the Cuban Interest Section at the Czechoslovakian Embassy in Washington, D.C. to prepare for the voyage. They obtained assurances that they would not be forced to bring back other undesirables, and would receive a favorable ratio of persons on their list to ex-political prisoners selected by the Cuban government. The Cuban Interest Section insisted, as part of the Cuban government commitment, that Frade's group turn over the list of the people they proposed to pick up. On May 9, 1980, the priests submitted a list of 260 names that were immediately telexed to Havana. An additional 106 names were telexed on May 11.[4]

In the week following their meeting at the Cuban Interest Section, the Cuban Government's attitude towards the boatlift had changed. Father Frade had been told by a Cuban official, during his last refugee flight to Cuba on May 5, that a "national purge was taking place," those applying for permission to leave Cuba were losing jobs, houses, and ration cards, and sometimes being attacked, beaten, and killed. Witnesses testified to the vengeful and bloody "repudiation meetings" which were arranged for would-be émigrés. Frade, with another priest, Father Doss, realized that they would be unable to make a return trip.[5]

The two priests flew to Havana to renegotiate for an improved ratio of persons on their lists. After two weeks of intense negotiation, over the dinners demanded by the Cuban officials at "mind-blowing" expense, they succeeded. On June 12, 1980, the God's Mercy arrived in Key West, with the priests and 402 refugees including 288 persons from the lists, escorted by two Coast Guard cutters.[6]

Upon their arrival, the priests were not applauded, but immediately *arrested*. In 1982, they were indicted for transporting and landing illegal aliens and conspiracy to

commit the same offense. The district court, sitting en banc, dismissed the indictment, finding an absence of the "fraudulent, evasive, or surreptitious" entry required for a violation of 8 U.S.C. Sec. 1324(a)(1).[7] The Eleventh Circuit Court of Appeals affirmed the dismissal, holding on the stipulated facts that the transportation of aliens for purposes of their seeking lawful entry into the United States did not constitute general criminal intent to violate the statute.[8]

Even after the charges against the priests were dismissed, the government brought another indictment against them, under the Trading With the Enemy Act.[9] Shockingly, they were convicted under this law.

The Eleventh Circuit recognized, "The regulation under which the priests were convicted, 31 C.F.R. Sec. 515.415, was quietly promulgated, unexpected, and unannounced on May 15, 1980, after the list of names had been tendered to Cuba." The Eleventh Circuit noted that the criminalized behavior (travel to, from, and within Cuba), had been expressly authorized in published regulation 31 C.F.R. Sec. 515.560, and, in fact, remained lawful, except when done in connection with the transportation of Cuban nationals, an activity which also is not generally criminal. Moreover, the statute penalized the paying of port fees in a foreign harbor and duly incurred hotel, motel, and restaurant bills—activities which laymen do not consider wrong.[10]

The text of this hastily-passed regulation would have been impossible for the priests to obtain—it had not been published by its effective date. Only an announcement of its promulgation, although not its contents, was broadcast by the Coast Guard in the Florida Straits in the days following its promulgation. But these broadcasts were being jammed and garbled by Cuba, and might not have been received by anyone. Further, the priests were not aboard the God's Mercy during its outward voyage, and during the two weeks of negotiations in Cuba they were largely prevented from communicating with their crew who were housed in a cordoned off area at Mariel. The first possible direct knowledge of the regulation that the priests could have received was during the return voyage, after the acts for which they were convicted had been committed.[11]

The Eleventh Circuit further recognized that President Carter had made statements approving the rescue, particularly at a press conference in Miami given on May 5, 1980, where he said, "[L]iterally tens of thousands of others will be received in our country with understanding, as expeditiously as we can, as safely as possible on their journey across the 90 miles of ocean, and processed in accordance with the law.... But we'll continue to provide an open heart and open arms to refugees seeking freedom from Communist domination and from economic deprivation, brought about primarily by Fidel Castro and his government." Ultimately, after a three-year legal battle, Frade's conviction of Trading with the Enemy was reversed, and he was vindicated.

Less than a year after the Eleventh Circuit issued its opinion, January 25, 1984, Frade was consecrated Bishop of Honduras. For almost 17 years he helped to grow the diocese, making it the fastest growing diocese in the Episcopal Church at the time. There, his wife, Diana Dillenberger Frade, founded Our Little Roses, a home for abandoned, abused, and orphaned girls.[12] He continued his involvement in social and justice issues as well as his evangelism. Finally, after an international search, Frade was elected Bishop of Southeast Florida on May 6, 2000, and enthroned on September 16, 2000.

After sharing with the congregation his experiences following the Mariel Boatlift, Bishop Frade expressed his thanks for attorneys' long hours, hard work, keen insight, and enduring commitment, and expressed his desire that they be endowed with the spirit of wisdom and understanding. He urged members of the legal profession to "fearlessly contend with evil, and to make no peace with oppression, that they may use our gifts and talents to maintain justice in our communities among the nations." Surely, a worthy goal for any member of the Bar. CB

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[1] U.S. v. Frade, 709 F.2d 1387, 1390 (11th Cir. 1983).
[2] *Id.* at 1390.
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.* at 1391-92.
[7] United States v. Anaya, 509 F. Supp. 289, 297 (S.D. Fla. 1980).
[8] United States v. Zayas-Morales, 685 F.2d 1272, 1275 (11th Cir. 1982).
[9] 50 U.S.C., Appendix § 5(b) (1968 & Supp.1983) (TWEA) and 31 C.F.R. § 515.415.
[10] *Frade,* 709 F.2d at 1391.
[11] *Id.* at 1396.
[12] For more information, visit http://www.ourlittleroses.org/about.htm.

Chairman Luis "Yoyo" Espino Memorial Golf Tournament

by Jennifer J. Perez, Esq.

It is with great sadness that CABA remembers the loss of a long-time CABA member, Luis Espino, who tragically passed away in October 2012. Mr. Espino, who was affectionately known to his family and friends as "Yoyo," was a partner at Fowler Rodriguez Valdes-Fauli who specialized in the areas of commercial litigation and real estate. He was a 1987 graduate of Belen Jesuit Preparatory School. Yoyo had obtained his bachelor's degree from the University of Chicago, and his law degree from Florida State University. He will always be remembered as an amazing lawyer, husband, father, and friend.

As a tribute to Yoyo and his family, the Chairman (Luis "Yoyo" Espino) Memorial Golf Tournament will take place on Friday, Sept. 13, 2013, at Crandon Park Golf Links. It will raise money to benefit the education of his children, as the funds will go directly to the Alina & Andres Espino Education Fund. We hope to see you there.

We hope to see you there. CB

EXCERPT FROM *CUBANS*

AN EPIC JOURNEY, THE STRUGGLE OF EXILES FOR TRUTH AND FREEDOM

LAWYERS AND JUDGES[1]

by Rene V. Murai, Esq.

INTRODUCTION

Cuba's most famous and infamous lawyer, sadly, is Fidel Castro, who attended the University of Havana law school in the 1940s. Founded in 1728, the University of Havana was one of the first universities of the Americas. Its student organization, la Federación Estudiantil Universitaria (the University Student Federation), was a hotbed of political activity, going back to the 1920s and the uprisings that led to the end of the government of President Gerardo Machado in 1933. It was during his university years that Castro participated in an attempt to overthrow the government of Rafael Trujillo in the Dominican Republic, and, as one of the organizers of a student congress in Bogota, Colombia, in a violent uprising that became known as the Bogotazo. While Castro may have gone to law school, obviously he did not learn much about the rule of law.

But not all Cuban lawyers had such misdirection. As in many countries, Cuban lawyers were prominent in public life. A number of its Presidents were lawyers: Mario Garcia Menocal (1913 - 1921); Alfredo Zayas (1921 – 1925); Miguel Mariano Gomez (1936); and Carlos Prio Socarras (1948 – 1952). Many others held important positions in government, including Carlos Marquez Sterling, who served as President of Cuba's House of Representatives, Secretary of Education and President of the Constitutional Assembly which wrote the much praised 1940 Constitution; Jose Miro Cardona, a Professor and Dean of the University of Havana Law School, who was the first Prime Minister under Castro's government for a brief period (replaced by Castro himself) and later a leader in exile of the forces opposing Castro; Alberto Inocente Alvarez, who held various appointed and elected positions in Cuba, served as Cuba's representative to the United Nations and President of the UN Security Council in 1949; Rafael Diaz Balart, who was elected to Congress and served as Majority Leader of Cuba's House of Representatives. He is the late father of U.S. Congressman Mario Diaz Balart and former U.S. Congressman Lincoln Diaz Balart. In 1955, Rafael Diaz Balart made an impassioned speech in Congress opposing a law proposed by President Fulgencio Batista, and passed by the Congress, which granted amnesty to political prisoners, including Castro and his henchmen in the 1953 attack on the Moncada garrison in Santiago de Cuba, Cuba's easternmost province. Diaz Balart warned of dire consequences for the country if Castro and the others were freed. Diaz Balart knew Castro well as a fellow law student and as his brother-in-law. Unfortunately for Cuba, his words were prescient but not heeded.

THE EARLY EXILE YEARS

The legal profession is not easily transportable from country to country. The basics of many other professions are not country dependent. The law is. Cuba's legal system was a civil law system, premised on the Roman and Napoleonic codes, which also formed the basis for the legal systems of Latin American and many European countries. In contrast, the United States adopted the English common law system (except in Louisiana where the legal system continues to have roots in

the Roman and Napoleonic codes). The civil law system relies almost exclusively on codified law. The common law system relies heavily on the development and interpretation of the law by courts.

In Florida, as in many (if not all) states, foreign educated lawyers were required to pass a college equivalency exam and be graduates of U.S. law schools before being eligible for admission to the practice. This meant that an exiled Cuban lawyer, who may have practiced law in Cuba for many years, was required to "start all over" and graduate from a U.S. law school in order to continue in the legal profession. The barriers were high. Law school was not a welcoming place for exiles with less than a good command of the English language. Money for tuition was scarce. And last but not least, Florida and all states required United States citizenship as a condition to admission to the Bar. Citizenship in turn was conditioned on five years of legal residence. Almost all Cuban exiles were admitted to the US as parolees and did not have a green card as a result. To obtain residency, one had to travel to a US Consulate abroad. Due to the numbers requesting them, appointments at these Consulates were difficult to obtain. The Cuban American Bar Association's (CABA) first elected President and later Judge Mario Goderich, who graduated from the University of Miami in 1966, had to work as a librarian at the University of Miami Law School for several years until he became eligible for citizenship.

Organizations came to the aid of the exile lawyers. Following a meeting with a group of exile lawyers headed by Jose Miro Cardona, the University of Miami organized a program for Cuban lawyers which ran from 1961 to 1963, supported by grants from the U.S. Department of Health, Education and Welfare. The program covered the basics of United States law and was designed to improve employment opportunities. 150 exile lawyers completed the first courses in 1961. A University report showed that the program helped its graduates to obtain employment, whether law related or otherwise. For example, lawyer Jose Cuervo reported that the program was invaluable in his securing a position as research assistant at the Miami law firm of Walton Lantaff. The American Bar Association set up a "Special Committee to Cooperate with Cuban Lawyers in Exile". In a letter dated October 10, 1961, New York lawyer John Burton, Chairman of the Committee, reported that a "number of insurance companies and industrial corporations have hired one or more Cuban lawyers or have indicated that it is their intention to do so."

Not surprisingly then, the decade of the 1960's would see few practicing Cuban Americans lawyers. There may have been fewer than 20 Cuban born lawyers practicing in Florida by the end of the '60s. A federal agency reviewing the work of the Miami legal services program for the poor noted in 1972 the absence of any program office in the Spanish-speaking areas of Miami. The young Cubans who were attending high school or college in this country had not yet come of age for law school. Those who had practiced law in Cuba had to find other ways to earn a living and support their families. Eduardo Le Riverend, a Justice of Cuba's Supreme Court, became the international law librarian at the University of Miami. Luis Botifoll, a well known international lawyer, and the editor in chief of one of Havana's most important dailies, El Mundo, became a banker. He chaired the loan committee and for seventeen years the Board of Directors of Republic National Bank, in its time the biggest Cuban American led bank in the U.S.

One of the first Cuban American lawyers in Miami was Carlos Fernandez, father of State Attorney Katherine Fernandez Rundle. Carlos Fernandez graduated as a lawyer from the University of Havana in 1943, then went to the University of Miami Law School and was licensed as a Florida lawyer in 1949. He served as a municipal judge (municipal courts have since been abolished in Florida) from 1961 to 1972. He became involved with the exile community, was a founder of CABA, a political commentator and writer.

Exiled lawyers also relocated to other states or countries in search of employment. Tomas and Olga Gamba, both lawyers in Cuba and parents of former Cuban American Bar President Tomas Gamba, along with many others, attended Indiana State University to study education and become high school teachers. After completing those courses, these lawyers taught Spanish in different states. Because of the similarity of the legal systems, some Cuban lawyers settled and became lawyers in Spain. Among them, the best known one was Manolo Vega Penichet, who founded the Bufete (law firm) of M. Vega Penichet in 1962. The firm today has approximately seventeen lawyers, a number of whom are the sons of the founder.

Two significant events accelerated the entry of Cuban born lawyers into the American legal profession. The first was the Cuban Adjustment Act of 1966, passed during Lyndon Johnson's Presidency, which, among other things, allowed Cuban exiles to obtain immediate legal residency and receive credit for up to half (but no more than two and one half years) of their stay in this country toward the 5 year residency requirement. This law made Cuban exiles eligible for citizenship much sooner than would have been possible otherwise. Had it not been for this Act, the Cuban-born law students of the late 60's and early 70's would have been unable to practice law in most states upon graduation.

The second important event occurred in July of 1973, when the Florida Supreme Court sanctioned law school programs at the University of Miami and the University of Florida for exiles who had obtained law degrees in Cuba prior to 1961. The National Association of Cuban Lawyers (in exile) had petitioned the Supreme Court for such a program, and the Florida Bar had supported the petition. After a twenty months course, the program graduates became eligible to take the Florida Bar exam. Classes were conducted nights and weekends, allowing lawyers to continue to support their families while obtaining their law degree. A federal loan program made tuition monies available to the students. Approximately 330 Cuban lawyers registered for these courses. The program opened the Florida Bar doors to many Cuban educated lawyers. Similar programs were approved in California and Illinois.

THE CUBAN AMERICAN BAR ASSOCIATION

By 1974, there were approximately sixty Cuban Americans practicing law in Florida. That year, a number of Cuban American lawyers attending a continuing legal education course met for lunch. As Luis Figueroa recalls it, the conversation focused on the need for an association of Cuban American lawyers. It was felt that such an association would allow Cuban American lawyers, with little history or contacts in this country, to gain prominence, to become better known to the judiciary and government officials, to help the community and to socialize with each other. CABA was not organized to replace any other bar association. It was formed as an association that brought together individuals who shared a profession, roots, and a common interest in matters affecting the Cuban community.

In August of 1974, Irma Hernandez filed the Articles of Incorporation of the Cuban American Lawyers Association, Inc. Its initial directors were Guillermo Fernandez Mascaro, Mario Goderich, Irma Hernandez, Manuel Vazquez, and Antonio Zamora, with Manuel Vazquez designated as the initial President until elections could be held. In the first election, Mario Goderich (in a friendly contested election) was elected President. He was followed by Guillermo Fernandez Mascaro and Manuel Vazquez".†

Monthly dinner meetings were held at the Centro Vazco restaurant and quickly became a forum for Cuban American lawyers to meet. Elections were also held at the Centro Vazco Restaurant, and, in the best CABA tradition, they were held in December at the same time as CABA's annual Christmas party. Soon elections were attended by judges, elected officials and other friends of CABA. When the ballot box closed at 9:00 p.m., lawyers and their spouses would have dinner while awaiting the result of the elections. In 1980, the late Judge Manuel Crespo and Francisco Angones ran for President. In a Bush-Gore type finish, after several recounts, the vote was tied. Angones yielded to Crespo and the office of President-elect was born, with Angones as the first President-elect. The annual installation dinner quickly became the best lawyers' party in Miami. These parties were sold out events, attended by Senators, Governors, a Vice President of the United States, members of the federal and state judiciary and many government officials. In time, many "Anglo" lawyers joined the party. By the late 80's, CABA had removed the requirement that one had to be of Cuban extraction to join its membership.

