

Affirmative Action Cases

A Policy of the Past?

News from the
Nation's Highest Court



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ON THE COVER



52 AFFIRMATIVE ACTION: A POLICY OF THE PAST?

Institutions of higher education use affirmative action policies to promote equal opportunity for all people. Race-based policies, for example, may help to ensure that students from minority groups are represented in all educational settings, including undergraduate and graduate institutions. These policies are justified because they are said to compensate for past discrimination. Such policies, however, have been challenged as violating the Equal Protection Clause of the United States Constitution.

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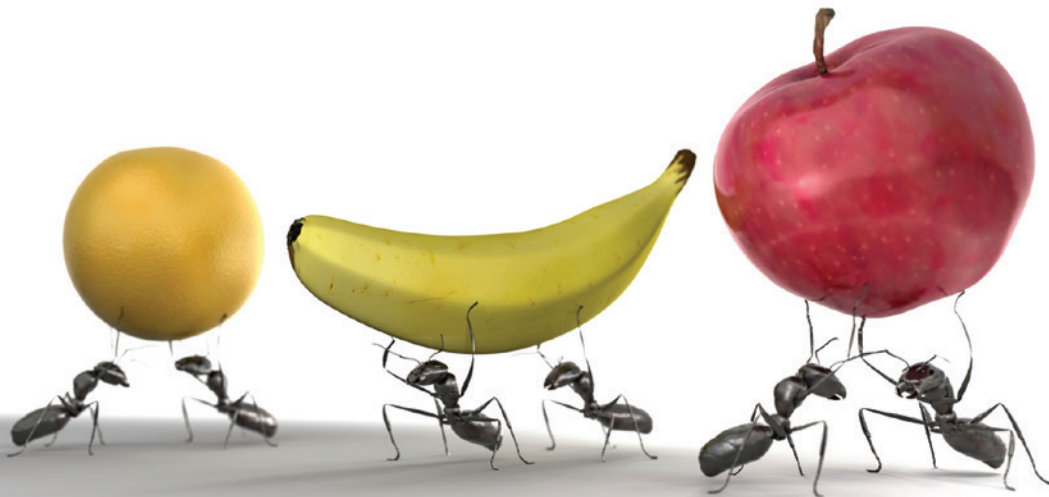
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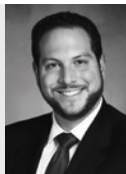


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PRESIDENT'S MESSAGE

“Tell me and I forget. Teach me and I remember.
Involve me and I learn.” -- Benjamin Franklin



Fall is here and CABA continues in its tradition of service to our profession and community. This year, CABA was pleased to take part in a “Back to School Supplies Drive,” in which numerous donations and supplies were received and given to needy students in our community through CABA’s partnership with the Children’s Home Society, the Miami-Dade County School System’s Homeless Assistance Program, and the Education Fund.

On August 23, 2013, CABA held its Annual Judicial Luncheon. Given that this was a non-election year, CABA took the opportunity to recognize and thank our judiciary for their dedication and public service to our profession and community. In particular, CABA recognized members of the 11th Judicial Circuit who serve as Administrative Judges and Associate Administrative Judges in each division, and had the opportunity to learn about different policies and procedures in place to efficiently run our courts. Our CLE programming has continued and on August 29, 2013, CABA co-sponsored “Reaching the Goal—Meeting the Expectations of Corporate Counsel” at Sun Life Stadium, which was followed by a tailgate reception and the Dolphins vs. Saints preseason game. This CLE offered CABA members a great opportunity to network with members of the Bankruptcy Bar Association – Southern District of Florida and Association of Corporate Counsel – South Florida Chapter.

On September 5, 2013, CABA held its Legislator Appreciation Cocktail Reception to give thanks to our elected officials in the State of Florida for their service to our community. In particular, CABA recognized the efforts of Senators Miguel Diaz De La Portilla and Anitere Flores, as well as, Representatives Manny Diaz, Jr. and Jose Felix Diaz for their commitment and support of CABA’s Pro Bono Project. We were fortunate to have Jeff Atwater, the Chief Financial Officer for the State of Florida, as our keynote speaker for the evening. On September 12, 2013, CABA’s Young Lawyers Committee, together with the Miami Children’s Young Ambassadors, held its 2nd Annual Christmas in September Cocktail Party & Toy Drive at Blue Martini. Thanks to the support of our attendees, the Miami Children’s Hospital Foundation received funds and toys valued in excess of \$1,000.00.

This year’s Annual Retreat took place September 19-21, 2013, in our nation’s capital. By all accounts, this year’s retreat led by CABA Board Member, Jennifer Perez, exceeded our attendees’ expectations. During our visit, CABA attendees met with numerous officials in order to give access and exposure to CABA on a national level. We had the opportunity to meet with the entire Cuban-American congressional delegation, and discuss and advocate two significant projects being worked on by the CABA on Cuba Committee as more particularly set forth in the retreat article to follow in this issue of *Briefs*. CABA members also enjoyed a cocktail and networking reception at the D.C. offices of Hogan Lovells, and had the opportunity to meet with numerous law students in D.C. interested in, and exploring the possibility of, establishing a CABA Student D.C. Chapter. CABA retreat attendees also enjoyed some of the best activities D.C. has to offer!

On October 17, 2013, CABA held its bi-monthly CLE, “The Basics of Business Court,” presented by Judge Jennifer Bailey, Judge John Thornton, and moderated by CABA Member, Leyza Blanco. This CLE was offered in order to demystify the uncertainty of filing cases in the Complex Business Litigation Division for those practitioners who do not have familiarity of the rules and procedures in place in this division. CABA members also were given a sneak peek into changes being considered to the CBL Rules. A two-day CLE, “Business Lawyers in the Courtroom,” also was done in conjunction with the Business Law Section of the Florida Bar and the Caribbean Bar Association, for young CABA lawyers looking to perfect their trial advocacy skills. CABA’s 9th Annual Art in the Tropics Fundraiser Event took place on October 19, 2013, at the Freedom Tower at Miami-Dade College. This event kicked off National Pro Bono Week and raised in excess of \$55,000 to benefit CABA’s Pro Bono Project. It is essential that the entire legal community engage in action that results in equal access to justice for all.

CABA continues to give back to future generations of attorneys. October 24-26, 2013, was dedicated to CABA's Foundation starting with CABA's Annual Mentoring Kickoff Reception and Scholarship Awards Presentation, Annual Golf Tournament, and Murder Mystery Dinner to benefit CABA's Foundation that provides scholarships to needy law students. More information on these and other events will be discussed in our next issue!

I look forward to the coming months as we are strengthened by our accomplishments and the expectation of what is yet to come.

In your service, I remain,



Sandra M. Ferrera
President



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SMGQ proudly supports its partner, Manny Crespo, Jr.'s, candidacy for CABA President-Elect 2014, and encourages all CABA members to vote at the annual elections on Tuesday, December 3, 2013, or by absentee ballot. For more details visit www.cabaonline.com.

SMGQ is also honored to welcome its new partners, Ellen Leesfield and Victoria Platzer, former Circuit Court Judges, as part of its ADR Practice Group.

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EDITOR'S MESSAGE



Dear colleagues:

I hope this issue is a pleasure to read, and that each and every member thoroughly enjoys the upcoming holiday season.

Special thanks to our amazing Articles Editors, Eric J. Eves and Kristina Maranges. They are a pleasure to work with and certainly make this editorial process painless.

In this issue of *Briefs*, many of the substantive articles focus on the recurring debate regarding affirmative action. For instance, in the “News from the Nation’s Highest Court” section, Carlos Corral notes that the United States Supreme Court is considering the constitutionality of a state’s ban on affirmative action policies in its public collegiate institutions. Further, Jorge Fors, Jr., discusses racial issues in the context of professional sports in light of recent racially-charged incidents. Finally, Jason Silver informs us that Trayvon Martin-focused debates regarding the legality and appropriateness of “stand your ground” laws are occurring across the country.

As we all know, favoritism or discrimination on the basis of race, ethnicity, and other immutable characteristics, and the necessity or appropriateness of affirmative action policies are sensitive topics. Regardless of your position on affirmative action, however, these articles should indicate that issues with racial equality are still prevalent in today’s society. I do not pretend to know where the problem lies and where it ends, but I believe that we can all be part of the solution when it comes to equality of opportunity. Particularly concerning our profession, relationship-building plays a major role in creating opportunities. Thus, mentors have a tremendous impact on the creation of opportunities for law students and young attorneys alike. To that end, and in light of CABA Foundation’s Annual Mentoring Kickoff Reception and forthcoming holiday spirit, I ask that we all “pay it forward” by mentoring a law student or young attorney. Although the task may seem daunting because of a hectic schedule, assistance and guidance can come in many forms and through many mediums of communication: meeting at lunch or for coffee; exposing a law student or young attorney to a court proceeding; assisting with resumes and interview preparation; or exchanging emails of encouragement. The wisdom shared in a mentor-mentee relationship could make a tremendous difference for both parties in the relationship.

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,

A handwritten signature in black ink that reads "Jorge Pérez". The signature is written in a cursive style and is enclosed within a large, hand-drawn oval.

Jorge A. Pérez Santiago
Editor-in-Chief

CHAIR'S MESSAGE



Dear CABA members:

It has been said that autumn is like a second spring, where every leaf appears as a flower. From sporting events, to networking mixers, to lobbying in our nation's capital, CABA's diverse and vibrant colors have truly bloomed this fall. We continue to create opportunities for our organization to expand and appreciate all of your dedication, input, and participation in these past few months. This issue kicks off the fall season in a big way, highlighting the great strides CABA is taking to continue to meet and exceed its goals in fighting for CABA's mission, promoting equality and diversity in the legal community and courts, and providing legal support to the indigent community. We hope you enjoy it....so, sit back, relax and "Fall" back with CABA!

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,

Jennifer J. Perez
Chair



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LEGAL ROUNDUP

by Elliot B. Kula, Daniel M. Samson, and W. Aaron Daniel*

First Baptist Church of Cape Coral, Fla., Inc. v. Compass Constr., Inc.,
No. SC11-1278 (Fla. May 30, 2013)

ALTERNATIVE FEE AGREEMENTS

PROTECT YOUR ABILITY TO OBTAIN FULL FEES BY COURT AWARD

In *First Baptist*, the Florida Supreme Court accepted jurisdiction to resolve a conflict between the Second and Fourth District Courts of Appeal regarding the propriety of alternative fee recovery clauses in attorney-representation contracts, where no contingency exists. Attorneys are quite familiar with the standard contingency-fee agreement, containing an alternative fee recovery clause whereby the attorney receives an agreed upon contingency percentage or court awarded attorney's fees, whichever is greater.¹ The propriety of such an alternative fee provision was decided by the Florida Supreme Court in 1990, and such clauses have become the standard where a client's recovery is expected to be small, but the time expended in litigation is expected to be considerable.²

Less clear, however, is the propriety of a non-contingency-alternative-fee clause, such as the one at issue in *First Baptist*. The fee clause at issue indicated that if fees were paid by the client, the attorney would be paid at one rate, whereas if fees were paid by "anyone other than" the client, the attorney would be paid at a rate to be determined by the court.³ The Second

District determined that because the fee contract was non-contingent, the fee recovery was limited by what the client had actually paid.⁴

Relying on freedom of contract principles, as well as extensions of its opinions holding alternative fee clauses lawful, the majority held alternative fee recovery clauses are valid in any context.⁵ The dissent, authored by Justice Lewis, posited this particular alternative fee recovery clause should be disregarded because not only did this dispute arise from a non-contingent fee contract, but also from contractual indemnification.⁶ That is so, wrote Justice Lewis, because indemnity contracts are intended to indemnify the amount actually paid.⁷ The majority disagreed, holding the contract itself controls, and not any external factor.⁸

So the issue is now settled. Alternative fee recovery clauses are valid and enforceable in any context, contingent or otherwise, and without regard to the basis for fee recovery. Practitioners should take heed and include such clauses in all fee contracts, contingent or otherwise. **CB**



State Farm Fla. Ins. Co. v. Laughlin-Alfonso,
No. 3D12-675 (Fla. 3d DCA Jul. 31, 2013)

PROPOSALS FOR SETTLEMENT

NOMINAL OFFERS CAN BE MADE IN GOOD FAITH

Practitioners often trip over the seemingly ever-shifting boundaries and requirements for serving a valid Proposal for Settlement pursuant to section 768.79, Florida Statutes (2011). Much uncertainty exists in this realm, from the stringent form and contents of such a proposal to the question what constitutes a good-faith offer when faced with a large damages claim but a legal impediment to recovery. In *Laughlin-Alfonso*, the Third District Court of Appeal provided significant guidance on the question of good faith.

