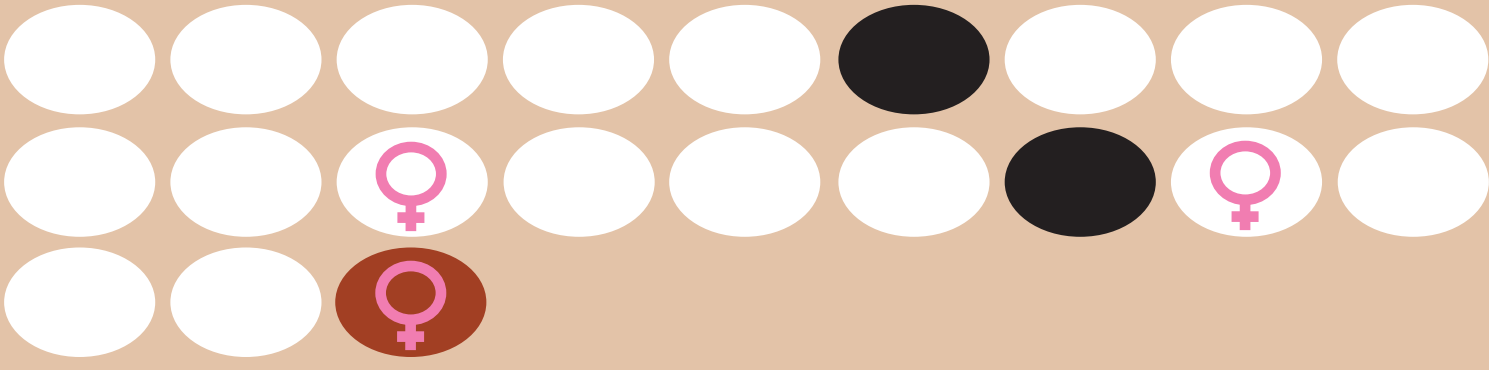
CABA BRIEFS

The Magazine of the Cuban American Bar Association SUMMER 2009

A SPECK OF BROWN IN A SEA OF WHITE.

President Obama nominates Judge Sonia Sotomayor to the Supreme Court of the United States.



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[PRESIDENT'S MESSAGE]

Going Strong!

Your Board of Directors never rests.

By **Roland Sánchez-Medina, Jr.**

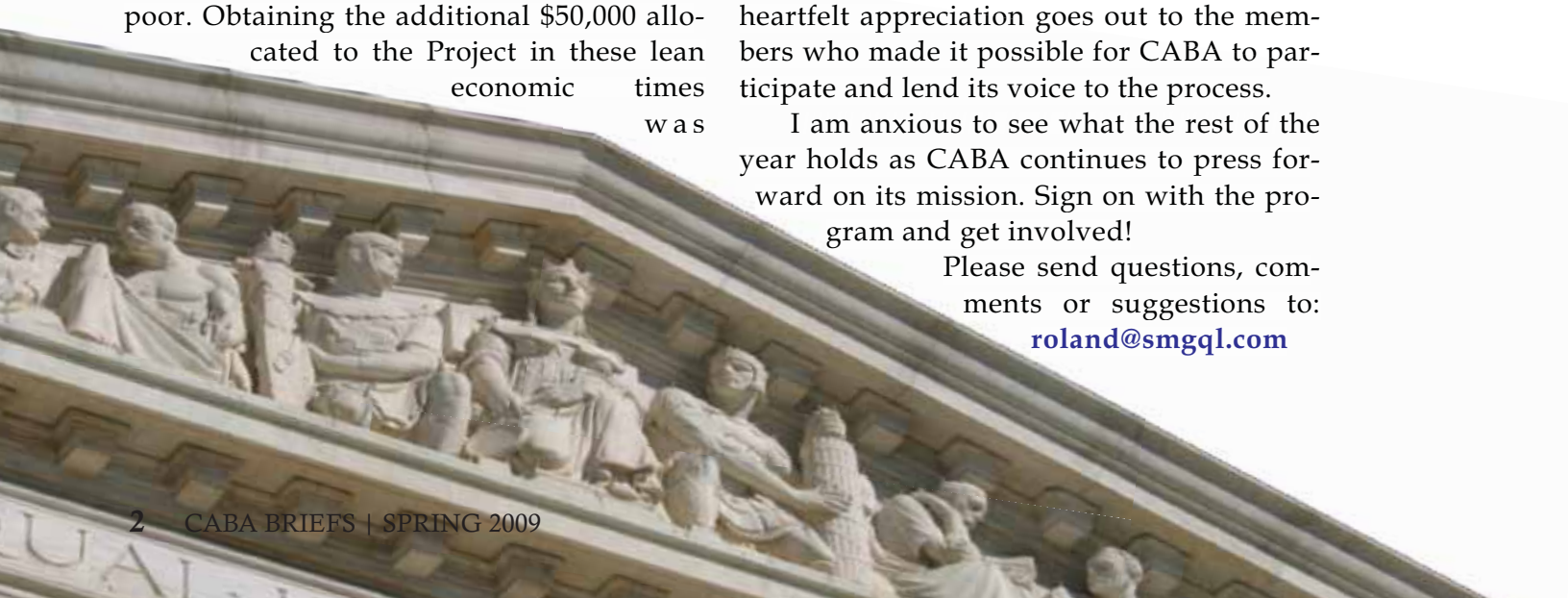
For the past seven months I have had the privilege of working with one of the most tireless Boards of Directors in my years of service to CABA.