Today CABA is one of the largest voluntary bar association in the country with approximately 2,000 dues paying members, and none more supportive than Osvaldo Soto, an early President who served on its Board of Directors for many years and whom many regard as the heart and soul of CABA.

CABA Activities

In 1984, under the leadership of Jose A. Garrido, Jr., later a CABA President, CABA began a pro bono project to provide civil legal assistance to Spanish speaking individuals without the means to afford a lawyer. The project's first office was at the Gesu church in downtown Miami, and the lawyers providing the legal assistance came from the CABA ranks. The project continues to this day. But already in the mid-80s, Cuban American lawyers, such as Leopoldo Ochoa, Alina Antonetti and Isabel McCormack, were representing, without charge, Cubans who had come through the port of Mariel and who were at risk of deportation. The next year, during the presidency of this writer, CABA organized the Cuban American Bar Foundation, with the objective of raising funds for loans and scholarships for Cuban law students. Its initial funds came from the profits made by CABA and the University of Miami from the biennial summer Conferences for Lawyers of the Americas. By 1987, CABA had created a $50,000 loan fund for University of Miami Law School students. The Foundation continues to date to award scholarships and provide loans to Cuban American law students in various law schools.

More recently, CABA has initiated a mentoring program for law students and has submitted from time to time amicus briefs in important cases of interest to the CABA membership. In addition, CABA's lawyers have participated in the drafting of a transitional law intended to govern the period between the end of a communist state in Cuba and the adoption of a new democratic constitution.

The Guantanamo Case

In 1994, there was once again a mass exodus from Cuba, except that this time the United States Coast Guard intercepted the boats and rafts and sent all that were fleeing to the U.S. military base in Guantanamo, Cuba. By November 1994, approximately 33,000 Cubans had been taken to Guantanamo. A group of Cuban American lawyers led by Francisco Angones† began meeting to determine a legal strategy for ending the detention. Harold Koh, a Korean American, then a Yale Law School Professor, subsequently Dean of Yale Law School, and today the Legal Advisor to the U.S. Department of State, had experience in similar cases for Haitians and agreed to join the Cuban American legal team. Dozens of Cuban American lawyers participated in the effort. All lawyers worked without compensation. After an unsuccessful trip to the White House to attempt to work out a solution, twenty-four Cuban American lawyers filed a lawsuit in federal court challenging the detention. The lawsuit sought to make new law by establishing rights for refugees, temporarily provided safe haven at the naval base, under the Immigration and Naturalization Act, the 1951 United Nations Convention relating to the Status of Refugees, the Cuban Adjustment Act, the Cuban Democracy Act and the U.S. Constitution. The lawsuit also sought to establish that legal organizations had a First Amendment right of freedom of speech and association with

these refugees. Roberto Martinez, Marc Jimenez, Manuel Kadre and Professor Koh acted as principal trial counsel. The district court entered preliminary injunctions granting the attorneys for the Cuban refugees access to all Cuban refugees in Guantanamo thereby insuring that these refugees would be able to consult an American lawyer prior to agreeing to voluntary repatriation, and barring the government from forcefully repatriating any Cuban refugee prior to the refugee's consultation with a lawyer. Soon the lawyers began traveling to Guantanamo to obtain evidence and inform the detainees of the pending legal proceedings. For most lawyers, it was the first time that they had touched Cuban soil since they had left as exiles. Some had never touched Cuban soil, having been born in the United States. Brothers to the Rescue pilots including its founders, Jose Basulto and William "Billy" Schuss, flew Orlando Cabrera, Jose Garcia-Pedrosa, Ramon Rasco and former Mayor Xavier Suarez on the first trip. A number of other trips followed in a plane provided by Joe Klock, then Managing Partner of the Miami law firm of Steel, Hector and Davis. The U.S. government appealed the grant of these injunctions to the 11th Circuit Court of Appeals, which ruled against the Cubans in *Cuban American Bar Association v. Cristopher* (43 F. 3d 1412 (11th Cir. 1995). Nevertheless, ultimately, the wide publicity given to the case may have contributed to the subsequent decision of President Clinton to allow most of the Guantanamo detainees to obtain legal entry into the United States. For their efforts on this case, the lawyers received The Florida Bar's highest honor for group *pro bono work* -- The Voluntary Bar Association Pro Bono Service Award of 1996 from the Florida Supreme Court.

THE BAR

All lawyers in Florida are required to be members of the Florida Bar, which currently has approximately 90,000 lawyers. The position of President of the Florida Bar is viewed by many as the ultimate achievement for a Florida lawyer, is often highly contested and requires almost a full time commitment for two years, the first year as President-elect and the second as President. In 1989, Steve Zack became the first Cuban American to serve as President of the Florida Bar. Zack in addition begins in 2011 a one year term as President of the American Bar Association, a voluntary association of over 400,000 lawyers. Zack is the first Cuban American lawyer elected to the most important bar association position in this country, from where he will represent the interests of lawyers nationwide. Zack is a partner in the Miami office of the firm of Boies, Schiller & Flexner LLP.

Francisco Angones, who came to the United States at age 13 in the Operation known as Pedro Pan, is the only other Cuban American lawyer who has served as President of the Florida Bar. Operation Pedro Pan brought to the U.S. over 14,000 children unaccompanied by their parents. Angones previously served also as President of the Dade County Bar and of CABA, and is the founder of the firm of Angones McClure & Garcia, P.A. A number of other Cuban American lawyers have served on the Board of Governors of the Florida Bar, including the late Judge Manuel Crespo, Manuel Morales, and Ramon Abadin who is a current member, and all three of whom are past Presidents of CABA, Erwin Gonzalez and Raquel Matas.

The Florida Bar Foundation is a state wide organization and the charitable arm of the Florida Bar. It makes grants annually of approximately $20 million, mostly for programs throughout the state that provide legal assistance to those who cannot otherwise afford a lawyer. This writer served as President of the Foundation in 2000 and is the only Cuban American lawyer to have served in that position.

THE JUDICIARY

The Federal Judiciary

The Federal Judiciary was established by Article 3 of the United States Constitution. Federal judges are appointed for life by the President, subject to confirmation by the Senate, and have no mandatory retirement age. Besides the Supreme Court, there are thirteen Courts of Appeals and ninety-four United States District Courts. Miami is in the Southern District of Florida, which, as of 2011, has sixteen active judges and eight senior judges. The Chief Judge of the Southern District of Florida is Federico Moreno, a Venezuelan born lawyer.

Three Cuban Americans have been appointed United States District judges. The first to be appointed was Eduardo Robreño, appointed by President George H. W. Bush in 1992 to the District Court for the Eastern District of Pennsylvania. Judge Robreño had previously been a lawyer with the Antitrust Division of the U.S. Justice Department and had also been in private practice. Adalberto Jordan and Cecilia Altonaga were appointed to the District Court for the Southern District of Florida by President Bill Clinton in 1999 and President George W. Bush in 2003, respectively. Judge Jordan had served as an Assistant United States Attorney and Chief of the Appellate Division in the Southern District of Florida, and Judge Altonaga as a County Court and Circuit Court Judge in Miami-Dade County.

All federal judges have "clerks", usually recent graduates who assist judges with the research and writing of opinions. These clerkships are highly sought after, and the most coveted ones are those with the Supreme Court Justices. Supreme Court clerks numbered approximately thirty-six during the 2010-2011 term. Cuban Americans who have clerked at the Supreme Court include the following (the justices for whom they have served are shown in parenthesis): Judge Adalberto Jordan (O'Connor); Judge Denise Posse-Blanco Lindberg (O'Connor), today a State of Utah trial judge; Eduardo Peñalver (Stevens), now a law professor at Cornell Law School; and Roman Martinez (Roberts), a 2008 graduate of Yale Law School and currently at the law firm of Latham Watkins in New York City.

The State Judiciary

Judges of state courts established by the Florida constitution are elected in the case of Circuit and County

Court judges, except that vacancies are filled by appointment of the Governor. Judges of the Supreme Court and the District Court of Appeals are appointed by the Governor and are then subject to a merit retention vote. Mario Goderich, CABA's first elected President, was also the first Cuban American appointed to a constitutional state court, when he was appointed by Governor Reubin Askew to the Circuit Court in Miami-Dade County. Circuit courts are courts of general jurisdiction. Judge Goderich was soon followed in the Circuit Court bench by Judges Maria Korvick and Margarita Esquiroz. In 2011, thirty-one Cuban American lawyers were serving as judges in the Circuit and County Courts of Miami-Dade County. Judge Goderich was also the first Cuban American to be appointed to the Third District Court of Appeals, where he served from 1990 until he retired as a judge in 2005. Judge Goderich is now in private practice. Cuban Americans currently serving on the Third District Court of Appeals are Juan Ramirez (Chief Judge), Angel Cortiñas and Barbara Lagoa. Rudy Sorondo, a partner at the Miami office of the firm of Holland & Knight, served on the Third District Court of Appeals from 1997 to 2002.

In 2002, Raoul Garcia Cantero, a Harvard law graduate and Fulbright scholar, became the first Cuban American to be appointed to the Florida Supreme Court. He served with distinction until his retirement in 2008 in order to return to Miami. Garcia Cantero is a partner in the Miami office of the firm of White and Case. In January, 2009, Jorge Labarga was appointed to the Florida Supreme Court by Governor Charlie Christ. Justice Labarga had been appointed a month earlier to the 4th District Court of Appeals and had served as a Circuit Court Judge since his appointment in 1996.

LAWYERS IN GOVERNMENT

Elected Officials

There have been numerous Cuban American lawyers elected to federal, state and local offices, including:

- Republican Mel Martinez, who came to the United States in Operation Pedro Pan, was the first Cuban American elected as a U.S. Senator from Florida. He had served previously as the U.S. Secretary of Housing and Urban Development and as Chairman (Mayor) of Orange County, after practicing law for twenty-five years. He was also the first Hispanic to serve as National Chairman of the Republican Party. Senator Martinez resigned from the Senate in 2009 and is currently the head of Chase Bank's operations in Florida, Mexico, Central America and the Caribbean.

- Democrat Bob Menendez from New Jersey was appointed to the U.S. Senate in 2005 and was elected to a full six-year term in 2006. Senator Menendez was previously a member of the U.S. House of Representatives from 1993 to 2006 and Mayor of Union City, New Jersey from 1986 to 1992.

- Republican Marco Rubio from Florida was elected to the U.S. Senate in 2011. Senator Rubio served in the Florida House of Representatives from 2000 to 2008 and as Speaker from 2006 to 2008.

- Republican Lincoln Diaz Balart served as the U.S. Representative for Florida's 21st Congressional District from 1993 until his retirement in 2011. He served in the Florida Senate and House of Representatives from 1986 to 1992.

- Those who have been elected Mayors include Alex Penelas, Mayor of Miami-Dade County, Xavier Suarez and Manny Diaz, City of Miami Mayors, and Raul Valdes-Fauli, Mayor of Coral Gables. In 2008, Mayor Diaz became the first Hispanic President of the U.S. Conference of Mayors.

U.S. Attorneys and State Attorney

A U.S. Attorney is the chief federal legal officer of a federal district. He is charged with the responsibility of enforcing all federal laws. U.S. attorneys are appointed by the President, subject to confirmation by the Senate. The U.S. Attorney's Office Southern District of Florida is one of the largest in the Country with approximately 265 assistant U.S. attorneys. The first Cuban American lawyer appointed U.S. Attorney for the Southern District of Florida was Roberto Martinez, now a partner with the firm of Colson Hicks Eidson. Subsequently, Marcos Jimenez, currently a partner in the Miami office of the firm of Kasowitz Benson Torres and Friedman LLP, Alex Acosta, currently Dean of the Law School at Florida International University, and Wilfredo "Willy" Ferrer have served as U.S. attorneys, with Ferrer currently serving in that post. Cuban American lawyer Paul Perez served from 2002 to 2007 as U.S. Attorney for the Middle District of Florida, which includes the cities of Jacksonville, Orlando, Tampa and Fort Myers.

The State Attorney in Florida is the chief legal officer for a county. Kathy Fernandez Rundle is the first and only Cuban American who has served as a State Attorney in Miami-Dade County, a position to which she was appointed in 1993 by Governor Chiles. She was re-elected without opposition to a fifth term as State Attorney in 2008. The Miami-Dade County State Attorney's Office is the largest prosecutors' office in the State and fourth largest in the nation.

LAW FIRMS AND INDIVIDUALS

Law Firms

Cuban American lawyers can be found in national law firms, regional firms, boutique firms and as solo practitioners. Today there are many prominent Cuban American lawyers throughout the country and a listing of them would be impossible. Greenberg Traurig is the only top 20 law firm in the country with a Hispanic as its Chairman, Cuban American lawyer Cesar Alvarez. Greenberg Traurig ranks as the number one firm in the country with the most minority partners and the most Hispanic-American attorneys. A number of firms in Miami have had Cuban American lawyers serve as managing partners, including Akerman Senterfitt, where Luis Perez served as Managing Partner of the Miami office, Holland & Knight, where Jose Sirven and Peter Prieto have managed the Miami office, and Richman Greer, currently managed by Manuel Garcia-Linares, a President of CABA in 2008.

A listing of the top South Florida Firms in the 2010 edition of the South Florida Legal Guide includes a number of firms with Cuban Americans as name partners. Appendix II seeks to list all those firms.

Individuals

Without this writer intending to slight anyone, the achievements of a number of lawyers, who may not otherwise have been singled out in this chapter and who are representatives of all Cuban American lawyers, are noted below. These individuals are listed in alphabetical order.

Cesar Alvarez was the first Cuban American lawyer hired by the law firm of Greenberg Traurig (at a time when he was known as the brother of Carlos, a star receiver for the University of Florida football team!). In 1997 Alvarez became the CEO of Greenberg Traurig, which then had approximately 340 lawyers in four states and one international office. During the 13 years of his stewardship, Greenberg Traurig became an international powerhouse, with approximately 1800 lawyers and thirty-three offices worldwide.

Armando Bucelo, a past President of CABA and a member of the Board of Trustees of Miami Dade College, served as Chairman of the Securities Investor Protection Corporation, after being nominated by President George W. Bush in 2002. He was appointed by President George H.W. Bush to the Board of Directors of the federal Home Loan Mortgage Corporation (Freddie Mac). Bucelo practices with the offices of Armando Bucelo.

Alberto Cardenas, a name partner in the Miami law firm of Tew & Cardenas, has held a number of important public posts, including two terms as Chairman of the Florida Republican Party and membership in the Board of Directors of the Federal National Mortgage Association (Fannie Mae).

Alfredo Duran, a veteran of the Bay of Pigs invasion and today a solo practitioner, was the first Hispanic to serve on the Dade County School Board and was Chairman of the Florida Democratic Party from 1976 to 1980.

Simon Ferro, served as Ambassador to the Republic of Panama during the Clinton Presidency and led the U.S. diplomatic mission to Panama during the turn-over of the Panama Canal. He was appointed by President Clinton, and confirmed by the Senate, to the Overseas Private Investment Corporation. Ferro also served as Chairman of the Florida and Miami-Dade County Democratic Party, and today practices with the Miami law firm of Genovese, Joblove & Batista.

Frank Jimenez has held a number of senior posts in the Florida state and the federal governments. He served as General Counsel of the U.S. Department of the Navy from 2006 to 2009, and is currently General Counsel to ITT Corporation.