State Farm served a proposal for settlement for a nominal amount.⁹ After prevailing on the merits, State Farm moved for fees pursuant to section 768.79, Florida Statutes (2011).¹⁰ The trial court denied State Farm's motion for fees upon a ruling that the nominal offer was made in bad faith.¹¹ On review, the Third District reversed upon a holding that at the time State Farm served its proposal, it was clear the plaintiff had not complied with "conditions precedent to filing a lawsuit against their insurer."¹² Therefore, and despite a large damages claim, State Farm "had a reasonable basis to believe that its exposure was nominal and did not act in bad faith when it made" the nominal settlement offer.¹³

This Third District opinion provides a definitive pronouncement that the amount of damages sought by a plaintiff is not the preeminent factor in determining whether a defendant has a reasonable basis to believe its exposure is nominal. **Where there is a legal impediment to recovery, the trial court need not compare the offer with the damages claim to determine good faith. It is enough that a defendant has a reasonable basis to believe there is a legal impediment to recovery.** **CB**

Rabie Cortez v. Palace Resorts, Inc., et. al.,
No. SC11-1908 (Fla. Jun. 20, 2013)

FORUM NON CONVENIENS

DEFERENCE TO OUT-OF-STATE LITIGANTS?

Since the Florida Supreme Court adopted the federal *forum non conveniens* test in *Kinney Sys., Inc. v. Continental Ins. Co.*, 674 So. 2d 86 (Fla. 1996), it has been axiomatic that a Florida resident's choice of a Florida forum is given strong deference, and it is overcome only in extreme circumstances. It has been equally axiomatic that foreign plaintiffs are entitled to less deference in their choice of forum.¹⁴ Left unanswered, however, was the level of deference accorded a plaintiff residing outside of Florida, but within the United States. The Florida Supreme Court has now answered that question, holding United States citizens are accorded a strong presumption in favor of their forum choice, regardless of their state of residence.¹⁵

Rabie Cortez purchased a vacation package from Florida-based corporations. While on vacation in Mexico, Rabie Cortez alleges she was sexually assaulted during a massage. She initially filed suit against numerous entities, both foreign and domestic, but the operative complaint contained allegations against three Florida companies only, ostensibly for negligent vacation packaging. Because Rabie Cortez is a California resident, the trial court found a lesser presumption in favor of her forum choice. Because the crux of the complaint begins with an assault in Mexico, the trial court granted the defendants' motion to dismiss in favor of the Mexican forum. The Third District affirmed.

The Florida Supreme Court reversed, primarily upon a holding that a non-Florida resident, who is nonetheless a United States resident, is entitled to the same strong deference in her forum choice as a Florida resident. The Court reasoned that foreign-citizen plaintiffs are granted less deference because there is a risk that such plaintiffs are engaged in forum shopping. To deny a United States citizen access to United States courts, however, has more far-reaching consequences.

Holding a California resident is entitled to the same deference as a Florida resident, the Court went on to hold the trial and appellate courts erred in sending the lawsuit to Mexico merely because the assault occurred in Mexico. That is so, the Court reasoned, because Rabie Cortez's allegations of negligent vacation packaging relate to events occurring in Florida. Moreover, the Court questioned the defendants' decision to seek a foreign forum given they were sued in their home forum.

The *Rabie Cortez* opinion leaves open a significant question for non-practitioners: what level of deference is accorded a United States citizen residing in a foreign country. The Court's sweeping language regarding United States citizens would seem to answer this question. That said, there does seem to be room to argue that the forum shopping concerns regarding foreign nationals apply with equal force to expatriates and foreign nationals who appear to have taken residency in Florida for the sole purpose of avoiding a *forum non conveniens* dismissal. **CB**



Choy, et. al. v. Faraldo,
Nos. 4D12-877 & 4D12-878 (Fla. 4th DCA Aug. 7, 2013)

IMPROPER COMMENT

NEW TRIAL? NOT SO FAST

Choy involved an automobile accident in which the plaintiff sought damages against the active tortfeasor driver and his employer because the driver allegedly acted in the course and scope of his employment as a pizza delivery driver. During closing argument, counsel for the employer showed the jury a Sports Illustrated cover, depicting a quadriplegic former athlete. The employer argued the jury needed to evaluate the plaintiff's injuries in light "of a big picture," including that "there are people that are in wheelchairs, that do not have limbs, that are blind."

The jury found the driver was not acting in the course and scope of employment. The jury did find for the plaintiff with regard to the driver, but awarded far fewer damages than were sought. The trial court ordered a new trial on all issues as a result of the prejudicial nature of the employer's comments.

The Fourth District affirmed as to damages, finding the trial court to have been within its discretion to find the employer's counsel's comments on damages prejudicial. However, because "the improper argument of [the employer's] counsel could not possibly be construed as affecting any issue related to liability or whether [the driver] was acting within the scope of his employment," the Fourth District reversed the trial court's order of a new trial on liability. The Court's direction to trial courts was crystalline: when ruling on a motion for new trial, it is not enough to determine that a prejudicial comment affected the outcome of the trial; a trial court must consider the nature of the comment to the specific findings of the jury. **Although these specific comments were directed at the plaintiff's injuries only, this opinion likely does not provide *carte blanche* to impugn a plaintiff and risk only a new trial on damages.** Such comments could be interpreted as impugning a litigant's character, and such comments likely would produce a closer call on appellate review. **CB**

Estate of Kester v. Rocco & Collins,
No. 1D12-2006 (Fla. 1st DCA Jun. 24, 2013)

UNDUE INFLUENCE

KEEP IN MIND THAT THE STANDARD IS HIGH

Although probate courts are granted significant deference in making factual findings regarding undue influence, a complete failure of evidence requires reversal. The facts of *Estate of Kester* are relatively common to the probate practitioner. A mother dies testate, providing for equal distribution of estate assets to all her children. Yet some assets passed outside of probate to one or more, but not all the children. Of course, the children left out cry undue influence.

In *Estate of Kester*, the "left-outs" argued their sister exercised undue influence over their mother in establishing three assets be passed to three of the five children out of probate. The "left out" sisters pointed to an unsigned, unexecuted spreadsheet, which purportedly indicated their mother's wishes as contrary to the creation of assets to pass outside of probate. There also was testimony that the mother intended for equal distributions to all children, and testimony was introduced that the decedent had a firm grasp of her financial affairs up until the time of death.

The First District determined this evidence to be insufficient to support a finding of undue influence. The First District determined a showing of a close relationship between child and parent is insufficient on its own to establish the child had a confidential relationship with the testator. Because there was unrefuted testimony the accused child had not been present at any occasion in which the “left out” sisters had been removed from the accounts passing outside probate, there was no competent evidence the accused child actively procured any particular devise. Finding that “unsigned, undated, unwitnessed” “to do lists” could not overcome specific documentation as to the beneficiaries of accounts passing outside probate, the First District reversed the probate court’s findings.

The point for practitioners is this: the standard to demonstrate undue influence is high, and even more so between adult and child. **When faced with accusations a sibling exercised undue influence over a parent, it is critical for both the accused and accuser to compile significant evidence to overcome the presumption a close relationship amounts to “family ties of love and natural affection” rather than undue influence.** **CB**

Olesky v. Stapleton, et. al.,

Nos. 2D11-5147 & 2D12-4168 (Fla. 2d DCA Jul. 26, 2013)

EXPERT TESTIMONY IN MEDICAL MALPRACTICE ACTIONS:

THE MURKY WATERS OF APPLYING AN ABUSE OF DISCRETION STANDARD

***Olesky* presents an opportunity to examine the boundaries of the abuse of discretion standard of review, and in particular, its application to expert testimony. The facts are relatively simple. The defendant doctor performed heart valve replacement surgery on the deceased. The deceased recovered from the surgery, but soon deteriorated and passed away. The deceased’s estate argued the deceased “died from a treatable” condition and offered expert medical testimony that if a common procedure had been performed, the condition would have been diagnosed and the patient would have lived. Relying on *Young-Chin v. City of Homestead*, 597 So. 2d 879 (Fla. 3d DCA 1992), the trial court did not permit this testimony on the grounds the test had not actually been performed, and therefore, the expert could not opine on what it would have shown.**

The Second District reversed, acknowledging the admissibility of evidence is subject to an abuse of discretion review standard, but noting “a court’s discretion is limited by the evidence code and applicable case law.” The Court found *Young-Chin* stands for the unexceptional proposition that an expert cannot testify where no facts support the expert’s opinion. Moreover, the Second District reasoned that if experts could not testify as to what a medical test would have shown, then failure to diagnose cases would be eliminated. Because the Legislature specifically permits such lawsuits, the Second District held trial courts cannot direct verdicts on such cases by not permitting experts to testify as to what a diagnosis would have shown.

The importance of this opinion is not necessarily in its ultimate holding, which applies only to failure to diagnose medical malpractice lawsuits. **Rather, the importance is in the often murky waters of applying an abuse of discretion standard where the trial court has made legal errors. Where it can be shown the trial court’s exercise of discretion was infected by demonstrable legal errors, appellate courts will not hesitate to reverse even discretionary rulings.** **CB**

Steinberg v. Winn-Dixie Stores, Inc.,
No. 4D13-619 (Fla. 4th DCA Aug. 28, 2013)

THE ATTORNEY-CLIENT RELATIONSHIP PREVAILS: OR, WHY THE BUDDY SYSTEM IS NOT JUST FOR CHILDREN

While it may be cliché to say the attorney-client relationship is sacrosanct, that does not diminish the fact a client’s trust in his or her attorney is fundamental to the American legal system. Should clients begin to doubt whether their communications are protected, or whether their choice of attorney will be respected, they will lose faith in the courts and the rule of law. For that reason, the Fourth District, in *Steinberg v. Winn-Dixie Stores, Inc.*, viewed with an appropriately jaundiced eye such an attempt to compromise the attorney-client relationship.

Steinberg injured herself when she slipped at a Winn-Dixie grocery store, and then sued Winn-Dixie, as well as the owner of the shopping center and the management company.¹⁶ Steinberg’s attorney visited the store with an investigator to view the scene of the accident and interview witnesses.¹⁷ The management company and property owner then deposed Steinberg’s attorney about his conversations with a Winn-Dixie store manager, who later gave a conflicting account of his conversation with Steinberg’s attorney.¹⁸ Upon Winn-Dixie’s motion, the trial court disqualified Steinberg’s attorney under Rule 4-3.7 of the Rules Regulating the Florida Bar, finding he was now a necessary witness on the store manager’s conflicting statements.¹⁹

The Fourth District, on rehearing, granted Steinberg’s writ of certiorari and quashed the trial court’s disqualification order.²⁰ Rule 4-3.7 mandates “[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness on behalf of the client.”²¹ However, the court held Rule 4-3.7 was inapplicable here because Steinberg’s attorney was not being called on Steinberg’s behalf, but on the defendants’ behalf.²² Moreover, Steinberg’s attorney was not a “necessary witness” since the investigator also had knowledge of the store manager’s conflicting statements, and could be called in Steinberg’s attorney’s stead.²³

Conversely, the property owner and the management company argued there was still a conflict of interest because they intended to call Steinberg’s attorney for critical testimony that would exculpate them and establish Winn-Dixie as the primarily negligent party.²⁴ This argument did not pass the smell-test. Indeed, the court maintained Rule 4-3.7 “was not intended to permit an opposing party to call [an attorney] as a witness and disqualify him from serving as counsel.”²⁵ Although the court recognized a disqualifying conflict “could arise if an opposing party called trial counsel as a witness and counsel’s testimony was adverse to the client’s position,”²⁶ in this case, the testimony was not “sufficiently adverse to Steinberg’s position.” In any event, Steinberg agreed to waive any potential conflicts to ensure her chosen attorney could represent her.²⁷

Perhaps the most valuable lesson here is that while it is certainly commendable when attorneys personally investigate the facts of their cases, it is wise to use the buddy system on field trips—lest the diligent attorney be called as a “necessary witness” by the opposition. CB



Fintak v. Fintak,

No. 2D12-3407 (Fla. 2d DCA Aug. 23, 2013)

THE RENUNCIATION RULE APPLIED TO SELF-SETTLED TRUSTS:

**“[T]HE DANGEROUS AMALGAM
OF FAMILY AND MONEY.”**

As often occurs in the probate world, the biggest question surrounding this opinion is, “What is going on in the Fintak family?” The case is significant, however, for addressing the unsettled question regarding the applicability of the renunciation rule in the context of a self-settled trust. The renunciation rule developed in the context of third-party trusts, requiring beneficiaries to part with any assets or benefits received from the trust prior to challenging the trust’s formation.