I wanted to take this opportunity to express my thanks to the hardworking members of the Board whose efforts have resulted in a number of impressive accomplishments this year. Recently, CABA was recognized by the Dade County Law Library Board of Trustees for its instrumental role in successfully lobbying for the passage of a new bill that "gave teeth" to court assessments issued in criminal and civil cases whereby assessments become liens on real property (thereby compelling payment more effectively and theoretically resulting in greater collections that will directly benefit the library). CABA also successully lobbied and obtained additional funding for the Pro Bono Project by way of a service contract to provide legal services to the poor. Obtaining the additional $50,000 allocated to the Project in these lean economic times was no easy feat, and we are fortunate to have been awarded these funds. That said, it is imperative that our talented members make a greater effort to offer their services to the Project. Despite the financial support received, the Project cannot meet its obligations to the community without members giving of their time. This year in particular has seen a tremendous increase in cases, no doubt due to current economic conditions. I encourage everyone to read the article in this issue concerning the project, and hope that it inspires each one of our members to take at least one case this year!

On another note, in my message for the previous issue of *Briefs* I commented on the pending Petition for a Writ of Certiorari before The U.S. Supreme Court in *Campa, et al. v. United States of America* for which CABA had filed an *amicus* brief in support of the government's position. The Supreme Court subsequently denied certiorari. Our heartfelt appreciation goes out to the members who made it possible for CABA to participate and lend its voice to the process.

I am anxious to see what the rest of the year holds as CABA continues to press forward on its mission. Sign on with the program and get involved!

Please send questions, comments or suggestions to: **roland@smgql.com**



Gay Adoption: Feedback

Surprising reactions to the cover story in the Spring 2009 issue of *CABA Briefs*.

In the Spring 2009 issue of *CABA Briefs*, we ran a cover story about Judge Cindy Lederman's decision declaring Florida's statute banning gay adoption unconstitutional. The response to the piece was overwhelmingly positive, with a large majority of readers expressing their support for the fact that we chose to give voice to this issue in our pages. There were, of course, some negative reactions from those who either disagreed with the position advanced by the piece, or simply did not think that *Briefs* was a suitable venue for addressing the topic.

By **Augusto R. López**

However, there were a few negative responses that caught me by surprise. The most innocuous of these had to do with our choice of cover, where the title of the article, "Is Gay the New Black?," was rendered in bold white letters upon a glossy black background. Some readers felt that the cover was overly provocative, and others did not understand the play on words involving the pop culture term "the new black" and the reference to African-Americans.

We also received several complaints from readers upset that the "Open Forum" section, which featured blurbs from a variety of prominent CABA members, did not have a single comment that wasn't supportive of gay rights in general. This is a valid criticism, but unfortunately the omission of alternative points-of-view from this section was by *necessity* not by *choice*: no one who opposed the Lederman decision was willing to go "on the record" with their thoughts. Thus, we had no choice but to limit the "Open Forum" section to those viewpoints we received in writing.