Alberto Mora was general counsel to the U.S. Information Agency during the administration of George H.W. Bush and was appointed General Counsel to the U.S. Department of the Navy in 2001. During his tenure, Mora, risking his career, argued repeatedly that the coercive interrogation of prisoners in the Guantanamo Naval Base was illegal. For his courageous stand, Mora was awarded in 2006 the Profiles in Courage Award by the John F. Kennedy Library Foundation, the preeminent award for public servants. The award honors those who defy personal risk and public opinion and follow their conscience. Mora currently serves as Vice President, Secretary and General Counsel of the Mars Corporation (manufacturer of well known brands such as M & M, Snickers and Spearmint gum).

Jose Luis Pelleya (deceased), a Cuban educated lawyer, arrived in the United States in 1970, after spending most of the preceding ten years in Castro's jails for "counter-revolutionary activities". He immediately enrolled at the University of Miami Law School and by 1974 was practicing law in Florida.

Rafael Peñalver, who practices with his sister Aurora in the Miami law firm of Peñalver and Peñalver, has devoted much of his life to public service. In 1987, following an order from the U.S. Department of State to deport 2500 Cuban inmates who had come to the U.S. through the port of Mariel, riots broke out at prisons in Atlanta, Georgia and Oakdale, Louisiana. Peñalver with others assisted Bishop Agustin Roman in dissipating what is considered, according to the Miami Herald, the largest prison uprising in U.S. history. Peñalver has led the restoration and almost single-handedly has maintained open the San Carlos Institute in Key West, a Cuban heritage center founded by Cuban exiles in 1871. His other civic activities are too numerous to mention, but include the Chairmanship of the Dr. Rafael Peñalver Clinic (so named for his father), a primary care facility in Little Havana that serves an average of 500 indigent and low-income patients per day.

Sofia Powell-Cosio, a solo practitioner in Miami, has been involved in a number of Cuban causes. She served, for free, as counsel to Brothers to the Rescue, and its co-founder, Jose Basulto, and in that capacity was often embroiled in confrontation with federal authorities. She was also part of a group of young professionals, born outside of Cuba, called Alianza de Jovenes Cubanos (Young Cuban Alliance). Alianza conducted a billboard campaign in Canada, with slogans like "As you pay to go, they die to leave" and "Your paradise, their hell", with pictures of rafters on inner tubes.

Maria Elena Prio, daughter of the last elected President of Cuba, was for many years the volunteer President and driving force of the East Little Havana Community Development Corporation, a not-for-profit corporation. During her tenure, ELHCDC built over 500 housing units for low income families in the Little Havana area of Miami.

A LEGAL SYSTEM

Alejandre et al. v. The Republic of Cuba; The Cuban Air Force, Case No. 96-10126-Civ-King; Case No. 96-10127-Civ-King; Case No. 96-10128-Civ-King

In 1997, Cuban American attorneys Frank Angones, Victor Diaz, later a CABA President, and Roberto Martinez, working with attorneys Ronald Kleinman and Aaron Podhurst, obtained the first judgment ever against a foreign state under the Anti-Terrorism and Effective Death Penalty Act of 1996. The district court ruled against the Republic of Cuba and the Cuban Air Force, awarding compensatory damages of $49,927,911 and punitive damages of $137,000,000 arising out of the murder by the Cuban Government of three United States nationals who were shot down by Cuban Migs while they were flying unarmed civilian aircrafts in international waters as part of Brothers to the Rescue organization. Brothers to the Rescue had been flying missions since 1991, spotting Cuban rafters in the Florida Straits. This was a novel case. After the conclusion of the trial proceedings, the lawyers were instrumental in obtaining a change in the federal statutes to permit satisfaction of an Anti-Terrorism judgment from the frozen assets of the Cuban Government located in the United States. Ultimately, the families of the victims were able to collect $96,000,000 from the frozen assets.

Fuentes v. Shevin, 407 U.S. 67 (1972)

Margarita Fuentes, a Cuban living in the section of Miami known as Little Havana, purchased in installments a stove and a record player from the Firestone Tire and Rubber Company's store at Flagler Street and 12th Avenue. When the stove broke down, Mrs. Fuentes made a lump sum payment which she thought would pay for the record player and stopped her monthly payments. Pursuant to Florida's replevin law, Firestone went to court and obtained an order directing the Sheriff to repossess both items. Three recent law graduates, who then worked for the Legal Services Program of Miami, including this writer, sued Firestone in federal court, claiming that the repossession of these goods without a prior hearing at which Mrs. Fuentes could have contested Firestone's default allegations violated the due process clause of the 14th Amendment of the U.S. Constitution. In a two to one decision, the District Court rejected her claim. The case was appealed to the U.S. Supreme Court, and, on June 12, 1972, the Supreme Court, in a landmark decision, ruled in favor of Mrs. Fuentes, holding unconstitutional on due process grounds the replevin law of Florida and similar laws in 47 other states. The Supreme Court remanded the case to the state County Court for ultimate resolution. The case was settled when Firestone agreed to pay Mrs. Fuentes $300 so that she could purchase a new record player. Margarita Fuentes, a Cuban exile, had become part of the annals of American jurisprudence. Her case was widely reported in the press and made Walter Cronkite's CBS Evening News.

FINAL OBSERVATIONS

What a Country!" † This the most generous country in the world. Much has been given to Cuban American lawyers: entry into this country, intensive courses in English, programs to permit Cuban educated lawyers to pursue other careers in the U.S., an accelerated law school course for those who had already graduated from law school in Cuba, the Cuban Adjustment Act of 1966 which shortened the wait for citizenship, the Cuban Loan Program without which many would not have been able to attend college or law school, and a lot more. In turn, much has been given back by Cuban American lawyers, consistent with the best traditions of the United States and Cuba. There is no profession in the United States more civic minded than the legal profession and Cuban American lawyers are doing their part. CB

The author graduated from Brown University and from Columbia Law School, cum laude, where he served as Managing Editor of the Columbia Law Review. Upon graduation from law school, he was awarded a Reginald Heber Smith Fellowship by the federal government and served as a legal services lawyer in Miami. He is a founding partner of the law firm of Murai Wald Biondo & Moreno, a past President of CABA and the Florida Bar Foundation, and a past Chairman of the Board of Directors of Miami Children's Hospital.

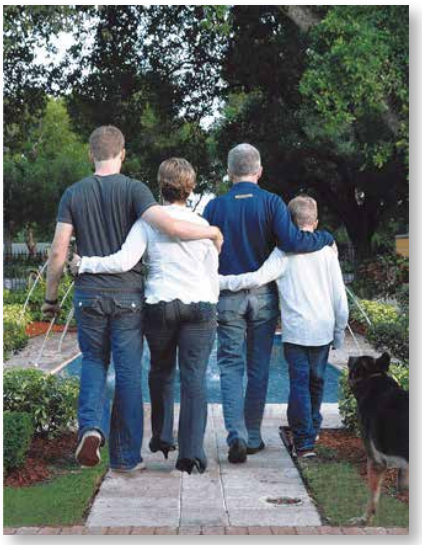
[1] CABA BRIEFS EDITOR'S NOTE: This excerpt from *Cubans: An Epic Journey, the Struggle of Exiles for Truth and Freedom* by Sam Verdeja and Guillermo Martinez is reproduced with the express permission of Facts About Cuban Exiles, Inc.

† CABA BRIEFS EDITOR'S NOTE: We have removed the original endnote because we did not reproduce the accompanying appendix listing all CABA Presidents.

† *The initial group included Cesar Alvarez, Orlando Cabrera, Jose Garcia Pedrosa, Jorge Hernandez-Toraño, Roberto Martinez, Rafael Peñalver, Ramon Rasco, former mayor Xavier Suarez, and this writer.*

† *Phrase borrowed without permission from businessman Armando Codina.*

JUDGE MARI SAMPEDRO-IGLESIA'S BOOK *The Heroes Among Us*



by Jason D. Silver, Esq.[1]

Miami-Dade Judge helps family overcome adversity from head and neck cancer, while simultaneously inspiring others with her book, *The Heroes Among Us*.

In 2010, Judge Mari Sampedro-Iglesia, a judge in the Children's Courthouse and Juvenile Justice Center in Miami, faced a tougher test than any she works with in court.

Her husband of almost 20 years, Jose Iglesia, was diagnosed with Stage 4 head and neck cancer, requiring grueling chemotherapy treatment, radiation, and major surgery. Some would have trouble just handling the burden themselves, but Judge Sampedro-Iglesia turned this incredible challenge into a way she and her husband could share their journey and inspire others.

In *The Heroes Among Us*, Judge Sampedro-Iglesia writes about the difficult days she and her family experienced while going through the ordeal of cancer treatment. She discusses the fear and anxiety of the experience, and highlights the gifts of love and life she and her family learned to never take for granted.

Importantly, all proceeds from the book are donated to the University of Miami Sylvester Comprehensive Cancer Center to fund research in finding a cure for head and neck cancer, and research for sentinel lymph node biopsies and related endoscopic surgery. Since it was published in 2011, the book has sold well over 1,000 copies and raised more than $12,000 for cancer research.

Looking back at the journey since 2010, Judge Sampedro-Iglesia is even more thankful for close friends and blessings. "I am not sure if I can say I did not know this before, but throughout the journey of cancer and the book, I had always known how there are many good people in the world," Judge Sampedro-Iglesia said. "However, when you go through hard times, your true friends come out. The amount of support we received, I will never have enough words to express. We were truly blessed," she said.

Additionally, the great news that Jose is doing well is a testament to the importance of research, diagnosis, and treatment for which the book raises money. "My husband is doing great. He has check ups every 3 months, and all has been clear now for almost 3 years. He is not how he was before, there are certain things he has limits on, but all in all, he is cancer free and we are very lucky!" Judge Sampedro-Iglesia said.

Judge Sampedro-Iglesia continues to motivate and inspire others. She said the book is still selling, and also reiterated her new motto in life, which she still takes with her from this journey. "My motto throughout the book and in life has become: With love, faith and hope, you can endure anything, no matter how difficult it appears." **CB**

To purchase *The Heroes Among Us*, go to http://bookstore.westbowpress.com/Products/SKU-000450992/The-Heroes-Among-Us.aspx

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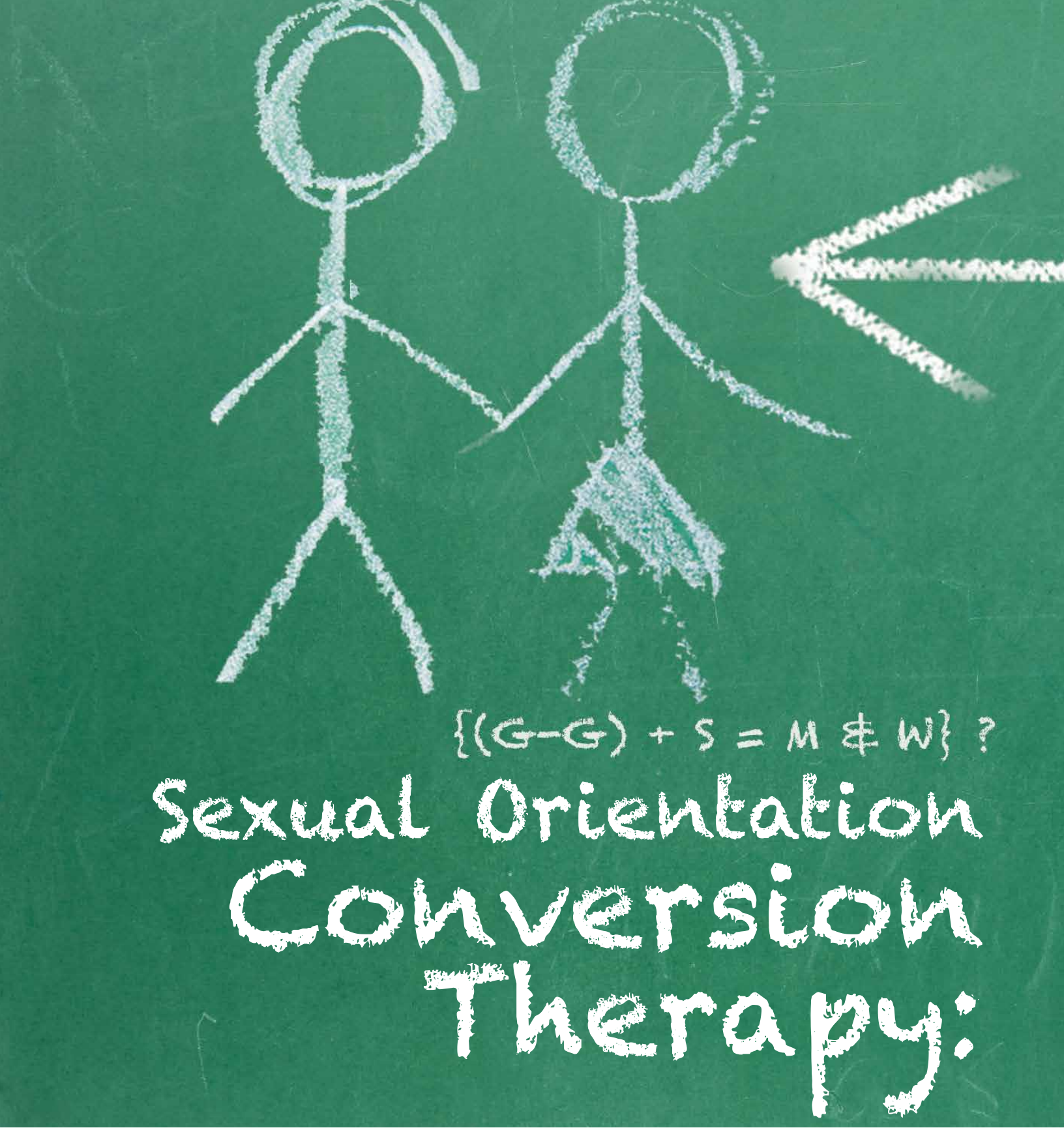
[1] *Jason D. Silver, Esq., is a member of the real estate litigation and lender foreclosure services team at Greenspoon Marder, P.A., representing various creditors and servicers. He constantly appears in state courts throughout Florida, and takes part in mediations frequently.*



Sexual Orientation Conversion Therapy:

Can the Government Ban a "Cure?

by Jorge R. Delgado, Esq.

The controversial therapies stem from the now widely discredited belief that homosexuality is a curable disease.[1] A minority view to the contrary remains, which is supported largely by conservative political and religious views.[2] Practitioners of these therapies have been described as using treatments "ranging from the novel and humorous to the appalling and dangerous."[3] These include electroshocks, the inducement of nausea while watching same-sex erotic images, and hypnosis.[4]

California passed Senate Bill 1172—codified in Cal. Bus. & Prof. Code §§ 865–865.2—to ban the conversion therapies in whichever form they take. The law states that "[u]nder no circumstances shall a mental health provider engage in sexual orientation change efforts with a patient under 18 years of age."[5] "Sexual orientation change efforts," often abbreviated as "SOCE," include "any practices by mental health providers that seek to change an individual's sexual orientation."[6] Those practices are deemed "unprofessional conduct," and could subject a mental health provider to discipline.[7]

Two district judges in the Eastern District of California have been asked to preliminarily rule on the ban's validity, and the two reached different decisions. First, in *Welch v. Brown*,[8] the Honorable William B. Shubb issued a preliminary injunction barring the enforcement of SB 1172 against an ordained minister licensed as a marriage and family therapist, a board certified psychiatrist, and a former gay therapy patient pursuing a doctorate in the field. The court found SB 1172 was a viewpoint and content-based regulation on the plaintiffs' free speech, which subjected the law to strict scrutiny review.[9] The court reasoned, in essence, that the California Legislature sent "a consistent and unequivocal message that . . . SOCE is ineffective and harmful," which the court viewed as "integrally intertwined with viewpoints, messages, and expression about homosexuality."[10] Applying strict scrutiny, Judge Shubb agreed the physical and psychological well-being of minors is a compelling state interest,[11] but was skeptical of the evidence that gay conversion therapy caused such a problem. In his view, the inadequacy of studies on the subject showed, at best, "that SOCE may cause harm to minors."[12]

The following day, the Honorable Kimberly J. Mueller, in *Pickup v. Brown*, reached the opposite conclusion, denying a preliminary injunction sought by several mental health professionals, the National Association for Research and Therapy of Homosexuality, the American Association of Christian Counselors, and two sets of parents on behalf of two minors.[13] Contrary to *Welch*, this court found SB 1172 to be content and viewpoint neutral. The court reasoned the law barred only the objectionable treatments and not the discussion of SOCE or referrals to persons not covered by the statute.[14] Moreover, the court found the treatments themselves were not protected speech, but rather non-expressive conduct, which did not merit special First Amendment protection.[15] The court further recognized and upheld the state's role in regulating the medical profession.[16]

Additionally, the court in *Pickup* addressed two issues not reached in *Welch*: the First Amendment rights of the minors and the parents. Concerning the former, the court noted the First Amendment protects listeners as well as speakers.[17] However, as the court already had concluded the statute did not infringe on protected speech, it considered the minors' claim the "flip side of that coin."[18] As to the parents, the court rejected the argument California's ban infringed on the right of parentage, finding "there is no fundamental or privacy right to choose a specific mental health treatment the state has reasonably deemed harmful to minors."[19]

The plaintiffs subsequently appealed Judge Mueller's decision to the Ninth Circuit,[20] which has yet to render a decision. Oral argument was heard in April of this year before Chief Judge Alex Kozinski, Judge Susan Graber, and Judge Morgan Christen, who were critical of the arguments raised by both sides. The decision will be watched closely by many given that other states—such as New Jersey and Massachusetts—are considering similar laws.