In *Fintak*, the settlor, Edmund Fintak, executed a trust instrument, which provided him with income for life, permitted him to receive principal distributions during his life, had a provision in the event of his incapacitation, and provided for the equal division of trust assets among his six children from his first marriage upon his death. The trust was funded entirely with Edmund’s assets, or in probate parlance, it was self-settled. Shortly after settling the trust, and requesting payments of principal, two of Edmund’s children (co-trustees of the trust) sought to have Edmund declared incapacitated. When that effort failed, the co-trustees began to pay Edmund’s bills directly from the trust without making disbursements directly to Edmund.

Edmund then filed a lawsuit, seeking to have the trust declared invalid for a variety of reasons, but critically, because the co-trustees had exercised undue influence in the choice of attorney to draft the trust instrument. After the lawsuit was filed, Edmund passed away and his current wife, to whom he sought to bequeath his assets as a part of the lawsuit, was substituted as plaintiff. The surviving trustees moved for summary judgment on the undue influence counts, arguing Edmund was required to renounce the benefits he received from the trust in order to challenge the trust as a product of undue influence. The trial court agreed and granted summary judgment.

The Second District reversed upon a holding the Renunciation Rule has no application to self-settled trusts because a self-settled trust contains funds the beneficiary would have had access to regardless of whether the trust existed: “[I]t is axiomatic that one who funds a trust with his or her own assets does not have to renounce any benefits received as a condition precedent to instituting a challenge to the validity of a trust.” “The renunciation rule is inapplicable ... because there can be no gift or devise to a settlor/beneficiary of a self-settled trust because his or her interest does not derive from the trust itself.”

So it is that the renunciation rule has no application to self-settled trusts. Because the settlor/beneficiary would have controlled the assets absent the trust, it would be impractical and eviscerate the incentives to creating trusts, to require a self-settlor to renounce his or her own money in order to later challenge the trust’s validity. **The lesson is that sometimes the best arguments rely on practical realities, and not a strict analysis of case law.** **CB**



* 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, the Firm works collaboratively with trial lawyers to provide appellate services and trial strategy consultations. Visit their website at www.kulaandsamson.com.

¹ *Id.* at 5-7.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 5-11.

⁶ *Id.* at 12-26 (Lewis, J., dissenting).

⁷ *Id.* at 23-27.

⁸ *Id.* at 10-12.

⁹ *Laughlin-Alfonso*, Case No. 3D12-675 at 2.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 3.

¹⁴ *Rabie Cortez*, Case No. SC11-1908 at 18-19.

¹⁵ *Id.* at 20.

¹⁶ *Steinberg*, Case No. 4D13-619 at 1.

¹⁷ *Id.* at 2.

¹⁸ *Id.*

¹⁹ *Id.* at 2-3.

²⁰ *Id.* at 5.

²¹ *Id.* at 2.

²² *Id.* at 3-4.

²³ *Id.* at 4.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*



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Serving the community to improve the legal profession through greater
diversity and equality of opportunity throughout Florida.



WHAT'S HAPPENING WITH THE FLORIDA BAR?

Source: Florida Bar Department of Public Information and Bar Services

2014 Pro Bono Service Award

Each year, the Supreme Court of Florida and The Florida Bar give special recognition to lawyers, legal groups, and a member of the judiciary who have freely given their time and expertise in making legal services available to the poor. The pro bono service awards ceremony will be held at the Florida Supreme Court at 3:30 p.m., Thursday, January 30, 2014. For additional information, contact public information coordinator Dorohn A. Frazier at The Florida Bar, (850) 561-5764 or dfrazier@flabar.org.

President's Social Media

Follow the activities of The Florida Bar President on Facebook and Twitter including the president's schedule, attendance at activities on behalf of the Bar, and recent articles and announcements.

2014 Winter Meeting

Save the date for The Florida Bar's Winter Meeting, to be held January 22-25, 2014, at the Hilton Orlando in Lake Buena Vista. Check back on the Florida Bar's website for hotel reservation information.

Selig I. Goldin Memorial Award nominations sought

The Florida Bar Criminal Law Section is seeking Selig I. Goldin Memorial Award nominations, acknowledging outstanding contributions to Florida's criminal justice system. This is the highest award given by the Criminal Law Section. Previous recipients include justices of the Florida Supreme Court, judges of the district courts of appeal and circuit courts, a former U.S. attorney general, state attorneys, public defenders, private defense lawyers, and law professors. Nominations must be submitted by December 10, including the name of the candidate, a description of contributions to the criminal justice system, a biographical sketch or resume, and the candidate's contact information. Send nominations to Eugene Sherman, program administrator, Criminal Law Section, 651 E. Jefferson St., Tallahassee, Florida 32399, (850) 561-5628, or esherman@flabar.org.

Judicial Feedback Program

The Florida Bar Judicial Administration and Evaluation Committee is seeking input to give judges feedback on their performance on the bench. It is confidential and all you need is your Florida Bar user name and password to log in. Please take a few minutes to participate. The feedback form can be accessed at www.floridabar.org/judicialfeedback. **CB**

SOCIAL MEDIA & SPORTS

CONVERGE TO EXPOSE THE TRUE STATE OF RACE RELATIONS



by Jorge L. Fors, Jr., Esq.

For over a century, professional sports have brought Americans together at fields, stadiums, and arenas across the nation. With the advent of social media, people now experience watching a sports event with other members of the community without so much as leaving the comfort of their living rooms. In fact, social media has redefined the very concept of community, as fans living on opposite coasts are able to watch a game together, socially interact, and share the experience with each other over Facebook and Twitter feeds.

Public discourse is more robust than ever. And gauging public sentiment and opinion has been simplified to the point where anyone can do so by simply searching a trending hashtag on Twitter. It is this particular aspect of social media that has recently revealed ugly truths about the current state of race relations and discrimination in America. In this age of social media, stories and public opinions that may have gone unnoticed in the past travel faster and farther than ever before.

This summer, the synergy between professional sports and social media sizzled as 27.9 million people tuned in to watch the 2013 Major League Baseball All-Star game on FOX. Viewers took to social media generating 851,192 total comments about the event on Twitter alone. But despite the crowd's warm welcome of Panamanian pitcher, Mariano Rivera, in the eighth inning of the game, one inning earlier a shocking number of those Tweets reminded the nation that prejudice and discrimination is alive and well in America. As New-York-born, Grammy-winning singer, Marc Anthony, took the stage to sing the traditional "God Bless America" performance during the seventh inning stretch, Twitter erupted with fans expressing outrage and disapproval, calling Anthony's performance "un-American" and criticizing the way Anthony pronounced certain words, such as rolling his r's in the word "America."



I HAVE A DREAM
MARTIN LUTHER KING
THE MARCH ON WASHINGTON
FOR JOBS AND FREEDOM
AUGUST 28, 1963

The incident at the All-Star Game was one of many incidents of discrimination that emanated from the professional sports world this summer. A few months earlier, eleven-year-old Sebastien de la Cruz sparked a similar, racially-charged Twitter reaction when the young mariachi singer performed the national anthem at the opening of game three of the NBA Finals. At the end of July, a video of Philadelphia Eagles wide receiver Riley Cooper uttering a racial slur at a Kenny Chesney concert went viral. And, within days of that incident, the iconic Jackie Robinson statue located outside a minor league baseball stadium in Brooklyn was defaced in a vile act of vandalism that left swastikas and racist slurs scratched across its base where an inscription details the monument's significance.

While the First Amendment safely secures the individual sports fan's right to express his or her opinion, discriminatory, racist, or otherwise, it cannot be denied that the eruption of prejudice observed in the sports world this summer flies in the face of the image portrayed by the professional sports industry. Many journalists submit that the events of this past summer are proof that American sports culture is far from the idyllic model of integration and equality that supposedly left exclusion and discrimination behind when Jackie Robinson broke through Major League Baseball's color barrier in 1947. The realization that sports remain a reflection of race relations in America has prompted renewed scrutiny of what the organizations who profit from professional sports are doing to comply with both legal and moral obligations to avoid discriminatory practices. Historically, sports have served as important experimental grounds for integration, and many claim it is critical that the industry continue to pave the way in America's struggle for equality. But such a duty cannot be imposed on privately-held organizations; rather, experts argue that the key to influencing societal change through sports once again depends on convincing the professional sports industry that diversity and equality are valuable assets, not merely standards of care to be managed by the compliance department.

Like many other business organizations in the United States, Major League Baseball (MLB), the National Basketball Association (NBA), and the National Football League (NFL), appear to strive for equality and integration.

In this day and age, discrimination and prejudice are bad for business and even unintentional discriminatory practices can result in legal claims. Indeed, the threat of legal action likely prompted one of the heaviest hitters in the business of professional sports, the NFL, to self-impose an affirmative action policy dubbed the "Rooney Rule," which requires that every NFL team interview at least one minority candidate to fill a vacancy in the front-office or at the head-coaching position. Named after Pittsburgh Steelers Chairman Dan Rooney, who devoted himself to pushing for equality within the NFL's managerial leadership, the Rooney Rule might appear to be solely concerned with achieving racial diversity in the NFL's administrative ranks. But the nature of the rule implicates much broader issues that also affect other sectors of industry, as well as employers in general. If the Rooney Rule is deemed to not only achieve diversity for the sake of diversity, but also to improve the quality of management within the NFL, then perhaps it can serve as a model for the kind of corporate policy needed to bring about societal changes in the private sphere.

The Rooney Rule sheds light on several important workplace diversity questions, including the benefits of ensuring that an organization's management reflects the diversity of its workforce, implementation of methods designed to ensure that the most qualified candidates receive meaningful consideration for a job, and adoption of strategies for eliminating systemic and pre-conceived bias in the hiring and promotion process. However, the debate of whether anti-discrimination measures like the Rooney Rule actually work is unsettled.

Undoubtedly, the Rooney Rule made an initial impact on the NFL's hierarchical structure. A decade before it took effect only five teams had a minority head coach. After, and since the NFL expanded the rule in 2009 to include vacancies for "senior football operation" positions, seventeen teams have had either a minority head coach or general manager. But despite the data suggesting that the Rooney Rule achieves its aim, more recent data suggests that it is no longer effective. This season, NFL hires failed to include one minority among the eight new head coaches and seven new general managers hired. Furthermore, many of the minorities hired at the outset no longer hold their positions. As of the date this article was written, only four of the NFL's thirty-two teams have



a minority head coach—Bengals (Marvin Lewis), Steelers (Mike Tomlin), Vikings (Leslie Frazier), and Panthers (Ron Rivera)—and only six teams have a minority general manager.

The NFL, which is increasingly regarded as the most dominant force in professional sports, is in position to continue to curtail disparity between the percentages of minority athletes in relation to minorities in leadership positions. It is entirely possible that a new surge against discrimination by professional sports could influence the sentiments expressed by society via social media, as well as business practices in other industries. This is especially true considering that sports generates such an overwhelming volume of social media interaction, and that NFL team owners also happen to lead many of the largest corporations in the country.