Finally, we were contacted by a few African-Americans who were disturbed by the piece, and specifically with the insinuation that homosexuals were subject to the same sort of bigotry and discrimination suffered by blacks in decades past (and thus that the two experiences were in some way comparable). Though I respect that because of their deeply held religious beliefs, many African-Americans do not support the cause of gay rights, black opposition to gay rights remains one of the tragic ironies of our time. If any group should empathize with another suffering under the yoke of prejudice and discrimination, it should be African-Americans, especially given the history of oppression, disenfranchisement and violence that they share with homosexuals. Fortunately, however, we also received calls and emails from several black attorneys who not only found the subject matter appropriate for our pages, but were also supportive of gay rights in general.

On a related note, arguments before the 3rd DCA on the Lederman decision are scheduled for August 26, 2009, so stay tuned.

Please send your comments and suggestions to **alopez@smgql.com.**

[THE COURTS]

Law Review

Recent appellate court decisions and how they affect you.

This column is intended to provide CABA members with an update of recent case law decided by the state and federal appellate courts, which might be of interest. The listing is by no means intended to be exhaustive, and in this instance, will focus entirely on recent decisions of the state district courts of appeal.

THIRD DISTRICT DECISIONS

Casa Investment Co., Inc. v. Nestor, (Fla. 3d DCA April 29, 2009)

By **Ed Guedes**

We've all been in this situation -- okay, maybe only some of us. During a hearing before the court, something is said or an argument comes to light that makes it immediately apparent that judgment should be entered in favor of our client. The human urge, of course, is to ask the court to save time and simply rule in favor of our client as a matter of law. Resist that urge. In this case, which originated in county court, a party made an ore tenus motion for summary judgment, which the county court judge granted. On appeal, the appellate division of the circuit court affirmed in a 2-1 decision. On certiorari petition to the Third District, the court quashed the affirmance below noting that Fla. R. Civ. P. 1.510(c) does not allow for oral motions for summary judgment because such a motion (1) does not set forth with particularity the basis for summary judgment, and (2) cannot be "served" at least 20 days before the hearing date. However obvious your victory may be, go back to the office, write it up in a motion and give the requisite 20 days' notice before obtaining your final summary judgment.

Infolink Group, Inc. v. Kurzweg, (Fla. 3d DCA Apr. 15, 2009)

Just a reminder that even though the Legislature may purport to create a right to immediate review of certain types of non-final orders, the courts may not enforce the legislation for lack of jurisdiction. In this case, a party filed a motion to confirm an arbitration award. When the circuit court entered an order confirming the award, the opposing party sought immediate review pursuant to section 682.20(1)(c), Florida Statutes. The pertinent statutory provision states: "An appeal may be taken from…an order confirming or denying confirmation of an arbitration award." The Third District dismissed the appeal for lack of jurisdiction noting that since the circuit court had not yet entered a final judgment, its ability to review a non-final order was limited by the authority conferred by the Florida Rules of Appellate Procedure, regardless of what the Legislature may have enacted. In essence, only the Florida Supreme Court, exercising its rule-making authority, can dictate what non-final orders a district court of appeal may review.

Safeway Premium Finance Co. v. Sosa, (Fla. 3d DCA Apr. 8, 2009)

This decision addresses the question of whether a particular complaint alleges a sufficient factual basis to justify certification of a class under Fla. R. Civ. P. 1.220(a) and (b). Because the complaint sought to recover damages that were available only upon the showing of a knowing violation of the applicable statute (prohibiting certain repeated premium finance charges during a 12-month period), the court concluded that the determination of a knowing violation required individualized consideration of the claims and therefore, the individualized questions of fact predominated over the common issues. These holdings are not particularly unusual, but the case does merit notice for its unusual pairings by the judges.


Lux diei ad paludum venit.

The first reported decision, authored by Judge Richard Suarez, was joined by Judge Frank Shepherd. The second reported decision, authored by Judge Shepherd to elaborate on additional grounds for reversal of the certification, was then joined by Judge Suarez. In short, the appeal generated two majority opinions because the third member of the panel, Judge David Gersten, dissented. Perhaps sensing that he was confronted by two, rather than the customary single, majority decision, Judge Gersten waxed eloquently in his dissent: "I believe it is as clear as *lux diei ad paludum venit* that this case is ideal for class action. Rather than have an unmanageable number of plaintiffs filing individual $20 lawsuits, this class action empowers the little guy and gives him leverage to fight an otherwise insurmountable foe. If plaintiff prevails, the big guy no longer lifts $20 from unsuspecting customers' pockets, the plaintiffs are made whole, and justice can reign supreme." Judge Gersten loosely translated the obscure latin phrase as "daylight upon the swamp."