As may be guessed, politics will likely play a deciding role in how the court rules. Notably, Judge Shubb (who declared the law unconstitutional) was appointed in 2004 by George W. Bush. Judge Mueller, on the other hand, who upheld the law, was appointed in 2010 by President Barack Obama. Of the current three-judge panel considering the law, Chief Judge Kozinski was appointed by Ronald Reagan in 1985, Judge Graber was a 1998 appointee of Bill Clinton, and Judge Christen was appointed in 2012 by President Obama. CB

***Jorge R. Delgado**, is an associate at Kluger, Kaplan, Silverman, Katzen & Levine, P.L. He received his Juris Doctorate from St. Thomas University School of Law, where he graduated valedictorian of his class. His litigation practice touches on a multitude of areas in both state and federal court. He holds a special interest in appellate and constitutional law, and regularly coaches moot court teams from his alma mater in well-renowned national moot court competitions.*

[1] Pickup v. Brown, No. 2:12-CV-02497-KJM-EF, 2012 WL 6021465, at *2 (E.D. Cal. Dec. 4, 2012).

[2] *Id.*

[3] Jonathan Sacks, *"Pray Away the Gay?"* an Analysis of the Legality of Conversion Therapy by Homophobic Religious Organizations, 13 Rutgers J.L. & Religion 67, 70 (2011).

[4] *Pickup*, 2012 WL 6021465, at *2.

[5] Cal. Bus. & Prof. Code § 865.1.

[6] Cal. Bus. & Prof. Code § 865(b)(1).

[7] Cal. Bus. & Prof. Code § 865.2.

[8] No. CIV. 2:12–2484 WBS KJN, 2012 WL 6020122 (E.D. Cal. Dec. 3, 2012).

[9] *Id.* at *11–*12.

[10] *Id.* at *11.

[11] *Id.* at *13.

[12] *Id.*

[13] *Pickup*, 2012 WL 6021465, at *2.

[14] *Id.* at *9.

[15] *Id.* at *10.

[16] *Id.* at *11.

[17] *Id.* at *12.

[18] *Id.*

[19] *Id.* at *18.

[20] Pickup v. Brown, Case No. 12-17681.

HYPNOSIS

Unlearn the Fear Response of the Subconscious Mind

by Todd Goodwin

The CEO of a major corporation began to present his company's financial outlook at the annual shareholders' meeting. He should have been confident. The news was favorable, and the company's profits were growing, but he had long suffered from a fear of public speaking. His voice was shaky; he was sweating; and he seemed very nervous. Financial analysts in the audience whispered, "Sell the stock, he's clearly lying."

Nerves can be helpful, but not when they produce performance anxiety, a common fear generated by the overwhelming pressure to perform at a very high standard. The root of the problem is an unconscious thought that creates pressure and leads to a fear of scrutiny, criticism, rejection, or failure. For example, feeling the pressures of a legal proceeding, a client or witness may feel he/she has to testify "perfectly" and not make any mistakes in court or in a deposition, or else the case is lost. This fear can lead to a fight or flight response, which may cause heart palpitations, shortness of breath, sweating, dizziness, or difficulty thinking clearly. The anxiety causes someone to seem as if he/she is being less than forthcoming, or even intentionally hiding something, leaving him/her vulnerable to the intimidations and manipulations of opposing counsel. Nervousness is mistaken for dishonesty, and the consequences of such a conclusion are potentially damaging, even fatal, to the outcome of a case.

Fear helps us avoid or escape dangerous situations, but performance anxiety is irrational and causes more harm than good. Conventional remedies like pre-trial coaching, public speaking classes, and talk therapy often are ineffective because they focus only on the rational conscious mind, which already understands the importance of being calm and relaxed in the spotlight. On the other hand, the powerful, emotional subconscious mind resists being calm and relaxed because exposure to scrutiny may lead to harsh judgment that may damage self-esteem. As a result, the subconscious generates fear to escape that threatening situation, even at the cost of long-term goals like successful public speaking or legal victory.

Fortunately, performance anxiety can be eliminated quickly and easily using hypnosis and NLP. These are the most effective ways to teach the subconscious mind that fear is not necessary for self-protection, and the client or witness will experience a calm, relaxed confidence without any additional coaching or conscious effort.

I personally have worked with lawyers, doctors, actors, athletes, salespeople, professional speakers, and legal witnesses who have unlearned the fear response and gone on to confidently achieve their respective goals and objectives. Consider how you will benefit once you can count on clients to be calm and focused in court or in depositions. If you would like to explore ways that I can help you in **English or Spanish**, please contact me at Todd@MiamiHypnosis.NET or **786-522-5464.** CB

Todd Goodwin, M.S., BCH is a board certified hypnotist and owner of The Miami Hypnosis Center.

ANTITRUST AND THE NCAA

Ed O'Bannon v. NCAA

by Juan C. Perez, Jr., Esq. [1]

The National Collegiate Athletic Association ("NCAA") continues to vehemently object to college athletes receiving financial benefits for their participation in sporting events, even though men's college football and men's college basketball programs together generate more than $6 billion in annual revenue.[2] The NCAA insists the reason they will not adopt a pay-for-play system is due to their mission to "maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports."[3]

In light of this position, the NCAA will not even allow student athletes to be compensated for the use of their likenesses.[4] This led former University of California-Los Angeles college basketball player Ed O'Bannon, who led the Bruins to the Final Four back in 1995,[5] to file a class action lawsuit against the NCAA and the Collegiate Licensing Company ("CLC") for the use of student-athletes' likenesses in various forms of merchandise.[6] O'Bannon's complaint represents former student athletes and alleges the NCAA violated antitrust laws by colluding with the CLC and its other business partners to depress prices paid to former college athletes.[7] A significant part of his claims stem from the fact that the NCAA is still enjoying an unjust financial gain from former players' likenesses in selling and licensing DVDs of past championship games, broadcasts of "classic" NCAA games on ESPN, video games produced by Electronic Arts, as well as other sports memorabilia, such as replica jerseys.[8]

Upon receiving a scholarship to play sports at a university, the NCAA requires student athletes to sign a document authorizing the NCAA or any third party acting on its behalf to use their name or picture to generally promote NCAA championships, events, activities, or other programs.[9] This language is truly what is at the heart of this entire issue. The NCAA, according to O'Bannon, interprets this form to mean student athletes have relinquished all rights in the NCAA's licensing of their likenesses for an indefinite period of time.[10] Ultimately, he claims this is an unreasonable restraint on trade in violation of the Sherman Act.[11]

To determine whether there is any validity to O'Bannon's claims, the court will have to weigh the anticompetitive effect of the restraint on trade against the procompetitive justification.[12] Courts balance the two from the perspective of consumers.[13] Under the "rule of reason" analysis, O'Bannon must show the acts of the NCAA have had an adverse effect on competition and, if he is successful, then the NCAA must show procompetitive virtues of the actions taken.[14] If the NCAA can accomplish that, the burden shifts back to O'Bannon to establish there are less restrictive means of accomplishing the same goals.[15]

If the United States Supreme Court decision in *NCAA v. Board of Regents* is any indication—in which the Court held the NCAA's act of restraining the amount of games a university could televise was a restraint of trade in the sense that they limit members' freedom to negotiate and enter into their own television contracts—it would only make sense to conclude that the NCAA's restriction on former student athletes' rights to negotiate contracts for the use of their likenesses to be an unfair restraint on trade.[16]

The NCAA will have to rely on its position of "preserving amateurism" as its justification for their position on the licensing of student athletes' images, which has been recognized as a procompetitive effect by the U.S. Supreme Court.[17] The issue with such an argument, however, is that former student athletes are no longer under the NCAA's control. Although there is an argument to be made that the NCAA does not want student-athletes to be concerned with licensing agreements while in school, it is a poor argument considering the fact that student athletes already face the pressure of deciding whether to leave school early to become professionals. Allowing a former player, such as Ed O'Bannon, to negotiate his own licensing agreements almost twenty years after he finished his collegiate career would have no effect on amateurism. This leaves the NCAA with the same argument they made in the *Board of Regents* case, which is the NCAA's licensing policies promote competitive balance between its stronger and weaker teams.[18] Under this reasoning, more talented players would attempt to play for stronger teams with the expectation of garnering more exposure due to the likelihood that stronger teams will play more televised games, be featured more often on ESPN, and likely play in front of larger crowds. However, this already happens despite the NCAA's licensing policy: the most highly coveted high school athletes are already choosing prominent universities over obscure ones on the basis of increasing their likelihood of advancing to the professional level where their earning potential is considerable. Thus, in reality, a student-athlete worrying about future licensing agreements would likely have zero impact on amateurism or on competitive balance between NCAA member universities.

The only glaring weakness in O'Bannon's complaint is that there may be only a handful of student athletes each year whose likeness is truly worth more on the open market than a year's worth of college tuition.[19] Otherwise, it only seems fair that the NCAA should be barred from having an eighteen-year-old sign away his right of publicity indefinitely in exchange for the opportunity to play a sport and receive an education. **CB**

[1] Juan C. Perez, Jr. is a graduate of St. Thomas University School of Law, Class of 2011. He is currently an Assistant State Attorney at the Miami-Dade State Attorney's Office, where he is serving as an Assistant Chief of County Court.

[2] Joe Nocera, *Let's Start Paying College Athletes*, N.Y. Times (Dec. 30, 2011), http://www.nytimes.com/2012/01/01/magazine/lets-start-paying-college-athletes.html?pagewanted=all&_r=0.

[3] Nat'l Collegiate Athletic Ass'n, 2012-2013 NCAA Division I Manual §1.3.1 (2012), *available at* http://www.ncaapublications.com/productdownloads/D113.pdf [hereinafter, NCAA Division I Manual].

[4] *Id.* at *§* 12.5.2.1.

[5] Paul Gutierrez, *UCLA Hero Ed O'Bannon is Right at Home in Las Vegas Selling Cars*, Sports Illustrated (Mar. 18, 2009), http://sportsillustrated.cnn.com/2009/writers/the_bonus/03/18/obannon/index.html.

[6] Class Action Complaint at 2, 10, O'Bannon v. NCAA, 2010 U.S. Dist. LEXIS 19170 (N.D. Cal. July 9, 2009) (No. CV 09-3329) (hereinafter, O'Bannon Complaint).

[7] *Id.* at 2, 62-68.

[8] *Id.* at 4.

[9] *Form 08-3a Academic Year 2008-2009: NCAA Student Athlete Statement Division I, NAT'L COLLEGIATE ATHLETIC ASS'N (2008),* http://www.ukathletics.com/doc_lib/compliance0809_sa_statement.pdf.

[10] O'Bannon Complaint, *supra* note 17, at 23-24.

[11] *Id.* at 64, 67-68.

[12] Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 56 (2d Cir. 1997).

[13] NCAA v. Bd. Of Regents, 468 U.S. 85, 107 (1984) (citing Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979)) ("Congress designed the Sherman Act as a consumer welfare prescription.") (internal quotation omitted).

[14] *Clorox Co.*, 117 F.3d at 56.

[15] *Id.*

[16] *NCAA v. Bd. Of Regents*, 468 U.S. at 98-99.

[17] *Id.* at 117.

[18] *Id.* at 118.

[19] Michael McCann, *NCAA Faces Unspecified Damages, Changes in Latest Anti-Trust Case*, Sports Illustrated (July 22, 2009), http://sportsillustrated.cnn.com/2009/writers/michael_mccann/07/21/ncaa/index.html.

NOTABLE ACHIEVEMENTS

of your CABA Board Members

by Vanessa Lopez [1]

THREE MEMBERS OF YOUR CABA BOARD OF DIRECTORS RECENTLY HAVE ACHIEVED NOTABLE DISTINCTIONS. MARIA GARCIA WAS NAMED A FLORIDA BAR FELLOW; YARA LORENZO WAS APPOINTED TO THE FLORIDA BAR FOUNDATION BOARD OF GOVERNORS AND NAMED A MIAMI FELLOW BY THE MIAMI FOUNDATION; AND JENNIFER PEREZ WAS NAMED A 2013 HISPANIC WOMAN OF DISTINCTION.

The Florida Bar recently selected Garcia as a Fellow of the Wm. Reese Smith, Jr. Leadership Academy ("the Academy"). The Academy is an exciting new program of the Florida Bar that selects, as Fellows, a limited group of individuals who have a history of leadership within their communities and the legal profession. The Academy's mission is to assist Fellows in enhancing their leadership skills to have a greater impact within their community. Garcia will study ethical, professional, and public service issues facing the legal profession and get a "behind the scene's" look at the Bar's role in the legal profession.

Maria Garcia was named a Florida Bar Fellow.

Yara Lorenzo was appointed to the Florida Bar Foundation Board of Governors and named a Miami Fellow by the Miami Foundation.

Jennifer Perez was named 2013 Hispanic Woman of Distinction.

The Florida Bar also recently appointed Lorenzo to the Board of Governors of the Florida Bar Foundation ("the Foundation"). The Foundation offers various assistance programs, including funding legal services for the poor throughout the State and providing grants to improve the justice system. Among other initiatives, the Foundation also has established public service fellowships for law students.

In addition to that appointment, Lorenzo was named by the Miami Foundation as a Miami Fellow. The Miami Foundation, originally established in 1967 as the Dade Community Foundation, works with community partners and its philanthropist fund-holders to face the challenges facing the community. It seeks to connect philanthropy to community needs to continually improve Miami. Its Miami Fellows Program ("the Program"), developed in 1999, is designed to build the knowledge, networks, and abilities of its Fellows while increasing their impact and engagement in the community. The Program selects Fellows who will help develop a greater Miami.

Perez was chosen as one of twelve 2013 Hispanic Women of Distinction for a charity event sponsored by Latina Style Magazine and Baptist Health. The event will be held August 16, 2013, at the Signature Grand in Davie, Florida, and all proceeds of the event will go to benefit the Light of the World Clinic in Broward. Congratulations Jennifer! For more information regarding the event, please contact Jennifer directly at jeperez@bupalatinamerica.com.