While implementation of measures like the Rooney Rule should always remain voluntary, there is a valid case to be made for the utility of such rules as valuable tools of corporate governance aimed to improve and diversify other businesses and industries. And, despite the questions surrounding the effectiveness of the Rooney Rule, a renewed corporate interest in the business value of diversity could be the key to professional sports (or another industry) ushering in change of the magnitude felt when Major League Baseball allowed Jackie Robinson to play ball at Ebbets Field. **CB**

BOOK REVIEW OF *MY CUBA LIBRE*

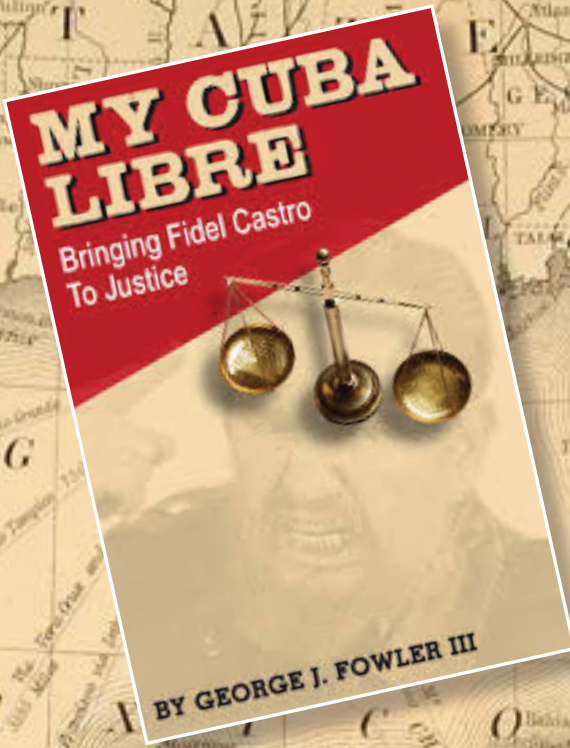
BRINGING FIDEL CASTRO TO JUSTICE



by Ernesto Rubi.¹

19,485 days. That's how long George J. Fowler, III has been in exile after boarding a Pan Am flight from Havana to Miami on May 17, 1960. As an adult, George has not forgotten his first flight. As a named partner in Fowler Rodriguez, a renowned maritime, energy, and international law firm with offices throughout the U.S. and Colombia, George has been devoted to exposing the criminal actions of the Castro dictatorship and proclaiming the undeniable path to a new Cuba. His new book, *My Cuba Libre—Bringing Fidel Castro to Justice*, is a lively, emotional, and reflective look at his own history of exile and through it, the chronology of the Cuban diaspora. It is sorrow for the smell of the mariposa and his childhood home of *Villa Viejo*, and an avowed faith in both mortal and divine justice. It is a call to follow his relentless drive to unshackle the Cuban people and set free the Cuban spirit.

My Cuba Libre surveys George's family history, and provides a tender ode to George's loving mother, Graciela. It recounts much of his early childhood in 1950s Havana, and his fondness for Varadero. But after laying this early framework, George delves into the early stages of Cuba's darkest chapter, referred to as "Fidelismo," and the pronounced impact on his family. *My Cuba Libre* recounts the economic and family hardship that greeted George in exile. It places us on the construction site in Puerto Rico where George toiled in his teenage years. But the book shows us how, true to the Cuban spirit of resilience, persistence, education, and faith, George enrolled in Louisiana State University and continued his advocacy for Cuba's cause. It was at LSU, while speaking out against the atrocities committed by Castro's thugs, that George met Cristina, his future wife. After LSU, George attended Tulane Law, and after graduation, continued his relentless campaign for Cuban freedom. *My Cuba Libre* gives an account of how, in 1989, George joined the Cuban American National Foundation as its



General Counsel. Combining his legal talent and his passion for Cuba with the Foundation's platform gave George a front-row seat to some of the most important legal battles against the Castro dictatorship. The book's description of the legal clashes with Fidel's henchmen, along with the account of the untiring international effort to bring Fidel to justice, is riveting.

Aside from the various civil legal skirmishes in the U.S., including a defamation lawsuit against Wayne Smith during which Castro's agents physically attacked George in the Miami-Dade County Courthouse, *My Cuba Libre* recounts the broader campaign to criminally try and convict the Castros, a campaign that is still very much alive. George recounts the criminal "querrela" filed in Spain against Fidel and Raul, supported by affidavits of many in the Cuban community who turned out *en masse* to testify as to the atrocities committed by the regime. The tale turns next to the argument for Castro's indictment in light of the shoot down of the Brothers to the Rescue planes, and George's mock trial of Castro presented to Congress in testimony before the House Judiciary Committee's Sub-Committee on Crime.

My Cuba Libre documents Castro's ongoing atrocities, the murder of Oswaldo Paya, the repression against the *Damas de Blanco*, and Cuba's emerging civil society. It serves as an exhibit in the case against the Castros. But George also gives a sound roadmap to a free Cuba: providing support to Cuban dissidents, whether informational, monetary, or organizational; a strong role for the U.S. as the international leader of Cuba's cause for freedom; and a criminal indictment of Fidel, making the tyrant accountable before his death. *My Cuba Libre's* takeaway, in the words of George himself: "shout out for freedom in every corner of the world."

With history on his side, George's flight to a free Cuba will no doubt be boarding soon. **CB**

¹ Ernesto earned his Juris Doctor degree from Florida International University College of Law, having graduated as Salutatorian of his law school class. In 2009, Ernesto was awarded the Hon. Mario P. Goderich Merit Scholarship by the Cuban American Bar Association. He is now an attorney for Carey Rodriguez Greenberg O'Keefe, LLP.

WILL THE “STAND YOUR GROUND” SELF-DEFENSE LAW BE REPEALED IN FLORIDA?



by Jason D. Silver, Esq.¹

Due to recent homicide cases that have made national news, including the George Zimmerman trial, the debate over Florida’s “Stand Your Ground” law has reached a crescendo, and become a major point of controversy, discussion, and debate from groups and advocates on both sides of the issue. The law and its impact on Florida has sparked demonstrations and a great deal of dialogue in Florida’s capital, Tallahassee, where in July and August of this year, groups organized a lengthy sit-in protest outside the Governor’s Office. But, after hearing much of the national debate, one could first ask the question: What exactly is Florida’s “Stand your Ground” law, and is there a realistic chance the law will be struck down or amended in the near future?

In 2005, Florida was actually the first state in the nation to enact a “Stand Your Ground” law. Since then, 46 states have enacted similar stand your ground laws, which are derived from the Castle Doctrine, a common law theory that serves as a defense to a homicide charge when people defend themselves in their dwelling. Codified as chapter 776, Florida Statutes (2013) (Justifiable Use of Force), the law’s major provisions can be summarized to apply in the situations when:

1. A person is presumed to have reasonable fear of imminent death or great bodily harm when using defensive force if an intruder has broken into his or her home or vehicle and is justified in using force;
2. A person does not have a duty to retreat if he or she believes death or bodily harm is imminent;
3. A person is provided immunity from criminal prosecution and civil action for justifiable use of force.

The outburst of very spirited national discussion from daily coverage of the George Zimmerman trial, which involved the shooting death of Trayvon Martin, caused groups to quickly ask political and community leaders of Florida to reevaluate the law. The phrase “Stand Your Ground” even permeated into Seminole County Judge Debra Nelson’s jury instructions in the Zimmerman trial. Although the attorneys for George Zimmerman did not purely assert Florida’s “Stand Your Ground” law as a defense, the law has still since become the beacon for discussion for advocacy groups on both sides of the deliberations. The lobbying on both sides of the law became so extensive that, in early August, Florida House of Representatives Speaker Will Weatherford agreed to order the House of Representatives to hold hearings on the “Stand Your Ground” law to be held in the fall of this year, during the House of Representative’s Spring Regular Session.



Groups asserting the need to repeal chapter 776 generally state that the law supports the shoot first mentality, creates an environment of vigilantism, and increases racial profiling. If the law is repealed, they contend that crime rates will decrease. On the other hand, there are groups equally as passionate in support of the current law. Groups in favor of the current law generally argue that it is essential to safeguard the ability for people to defend themselves, that the law is very strongly supported by the right to keep and bear arms in the Second Amendment of the United States Constitution, and that the law is a major deterrent to serious crime and gun-related homicides. The salient question, however, is whether the law will be repealed or changed by the Florida Legislature in the near future?

It is confirmed that meetings will take place in the Criminal Justice Subcommittee of the Florida House of Representatives during the Spring Regular Session, likely in October of this year. Although there is sure to be an intense debate over the “Stand Your Ground” law in the subcommittee meetings in Tallahassee, there is no strong reason to believe that the law will be repealed or changed in the House of Representative’s Spring Session. What is expected, however, is that parties on both sides of the argument will take the opportunity to have a serious and open discussion on the current law. As reported by Karl Etters of Tallahassee.com, State Representative Matt Gaetz (R-Fort Walton Beach) said the discussion is sure to draw a

“productive, informative and spirited debate. I expect robust advocacy on both sides, but it’s not a surprise to anyone that I don’t support changes.”¹

As a leader for the push to repeal the law, Philip Agnew, the leader of the organization Dream Defenders, the organization which led the sit in of the Governor’s Office, says the organization is approaching the subcommittee meetings on the “Stand Your Ground” law with very high expectations. “We fought for this meeting and we are approaching it with every amount of seriousness we’ve approached everything else,” Agnew said. “It’s about engaging in a real discussion about a law that a lot of people in the state disagree with.”²

It is safe to say that although the debate over the Stand Your Ground law has recently begun, there are no signs that it will slow down either in Florida or across the United States. National attention will once again be focused in on Florida as the center of this major legal and social issue. CB

¹ Karl Etters, *Stand Your Ground hearing likely to take place in October*, TALLAHASSEE (Sept. 13, 2013), <http://www.tallahassee.com/article/20130914/POLITICSPOLICY/309140016/Stand-Your-Ground-hearing-likely-take-place-October>.

² *Id.*

CABA Members Named to the Inaugural Class of Fellows for the Florida Bar's Wm. Reece Smith, Jr. Leadership Academy



by Maria D. Garcia

THE FLORIDA BAR'S WM. REECE SMITH, JR. LEADERSHIP ACADEMY RECENTLY NAMED ITS INAUGURAL CLASS OF ACADEMY FELLOWS. THE LEADERSHIP ACADEMY IS A YEAR-LONG, MULTI-SESSION TRAINING PROGRAM DESIGNED TO ASSIST LAWYERS FROM ACROSS THE STATE OF FLORIDA IN BECOMING BETTER LEADERS WITHIN OUR PROFESSION AND OUR COMMUNITIES. THERE WERE OVER 300 APPLICATIONS FROM ATTORNEYS THROUGHOUT THE STATE TO JOIN THE INAUGURAL CLASS OF ACADEMY FELLOWS.

Academy Fellows follow a curriculum tailored to enhance our professional development, knowledge base, and experience, including attending Florida Bar events and special educational programs. For example, past presidents of the Florida Bar share their experiences and participate in interactive sessions with Academy Fellows. As Academy Fellows, we are given the opportunity to learn more about the inner workings of the Florida Bar and our role in the legal profession, while enhancing



Renee Thompson, Academy Chairperson

our personal leadership skills. The Academy's mission is to identify, nurture, and inspire effective leadership within the Bar and the legal community. The year-long program will conclude with graduation at the 2014 Florida Bar Convention in Orlando.

The Leadership Academy is an integral program for the Florida Bar geared at identifying and developing the future leaders of the Bar. As Renee Thompson, Academy Chairperson, has said, "Serving as Chair of the Leadership Academy is an incredible experience. I am thrilled to work with the exceptional attorneys who are a part of this program. The Leadership Academy Committee is working tirelessly to advance this program's curriculum to be the premier leadership training program for our profession. I do not think we can even comprehend yet how far a reach our graduates will have; however, I am excited to see all that our Fellows will accomplish. I am especially proud to see our Bar investing in our future."

Below CABA showcases its members who have been named to the inaugural class of Fellows (in alphabetical order). We asked each of them to comment on their experience in the Leadership Academy thus far. **CABA congratulates each of them and is very proud to have them as part of the organization!**



1. Pedro Allende

"The Wm. Reece Leadership Academy has provided a great opportunity for our class to learn, develop professionally, and interact with Bar leaders throughout the State of Florida. The Leadership Academy embodies the Florida Bar's commitment to creating better leaders within our profession. The next generation of Florida Bar leaders will be responsible for carrying forth the Bar's various roles, such as providing guidance on emerging issues, educating, serving its members, and regulating the profession. I hope to help steer the Florida Bar in the right direction in the years to come."