BDO Seidman, LLP v. Banco Espirito Santo Int'l, Ltd., (Fla. 3d DCA April 8, 2009)

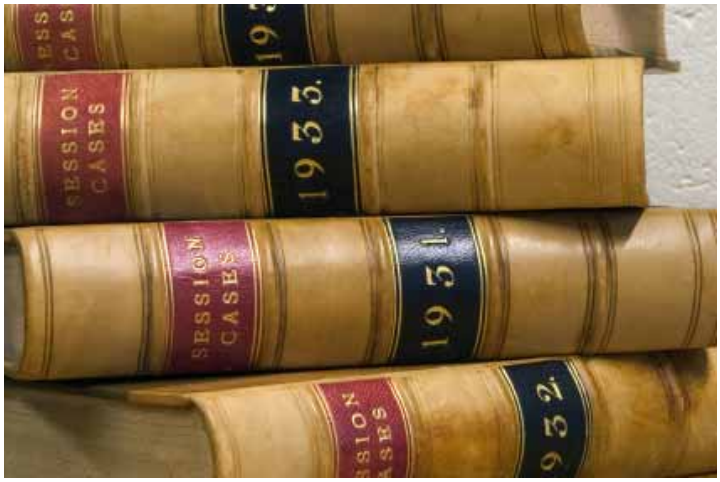
This decision reminds us that we should never assume victory simply because the other side doesn't oppose our position. In this case, a party sought to file an appendix under seal and the other side did not oppose the motion. However, the moving party neglected to address the applicable standard for sealing court records set forth in Barron v. Florida Freedom Newspapers, Inc., 531 So. 2d 113 (Fla. 1988). Citing the constitutional concerns raised by closing any aspect of public proceedings, and after noting that it was obligated to apply the Barron standard regardless of the parties' aligned positions, the court denied the motion to seal without prejudice and directed the party to address the pertinent standard in its motion.

OTHER DISTRICTS DECISIONS

Neighborhood Health P'ship, Inc. v. Merkle, (Fla. 4th DCA Apr. 15, 2009)

This decision addresses the scope of the attorney work product privilege. An HMO claimed that documents it had prepared, presumably with the assistance of or at the direction of its counsel, in response to a rate inquiry from a regulatory agency were pro-

tected from discovery by the work product doctrine. The trial court examined the documents in camera and concluded they were not protected. The Fourth District affirmed, holding that the HMO's response to a rate inquiry from a regulatory agency was not sufficiently in anticipation of litigation to warrant application of the doctrine. As the court stated, "a mere routine request for information by a regulatory agency [does not] justif[y] presumptive work product protection for any document on which the regulated industry company's lawyer has cast an eye."



Giacalone v. Helen Ellis Memorial Hosp. Foundation, Inc., (Fla. 2d DCA May 1, 2009)

Traditionally, lawyers are taught that a trial court's decision denying discovery generally is not immediately reviewable by certiorari petition because the writ's requirements -- that a departure from the essential requirements of law cause a material injury which cannot be remedied on appeal -- usually cannot be met by a trial court order that denies access to discovery. Discovery orders reviewable by certiorari are usually those that violate the "cat out of the bag" doctrine by granting access to information, which creates irremediable harm upon disclosure of the information. More recently, appellate courts in Florida have expressed a willingness to review discovery orders denying access to information. This Second District decision adds to that trend.

While the court acknowledged that most discovery orders denying discovery are not reviewable by writ of certiorari, it went on to hold that such orders will be reviewed when it "effectively eviscerates a party's claim, defense, or counterclaim" and "there is no practical way to determine after judgment how the requested discovery would have affected the outcome of the proceedings." The court also took issue with the trial court's order denying discovery because it was "a form order containing no explanation of its decision to deny the motion or an analysis of the individual requests." It is interesting that the court justified its conclusion that the denial "eviscerated" the defendant's defenses and counterclaim even though there were other ways for the defendant to support his defenses and counterclaim. No doubt this decision will be cited by many litigants seeking to have orders denying discovery reviewed on an interlocutory basis.