I know I can speak for everyone in CABA by saying "congratulations" to these three outstanding ladies for their well-deserved achievements! CB

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[1] *Vanessa Lopez is a law student at Emory School of Law. She works for Carlton Fields in its Miami office as a Summer Associate and was a judicial intern for the Honorable Paul C. Huck in the Southern District of Florida. Before starting law school, Ms. Lopez worked as a Research Associate at the Institute for Cuban and Cuban-American Studies (ICCAS) at the University of Miami.*

Celebrating "El Día Del Abogado"

SPOTLIGHT ON JOSE "PEPE" VILLALOBOS

by Jorge A. Pérez Santiago, Esq.[1]

In Jose "Pepe" Villalobos' inauguration speech in 1980, he reminded CABA members why Cubans originally fled the Castro regime, noting that we, as Cubans, should never forget, but, naturally, often do.[2] Thus, it is fitting that on June 6, "El Día Del Abogado,"[3] we honor Pepe, one of the first Cuban attorneys licensed to practice law in Florida, whose story embodies the Cuban struggle for freedom—indeed, Pepe once said that his "greatest satisfaction was to be a free man"—and reminds us of the hardships and obstacles Cuban-American attorneys overcame to provide the opportunities so many of us enjoy today.

Pepe, a practicing attorney for 36 years and presently of counsel at Akerman Senterfitt, overcame many trials and tribulations to become a successful attorney in Florida.[4] After graduating high school from Riverside Military Academy in Gainesville, Georgia, in June 1954, he was accepted to law school in Cuba, starting in September 1954 at St. Thomas of Villanova (Universidad de Villanueva). He worked his way through law school as a life insurance agent and then worked with Dr. Hector J. Rodriguez in his law practice specializing in corporate law, corporate transactions, real estate, and research in testaments. Shortly thereafter, Castro's regime took over. One of the first acts of power was to enact a "Revolutionary decree #11 of January 11, 1959," which declared null and void all certificates, licenses, and diplomas received after November 30, 1956. This decree applied to Pepe's law school diploma, which he received in November 1959.

Pepe's degree, however, would have been deemed valid had he agreed to support Castro's revolution, an option he was not willing to take. At the time, the Cuban Constitution provided that laws with retroactive effect were illegal, which prompted him to write a thesis, distributed in the form of pamphlets, attacking the morality and legality of this penal decree. As a result, he was labeled an enemy of the regime and subjected to harassment in many forms: (1) his home was raided; (2) his furniture, books, and documents were burned; (3) his mother was physically assaulted; (4) his life was threatened; (5) bullets were fired into his home; and (6) his home was ultimately confiscated. On February 14, 1960, Pepe came to the United States. He spent the next 12 years working his way up from unloading freight trucks and pumping gas in Sears to a role in a supervisory capacity. He was then enrolled at Biscayne College in Miami, where he earned a degree in Public Administration.

On July 31, 1973, the Supreme Court of Florida issued an order recognizing as a proper applicant for admission to take the Florida Bar Examination and for admission to The Florida Bar, any applicant "who is an American citizen and bona fide resident of the State of Florida, who, prior to December 31, 1960, practice law in Cuba and was a graduate of" either the University of Habana, Jose Martí University, St. Thomas of Villanova Law School, or Oriente University.[5] Further, the applicants were required to furnish evidence that he was "an attorney in good standing in the Republic of Cuba prior to December 31, 1960." The Court, in pertinent part, found that "[p]ublication of name in the Official Gazette of the Republic of Cuba" would serve as sufficient evidence that an applicant was an attorney in good standing prior to December 31, 1960.[6]

Pepe was unable to fulfill the requirements set forth in the Court's order. Specifically, Pepe did not practice law in Cuba prior to December 31, 1960, and his name was not published in the Official Gazette of the Republic of Cuba. In addition, although he had applied to be an American citizen, his application had not yet been approved. Thus, pursuant to the terms of the order, Pepe could not participate in the Cuban American Lawyers program established by the order.

Pepe, however, continued to fight for his chance to participate in the program. He filed countless petitions with the Court, many of which were rejected because they did not meet the Court's filing requirements. After overcoming these procedural hurdles, he filed a petition arguing that the Court should allow him to participate in the program because: (1) political events, such as horrendous political persecutions and his own sense of honor and dignity hindered his intentions to complete the requirements to obtain a license to practice law in Cuba despite completion of all education requirements; (2) although he technically was not a practicing attorney under the communist regime, he believed he was a practicing attorney because he defended the Cuban Constitution; and (3) he was not yet an American Citizen, but had applied for citizenship. In a February 22, 1974, order, this Court approved Pepe for the Cuban American Lawyers program.[7] Then, on Monday, May 17, 1976, the Court issued an order for Conditional Admission to the Bar holding that Pepe, Pedro Antonio Alvarez, Mario Ernesto DeCardenas, Frank Diaz Silveira, Esteban A. Ferrer, Armando Andres Pardillo, and Oscar A. Salas, had graduated from the Cuban American Lawyer program, had attained a passing grade on The Florida Bar Examination administered in 1976, and were to be administered the Oath and be admitted to The Florida Bar on June 1, 1976.[8] Pepe, 16 years after arriving in the United States and 17 years after he first graduated from law school, was finally and officially a practicing attorney.

Jose "Pepe" Villalobos

To truly understand the historical significance of this order, it is crucial to revisit the prevailing attitude in Miami surrounding the Cuban diaspora in the 1970s and 1980s. Cuban "exilados" were derisively referred to as "cheos"—men who exposed their chest hair, wandered from "cafetín to cafetín" all day, and refused to take any menial jobs.[9] The "exilados" were also considered responsible for the increase in crime and lack of jobs. In a report written by members of a committee commissioned by the governor to investigate the cause of the Arthur McDuffie riots in 1980, which occurred roughly around the time of the Mariel boatlift, the committee wrote that one of the causes was the "Latin immigration problem" that polarized different ethnic groups.[10] Further, the report concluded that "the recent influx of Cuban refugees into the Miami area" exacerbated the jobs problem and pitted different racial groups against each other for marginal jobs in the economy.[11]

As a panel member for the committee investigating the McDuffie riots and later as part of a task force addressing criminal system reform, Pepe wrote that he felt that Latins and Cubans were unfairly blamed for the social problems that had existed prior to the influx of Cubans and that Hispanics were not well-represented in these committees, which, in his eyes, contributed to the polarization of the Latin community. He also believed that much of the vilification of the Latin community that occurred after the McDuffie riots came from members of the white community rather than the black community.[12] Thus, the Cuban community worked to break down these barriers to achieve respect and equality under the law—a task Pepe and these new Cuban-American attorneys proudly accepted and a task CABA and its members continue today.

Accordingly, on "El Día Del Abogado," we proudly celebrated Pepe for his service to the community and tireless efforts in paving the way for future generations of Cuban-American attorneys, Cubans, and Latins alike. His will and determination should be an inspiration for all of us to continue our efforts to empower our community. **CB**

[1] Jorge A. Pérez Santiago is a staff attorney for Justice Jorge Labarga and current Editor-in-Chief of *CABA Briefs*. He graduated from the University of Miami School of Law in 2011.

[2] Roberto Fabricio, *Abogados cubano-americanos,* El Miami Herald, Mar. 19, 1980.

[3] On "El Día Del Abogado" CABA celebrated and recognized four of its Past Presidents who started their law studies and originally practiced in Cuba, including: Osvaldo Soto, Luis Figueroa, Mario Goderich and Jose "Pepe" Villalobos.

[4] Demonstrating his humility, Pepe emphasizes that his story is not unique and that he only wishes to preserve history.

[5] Florida Board of Bar Examiners Re: Proposed Amendment to article IV, section 22, Rules of the Supreme Court Relating to the Bar, SC-43,040 (Fla. July 31, 1973).

[6] *Id.*

[7] Florida Board of Bar Examiners Re: Jose A. Villalobos, SC-44,962 (Fla. Feb. 22, 1974).

[8] Florida Board of Bar Examiners Re: Proposed Amendment to article IV, section 22, Rules of the Supreme Court Relating to the Bar, SC-43,040 (Fla. May 17, 1976).

[9] According to Pepe, Bill Berry of the Miami News wrote an article titled, "Los Exilados," in which he wrote critically about the influx of Cubans and referred to "cheos."

[10] Heather Dewar & Marilyn A. Moore, *Panel member: Latins not to blame for racial discord*, Miami News, Dec. 1, 1980, *available at* http://www.latinamericanstudies.org/exile/miami-dec-1-31-1980.pdf.

[11] *Id.*

[12] *Id.*

THE 11TH CIRCUIT STRIKES DOWN FLORIDA'S BUSINESS-WITH-CUBA LAW

by Lorenzo J Palomares Starbuck, Esq.1

In a recent decision, the Eleventh Circuit Court of Appeals affirmed the decision of the Honorable U.S. District Judge Michael Moore, holding that the Florida Cuba Amendment, codified as section 287.135, Florida Statutes, is likely to facially discriminate against foreign companies doing lawful business with Cuba, and likely to impede the federal government's ability to speak with one voice in regulating foreign trade.[2] In 2012, the Florida Legislature passed the Florida Cuba/Syrian Amendment, which, in effect, is Florida's application of the Federal Cuban Embargo codified under U.S.C.A. Const. Art. 6, cl. 2; Cuban Democracy Act of 1992, § 1702 et seq., 22 U.S.C.A. § 6001 et seq.; Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, § 306, 22 U.S.C.A. § 6085.

In Odebrecht, Odebrecht's claims were brought pursuant to 42 U.S.C. §§ 1983 and 1988, as well as 28 U.S.C. §§ 2201 and 2202, for declaratory judgment and temporary injunction against the State of Florida, and its officer Ananth Prasad.[3] Odebrecht, a large Florida Corporation owned by a Brazilian conglomerate conducting business in Florida with several state agencies, argued that if the law was not set aside, it stood to lose its contracts and future bidding potential because its sister company was involved in the enlargement of the $1.2 billion construction project known as the Port of Mariel in Cuba. Stated differently, Odebrecht argued section 287.135 was unconstitutional on its face. The district court ultimately enjoined the State, holding the statute was likely to facially discriminate against foreign companies doing lawful business with Cuba, and likely to impede the federal government's ability to speak with one voice in regulating foreign trade.

The statute establishes certain conditions precedent to denying a contract under section 287.135. Under subsection 2, a company that, at the time of bidding or submitting a proposal for a new contract or renewal of an existing contract, is on the Scrutinized Companies with Activities in Sudan List or the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List, created pursuant to section 215.473, Florida Statutes, or is engaged in business operations in Cuba or Syria, is ineligible for and may not bid on, submit a proposal for, or enter into or renew a contract with an agency or local governmental entity for goods or services of $1 million or more.

Under (b)(5), the statute provides that before a contractor submits a bid or proposal for a contract, or enters into or renews a contract, with an agency or governmental entity for goods or services of $1 million or more, the company must certify it is not on the Scrutinized Companies with Activities in Sudan List or the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List, or that it does not have business operations in Cuba or Syria.

Pursuant to (5)(a), if, using credible information available to the public, the agency or the local governmental entity determines the company has submitted a false certification, the agency or local governmental entity shall provide the company with written notice of its determination. The company then shall have 90 days following receipt of the notice to respond in writing and demonstrate the determination of false certification was made in error. However, in the Odebrecht complaint, as well as in both the trial and appellate court opinion, there is a lack of satisfaction of fundamental standing issues of injury under *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992). Article III standing requires: (1) injury in fact, which means an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal relationship between the injury and the challenged conduct, which means that the injury fairly can be traced to the challenged action of the defendant, and has not resulted from the independent action of some third party not before the court; and (3) a likelihood that the injury will be redressed by a favorable decision, which means that the prospect of obtaining relief from the injury as a result of a favorable ruling is not too speculative.[4]

Importantly, the *Odebrecht* complaint did not satisfy the initial requirement of presenting an injury in fact because the State of Florida had not made the determination that Odebrecht was on the Scrutinized Companies with Activities in Sudan List or the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List, or was engaged in business operations in Cuba or Syria, and thus, was ineligible for, and could not bid on, submit a proposal for, or enter into or renew a contract with any agency or local governmental entity for goods or services of $1 million or more. The standing argument is meritorious because even the plaintiff admits section 287.135 contains a "savings clause,"[5] which provides: "This section becomes inoperative on

the date that federal law ceases to authorize the states to adopt and enforce the contracting prohibitions of the type provided for in this section."[6] The Cuba Amendment did not substantively alter this provision.[7] Although there were claims that Odebrecht was told of Florida's intent to implement the law, no substantive evidence from the State intent was discussed by the opinion or ruling.[8]

By its own admission, Odebrecht did not conduct, nor did it ever conduct, business operations in Cuba.[9] Its business operations fully comply, and complied, with the laws and regulations implementing the U.S. Embargo of Cuba. If such statement bears truth, Odebrecht's submission under (b)(5) would satisfy the Florida Cuba Amendment, and no claim of action against the defendant could occur, giving rise to a dismissal of the complaint because of a lack of standing and a lack of case or controversy. The court never addressed these issues.

Central to our constitutional design is federalism, which adopts the principle that both the national and state governments have elements of sovereignty the other is bound to respect.[10] To resolve conflicts between laws of the two sovereigns, the United States Constitution provides: "[t]he Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."[11] Accordingly, a fundamental principle of the Constitution is that Congress has the power to preempt state law. Even absent an express provision for preemption, the Supreme Court has held that state law must yield to a congressional act in at least two other circumstances.[12] First, "[w]hen Congress intends federal law to 'occupy the field,' state law in that area is preempted."[13] The Cuban Embargo has not preempted state law. Many supporters, and even those who oppose the Cuban Embargo, admit that while it establishes a federal public policy the United States has done little to enforce, it is nonetheless a federal public policy. For example under section § 6003 of the Embargo, the president is required to encourage governments of countries that conduct trade with Cuba to restrict their trades and credit relations with Cuba in a manner consistent with the purposes of the Cuban Democracy Act. If the White House has such an obligation to enforce the law, the Florida Cuba Amendment simply follows and affirms this federal public policy. The president can only waive the Embargo's requirements when the president determines and reports to Congress that the Government of Cuba: (1) has held free and fair elections conducted under internationally recognized observers; (2) has permitted opposition parties ample time to organize and campaign for such elections, and has permitted full access to the media to all candidates in the elections; (3) is showing respect for the basic civil liberties and human rights of the citizens of Cuba; (4) is moving toward establishing a free market economic system; and (5) has committed itself to constitutional change that would ensure regular free and fair elections.[14]

Finally, for a state statute to encroach on the federal government's Foreign Affairs Power, it must have more than "some incidental or indirect effect in foreign countries," and have the potential for diplomatic "disruption or embarrassment."[15] The Eleventh Circuit simply ignored this issue in its *Odebrecht* opinion. The Florida Cuba Amendment does not attempt to regulate activity in Cuba or any place else, it simply states that if you are on a particular list, and the State of Florida makes a finding the company is on the Scrutinized Companies with Activities in Sudan List or the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List, created pursuant to section 215.473, Florida Statutes, or is engaged in business operations in Cuba or Syria, the party is ineligible for, and may not bid on, submit a proposal for, or enter into or renew a contract with an agency or local governmental. **CB**

[1] Lorenzo J Palomares-Starbuck, Esq. has obtained several law degrees including a L.L.M. in International law and taxation from St. Thomas University School of Law, L.L.M. in taxation, financial services, and banking from Thomas Jefferson University School of Law, and J.D. Northwestern California University School of Law. He is admitted to practice law in 33 jurisdictions including Florida, California, District of Columbia, and Massachusetts.

[2] *See Odebrecht* Const., Inc. v. Prasad, 876 F. Supp. 2d 1305 (S.D. Fla. 2012).

[3] *See* Amended Complaint at D.E. 4, *Odebrecht*, S.D. Fla., No. 12-cv-22072-KKM.

[4] *Lujan,* 112 S. Ct. at 2136.

[5] The savings clause permits the granting of a contract to a restricted company, even after an adverse finding by the State of Florida if it is in the best interests of the State.

[6] Ch. 2012-196, § 2(9), Laws of Fla. (amending § 287.135(9), Fla. Stat.).

[7] *See* Complaint at D.E. 4, 12 savings clause, Odebrecht, S.D. Fla., No. 12-cv-22072-KKM.

[8] *See id*. at 14.

[9] *See id*. at 19.

[10] *See* Arizona v. United States, 132 S. Ct. 2492, 2500 (2012) (citing Gregory v. Ashcroft, 501 U.S. 452, 457 (1991)).