Pedro is an associate with Boies, Schiller & Flexner LLP. He practices complex commercial litigation and product liability law.



2. Vivian Chavez

"Being part of the inaugural class of Academy Fellows has been an exciting and rewarding experience. I have had the opportunity to learn more about the inner workings of the Florida Bar and meet other attorneys from across the State. Through the Academy, I hope to learn how I can be a more effective communicator, inspire others to create change, and educate attorneys about the importance of pro bono work and the impact they can have on local communities. I commend Bar President Eugene Pettis for his visionary leadership in establishing a program that develops future bar leaders. The Academy provides attorneys with leadership opportunities and experiences that they can bring back to their local communities for effective change."

Vivian is the Director of Client Services for Legal Services of Greater Miami, Inc. Her area of practice is Public Benefits.



3. Maria D. Garcia

“Becoming a member of the inaugural class of Academy Fellows has been a great honor and opportunity for me personally and professionally. It has given me the chance to meet amazing attorneys and leaders throughout the State of Florida, and to share ideas and goals with each other. As an Academy Fellow, I have also gained access to well-prepared and sophisticated leadership development programming, which has helped me grow as an attorney and active community leader. The lessons and ideas that I have been exposed to, thus far, truly have been enjoyable and beneficial to my growth as a person. The opportunity to collaborate with such great people, while having the time to individually reflect and set goals, has been priceless.”

Maria is an attorney with *Zumpano Patricios & Winker, P.A.* She focuses her practice on health care law and international matters, as well as business litigation.



4. Joshua Hertz

“The Academy’s inaugural class has been an invaluable experience for me so far. I was honored to be a part of the inaugural class and to participate with some of the best and brightest lawyers around the State of Florida. We have had several meetings throughout the state so far, and I have learned some unique leadership skills during the great programming they have provided. The Academy has really focused on procuring our leadership skills by bringing experts in various leadership topics to teach us. In addition, it is an important program because it takes local leaders in our community and enhances their skills. I am thrilled to be part of such great programming. By the end of the lessons, I hope to give back as much as I have gained.”

Joshua is a solo practitioner who practices in the area of Personal Injury law.



5. G.C. Murray, Jr

“My experience in the Florida Bar Leadership Academy has been more than just a method to facilitate and expedite my professional growth. The Academy has also served as tangible evidence of the brightness, compassion, and integrity of the members of the Florida Bar. Through the Academy, I seek to circumscribe my actions within the true meaning of the profession, so that I may be as helpful to others as others were to me. The Academy is an essential program because it allows for diverse, yet unacquainted, lawyers to enter as colleagues but depart as friends. Even in its inception, the program sets forth to enhance the character and temperament of its membership, so that the perpetual currency of the Florida Bar is cordiality, humility, and a servant-leader mentality.”

G.C. is Deputy General Counsel for the Florida Justice Association.

He focuses his practice in the areas of governmental affairs and advocacy. **CB**



CUBAN AMERICAN BAR FOUNDATION 2013 Scholarship Recipients

CABA Scholarships

Oswaldo Soto Scholarship	Jean-Pierre Bado (<i>FIU</i>)
Margarita Esquiroz Scholarship	Yelina Angulo (<i>NOVA</i>)
At-Large Scholarship	Marc Hernandez (<i>UF</i>)
At-Large Scholarship	Karla Albite (<i>UM</i>)
At-Large Scholarship	Jennifer Aguila (<i>NOVA</i>)



CABA - Florida International University	Viviana Acosta Ivette Delgado
CABA - St. Thomas University	Maria Cristina Morales
CABA - Nova Southeastern University	Laura B. Garcia
CABA - Florida State University	Nadine Navarro
CABA - University of Miami	Anaili Medina



**Annual Judicial Luncheon—
“MEET YOUR JUDICIAL ADMINISTRATION”**

Lawyers Join Hands for Students

**CLE ENTITLED “REACHING THE GOAL:
Meeting the Expectations of Corporate Counsel.”**

**CABA’s Legislative Appreciation
Cocktail Reception**

**2nd Annual
“CHRISTMAS IN SEPTEMBER”
Event and Toy Drive**

**1st Annual
Advocacy Event and Retreat**

**CLE on the Basics of
COMPLEX BUSINESS DIVISION**

**9th Annual Art in the Tropics
Art Auction and Fundraiser**

CABA EVENTS



by Jennifer J. Perez, Esq.

On August 23, 2013, CABA held its **Annual Judicial Luncheon—“Meet Your Judicial Administration”** at the Ritz Carlton in Coconut Grove. This event was sponsored by Sabadell United Bank and was hugely successful, attracting over 300 guests. The music was courtesy of Stewart Tilghman Fox Bianchi & Cain, PA.

Two bar associations teamed up with a circuit court judge to help students in need. **“Lawyers Join Hands for Students”** succeeded in assisting students and teachers throughout Miami-Dade County by providing needed school supplies while protecting the environment.

That same month, CABA joined the Association of Corporate Counsel, and the Bankruptcy Bar Association for the Southern District of Florida, and sponsored a **CLE entitled “Reaching the Goal: Meeting the Expectations of Corporate Counsel.”** This event was held at Sun Life Stadium and guests were able to enjoy the Dolphins v. Saints preseason game.

In September, City National Bank sponsored **CABA’s Legislative Appreciation Cocktail Reception**, where guests were offered the opportunity to meet and greet many members of the Florida Legislature. Further, the Miami-Dade Delegation was honored for its work and accomplishments. The keynote speaker was Jeff Atwater, Chief Financial Officer for the State of Florida.

Also in September, CABA teamed up with Miami Children’s Hospital’s Young Ambassadors and held its **second annual**

“Christmas in September” event and toy drive. This was not only a great opportunity for members to network with non-lawyers and business people in our community, but also CABA was able to collect toys and raise funds for the patients of Miami Children’s Hospital. In fact, \$855.00 in cash, checks, and credit card charges was raised, and an additional \$240.00 was raised in toy donations for a grand total of \$1,095.00.

Last, but certainly not least in September, CABA held its **first annual Advocacy Event and Retreat** in Washington, D.C. Guests were given the opportunity to meet with the White House, State Department, Senators and Congressman while enjoying the sights and sounds of the wonderful Washington, D.C. area. Members of the CABA on Cuba Committee attended and advocated for the work it has been doing with regard to Transitional Law for Cuba as well as Cuban dissidents and refugees. The event was impacting, exciting, and truly unforgettable.

October opened with a **CLE on the Basics of Complex Business Division.** The event was held at the Dade County Courthouse and was presented by Judge Jennifer D. Bailey, Judge John W. Thornton, Jr., and Leyza F. Blanco, Esq.

The main event in October was CABA’s **9th Annual Art in the Tropics Art Auction and Fundraiser.** This event was held at the Freedom Tower, which added a new sense of Cuban nostalgia and history to the event. Over 300 guests attended and CABA’s Pro Bono Project greatly benefited from all of the funds raised that night.

Annual Judicial Luncheon— “MEET YOUR JUDICIAL ADMINISTRATION”



Javy Lopez, Sandra Ferrera, Manual Garcia Linares, Honorable Juan Ramirez



Judge Jacqueline Scola, Judge Norma Lindsey



Judge Vicky del Pino, Gina Beovides



Sandra Ferrera, Judge Jacqueline Schwartz



Mary C. Gomez



Judge Bertila Soto



Ray Rasco, Annie Hernandez, Ricardo Martinez-Cid



Judge Pedro Echarte, Judge Antonio Marin, Ricardo Martinez-Cid, Judge Monica Gordo



Judge Norma Lindsey, Jose M. Herrera



Sandra Ferrera



Judge Caroll Kelly, Judge Samuel Slom, Judge Teretha Thomas and Judge Abby Cynamon





LAWYERS JOIN HANDS FOR STUDENTS

Two bar associations teamed up with a circuit court judge to help students in need. **“Lawyers Join Hands for Students”** succeeded in assisting students and teachers throughout Miami-Dade County by providing needed school supplies while protecting the environment.

In Miami-Dade County, there are over 6,400 identified students who depend upon the School System’s Homeless Assistance Program. School supplies are a necessity and, for many families, a trip to the local Office Depot is not an option. Many teachers also require materials that are not readily available. Fortunately, those same school supplies are in abundance at the Dade County Courthouse. Judge Beth Bloom recognized that many supplies, such as binders, notebooks and dividers are submitted to judges for use at hearings yet few attorneys request that the materials be returned. A quick survey revealed that most of the other 37 court divisions had similar supplies that were either discarded or placed for recycling. Bloom, together with the Miami-Dade Justice Association and the Dade County Defense Bar Association encouraged lawyers and judges to drop off supplies in the Clerk’s Office and the Dade County Law Library at the Dade County Courthouse. The supplies were then donated to the Miami-Dade County School System’s Homeless Assistance Program and the Education Fund, an entity that operates a free public school teacher warehouse. **CB**

CLE ENTITLED “REACHING THE GOAL: Meeting the Expectations of Corporate Counsel.”



- Gina Beovides and Sandra Ferrera



Alex Arrieta, Blas Cueto, Kelle Cueto, Sandra Ferrera



Gina Beovides and Nelson Bellido



Sandra Ferrera and Nelson Bellido



CABA's Legislative Appreciation Cocktail Reception



Judge Alan Fine, Gina Beovides, Judge Jose Rodriguez, Sandra M. Ferrera and Maria Garcia



Nicole Mestre and Ena Diaz



Ricardo Martinez-Cid, Jennifer Ruiz, Judge Betty Capote and Judge Rudy Ruiz



Jorge Gutierrez and Jorge Piedra



Jorge Piedra, Sandra M. Ferrera, Representative Jose Felix Diaz, Vivian de las Cuevas-Diaz, Maria Garcia



Jorge Piedra, State Attorney Katherine Fernandez-Rundle, Judge Fleur Lobree, and Dax Bello



CABA Board with Jeff Atwater, CFO for the State of Florida



Judge Thomas Rebull and Nilda Pedrosa



Bernardo Adrover – SVP and Director of Business Banking – City National Bank, Tyrell Hall, Eddie Dominguez – SVP and Director of Marketing, Corporate Communications and Community Relations – City National Bank



State Senator Anitere Flores and Miami-Dade County Commissioner Joe Martinez

CB

2nd Annual “CHRISTMAS IN SEPTEMBER” Event and Toy Drive



Sandra Ferrera, Olivia Rodriguez



Andrew Fumagali



Sandra Ferrera, Ricardo Martinez Cid,
 Juan Carlos Antorcha



Olivia Rodriguez, Nory Acosta Lopez



Ricardo Martinez-Cid



Janine Olivia, Dax Bello, Kristina Maranges, Olivia Rodriguez

CB

1st Annual Advocacy Event and Retreat



by JNory M. Acosta-Lopez, Esq.



Congressman Albio Sires and CABA



Sandra Ferrera, Javier Lopez, Jennifer Perez, Alexis Perez



Congressman Patrick Murphy, Congressman Joe Garcia

This year's CABA Retreat was certainly much more than just fun and games, bringing to light various substantive issues of great import to CABA members, as well as issues surrounding the judiciary and the legal community at large.

Over twenty CABA members traveled to Washington, D.C. in order to give national exposure to two great projects being worked on by the CABA on Cuba Committee, led this year by Aldo Leiva and Eduardo Palmer. The first project discussed has been a long-standing labor of love for the CABA on Cuba Committee—the preparing of a Draft Fundamental Transitional Law of the Republic of Cuba (the “Law”). The Law is a collaborative effort between attorneys of Cuban descent practicing in the U.S., attorneys who have practiced in Cuba as well as the U.S., and attorneys still on the island—many of whom have been disbarred as a result of their dissident activities. It sets out a proposed legal framework to reestablish the rule of law and democracy in Cuba with the purpose of providing a suggested path towards establishing a democratic government the day the current regime in Cuba ceases to exist and a new government is formed.