DNA Ctr. for Neurology and Rehab. v. Progressive Amer. Ins. Co., (Fla. 5th DCA May 15, 2009)

The principle is drilled into our heads in law school and repeatedly during our careers: a court's lack of subject matter jurisdiction may be raised at any point in the proceedings and the parties may not agree to jurisdiction where it simply doesn't exist. In this case, neither party during trial or on appeal noted or discussed that the amount in

controversy was below the jurisdictional threshold for circuit court actions. Sadly for the parties, the Fifth District noticed and refused to consider the merits of the summary judgment on appeal, instead reversing and directing that the claim be re-filed in county court. The parties wasted who knows how much money litigating a case through appeal only to have the entire process invalidated because no one was vigilant to the jurisdictional issue.

DFC Homes of Fla. v. Lawrence, (Fla. 4th DCA May 27, 2009)

This case raised the question of what conduct by a litigant waives it right to arbitration under a contract. An arbitration proceeding was held and resolved in favor of DFC. Lawrence then filed suit in circuit court claiming that DFC had breached the contract. In response, DFC moved to confirm the earlier arbitration award. The circuit court found for Lawrence holding that questions of fact remained as to whether all issues had been resolved in the earlier arbitration. After the case was pending for a year without any activity, the court sua sponte indicated its intent to dismiss for lack of prosecution, at which point Lawrence deposed DFC and the parties engaged in settlement discussions. Lawrence subsequently argued that DFC waived by actively participating in the litigation and settlement discussions.

The Fourth District ruled in favor of DFC finding that (1) the circuit court was incorrect in concluding that it, as opposed to the arbitrator, could determine the factual question of whether all issues had been fully resolved in the earlier arbitration; (2) DFC's participation in the litigation (by filing a motion to dismiss for lack of prosecution) came after it invoked its right to arbitrate and actually arbitrated; and (3) allowing mere participation in settlement discussions to constitute a waiver would be contrary to the policy furthered by arbitration to resolve disputed claims quickly and cost-effectively. On remand, the court directed the arbitrator to resolve the question of whether there remained unresolved claims between the parties.

Lackner v. Central Fla. Investments, Inc., (Fla. 5th DCA May 29, 2009)

As frustrating as it may be to deal with the overcrowded dockets of the courts and the inability to get to trial within a reasonable period of time, do not make the mistake of thinking that litigants may consent to have a general or special magistrate hear a jury trial and render a final judgment. That is precisely what occurred in this case. Apparently, there is a standing practice in the Ninth Judicial Circuit that allows magistrates to preside over jury trials. The parties proceeded under this practice only to find that the Fifth District, sua sponte, invalidated the final judgment on appeal because no statute or rule authorizes a magistrate to preside over a jury trial. Once again, a jurisdictional failing resulted in the parties undoubtedly expending tens of thousands of dollars litigating a case to its conclusion only to find the judgment obtained to be worthless.

Westminster Community Care Svcs., Inc. v. Mikesell, (Fla. 5th DCA May 29, 2009)

We've saved the most interesting case for last. In this decision, the Fifth District was asked to apply the remittitur/additur statute, section 768.74, Florida Statutes -- always an endeavor fraught with analytical peril. In what was essentially a wrongful death claim brought by the decedent's estate, the jury deliberated for several hours and then indicated it was deadlocked. The parties agreed to charge the jury again to continue deliberations in an effort to reach a verdict. The jury deliberated another hour then returned a verdict of liability for negligence but awarded no damages of any kind. The jury was polled and then discharged. The decision reflects that while deciding how to proceed with the jury's declaration of a deadlock and before the jury was asked to continue deliberations, the parties and the trial court noted that deliberations "had been very heated." There is no indication in the decision how the parties or court knew this to be the case.

Upon a post-trial motion for additur, the defendant rejected the additur and insist upon a new trial not only on damages, but also on liability, contending that the liability determination should be revisited in a new trial because liability had been "hotly contested." The trial court granted additur and a new trial, but only on damages, in light of the clear language of section 768.84(4), Florida Statutes, which states "If the party adversely affected by such remittitur or additur does not agree, the court shall order a new trial in the cause on the issue of damages only." On appeal, the Fifth District reversed, concluding that the trial court should have ordered a new trial on liability as well because the issue of liability had been "hotly contested." Nowhere in the opinion does the court indicate how it or the parties defined "hotly contested." In fact, it's not clear whether the proverbial temperature of the contest pertains to manner in which the case was tried or the volatility of jury deliberations or some combination of the two.