[11] U.S. CONST. art. VI, cl. 2.

[12] *See* U.S. v. Whiting, 131 S. Ct. 1968, 1977 (2011).

[13] *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000) (citing California v. ARC Am. Corp., 490 U.S. 93, 100 (1989)).

[14] 22 U.S.C. § 6003.

[15] Zschernig v. Miller, 389 U.S. 429, 434–35 (1968).

by Jennifer J. Perez, Esq.

SUMMERTIME IS HERE AND CABA MEMBERS HAVE CERTAINLY BEEN

SOAKING UP THE FUN!

On May 9, CABA, in conjunction with the Dade County Bar Association, hosted a CLE titled, **"MY SHINGLE—The Ins & Outs of Opening Your Own Practice."** The event was sponsored by and held at Sabadell United Bank. All proceeds benefited the CABA Pro Bono Project and Miami-Dade County Legal Aid.








On May 16, **CABA's Young Lawyers' Committee** hosted a Happy Hour at Club 50 in the Viceroy Hotel in Downtown, Miami, which brought together young professionals from across Miami-Dade for a great networking evening.

Olivia Rodriguez and Dax Bello

Maria Garcia, Erica Steinmiller, Ricardo Martinez-Cid, and Sandra M. Ferrera

Manuel Garcia-Linares, Annie Hernandez, and Dax Bello

Alex Fumagali, Olivia Rodriguez, Raul Ordonez, and Ernesto Zaldivar

Ernesto Zaldivar, Sandra M. Ferrera, and Javier A. Lopez

Nick Basco and Kristina Maranges

On June 5, Berger Singerman hosted another CLE called, **"Let's Get Dirty—the Life of a Real Estate Deal from Beginning to Finish"** with presenters Katherine Amador-Fortuny and Marc Stephen Shuster.

On June 6, CABA held its annual **"El Día Del Abogado"** cocktail, in honor of Lawyer's Day in Cuba. The event was especially memorable this year as it was held at the University of Miami Otto Richter Library, in the Cuban Heritage Collection, where some of CABA's founders were able to locate their and their colleagues' names in a docket for Cuban attorneys entering the U.S. as exiles.

Olivia Rodriguez, A. Dax Bello, Sandra Ferrera, Aldo Leiva, and Daniel Buigas

Tomas Gamba, Judge Maria Korvick, Sandra Ferrera, Judge Victoria Del Pino, and Jim Skinner

Aldo Leiva and Maria R. Estorino

Ignacio Rodriguez, Jorge Fors, A. Dax Bello, and Olivia Rodriguez

Isis Pacheco and Marco Leyte Vidal

Tomas Gamba and Ana Maria Pando

Annette Rasco, Judge Richard Hirsch, and Elena Doyle

Manuel Crespo, Jr. and Joe Cantrell

Tomas Gamba, Osvaldo Soto, Hector Lombana, and Retired Judge Joseph P. Farina

Chief Judge Bertila Soto, J. Alex Villalobos, Barbara Villalobos, and Jose "Pepe" Villalobos

Roland Sanchez-Medina, Osvaldo Soto, Jose "Pepe" Villalobos, Sergio Mendez, Rogelio Del Pino, and Sandra Ferrera

Judge Abby Cynamon, Chief Judge Bertila Soto, Judge Victoria Del Pino, Bonnie Riley, Hector Lombana, Gina Beovides, Judge Rosa Figarola, and Billy Soto

Brickell Luxury Motors

Sandra M. Ferrera, Judge Tom Rebull, and Isabel Diaz

Finally, on June 18, the **Summer Solstice Membership Appreciation Cocktail** was held at Brickell Luxury Motors. An annual time to celebrate CABA's members, this event helps new as well as seasoned CABA members to continue to understand who makes up CABA and what opportunities they have as CABA members.

Dax Bello test driving a Lamborghini Gallardo Spyder

Tomas Gamba, Jim Skinner, Judge Maria Korvick, Sandra M. Ferrera, and Rafael Yaniz

Jorge Piedra, Gina Beovides, and Javier A. Lopez

Judge Don Cohn, Nelson Bellido, and Gustavo Guerra

Richard Montes de Oca and Javier Ley Soto

Javier A. Lopez, Dax Bello, and Martin Zilber

Mario Murgado from Brickell Motors

Javier Ley Soto and Judge Jason Dimitris

Sandra Ferrera, Gina Beovides, Israel "Izzy" Reyes, Judge Victoria Del Pino, and Maria Garcia

Please SAVE THE DATE!!!

Looking forward, CABA has much in store for fall. CABA will host its 2013 Retreat and Advocacy Days in Washington, D.C. from **September 19-21**. This retreat will give guests exclusive meet and greet opportunities with various members of Congress, as well as tours of our nation's prime locations.

Please contact the event chair, Jennifer J. Perez, Esq., at jeperez@bupalatinamerica.com.

On Saturday, **October 19**, the Ninth Annual "Art in the Tropics" Pro Bono Art Auction and Restaurant Tasting Event will be held at the Freedom Tower in Downtown, Miami. This event is always a hit, showcasing local artwork and delicious Miami restaurant cuisine.

For more information, please contact the event chair, Nicole Mestre, Esq., at nem@mestrelaw.com.

Finally, on Friday, **November 8**, "The Legal Aspects of Doing Business in the Americas" is an all-day legal conference that CABA will be hosting in the Intercontinental Hotel in Downtown, Miami.

Please contact Nelson Bellido, Esq., the event chair,he event chair, at nbellido@cfclaw.com for more information.

CABA LEADS
On Comprehensive Immigration Reform

by Alejandro Miyar[1]

Bipartisan attempts to overhaul the U.S. immigration system have intensified over the past year. This spring CABA took action at a key moment in the debate over guarding against measures that could have resulted in the indefinite detainment of Cuban refugees.

On May 16, 2013, CABA President Sandra M. Ferrera wrote to ranking members of the Senate Judiciary Committee as they were set to mark up amendments to S. 744, the "Border Security, Economic Opportunity, and Immigration Modernization Act." The committee was slated to consider a controversial amendment proposed by Senator Charles Grassley of Iowa.

Grassley's proposal to S. 744 would have allowed nearly all categories of immigrants to be separated from their families and detained for the entire duration of their immigration court cases with little to no recourse. In effect, the amendment would allow the Department of Homeland Security to indefinitely detain Cuban refugees, and others in similar situations, with final immigration removal orders that cannot be carried out.

In CABA's view—shared by a number of immigration and constitutional legal scholars—such an immigration review process conflicts with the Supreme Court's decisions in *Zadvydas v. Davis,* 533 U.S. 678 (2001), and Clark v. Martinez, 543 U.S. 371 (2005), as well as CABA's general humanitarian ethos and mission. In 2004, CABA signed an amicus curiae brief before the Supreme Court in support of the immigrant detainee in *Clark v. Martinez.* At the time, CABA objected to a so-called administrative "Cuban Review Plan," which CABA argued led to arbitrary immigration outcomes with minimal due process protections. CABA's *amicus* brief in *Clark* shared the plight of Eduardo Dominguez, a Mariel boatlift refugee who was detained in a U.S. federal prison for *six* years, despite repeated recommendations for his release. In 2005, the Supreme Court vindicated CABA's position and ordered the release of two Cuban nationals detained well beyond the time of their removal orders.[2]

In the current debate over comprehensive immigration reform, President Ferrara's letter voiced, on behalf of a unanimous board of directors, CABA's opposition to measures that: (1) provide for indefinite detention of immigrants; (2) abridge judicial review of immigration proceedings; or (3) eliminate a reasonable path to citizenship for deserving, undocumented immigrants currently in the United States. CABA's leadership on comprehensive immigration reform respects the organization's legacy as a volunteer bar association founded by, among others, Cuban immigrants in Miami in 1974.

The Miami Herald and other media outlets covered CABA's advocacy on the Grassley amendment, which was never meaningfully considered after CABA's advocacy made headlines. CB

[1] *Alejandro Miyar graduated cum laude from the University of Miami School of Law in May 2013.*

[2] *Clark*, 543 U.S. at 386.

News from the Nation's Highest Court

State Statute Preempted by State Medicaid Anti-lien Provision

by Carolina S. Rohrig, Esq.[1]

In *Wos v. E.M.A.*,[2] the United States Supreme Court interpreted a North Carolina statute governing the State's reimbursement from a Medicaid beneficiary's tort damages in light of a federal statute, 42 U.S.C. § 1396(p)(a)(1) ("the Medicaid anti-lien provision"). The Court held that the North Carolina statute was preempted by the Medicaid anti-lien provision.[3]

The Medicaid anti-lien provision prohibits states from attaching a lien on a Medicaid beneficiary's property to recover benefits paid by the states on its behalf.[4] This federal statute preempts a state's effort to take any portion of a Medicaid beneficiary's tort judgment or settlement not designated as Medicaid care payments.[5] The North Carolina statute required that up to one-third of any tortuous injury damages recovered by a Medicaid beneficiary was to be paid to the State to reimburse it for the State's medical treatment payments.[6]

In *Wos*, the Court considered whether the State statute contravened the Medicaid anti-lien provision. E.M.A., the respondent, was a child who suffered multiple birth injuries that required twelve to eighteen hours of skilled nursing care per day.[7] E.M.A.'s ongoing medical care was in part paid by North Carolina's Medicaid program.[8]

In 2003, E.M.A. and her parents filed a medical malpractice suit against the physician and hospital where she was born.[9] Eventually, E.M.A. received a $2.8 million settlement, but the agreement failed to allocate the money among the different claims advanced by her, including medical expenses.[10] E.M.A. and her parents then filed a 42 U.S.C. §1983 action seeking declaratory and injunctive relief, arguing that the State's reimbursement scheme violated the Medicaid anti-lien provision.[11]

THE MAJORITY

The majority determined that under the State statute, when the State's Medicaid expenditures exceeded one-third of the beneficiary's tort recovery, the statute established a conclusive presumption that one-third of the recovery represented medical expenses compensation.[12] Accordingly, the majority held that the State statute's operation was preempted by the Medicaid anti-lien provision.[13]

In the majority's view, the State statute was problematic, as there was no process for determining what portion of a beneficiary's tort recovery was attributable to medical expenses.[14] Rather, it arbitrarily chose a portion of the tort recovery without regards to whether it was a reasonable approximation to any particular case.[15]

The majority ruled "an irrebuttable one-size-fits-all statutory presumption is incompatible with the Medicaid Act's clear mandate that a state may not demand any portion of a beneficiary's tort recovery except the share that is attributable to medical expenses."[16]

THE DISSENT

The dissent's opinion expressed concern about the decision denying the States' flexibility in resolving a policy question with broad significance for a complicated program.[17] It also highlighted problems, such as: tort victims seldom only seek medical expenses in recovery, the states' complicated task in navigating through competing federal requirements, and the unclear process of complying with the majority's opinion.[18] The dissent defended North Carolina's bright line rule, as it provided clear notice to beneficiaries along with a cheap and efficient way to administer the program.[19]

THE EFFECT OF THE WOS DECISION

The significance of the Wos decision is that this new ruling will likely usher many changes in the future. Many states, including Florida, will need to reconcile their existing statutes, which are based on fixed percentage of tort recoveries for Medicaid costs, with the Court's decision. As the Court encouraged, states may turn to individualized evidentiary hearings, adopting judicial or administrative proceedings, or other mechanisms to determine medical expenses when unspecified in settlements and verdicts. Also, this decision may spur new litigation on defining the contours of "medical expenses." **CB**

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[2] 133 S. Ct.1391, 1395 (2013).
[3] *Id.* at 1398.
[4] *Id.* at 1394-95.
[5] *Id.* at 1395.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.* at 1395-96.
[12] *Id.* at 1397-98.
[13] *Id.* at 1398.
[14] *Id.*
[15] *Id.*
[16] *Id.* at 1399.
[17] *Id.* at 1404 (Roberts, C.J., dissenting).
[18] *Id.* at 1405-06.
[19] *Id.* at 1408.

Comcast Corporation v. Brehren: Reaffirming a Rigorous Evidentiary Basis for Class Certification

by Carolina S. Rohrig, Esq.[1]

In *Comcast Corporation v. Brehrend,*[2] the United States Supreme Court considered whether a class action brought by subscribers to the cable television services provided by Comcast Corporation and its subsidiaries had been appropriately certified pursuant to Federal Rule of Civil Procedure 23(b)(3). The Court held the class action was improperly certified, as the United States Court of Appeals for the Third Circuit refused to hear arguments against the subscribers' damages model simply because they were also pertinent to the merits determination.[3] The Court further held the damages model did not measure damages attributable to the only remaining class theory.[4]

From 1998 to 2007, Comcast engaged in "clustering," a strategy of concentrating operations within sixteen counties in Pennsylvania, Delaware, and New Jersey.5 The subscribers filed a class action antitrust suit, claiming that Comcast entered into unlawful swap agreements in violation of section 1 of the Sherman Act and monopolized services in the cluster, in violation of section 2.[6] The subscribers claimed they were harmed by Comcast through its elimination of competition and holding prices above competitive levels.[7]

The subscribers sought class certification under rule 23(b)(3), which only permits certification if "the court finds that the questions of law or fact common to

class members predominate over any questions affecting only individual members."[8] Although the subscribers proposed four antitrust impact theories to satisfy rule 23(b)(3)'s predominance requirement, the United States District Court for the Eastern District of Pennsylvania only accepted the overbuilder theory, which claimed that Comcast's activities reduced the level of competition from "overbuilders" (companies that build competing cable networks in an area where an incumbent cable company already operates).[9] To establish damages calculated on a class-wide basis, the subscribers relied on Dr. James McClave's regression model.[10] However, the model did not isolate damages resulting from any of the subscribers' four theories, particularly the overbuilder theory.[11] Nevertheless, the district court certified the class.[12] In affirming the decision, the Third Circuit Court of Appeals refused to consider Comcast's arguments that the class was improperly certified because the model failed to attribute damages resulting from the overbuilder theory, the only accepted injury theory.[13] To this effect, the Third Circuit stated an "attack on the merits of [the] methodology had no place in the class certification inquiry."[14]

THE MAJORITY

According to a majority of the Supreme Court, rule 23(b)(3) necessitated a rigorous analysis of its prerequisites that often overlaps with the merits of the claim.[15] As such, the Court criticized the Third Circuit when it refused to entertain arguments against the subscribers' damages model that bore on the propriety of class certification, just because those arguments were pertinent to a merits determination.[16] In fact, it rejected that at the class-certification stage any method of measurement was acceptable as long as it could be applied class-wide.[17]

Under the proper standard for evaluating certification, the subscribers' model unsuccessfully established that damages were capable of measurement on a class-wide basis.[18] The subscribers' model was inadequate, as it did not measure the damages solely attributable to the overbuilder theory, but indivisibly incorporated damages resulting from the other three theories rejected by the district court.[19] In reversing, the majority determined that in rule 23(b)(3) class certification, the subscribers were burdened to show that the measured damages resulted from the particular antitrust injury on which Comcast's liability was premised.[20]

THE DISSENT

Along with challenging the majority's reformulation of the question initially submitted for review, the dissent argued that Comcast untimely objected to the admission of the subscribers' damages model and failed to strike Dr. McClave's testimony or report.[21] Therefore, the dissent opined that Comcast forfeited the question that the Court granted for review.[22]

The dissent cautioned that the decision should not be read to require, as a certification prerequisite, that damages attributable to a class-wide injury be measurable "on a class-wide basis."[23] Rather, it still recognized individual damages calculations under rule 23(b)(3) certification.[24]

Additionally, the dissent opined that the district court's finding that the subscribers' model capable of measuring damages was a factual finding (as opposed to legal finding) of how the model worked that should remain undisturbed.[25]

THE EFFECT OF THE COMCAST DECISION

The *Comcast* decision reaffirms a rigorous evidentiary basis for class certification. Foreseeably, merit issues will be raised early in litigation in rule 23 prerequisite inquiries, and early evidentiary showings may complicate future class action certification. It is certain that the practical application of the decision will be revisited in future litigation. CB

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[2] 133 S. Ct. 1426, 1429-30 (2013).
[3] *Id.* at 1432-33.
[4] *Id.* at 1433.
[5] *Id.* at 1430.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.* at 1431.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.* at 1432.
[16] *Id.* at 1432-33.
[17] *Id.* at 1433.
[18] *Id.*
[19] *Id.* at 1434.
[20] *Id.*
[21] *Id.* at 1435-36.
[22] *Id.* at 1436.
[23] *Id.*
[24] *Id.* at 1437.
[25] *Id.* at 1440.