The second project is an ongoing effort to publicize the plight of 49 Cuban political prisoners arrested in 2003 during Cuba’s “Black Spring” and exiled to Spain. While the arrest and subsequent exile of the first 75 Black Spring dissidents was highly publicized, the story of the second wave of political prisoners has been lost in the media shuffle. These 49 dissidents and their families are facing dire circumstances in Spain due to that country’s economic tailspin. Many of them are living on the streets and scrounging for food, all the while waiting for permission from the U.S. State Department to enter the United States. CABA’s mission in Washington, D.C. was to bring awareness to the situation of these exiled Cubans and encourage the U.S. State Department to grant this second wave of dissidents the same Humanitarian Parole Visas granted to the initial 75 dissidents.

The CABA delegation also spoke to members of Congress regarding the adverse effects the federal budget sequestration is having on the judiciary, as well as the importance of quicker and more efficient processing of judicial nominations.

CABA members met with the entire Cuban-American congressional delegation, including Rep. Joe Garcia (D-FL), Rep. Ileana Ros-Lehtinen (R-FL), Rep. Albio Sires (D-NJ), and Sen. Robert “Bob” Menendez (D-NJ), as well as staff members from the offices of Sen. Ted Cruz (R-TX), Sen. Marco Rubio (R-FL), and Rep. Mario Diaz-Balart (R-FL). While CABA’s message was well-received by all members of Congress, the most promising was Rep. Ros-Lehtinen, who promised to take on the task of asking all members of the Cuban-American congressional delegation to sign a letter addressed to the U.S. Secretary of State, John F. Kerry, urging equal treatment for the second wave of 49 Black Spring political prisoners and their families.

In addition to members of Congress, CABA members also met with a number of White House and State Department officials, including Ricardo Zuniga, the President’s Senior Director for Western Hemisphere Affairs; Bob Bullock, from the Office of Management & Budget’s Justice Branch; Esther Olavarria, Deputy Assistant Secretary of Homeland Security for Policy; Julie Rodriguez, Advisor in the White House Office of Public Engagement; Rep. Patrick Murphy (D-FL); Stephanie Valencia, Special Assistant to the President in the Office of Public Engagement; Anyer Antonio Blanco Rodriguez, a young Cuban dissident and founder of the “Union Patriótica de Cuba” (UNPACO), an organization that fights human rights abuses in Cuba; Ambassador Carmen Lomellin, U.S. Ambassador to the Organization of American States; and Raymond G. McGrath, Coordinator for the Office of the Coordinator for Cuban Affairs, U.S. Department of State.

Of course, what is a CABA retreat without some fun mixed in? CABA Retreat attendees attended a cocktail and networking reception at the D.C. offices of Hogan Lovells, as well as tours of Capitol Hill, the Supreme Court, the U.S. Botanical Garden, and a 3-hour private trolley tour through Georgetown and Arlington. Add in some amazing restaurant outings at Jaleo, Old Ebbit Grill, P.O.V. Rooftop Lounge and Terrace, Zengo, among others, and this year’s CABA Retreat, led by CABA Board Member, Jennifer Perez, certainly exceeded everyone’s expectations!





Congressman Joe Garcia, Eduardo Palmer



Jennifer Perez and Javier Lopez



Aldo Leiva and Eduardo Palmer



Aldo Leiva, Jennifer Perez, Javier Lopez, Susanita Rodriguez Chomat, Judge Jose Rodriguez Chomat, Yara Lorenzo and Karen Cespedes



Congresswoman Ileana Ros Lehtinen and Eduardo Palmer



Robert Pardo, Aleli Puig Pardo, Javier Lopez



Alexis Perez and Jennifer Perez



Olivia Rodriguez, Sandra Ferrera, Jennifer Perez



Javier Lopez, Susanita Rodriguez Chomat, Judge Jose Rodriguez Chomat, Ana Maria Pando, Judge Maria Sampedro Iglesias



Karen Cespedes, Sandra Ferrera, Manual Crespo Jr., Joe Cantrell



Sandra Ferrera, Aldo Leiva, Eduardo Palmer, Jennifer Perez



Ana Maria Martinez and Karen Cespedes



Nory Acosta with DC Law Students



Ana Martinez, Brigida Benitez, Javier Lopez and Judge Rudy Contreras



CLE on the Basics of **COMPLEX BUSINESS DIVISION**



CB

9th Annual Art in the Tropics Art Auction and Fundraiser



Isabel C. Diaz, Angela Vigil, Christina Guerreiro, Yesenia Arocha, Lesley Mendoza, and Yara Lorenzo



Sandra M. Ferrera and Daniel A. Medina



Nicole Mestre, Fernando Figueredo, Communications Director (Office of Mayor) and Sandra M. Ferrera



Maria Garcia, Miriam Ramos, Gina Beovides, Sandra M. Ferrera, Judge Ariana Fajardo, and Nicole Mestre



Alfredo Sanchez, Rene Gonzalez-Llorens, and Lilliam Lopez



Coralí Lopez-Castro and Maggie Lopez-Castro



Bueno Onda Band



Albert Lazo, Judge Monica Gordo, Susanita Rodriguez-Chomat and Judge Jorge Rodriguez-Chomat



Mr. and Mrs. Armando Bucelo and Mr. and Mrs. Raul Morales



Madelin and Juan D'Arce



Mr. and Mrs. Calixto ("Cali") Garcia-Velez and Mrs. and Mrs. Jose Cueto from Title Sponsor, FirstBank Florida



Judge Marcia Caballero, Ena Diaz, Judge Abby Cynamon, Judge Victoria Del-Pino and Judge Rosa Figarola



Tomas Gamba, Manuel Morales and David Young



Mr. and Mrs. Raul Cosio



Freedom Tower

CABA LAW SCHOOL CHAPTERS ORIENTATIONS AND MEETINGS

CABA Board of Directors Members have been supporting the various CABA Law School Chapters by visiting each of them during their respective orientations, as law students begin the school year. At the orientations' club fairs, CABA student members and Board members encourage students to join CABA and explain the benefits of joining the organization.



Florida State University

Joseph R. Salzverg (CABA FSU President), Erica Steinmiller (CABA FSU Secretary), Nadine Navarro (CABA FSU Board Member and 2013 CABA scholarship recipient), Rep. Jose Felix Diaz, Jessica Fernandez (CABA FSU VP), Daniel Bart (CABA FSU Board Member), & Dean Rosanna Catalano (CABA FSU Faculty Advisor & Dean).

University of Miami



Florida International University



University of Florida



NOVA Southeastern University



News from the Nation's Highest Court

Chunon L. Bailey, AKA Polo v. United States



by Leonel Peraza, Esq.

In *Bailey v. United States*,¹ a 6-3 decision, the U.S. Supreme Court sought to resolve a split among Federal Court of Appeals “as to whether *Michigan v. Summers*² justifies the detention of occupants beyond the immediate vicinity of the premises covered by a search warrant.”³ In *Bailey*, local police obtained a warrant for the search of a residence for a handgun resulting from a tip provided by a confidential informant.⁴ Prior to the commencement of the search, two detectives conducting surveillance of the residence observed two men, matching the description provided by the informant, leave the community and enter a vehicle. The detectives tailed the vehicle for about a mile, before pulling it over, and arresting the occupants “incident to the execution of the search warrant for the residence.”

At trial, Bailey moved to suppress the apartment key and statements made to the detectives when he was stopped arguing that it was evidence derived from an unreasonable seizure. The U.S. District Court denied the motion to suppress, and held that the detention was permissible under *Summers*, as a detention incident to the execution of a search warrant, or alternatively, the detention was lawful under *Terry v. Ohio*⁵ as an investigatory detention supported by reasonable suspicion.⁶ The Court of Appeals for the Second Circuit affirmed the denial of the motion to suppress, holding that *Summers* “authorizes law enforcement to detain the occupant of premises subject to a valid search warrant when that person is seen leaving those premises and the detention is effected as soon as reasonably practicable.”⁷

In *Summers*, “the Court defined an important category of cases in which detention is allowed without probable cause to arrest for a crime. It permitted officers executing a search warrant to detain the occupants of the premises while a proper search is conducted.”⁸ The *Summers* rule “allows detention incident to the execution of a search warrant ‘because the character of the additional intrusion caused by detention is slight and because the justifications for detention are substantial.’ ”⁹ However, “[b]ecause this exception grants substantial authority to police officers to detain outside of the traditional rules of the



Fourth Amendment it must be circumscribed.”¹⁰ Thus, “[a] spatial constraint defined by the immediate vicinity of the premises to be searched is therefore required for detentions incident to the execution of a search warrant.”¹¹ This rule is categorical and not subject to an interest-balancing determination.¹²

Here, Bailey was “beyond any reasonable understanding of the immediate vicinity of the premises in question”¹³ and therefore, could not have been detained under *Summers*. Importantly, however, while *Bailey* purports to resolve this split, it leaves open the door for issues arising under the determination of what constitutes the “immediate vicinity” of the premises where a suspect was detained. The Court felt *Bailey* was beyond any reasonable interpretation of the “immediate vicinity,”¹⁴ and as such “this case presents neither the necessity nor the occasion to further define the meaning of immediate vicinity.” Despite that fact, the majority opinion introduces a number of factors (without applying them in *Bailey*) to be considered to make this determination into a so-called “categorical” *Summers* rule, and leaves future courts without guidance on how to apply them.¹⁵ **CB**

¹ 133 S. Ct. 1031 (2013).

² 452 U.S. 692 (1981).

³ *Supra*, n.1 at 1037.

⁴ *Id.* at 1036.

⁵ 392 U.S. 1 (1968).

⁶ *Supra*, n.1 at 1037.

⁷ 652 F.3d 197, 208 (2011).

⁸ *Supra*, n.1 at 1037.

⁹ *Supra*, n.1 at 1038

(quoting *Muehler v. Mena*, 544 U.S. 93, 98 (2005)).

¹⁰ *Id.* at 1042.

¹¹ *Id.*

¹² *Id.* at 1043 (Scalia, J., concurring in judgment).

¹³ *Id.* at 1042.

¹⁴ *Id.*

¹⁵ “In closer cases courts can consider a number of factors to determine whether an occupant was detained within the immediate vicinity of the premises to be searched, including the lawful limits of the premises, whether the occupant was within the line of sight of his dwelling, the ease of reentry from the occupant’s location, and other relevant factors.” *Id.*

Have Aggregate Campaign Contribution Limits Reached their Limit?



by Jorge R. Delgado, Esq.

Shaun McCutcheon is a wealthy resident of Alabama and a staunch Republican. He demonstrated his wealth and ardent political affiliation during the 2011–2012 election cycle by contributing \$33,088 to sixteen different candidates in increments of \$1,776 to \$2,500.¹ Indeed, McCutcheon wished to contribute even more money to the GOP by supporting twelve other candidates and increasing his contributions to various Republican campaign committees,² but could not. The reason he could not is because although McCutcheon's *individual* contributions would be within the legal limits, the *aggregate* of those contributions would violate §§ 441a(a)(3)(A) and (B) of the Bipartisan Campaign Reform Act.³ Under those sections, in a two-year period, a contributor may not give more than \$74,600 to non-candidate committees, or more than \$48,600 to candidate organizations.

As a result of this inability to contribute additional money to the GOP, McCutcheon and the Republican National Committee sued, arguing the BCRA's biennial limits unconstitutionally infringe on McCutcheon's First Amendment rights. McCutcheon's challenge is the latest in a long legacy of campaign contribution and expenditure cases, one of which recently gained much notoriety. This legacy starts with the landmark case of *Buckley v. Valeo*.⁴ In *Buckley*, the U.S. Supreme Court made a distinction between campaign contributions and expenditures, even though both concepts "operate in an area of the most fundamental First Amendment activities."⁵ The Court held contribution limits were constitutional, even if they intruded on a person's right of free association because they circumvent corruption and the appearance of corruption in the political process.⁶ On the other hand, the Court held the same interests did not justify limits on campaign expenditures, which "impose direct and substantial restraints on the quantity of political speech."⁷ Accordingly, different levels of scrutiny have been applied to political expenditures versus political contributions; the former is subject to strict scrutiny, while the latter has "the lesser demand of being closely drawn to match a sufficiently important interest."⁸

In *Citizens United v. Federal Elections Commission*,⁹ the Court famously applied this distinction when invalidating limits on campaign expenditures by corporations. The Court, however, made sweeping declarations linking campaign contributions and political speech.¹⁰ This link is important because, as recognized by *McCutcheon I*, "*Citizens United* proclaimed that '[l]aws that burden political speech are 'subject to strict scrutiny.'"¹¹ Thus, "the constitutional line between political speech and political contributions grows increasingly difficult to discern."¹²



Nevertheless, the District Court for the District of Columbia did not agree with McCutcheon and the RNC. The district court reaffirmed the distinction between political contributions and political expenditures first stated in *Buckley*, namely, “giving money to an entity and spending that money directly on advocacy.”¹³ The district court then found McCutcheon’s case involved political contributions, and thus warranted the lower level of scrutiny.¹⁴ Applying a relaxed standard, the district court found the aggregate contribution limits were constitutional because they not only furthered the government’s anti-corruption interests, but prevented parties from *circumventing* that interest through the aggregation of many small contributions.¹⁵

McCutcheon and the RNC petitioned the Supreme Court for review, and it obliged.¹⁶ *McCutcheon II* is set for oral argument on October 8, 2013. Notably, Justices Antonin Scalia, Anthony Kennedy, and Clarence Thomas already have expressed in previous opinions they would overrule the contribution/expenditure distinction in *Buckley*.¹⁷ However, Justices Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor dissented in *Citizens United*. Moreover, Justice Elena Kagan—Solicitor General at the time—argued in *Citizens United* to uphold the ban on corporation expenditures. Thus, the deciding votes likely will come from Chief Justice John Roberts and Justice Samuel Alito—both of whom joined in the majority opinion in *Citizens United*.

So what does this mean? Have aggregate campaign contribution limits met their own limit? Only time will tell, but if anything is certain, it is this: the opinions in *McCutcheon II* will be divided, and they likely will reverberate for years to come, just like *Buckley* did, and *Citizens United* continues to do. **CB**

¹ *McCutcheon v. Fed. Elections Comm’n* [McCutcheon I], 893 F. Supp. 2d 133, 136 (D.D.C. 2012).

² *Id.*

³ *Id.*; 2 U.S.C.A. § 441a.

⁴ 424 U.S. 1, 17 (1976).

⁵ *Id.* at 14.

⁶ *Id.* at 25–26.

⁷ *Id.* at 39.

⁸ *McCutcheon I*, 893 F. Supp. 2d at 137 (citing *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 136 (2003)).

⁹ 558 U.S. 310, 363 (2010).

¹⁰ *Id.* at 364 (“The First Amendment does not permit Congress to make these categorical distinctions based

on the corporate identity of the speaker and the content of the political speech.”).

¹¹ *McCutcheon I*, 893 F. Supp. 2d at 137.

¹² *Id.* at 138.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 138–39.

¹⁶ *McCutcheon v. Fed. Election Comm’n* [McCutcheon II], 133 S.Ct. 1242 (2013).

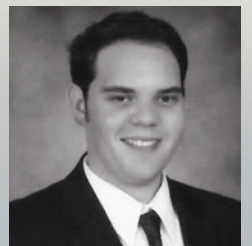
¹⁷ See *Nixon v. Shrink Missouri Gov’t PAC*, 528 U.S. 377, 410 (2000) (Thomas, J., dissenting); *Colorado Republican Fed. Campaign Comm. v. Fed. Election Comm’n*, 518 U.S. 604, 626, 663 (1996) (Kennedy, J., and Thomas, J., concurring in the judgment and dissenting in part).





Affirmative Action:

A Policy of the Past?



by Carlos Corral, Esq.

INSTITUTIONS OF HIGHER EDUCATION USE AFFIRMATIVE ACTION POLICIES TO PROMOTE EQUAL OPPORTUNITY FOR ALL PEOPLE. RACE-BASED POLICIES, FOR EXAMPLE, MAY HELP TO ENSURE THAT STUDENTS FROM MINORITY GROUPS ARE REPRESENTED IN ALL EDUCATIONAL SETTINGS, INCLUDING UNDERGRADUATE AND GRADUATE INSTITUTIONS. THESE POLICIES ARE JUSTIFIED BECAUSE THEY ARE SAID TO COMPENSATE FOR PAST DISCRIMINATION. SUCH POLICIES, HOWEVER, HAVE BEEN CHALLENGED AS VIOLATING THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.



Affirmative Action:
**A Policy of
the Past?**

GRUTTER V. BOLLINGER

Prior to 2012, the most recent case involving a challenge to affirmative action was *Grutter v. Bollinger*.¹ In *Grutter*, a white law student, who was not accepted to the University of Michigan Law School, brought suit claiming that the law school's consideration of race and ethnicity in its admissions decisions was unconstitutional.² In applying strict scrutiny, the Supreme Court determined that the law school's admissions process was narrowly tailored, and accepted the law school's argument that diversity was a compelling interest.³ The Court stated that the law school's special commitment to reach a "critical mass" of students from historically underrepresented minority groups was important.⁴ In addition, Justice O'Connor changed how the Court examines the compelling government interest of a race-based affirmative action policy. Before *Grutter*, race-based measures could only be used to remedy past discrimination, but now the Court stated that "the educational benefits that flow from a student body" are a compelling interest.⁵

The Court also stated it expected that twenty-five years from the 2003 decision, the use of racial preferences will no longer be necessary to further the interest they allowed in *Grutter*.⁶

FISHER V. UNIVERSITY OF TEXAS AT AUSTIN

Now, only ten years later, the issue of affirmative action was reexamined in *Fisher v. University of Texas at Austin*.⁷ In *Fisher*, a white high school student, who was denied admission to the University of Texas, brought this case against the university challenging the race-based admissions policies used by the university.⁸ The case gave the Supreme Court a chance to end the court-approved policy of race-based affirmative action and overrule *Grutter*. The most important factor that the Court took into account was to determine the constitutionality of the actual process by which the university reviews applicants, and how diversity is considered.

In June of this year, more than six months after oral argument, the Supreme Court issued a thirteen-page opinion that did little to change the existing law regarding affirmative action. In a 7-1 majority opinion written by Justice Kennedy, the Court vacated the Fifth Circuit Court of Appeals' decision and remanded for further consideration because the Fifth Circuit failed to apply strict scrutiny in its decision affirming the admissions policy.⁹ In order to adhere to strict scrutiny, Justice Kennedy wrote that "[t]he reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity."¹⁰ Ultimately, the decision upheld *Grutter*; however, the Supreme Court may be suggesting to universities that they must begin looking for race-neutral alternatives to affirmative action.

COLLEGE OF





Affirmative Action:
**A Policy of
the Past?**

SCHUETTE V. COALITION TO DEFEND AFFIRMATIVE ACTION

For the second time in a year, the Supreme Court has agreed to hear a case involving affirmative action. In *Coalition to Defend Affirmative Action v. Regents of the University of Michigan*,¹¹ the issue is whether the state of Michigan can forbid preferential treatment based on race in their state universities.¹² Although *Grutter* upheld affirmative action, in 2006, Michigan voted to pass Proposal 2.¹³ This amendment prohibited race-based and sex-based discrimination or preferential treatment in public schools, including admissions decisions in public universities.¹⁴ The ultimate effect of Proposal 2 was to do away with affirmative action programs in Michigan.

In *Coalition to Defend Affirmative Action*, the Sixth Circuit Court of Appeals overturned Proposal 2, holding that it violates the equal protection clause by denying minorities a fair political process.¹⁵ The question now being presented to the United States Supreme Court is whether a state violates the equal protection clause by amending its constitution to prohibit race-based and sex-based discrimination or preferential treatment in public university admissions decisions. The case is set to be heard in October of this year.

CONCLUSION

Although the goal of racial diversity in higher education is important, race-based affirmative action cannot be used to accomplish that goal if the Constitution requires a “colorblind society.” In fact, such policies have not been necessary to achieve a diverse student body in institutions of higher learning.¹⁶ If the Supreme Court agrees with this conclusion, affirmative action may soon become a policy of the past. **CB**



Carlos J. Corral is an associate at Zumpano, Patricios & Winker, P.A. where he concentrates his practice in the areas of health care litigation and real estate matters. He earned his Juris Doctorate from Villanova University School of Law in 2012. Mr. Corral can be reached at ccorral@zpwlaw.com.

¹ 539 U.S. 306 (2003).

² *Id.* at 317.

³ *Id.* at 329, 334.

⁴ *Id.* at 329.

⁵ *Id.* at 372.

⁶ *Id.* at 343.

⁷ 133 S. Ct. 2411 (2013).

⁸ *Id.* at 2417.

⁹ *Id.* at 2421.

¹⁰ *Id.* at 2420.

¹¹ 701 F.3d 466 (6th Cir. 2012),
cert. granted, 81 USLW 3327
(U.S. Mar. 25, 2013) (No. 12-682).

¹² *Id.* at 470.

¹³ *Id.* at 471.

¹⁴ *Id.*

¹⁵ *Id.* at 470.

¹⁶ *Grutter*, 539 U.S. at 367 (Thomas, J.,
dissenting) (noting that the University
of California, Berkeley Law School
was prohibited from using race-based
classifications, but still achieved a
diverse student body).

CABA's Pro Bono Project

The Florida Bar Foundation Provides leadership and funding for justice



by Yara Lorenzo and
Bob Pardo

As lawyers we share a commitment to justice. The Florida Bar Foundation, a 501(c)(3) public charity, turns our commitment into action through its funding of programs that provide access to justice for Floridians living in poverty. Through support of The Florida Bar Foundation (FBF), we can demonstrate our belief that the justice system works best when it works for everyone regardless of economic status.

Locally, the FBF is an important funding source for the Cuban American Bar Association Pro Bono Project, as well as several other local legal aid organizations, including Legal Services of Greater Miami, Americans for Immigrant Justice, and Dade Legal Aid. Simply put, we could not do the work we do without the support that we receive from the FBF. Through its Administration of Justice Grant Program, the FBF also helps fund special projects and initiatives across the state such as the Innocence Project of Florida, which has succeeded in exonerating 13 wrongfully imprisoned Floridians using DNA evidence since 2003, as well as the Florida Law Related Education Association, which teaches Florida students about democracy and the American legal system.

Since 1981, the primary source of funding for the FBF has been Florida's Interest on Trust Accounts (IOTA) Program, which has enabled the FBF to provide about a third of the total funding for civil legal aid organizations in Florida. Over the past 32 years, Florida's IOTA Program has distributed more than \$425 million to help hundreds of thousands of indigent members of the community receive critically needed free civil legal assistance throughout Florida.



The Florida Bar Foundation

Leadership and Funding for Justice in Florida

Just as important, the FBF also funds initiatives such as salary supplementation and loan repayment programs that help attract and retain legal aid attorneys. In 2012-13, CABA received a salary supplementation grant of \$11,000. Sadly, the benefits provided by these great programs are being reduced due to the impact of extremely low bank interest rates on IOTA revenue, which has required the FBF to drastically reduce support for these programs.

Likewise, due to the impact of low interest rates on IOTA revenue in recent years, the FBF has had to cut back on general grants. Whereas in 2010, CABA received a FBF general support grant of \$71,741 to provide legal services, in 2013 that grant amount was reduced to \$32,642. Overall, FBF funding is now about a quarter of overall legal aid funding statewide.

We encourage CABA's membership to visit the FBF's website at www.floridabarfoundation.org. You will be impressed with the number and diversity of the grantees assisted by the FBF. It is an organization in which all of us, as Florida attorneys, should take tremendous pride. At the CABA Pro Bono Project, we are grateful for the resources the FBF brings to our community. **CB**

*Yara Lorenzo
CABA Pro Bono Project, Co-Chair & Florida Bar Foundation Board Member*

*Bob Pardo
Past Florida Bar Foundation Board Member & Past CABA Board Member*

A SPECIAL IMMIGRANT JUVENILE'S SUCCESS STORY



by Yesenia Arocha

AT THE TENDER AGE OF EIGHT, A YOUNG GUATEMALAN BOY, WHOM WE WILL REFER TO AS JJ, WAS SENT BY HIS MOTHER TO WORK THE FIELDS PLANTING CORN AND BEANS. HIS DAYS CONSISTED OF WAKING UP AT DAWN AND WORKING IN THE HOT SUN FOR EIGHT HOURS A DAY OR MORE. JJ IS DEVELOPMENTALLY DELAYED. AS A RESULT, HIS MOTHER STOPPED SENDING HIM TO SCHOOL BECAUSE SHE FELT IT WAS A WASTE OF TIME AND MONEY. JJ NEVER MET HIS FATHER AND, FOR A MAJORITY OF HIS CHILDHOOD, HE WAS RAISED BY HIS MATERNAL AUNT BECAUSE HIS MOTHER WOULD LEAVE FOR MONTHS AT A TIME TO FIND WORK IN OTHER NEARBY TOWNS. AFTER LIVING WITH HIS AUNT FOR SEVERAL YEARS, HIS MOTHER RETURNED TO JJ'S TOWN WHEN HE WAS ABOUT TWELVE. WHEN SHE RETURNED, JJ AND HIS SIBLINGS WERE SENT TO LIVE WITH HER ON A PERMANENT BASIS.