U.S. Supreme Court Reverses Decision to Remove Indian Child from Adoptive Parents

by Jane W. Muir [1]

In a 5-4 decision issued on June 25, 2013, the U.S. Supreme Court ruled in favor of the non-Native American adoptive parents holding that they would be allowed to keep their child, over the objections of the biological father under the Indian Child Welfare Act. The Indian Child Welfare Act of 1978 (ICWA), establishes federal standards for state-court child custody proceedings involving Indian children, and was enacted to address "the consequences . . . of abusive child welfare practices that [separated] Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes."[2] According to records of the case, Matt and Melanie Capobianco of Charleston, South Carolina adopted the child, Veronica Capobianco, at birth, in 2009. However, four months after Veronica's birth, Dusten Brown decided he wanted his child back.[3]

The South Carolina Family Court denied the Copobianco's adoption petition and awarded custody to Brown following a trial, which took place when Veronica was two years old.[4] Soon after, Veronica was handed over to Brown, whom she had never met. The South Carolina Supreme Court affirmed, concluding that: the ICWA applied because the child custody proceeding related to an Indian child; Biological Father was a "parent" under the ICWA; and his parental rights could not be terminated under the act.[5] However, the Supreme Court concluded that the language of the ICWA required heightened showing of a parent's "continued custody of the child." Brown never had custody of the child

because Veronica had been adopted at birth. The Court noted that the adjective "continued" plainly refers to a pre-existing state, and so "continued custody" refers to custody that a parent already has (or at least had at some point in the past). The statute demonstrates that the ICWA was designed primarily to counteract the unwarranted removal of Indian children from Indian families. Accordingly, the ICWA's primary goal is not implicated when Veronica's adoption was voluntarily and lawfully initiated by a non-Indian parent with sole custodial rights.[6]

The court further held that the act applies only when an Indian family's "breakup" would be precipitated by terminating parental rights, not when a parent abandons an Indian child prior to birth and that child has never been in the Indian parent's legal or physical custody.

In that situation, the termination of parental rights did not cause the breakup, according to the opinion, because the family had not been whole before the birth of the child. Justice Alito authored the opinion, with Justices Roberts, Kennedy, Thomas and Breyer concurring. Justices Thomas and Breyer filed concurring opinions and Justices Scalia and Sotomayor dissented. Justice Sotomayor's dissent was joined by Justice Kagan, Ginsberg and in part, Scalia. CB

[1] *Jane W. Muir is a civil litigator, who has confronted Indian Law issues and successfully argued for changes in treatment of Indian sovereign immunity in federal appellate court. She may be reached at jane@gerstenmuir.com.*

[2] Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32 (1989).

[3] Adoptive Couple v. Baby Girl, et al., No. 12-399, at 1 (U.S. June 25, 2013).

[4] *Id.*

[5] *Id.* at 1-2.

[6] *Id.* at 7-11.

Before the Supreme Court: Can Genes Be Patented?

by Steve Schlackman, Esq.[1]

The Supreme Court has released its decision on the closely watched human genome case. The case, heard last April, *Association of Molecular Pathology v. Myriad Genetics, Inc.*, involved the validity of patents on two genes, the breast cancer genes (BRCA1 and 2) that Myriad Genetics discovered in 1994. In a 9–0 decision issued on June 12, 2013, the Supreme Court held "isolated DNA sequence" composition claims do not constitute patent-eligible subject matter under 35 U.S.C. § 101, but composition claims directed to complementary DNA (cDNA) do constitute patent-eligible subject matter.[2]

Gene patents have been granted for decades. Yet, patents are not supposed to be available for something that is a "product of nature." The patent claims can be made on the process, or the use of the thing, but not the thing itself. So given this fine-line, gene patent-holders have been politically prudent by not enforcing many of the rights associated with their patents.[3] Unfortunately, Myriad changed that practice. After spending $500 million over 17 years studying BRCA1 and BRCA2, Myriad started aggressively enforcing the BRCA patents, serving violation notices to labs that performed infringing tests. Labs were required to obtain a license from Myriad, which made the test more expensive and less common.[4] Additionally, each test Myriad runs costs $4,000, which is more than 20 times the cost for sequencing the two genes in any academic center laboratory.[5]

At oral argument, Christopher A. Hansen, senior national counsel for the American Civil Liberties Union in New York, represented the group challenging Myriad's patent and argued the BRCA 1 and 2, even in isolated form, do not rise to the level of patentability. "What exactly did Myriad invent?" Hansen asked.

"The answer is nothing. . . . The genes themselves—where they start and stop, what they do, what they are made of, and what happens when they go wrong—are all decisions made by nature, not by Myriad."[6]

Gregory A. Castanias, a partner in the Washington office of Jones Day, argued on behalf of Myriad. He said that what Myriad inventors created was a new molecule never before known to the world. More importantly, he argued these genes fit within the U.S. Patent and Trademark Office guidelines that have long been in place. The guidelines had been a practice for years before officially adopted in 2001.[7]

In the unanimous decision, written by Justice Clarence Thomas, the Supreme Court reaffirmed isolated DNA sequences are a product of nature and do not constitute patentable subject matter, rejecting the U.S. Court of Appeals for the Federal Circuit's analysis.[8] In his decision, Thomas wrote:

> It is undisputed that Myriad did not create or alter any of the genetic information encoded in the BRCA1 and BRCA2 genes. . . . The location and order of the nucleotides existed in nature before Myriad found them. Nor did Myriad create or alter the genetic structure of DNA. . . . Separating the gene from its surrounding genetic material is not an act of invention.

Conversely, the decision affirmed cDNA is patentable subject matter. Complementary DNA is single-stranded DNA that is artificially created from, and complementary to, a messenger RNA. Justice Thomas noted a lab technician unquestionably creates something new when cDNA is made.

This decision was not surprising as it finds a way to continue to incentivize companies like Myriad while also adhering to the idea nature is not patentable. According to Sandra Park, senior staff attorney with the ACLU Women's Rights Project, "[b]ecause of this ruling, patients will have greater access to genetic testing and scientists can engage in research on these genes without fear of being sued." For Myriad, while the decision invalidated five of the company's claims on isolated DNA, Peter Meldrum, Myriad's president and chief executive officer, said: "We believe the court appropriately upheld our claims on cDNA, and underscored the patent eligibility of our method claims, ensuring strong intellectual property protection for our BRAC Analysis test moving forward."[9] How this decision will actually affect the biotech industry remains to be seen. Regardless, it solidly resolves the gene-patenting question plaguing the biotech industry for decades. **CB**

[1] Steve Schlackman is a registered patent attorney, with a solo practice in Miami and curator for the Art Law Journal, at artlawjournal.com. He is also a photographer whose latest work centers on Santeria and Afro-Cuban second-class citizenry. His work can be seen at cubanophoto.com or on display at the Emmanuel Fremin Gallery in New York City starting on June 27, 2013.

[2] William Gaede, *Supreme Court to Myriad: Isolated DNA Sequences Are Not Patent-Eligible Subject Matter,* The National Law Review (June 15, 2013), http://www.natlawreview.com/article/supreme-court-to-myriad-isolated-dna-sequences-are-not-patent-eligible-subject-matte.

[3] Eric J. Topol, Op-Ed., *DNA & Supreme Court: Nature cannot be patented,* U-T San Diego, April 27, 2013, http://www.utsandiego.com/news/2013/Apr/27/dna-supreme-court-nature-cannot-be-patented/.

[4] Russell Brandon, *'Could you patent the sun?' Inside the Supreme Court case on patenting DNA,* The Verge (Apr. 17, 2013, 2:30 PM), http://www.theverge.com/2013/4/17/4235262/could-you-patent-the-sun-inside-the-supreme-court-case-on-dna-patents.

[5] *Id.*

[6] Peter Murray, *US Supreme Court to Decide whether or Not Genes Can Be Patented,* Singularity Hub (Apr. 22, 2013, 8:59 AM), http://singularityhub.com/2013/04/22/us-supreme-court-to-decide-whether-or-not-genes-can-be-patented/.

[7] Kimberly Atkins, *U.S. Supreme Court struggles with question of human gene patentability,* Lawyers Weekly USA (2013).

[8] Gaede, *supra* note 2.

[9] Marcia Coyle, *Supreme Court Rejects Human Gene Patents in 'Myriad' Ruling,* The National Law Journal, June 13, 2013, *available* at http://www.law.com/jsp/nlj/supreme_court_brief.jsp.

CABA's Pro Bono Project

"LAWYERS ON THE RUN"

Source, CABA Pro Bono Project

by Miriam Soler Ramos[1]

For the second year in a row, "Lawyers on the Run" to benefit the Cuban American Bar Association ("CABA") Pro Bono Project ("the Project") was an absolute success. The 2012 5K was undoubtedly successful and this year's 5K surpassed the inaugural run—adding more runners and raising more funds for this worthwhile and necessary project. The primary goal of the event is to raise funds for the CABA Pro Bono Project, whose mission it is to assist the indigent community in Miami-Dade County by connecting them with attorney volunteers. It is events like this that ensure the Project's ongoing success.

The event, which was held on April 20, 2013, at Tropical Park, had over 500 participants, including 30 children who participated in the Kiddie Dash, which was added this year. The event raised approximately $25,000!

Power 96 provided fun and encouraging music that pleased our devoted crowd. We were once again honored to have Univision's Sandra Peebles as our mistress of ceremony. All aspects of the run went smoothly, and it was a fun event for all who attended.

This year's event was attended, and supported, by many members of our legal community, as well as from the community at-large. Notable attendees included United States Attorney Wifredo Ferrer, Counselor to the United States Attorney Ed Sanchez, the Honorable Fleur Lobree, the Honorable Spencer Multack, the Honorable Richard Hersch, the Honorable Gloria Gonzalez-Meyer, the Honorable D.J. Cannava, Dade County Bar Association President Garrett Biondo, North Miami Mayor Andre Pierre, and Public Defender Carlos Martinez. Lawyers on the Run would not have been possible without generous contributions from the following Miami-Dade County Commissioners: Juan C. Zapata, Bruno A. Barreiro, Javier D. Souto, Xavier L. Suarez, and Sally A. Heyman. Special appreciation is due to Commissioner Heyman, who arrived early to serve coffee from her coffee truck, "Coffee Brake," and donated all proceeds to the Project. As part of the committee, I felt a great deal of pride in seeing our local community come out in support of an event so dear to our hearts.

Through the hard work and dedication of our committee, under the leadership of Co-Chairs Yara Lorenzo and Isabel Diaz, we were able to organize this fabulous event. A special thank you goes out to Yara and Isabel for their countless hours of work and strong leadership, which assured that our committee reached and surpassed all of our goals for this year's race. A much deserved thank you also goes out to the entire 5K committee: Mariel Acosta, Nory Acosta, Dax Bello, Gina Beovides, Claudia Casalis, Karen Cespedes, Monica Cunill-Fals, Juan D'Arce,


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TEAM CNB


PACHECO PEREZ, P.A.
526
516
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236
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LOS PPs
647


GFS
CROSSFIT


FINISH


LOS PPs
502
214
402


PPs
369


349
572


SPECIAL COUNSEL


CUBAN AMERICAN BAR ASSOCIATION
PRO BONO PROJECT
HELPING MIAMI ONE RESIDENT AT A TIME
APRIL 20th, 2013
City National

Vivian de las Cuevas-Diaz, Gregory Falkenstein, Isabel Fernandez, CABA President Sandra Ferrera, Alexander Fumagali, Amalia Gonzalez, Giselle Gutierrez, Javier Ley-Soto, Marco Leyte-Vidal, CABA Pro Bono Project Executive Director Lesley Mendoza, Michael P. Murawski, Jennifer J. Perez, Miriam S. Ramos, Olivia Rodríguez, and Diana Vizcaino. And, of course, this event could not have occurred without the support of CABA's past presidents who, thanks to team captain Manny Morales, organized a supportive team of past presidents.

As most of you know, the Project, which offers free bilingual legal services to our local indigent community, was formed by CABA in 1984 to provide needy minorities with access to our court system. In order to sustain and expand this worthwhile cause, we need your continued support at events like the "Lawyers on the Run." If you are interested in serving as an attorney volunteer, more information can be found at www.cabaprobonoproject.com.

We are thrilled to see the event's success increase in our second year and look forward to its continued growth and popularity. Please continue to support the Project and join us on October 19, 2013, at our annual Art in the Tropics event. All proceeds will go toward the Project. Thank you for your commitment to helping the Project deliver essential legal services to those most vulnerable in our community—we cannot do it without you! CB

THE TOP OVERALL WINNERS WERE AS FOLLOWS:

Women:

Karla Rojas .....18:40 mins.
Didi Mantecon .....19:44 mins.
Lisie Gonzalez .....21:55 mins.
Bridget Schultz .....22:06 mins.
Heather Schry Setter .....23:31 mins.
Erin McAdams .....23:22 mins.
Caroline Gallina .....23:57 mins.
Viktoria Telek .....24:07 mins.
Cristina De la Maza .....24:09 mins.
Cire Andino .....24:15 mins.

Men:

Jonathan Aleda .....17:44 mins.
David Bixby .....18:05 mins.
Jeff Watts .....18:25 mins.
Eduardo de Las Cuevas ...19:39 mins.
Gregorio Gaudenzi .....19:25 mins.
Jose Lorbrira .....20:46 mins.
Isaac Saiz .....21:07 mins.
George Karavetsos .....21:10 mins.
Jouber Oliveras .....21:40 mins.
Javier Banswevo .....21:43 mins.

Team: City National Bank, Title Sponsor

Law Firm: Holland & Knight

[1] *Miriam S. Ramos, Esq. currently serves as Deputy General Counsel for the Miami-Dade Commission on Ethics and Public Trust. She has worked for the Commission since 2005 and formerly served as Deputy Advocate. Prior to joining the Commission on Ethics Ms. Ramos was an Assistant State Attorney in Miami-Dade County. She earned a Bachelor of Science from the University of Miami in Communications and Political Science with Honors and her Juris Doctor from the University of Miami in 2002. Ms. Ramos is an active member of the Cuban American Bar Associations and sits on their Pro Bono Committee. She is a mentor with the Take Stock in Children Program and is a member of the Educational Excellence School Advisory Council. Ms. Ramos also serves on the Professional Ethics Committee of the Florida Bar and on the board of the Children's Home Society, Miami Chapter. She has participated in numerous panel discussions, provided training and has appeared on radio and television discussing ethics in government.*

CABA's Pro Bono Project

Helps Mother Reunite with

Three - Year - Old Daughter Sequestered in Cuba for Twenty Days

by Elizabeth Gonzalez, Esq.

A YOUNG MOTHER, AND RECENT CUBAN IMMIGRANT, MOVED TO MIAMI WITH HER THREE-YEAR-OLD DAUGHTER AND HUSBAND TO BEGIN A NEW LIFE IN THE UNITED STATES. THE YOUNG MOTHER HAD BEEN MARRIED TO HER HUSBAND FOR SIX YEARS, AND HAD RESIDED HER ENTIRE LIFE IN HER NATIVE COUNTRY OF CUBA. THE HUSBAND WAS AN AMERICAN CITIZEN THAT SPLIT HIS TIME LIVING BETWEEN MIAMI AND CUBA. THE FAMILY HAD DECIDED IT WOULD BE BEST TO MOVE TO MIAMI SO THAT THE DAUGHTER COULD BE RAISED IN A COUNTRY WHERE SHE WOULD BE GIVEN OPPORTUNITIES NOT AVAILABLE TO HER UNDER CUBA'S COMMUNIST REGIME.