JJ and his mother did not have a good relationship. JJ always felt that she treated him differently because of his developmental delay. Because JJ was the oldest child, his mother depended on him to help provide for her and his siblings. Despite significant efforts to please his mother, he was never quite able to meet her expectations. As a result, JJ was exposed to severe beatings by his mother. But JJ's mother was not the only cause of strife. Due to JJ's developmental delay, he was taken advantage of by a sexual predator in his town. He reported the abuse to his mother, but she only exacerbated his feelings of guilt and shame. After rumors circulated regarding JJ's abuse, he grew concerned that his abuser would seek reprisal for having reported the occurrence. In order to escape further abuse, and for fear of his life, he left Guatemala on foot in pursuit of a better life in the United States.



JJ was joined by a group of people on his journey to the United States. Along the way, JJ suffered from severe hunger and dehydration. Shortly after crossing the Rio Grande, he was apprehended and taken to a detention cell known as the Hielera. It is commonly referred to as the Hielera because of the cold temperatures inside the cells. JJ's cell, for example, was essentially bare, forcing him and other detainees to sleep on the cold floor without a blanket or a mattress. Because of the cold temperatures, JJ's fingers and toes were blue and his lips were chapped. He was detained there for four days. While detained at Hielera, JJ was declared an unaccompanied immigrant child. He was later transferred to the Office of Refugee Resettlement and is currently placed at a foster care facility in Miami, Florida.

Since being detained, CABA Pro Bono Project, Inc., has been able to support JJ in attaining Special Immigrant Juvenile Status. This status is based on a federal law that assists unaccompanied immigrant children in obtaining permanent residency. It was designed to help abused, abandoned, and neglected children, like JJ. After successfully assisting JJ in obtaining Special Immigrant Juvenile Status, CABA Pro Bono Project attorneys are now in the process of helping him acquire a green card. "Seeing the relief on his face when he found out that his Special Immigrant Juvenile Status was granted, further validates our mission at CABA Pro Bono," said one of JJ's attorneys. JJ will hopefully receive services from the Trauma Resolution Center, and he plans to continue to work towards his dream of becoming a veterinarian.

For more information on how you can help an unaccompanied immigrant child with pro bono representation, please contact Lesley Mendoza at (305) 646-0046. **CB**



SPOTLIGHT ON LOCAL CHARITY CHILDREN'S HOME SOCIETY OF FLORIDA

FOSTER FAMILIES
PROVIDE **HOPE** AND
STABILITY TO FLORIDA'S
VULNERABLE CHILDREN

The sheer number is shocking: more than 18,000 Florida children currently are unable to live safely at home. Through no fault of their own, these children have lost all sense of security. Many have suffered abuse or neglect at the hands of those who are supposed to love them the most—their parents. When children are not safe in their own home—at least for a little while—they often find protection and healing with a loving foster family.

Many of these children and teens find hope at Children's Home Society of Florida. In need of a safe and secure environment, we place these children with loving foster parents who can care for them as they work through painful pasts, and find strength to heal from victims to survivors. These special families who choose to open their hearts and homes to children in need experience journeys of a lifetime and are filled with endless rewards.

INTERESTED IN BECOMING A FOSTER PARENT?

For Children's Home Society of Florida foster parent, Annette, fostering was her true calling. With a soft spot in her heart for children, particularly the abandoned and abused, she wanted kids to feel safe and understand the unconditional love of a family. "I love having kids around; I love trying to give them a better life," Annette says. "I like to show them what a family's supposed to be, to give them some stability."



Families interested in filling a critical role through fostering find more than a licensing organization with Children's Home Society of Florida. For prospective and current foster parents, Children's Home Society of Florida provides training and support so families are fully equipped with the knowledge of what it means to be a foster parent. Families learn how to care for children who have suffered abuse, neglect, or abandonment, as there is a lot to learn and adapt to when parenting children who have suffered trauma.

Foster families provide more than safe, loving homes. They provide patience, care, understanding, and hope to children who have endured unspeakable agonies. Though they may have a child for a few days, a few weeks, or even a year, foster families make a lasting difference in the lives of the children they welcome into their hearts and homes. But Florida needs more families ready to embrace our community's kids. Consider becoming a foster parent today.

Learn more about fostering with Children's Home Society of Florida at www.chsfl.org/fostering.

*On the front lines since 1902, Children's Home Society of Florida is the oldest and largest statewide organization devoted to helping children and families. Children's Home Society of Florida offers services that help break the cycle of abuse in more families, heal the pain for traumatized children, guide teens to successfully transition into adulthood and create strong, loving families through adoption. Children's Home Society of Florida serves approximately 100,000 children and families throughout the state each year. **CB***

Dichos de Cuba



by Monica M. Albarello¹

Mas vale tarde que nunca

Better late than never.

We all know someone who wishes he/she would have taken a different career path, but chose not to because he/she feels too old, has children, or any other number of excuses. I am of the belief that as long as you are alive, it is never too late to accomplish or fulfill a dream. Death should be the only thing that can stop you. I admire some of my classmates from both college and law school who were starting a new chapter in their lives at the age of 50 plus. Some would opine starting a new career at 50 is a crazy thing to do, but I disagree. I believe it is an admirable feat, and reflects a person's strong will and positive attitude.

Piensa mal y aceptaras

Think bad and you will understand.

This means to always carry some doubt. If something is too good to be true, then it probably is, and a little bit of doubt may help you see reality. Trusting people comes with a price. Before you trust someone, determine whether they have earned (paid the price for) your trust. Of course, this is not promoting a negative personality, but rather promotes keeping your eyes open to analyze how much you know of the person seeking your trust before you give it to them.

It has been an interesting adventure researching and writing these articles on Cuban *dichos* over the last year. I do not have a vault with a box full of *dichos*, although that would be great. What I do have is access to many Cuban-cultured individuals. My abuelita is my primary source for research. She has a very healthy mind for her age, and I believe it is because she always is reading a book, a newspaper, or a magazine. When she is sharing *dichos* with me, I often realize some of them have American counterparts. This tells me no matter what race, ethnicity, or religion, we all share in the human experience.

De tal palo tal astilla

Like father, like son.

We have all heard some version of this saying, whether in English or in Spanish. As you know, this saying is used to describe similar personality and physical characteristics between parent and child. My brother, Alex, has two young boys, Alex II and Liam. The boys do not necessarily look like my brother, but you can most definitely tell those two boys are my brother's children—they walk, talk, and laugh just as my brother does. The boys have even developed the same body type. Unfortunately, my sister-in-law just gave birth to these kids because they are nothing like her. I find it fascinating how much of a parent's personality passes on to their children.

A mal tiempo buena cara

Stay positive during difficult times.

In a bad situation, whether it be a difficult financial situation or a loved one's health issue, someone related to the situation has to stay positive. When times get tough, you cannot let that situation consume you or become your identity; you must stay positive. Positive thoughts tend to become reality in this world wherein the law of attraction rules. Put on a smile and think positive!

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.

La Cocina de Christina

San Guibin

The Cuban Saint of Thanksgiving



Our family's traditional Thanksgiving parties were really something else. My husband's Tia Moki would invite everyone, their mother, and the primo. And we would eat so late, I mean so really late, that everyone would take her up on the invite. Friends, cousins, sisters, brothers—everyone—would come around 10 p.m. to start the festivities. One year, we even had a one-man band, accordion player, and a DJ. Yes, for Thanksgiving.

When Moki passed away in 2005, my husband and I took Thanksgiving as our holiday. And I needed to have San Guibin on my side to help me get through the craziness of having fifty of our closest Cuban and Cuban-affiliates over for dinner. The hours, the preparation, the stress, the planning... all for a group of relatives that are thankful—or not—for your labor of love. Here is my favorite Thanksgiving Turkey recipe, as found in Nitza Villapol's *Cocina al Minuto*, created for the first time in 2009 with the launch of *La Cocina de Christina*. I hope your Cuban and Cuban-affiliates enjoy it as much as mine did.

Pavo Relleno Con Congri (Turkey with Congri Stuffing)

Ingredients: 1 turkey, 8 pounds; 3 garlic cloves; 2 teaspoons salt; ¼ teaspoon paprika; ¼ teaspoon cumin; 1 teaspoon oregano; 1 sour orange; 1 white onion, sliced; ½ pound black beans; 4 cups water; 1 green pepper; 2 strips bacon; ½ onion, chopped; ½ green pepper, chopped; 2 garlic cloves, minced; 1½ cups white rice; 2 teaspoons salt; 1 bay leaf; ¼ teaspoon paprika; 1/8 teaspoon oregano; 6 strips bacon; ½ cup cooking wine (vino seco).

Instructions:

1. Preheat oven to 325 degrees;
2. Clean the turkey, inside and out. Take out all the plastic wrapped guts and remove the plastic things they put inside also.
3. Mash the garlic with the salt, paprika, cumin and oregano. Add the liquid from the sour orange to the spices to form a mojo.
4. Place the turkey inside a large, plastic oven bag and pour the mojo over the turkey, rubbing it completely on the outside and inside of the turkey.
5. Top the turkey with the sliced onions and close the plastic bag.
6. Let the turkey marinate in the refrigerator for a few hours, or overnight, inside the bag.
7. Clean and wash the black beans and place them in a large bowl, covered with water and the sliced green pepper. Let sit for a few hours in the water.
8. Pour the beans into a large pot, in the same water, and with the green pepper and bring to a boil.
9. Lower heat and cook on medium until the beans soften.
10. Slice the two bacon strips into 1" pieces and fry in a pan. Remove the bacon bits from the pan.
11. Using the bacon grease in the pan, fry the Cuban Trilogy (onion, green pepper and garlic cloves).
12. Add this sofrito to the pot with the black beans once they have softened and bring back up to a boil.
13. Add the rice, salt, bay leaf, paprika and oregano to the pot with the beans. Bring back up to a boil.
14. Lower the heat to medium and add the bacon bits to the pot. Stir in well and cover for 20 minutes (you want to undercook the rice so that it finishes cooking inside the turkey).
15. Fill the turkey cavity with the Congri (rice you just made) and tie the turkey up to close it, using a turkey-lacing kit (or twine).
16. Place the turkey in a large roasting pan and cover with the six strips of bacon.
17. Pour the vino seco over the entire turkey and place in the oven to cook.

My turkey took at least four hours, but it can take longer to cook, depending on your oven. Try not to compact the Congri into the turkey, as this will delay the cooking process. Stuff the turkey liberally, making sure to leave it a little loose so that heat can flow through it.



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www.lacocinadecristina.blogspot.com



For more Thanksgiving recipes and other Cuban recipes from the Christina & Nitza project, visit: <http://lacocinadecristina.com> or follow her on Facebook at <http://facebook.com/lacocinadecristina>, Twitter @ChristinaCocina, Instagram @lacocinadecristina, and Pinterest <http://pinterest.com/lacocinadecristina> **CB**

MOVING FORWARD



by Jorge A. Pérez Santiago

Time truly flies. This issue was my third as Editor of *CABA Briefs*, and the next issue will possibly be my last as CABA ushers in and welcomes its new leadership. Thus, the next issue of *Briefs* will take us through the holiday season and into one of CABA's most anticipated events of the year, CABA's 40th Annual Installation Gala.

Further, as always, *Briefs* will discuss cases presented to the United States Supreme Court and try to fairly select a representative sample of trending legal issues. We will offer both sides of the issue and encourage frank discussion among our members. We will also continue to highlight the work of CABA and its members, such as CABA's Pro Bono Project and other philanthropic activities, and CABA's amazing events.

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**



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