Upon arrival, the family moved to the husband's Miami home. The mother, appreciative of the socio-economic opportunities available to her, sought to take full advantage and enrolled in a school to become a medical assistant while also working part-time. The husband had always been of a jealous character and the move to Miami exacerbated the husband's jealous tendencies. The husband did not want the mother to work or attend school. He thought that if she did not have economic independence, he could dominate and control her. The husband would emphatically inform the wife that if she kept working, he would send

her back to Cuba. Additionally, he would threaten to harm her physically and to remove the child's custody from her should she decide to leave him. Eventually, the husband's controlling character pushed the mother to move out of the home with her daughter. In fear of her safety, the mother and child left the husband's home on May 4. This unplanned separation resulted in the mother having to leave all of her and her child's personal belongings and legal documents behind.

The mother, having nowhere to turn to, moved into her uncle's house. The mother still allowed the child to have contact with her father, including sleepovers. On Mother's Day, the husband requested that the child spend the night with him and the mother willingly agreed. Later that evening, the mother called to wish the child goodnight. The following day, by mid-morning, the mother began to worry because the husband had not returned the child as had been agreed. The mother made several calls to the husband, all of which went unanswered. Later that evening, the husband sent a text to the mother advising her that both he and the child were in Cuba. The husband then sent an email to the mother advising her that he now had custody of the child and that the child would not be returning to Miami. He further threatened that should she wish to see her child again, she would have to return to Cuba.

The mother, frantic, not knowing English, and completely unaware of the workings of our legal system, spent about a week trying to figure out what to do and where to go to for help. The mother had never been away from her three-year-old child. Her child suffered from febrile seizures and the mother did not know how the sudden move back to Cuba was affecting her child's health. The husband had since returned to Miami, and the child had been left in Cuba under the care of the child's godmother. The mother's contact with the child was limited to telephone calls and she constantly worried when these calls went unanswered. The mother could not ascertain whether her child was being given proper care. To add to her desperation, the husband had all of the mother's legal documents, including her green card. This meant that should the mother board a plane to Cuba, she would not be able to travel back to the United States. Additionally, even if the mother were to fly back to Cuba, under the Cuban regime, the party that brings the child to the country is the only party that is allowed to remove the child from the country. This Cuban policy left the mother at the mercy of her soon-to-be former husband.

The mother finally found her way to the courthouse to file a petition for dissolution of marriage and a motion for a temporary injunction. The temporary injunction was granted and an order to pick up the minor child was issued by the court. A hearing on the temporary injunction, as well as a hearing on the order to pick up the minor child, was set for Tuesday, May 28, 2013, a day after Memorial Day. The mother was then referred to CABA Pro Bono the Friday evening before the hearing. Over Memorial Day weekend, CABA Pro Bono's executive director, Lesley Mendoza, visited the mother at her uncle's house to obtain the facts of the case and to begin searching for a pro bono attorney.

CABA Pro Bono's Staff attorney, Elizabeth Gonzalez, represented the mother at both hearings. At the conclusion of the hearings, the husband was ordered to bring the child back to the courthouse within 48 hours. Although the order had been issued, a lot of uncertainty remained. The mother feared that the father would fly back to Cuba, ignore the judge's order, and decide to reside there with their daughter. Knowing that this case was complex and of a delicate nature, the program director, Lesley Mendoza, began strategizing with CABA Pro Bono Chair, Yara Lorenzo, and CABA President, Sandra Ferrera. Numerous attorneys and law professors were contacted regarding this matter, so as to provide the mother with the best representation possible and to assure that mother and child were re-united. Attorney, Willy Allen, immediately volunteered his services for the immigration portion of the case. Family Law attorney Elena de Socarraz was contacted and asked to represent the mother on the family law portion of the case. At the time the call was made to Elena de Socarraz, she was on an airplane ready for take-off. After being briefed on the case for less than a minute, de Socarraz agreed to take the case and quickly emailed her associate, Christina Guerreiro, so that she could begin working on it. She later stated, "It was not only my professional duty but also my moral obligation as a human being to help someone in dire need. It was my pleasure to immediately accept this pro bono case."

A little over 48 hours after the order to pick up the minor child was issued, the mother's greatest fears were confirmed when the husband sent the mother a message saying that he was not returning to Miami and, instead, repatriating with their daughter to Cuba. The attorneys involved in the case did not lose hope and continued to strategize and think about the best way to get the daughter back to Miami safely. Many more motions were filed, copies of which were sent to the husband in Cuba. As a result of the arduous work from all of the pro bono attorneys involved, the husband reconsidered and called Lesley Mendoza on Friday, May 31, 2013, to inform her that he would be boarding an airplane to Miami that afternoon with the daughter.

Not knowing what to expect from the husband, Lorenzo, de Socarraz, Guerreiro, and Mendoza immediately began researching ways to best enforce the pick-up order at the airport without compromising public safety. Once it was confirmed by the airline's manifest that the daughter was indeed on the flight, arrangements were made immediately for airport police to meet the daughter at customs and escort her to a safe space, where the mother would be waiting with her attorneys. De Socarraz, Guerreiro, and Mendoza had the pleasure of witnessing the touching reunion that took place at Miami International airport twenty days after the three-year-old child had been callously separated from her mother. Upon being asked about her experience, Guerreiro said, "It was immensely gratifying and emotional to see the reunion of the child with her mother. . . . After a most stressful and hardworking 48 hours, it was all worth it to see the mother and child together."

This is truly an example of what occurs when the CABA Pro Bono Project and the CABA legal community come together to help those that are in dire need of pro bono legal assistance. Together we can make a difference! CB

SPOTLIGHT ON LOCAL CHARITY

MIAMI BRIDGE

MIAMI-DADE'S ONLY EMERGENCY SHELTER FOR ABUSED AND ABANDONED YOUTH

Every year, thousands of children and teenagers in Miami-Dade County face the daunting prospect of life on the streets. Abused, neglected, and abandoned (many of them runaways), they are some of the greatest in need. But just when it seems there is nowhere to go, the path opens to Miami Bridge Youth & Family Services, Inc., the only 24-hour emergency shelter in the county that provides refuge, protection, and specialized care to youth in crisis. With two campuses in Miami and Homestead, the organization has been serving children, teenagers, and their families since 1985, acting as a bridge to new beginnings by providing alternatives, solutions, and hope.

Miami Bridge offers services such as structured daily living programs employing positive behavior modification techniques; mental health counseling; formal on-site education programs; life skills groups to promote responsibility and independence; substance abuse prevention services; family reunification services and case management; activities such as arts, crafts, and music to promote positive youth development; and health care coordination services to insure access to medical treatment. Most recently, through initiatives with the Miami-Dade State Attorney's Office, lawmakers and local law enforcement, the organization has been working to combat human trafficking and the exploitation of youth, working to bolster critical services and help rescue victims.

A SAFE HAVEN

Miami Bridge is more than a shelter—it is a safe haven from a broken world. In a testament to the organization and its influence, "James," now 17, was a young man who had exhausted nearly every option and was brought to Miami Bridge as a last chance for a future. In his own words, he writes about his life-changing experience in finding refuge with the organization:

> *Until the age of 15, I was abused, neglected of love, and lied to. I found out I was adopted at age three and everyone around me kept it a secret for 12 years. My sister was my mom, my mom was my grandmother, and my brother and sisters were aunts and uncles.It flipped my world upside down and led me to a path of drugs, theft, depression, and deceit. I scammed everyone. I trusted no one and tried everything. After two years of criminal activity, my actions caught up to me. I was arrested and I messed up a college scholarship, sports opportunities, and relations with my real mom. Now, my counselor is helping me patch things up with my family and get my life on track. I want to change and I feel like, through Miami Bridge, this is the right time and place to do it.*

Each one of Miami Bridge's programs is guided by a commitment to a positive youth development approach, capitalizing on the strengths and assets of children and teenagers and assisting them in achieving their full potential. Miami Bridge reconnects youth with educational, social, and vocational opportunities, encouraging them to attain the competencies necessary to ensure self-sufficiency.

EDUCATION

Through a special partnership with Miami-Dade County Public Schools (MDCPS), Miami Bridge has schools on both of its campuses, led by certified MDCPS teachers. In addition to a formal scholastic program, Miami Bridge provides academic advisement, tutorial services, life-skill training courses, recreational programs, and mentoring. Students in residence at Miami Bridge attend school daily, whether it is on campus or in their designated schools, a GED program, an adult education program, Special Education/ESOL classes or a charter school (in addition to virtual classes).

GIVING BACK

Youth at Miami Bridge are, themselves, going through their own crisis, yet they are eager to do more for others. In an effort to help heal, build confidence, and restore hope, Miami Bridge has implemented a Pay it Forward program, encouraging children and teenagers within the organization to give back through volunteer work. Whether it is serving in a soup kitchen on a Sunday or working at a horse ranch for children and adults with physical and cognitive disabilities, the range of community-focused projects is widespread. Giving back, especially with such purpose, gives youth a sense of pride and provides an opportunity to gain confidence while participating in a positive activity.

CABA INVOLVEMENT

Miami Bridge enjoys a tight-knit network of supporters and advocates from within the South Florida community and beyond. Marlene Quintana, CABA member and Labor and Employment Shareholder at GrayRobinson, P.A., is an active backer of Miami Bridge, serving on the organization's prestigious Board of Directors. A staunch promoter of Bridge's mission and outreach, Quintana has been the back-to-back chair of the nonprofit's annual "Starry Night" gala, and looks forward to a third consecutive stint at the helm in 2014.

HOW TO GET INVOLVED

Even the smallest amount of time volunteered or a contribution to the cause can make an impact and change lives:

- Visit the shelters and learn the children's stories
- Become a mentor
- Support a youth in finishing high school
- Give a youth job training
- Plan an activity for our children
- Help support our mission financially
- Sponsor our annual gala or a fundraiser for the organization

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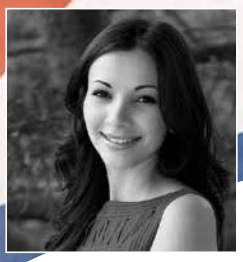
2810 NW South River Drive
Miami, FL 33125
305.635.8953

Homestead
326 NW 3rd Avenue
Homestead, FL 33030
305.246.8956 CB

Dichos de Cuba



by Monica M. Albarello [1]

The following are a few of the most visual Cuban sayings my family, Cuban friends, and I could recall.

[1] *Monica M. Albarello, Esq., practices personal injury law and civil litigation at Conerly, Bowman and Dykes, LLP, a law firm in Destin, Florida. She can be reached via email at malbarello@emeraldcoastlawyers.com or by phone at (850) 837-5118.*

No todo lo que brilla es oro. *Everything that shines is not gold.*

Recently volunteered to speak to some foster teens here in the Florida panhandle, my new home. I met with the onsite counselor for the teens a week before I was scheduled to speak to them. She wanted to discuss certain issues the teens were currently going through and give them some guidance. The common issue amongst all the teens, boys and girls, was their desire for attention from the opposite sex. Well of course, these teens are between the ages of 18 and 19 (just recall when you were their age). I was faced with a great challenge: talking to grown teens about the dangers of "flirting" and on a serious note, online dating. When I met with the teens, I touched upon this topic. In a nutshell, I told them to be careful and not trust anyone simply because they wear nice clothes, they are good looking, rich, or drive a nice car, etc. Criminals of all kind are good looking, drive nice cars, and are rich. Looks may be deceiving, and that is what this dicho is saying. Just because it looks good does not mean it is good at all. It may be a rotten apple.

El que a buen árbol se arrima buena sombra le cobija.

He who leans on a good tree, will be covered by good shade.

If you build relationships with successful people that you look up to, you will benefit from those relationships. The benefit need not be an economic benefit. The benefits intended are knowledge, experience, and establishing important contacts. Sometimes it is all about "who you know." As a young lawyer, I make sure to lean on good mentors who are experienced in my area of the law and others that know how to market themselves very well. I have most definitely gained a great deal of knowledge and experience from my mentors.

No van lejos los de adelante si los demás corren bien.

Those ahead will not get far if everyone else runs well.

This dicho is telling you in a way that the race is not over yet. The "best" professionals sometimes seem seasonal and you will see and read about new faces and their success. These new faces work really hard towards becoming the best and they often do get to the top. The competition does not intimidate the hard worker because he is too busy working hard. If you work hard to be the best, then you can surely get there. However, this does not mean that the hard worker was anticipated to fail. This is not like the Tortoise and the Hare where the Tortoise was anticipated to fail, but the rabbit became too confident in winning the race and ultimately lost. It simply means that there is always room at the top for those who put effort to get there.

La Cocina de Christina

Arroz Blanco *(a.k.a., Killer Rice)*

When I first saw a recipe for Arroz Blanco in Cocina al Minuto, I laughed. I mean, a recipe for white rice? Isn't that just something that everyone knows how to cook? Good or bad, everyone has their own recipe for white rice. Whatever it is you use—Hitachi or a microwave, cazuela or horno, tapita de aceite or garlic powder—you have been making white rice your way for years. Until now.

This recipe has been dubbed "Killer Rice" because: (a) yes, it is that good; and (b) it nearly killed my family. No joke. Unless you intentionally want to make hot oil salpicar throughout your kitchen, and send your spouse, kids, and dog ducking for cover, never add water to a pot with hot oil. Never. Let's just say I learned the hard way.

This recipe will change your life, and I would love to hear about it. Email me at lacocinadechristina@gmail.com with your story.

Ingredients: 3 Garlic cloves, whole; 3 Tablespoons of olive oil; 3 Cups of water (use a plastic Flanigan's green cup and fill to Big Daddy's head); 1 Tablespoon of salt; 2.5 Cups of jasmine rice (note: jasmine rice obligatory).

Instructions:

1. Heat the oil in a deep pot and add the whole garlic cloves.
2. When the cloves start to brown on one side flip them over and gently press them down into the oil with a spoon to let their juices run out and emulsify the oil.
3. Once the cloves are golden on both sides, remove them from the oil and set aside (and eat).
4. Let the oil cool. Cool. Cool.
5. Add the salt to the Flanigan's cup filled with water to Big Daddy's head (3 cups of water) and mix well.
6. Once the oil has cooled, add the water to the pot and bring to a boil.
7. Add the jasmine rice to the boiling water and stir occasionally until the boil returns.
8. Stir one last time, cover, and lower the heat.
9. Cook for 30 minutes on low. Do not lift the lid.

Enjoy!

Serving size: unknown *(too many people sneak a taste test once the rice is done cooking, so I cannot get a clear gauge of how many cups it actually yields).* CB

MOVING FORWARD

by Jorge A. Pérez Santiago

In this issue, we explored CABA's and our members' pasts in an effort to demonstrate how far we have come as an organization and how much has changed in our community. Although we have made visible and tremendous strides, recent events involving race and ethnic relations call into question whether racial equality has truly been achieved.

As a result, our next edition of Briefs will focus on legal issues including the continued call to repeal Stand Your Ground laws in Florida and around the country following the George Zimmerman verdict and the United States Supreme Court's affirmative action cases—Fisher v. Texas and Schuette v. Coalition to Defend Affirmative Action. In Schuette, the justices will hear oral arguments regarding the constitutionality of a voter referendum in Michigan banning race- and sex-based discrimination or preferential treatment in public university admission decisions. Further, given that Florida Bar President Eugene Pettis and Chief Judge Bertila Soto both made history this past quarter, the next edition will feature discussion on diversity in the legal profession. We will also continue to highlight the work of CABA and its members, such as CABA's Pro Bono Project, and CABA's amazing events, such as its "Art in the Tropics."

As always, we will offer both sides of the issue and encourage frank discussion among our members.

Jorge A. Pérez Santiago is a Staff Attorney for Justice Labarga of the Florida Supreme Court and CABA Briefs' Editor-in-Chief for 2013. CB

Sandra M. Ferrera, President
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