In any event, the Fifth District circumvented what it described as the "limiting provision" in section 768.84(4), which calls for a new trial on damages "only," by citing to a line of cases that have similarly concluded that "hotly contested" liability determinations should be revisited in a new trial upon the rejection of additur by a defendant. No effort is made to explain how or why the clear language of the statute should be avoided. In citing to the pertinent line of cases, the court seems to suggest that concerns about a possible jury compromise as to liability should override well-established principles of statutory construction and mandate a new trial on liability, as well as damages.

This decision and the precedents it relies upon seem to signal a clear change in policy direction from the district courts of appeal to allow for new trials on liability when additur

is rejected, so long as the liability determination is "hotly contested." The rule announced seems impossible to apply in a consistent manner, not only because little effort is made to determine the degree of "hotness" needed to trigger this rule, but also because the reader is left to wonder whether the rule applies in any case where additur is granted. In short, if the jury had awarded $10,000 instead of no damages, but the trial court felt the appropriate award should have been ten times greater, does that raise a sufficient concern about jury compromise to justify ordering a new trial under the "hotly contested" standard? If ever a body of case law seemed destined for Supreme Court review, this is it.

THE FARM(ER'S) REPORT

And lastly, it's time for my "Farm Report," or more accurately, my "Farmer's Report." For those who enjoy Fourth District Judge Gary Farmer's occasional turn of phrase, I would recommend his lengthy dissent in *Bland v. Green Acres Group, LLC* (Fla. 4th DCA May 27, 2009). Judge Farmer's dissent, which is almost four times as long as the majority decision, and for which he "begs the reader's leave," includes the following observation in a footnote: "A verbal nugget lies buried in the verbal harvest of this case: a lawyer named Kornfield argues on behalf of a party named Green Acres before a judge named Farmer. Maybe it's just fertilizer for the Farmer." Enough said until next time.

Edward G. Guedes *is a partner in the Appellate Practice Group at Weiss Serota Helfman Pastoriza Cole & Boniske, PL. He is Board Certified by the Florida Bar in Appellate Practice and currently serves on the Boards of the Florida Supreme Court and the Third DCA Historical Societies.*

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[PICTORIAL]

CABA CACPA United Way Cocktail

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[U.S. SUPREME COURT]

Making History

President Obama Nominates Judge Sonia Sotomayor

With the retirement of Justice David Souter, lawyers, media pundits and Washington insiders played one of their favorite parlor games: Who is on the President's shortlist of potential nominees? Various groups jockeyed for position and many in the Hispanic community wondered whether President Obama would nominate one of their own. As we all know, President Obama chose a Hispanic, Judge Sonia Sotomayor from the Second Circuit Court of Appeals, to fill the Souter vacancy.

By **Armando Rosquete**

The push for a Hispanic nominee came early. Reps. Nydia Velazquez (D-N.Y.) and Charles Gonzalez (D-Tex.), chairwoman and vice chairman of the Congressional Hispanic Caucus, sent the President a letter asking him to fill any Supreme Court vacancy with a Hispanic justice -- they sent the letter a full day before news broke that Justice Souter planned to retire in June.

Further, Rep. Anthony Weiner (D-N.Y.), a member of the House Judiciary Committee, mailed a letter to the President on May 1, 2009, noting that Justice Souter's retirement "creates a golden opportunity to add both talent and diversity to the highest court in the land." Both Rep. Weiner and the CHC cited statistics indicating that Hispanics represent 15 percent of the population and are expected to make up 30 percent of the nation's population by 2050. Despite the growth of this community, Rep. Weiner noted that Hispanics only comprise approximately 7 percent of the federal bench. Rep. Weiner then recommended, among others, Judge Sotomayor. The Obama administration ultimately proved receptive to the recommendation.

Many have commented that President Obama's decision is an exceedingly savvy one. First, Sotomayor's qualifications as evidenced by her Senate Judiciary Questionnaire are, by any objective measure, beyond reproach. Second, the fact that a Republican initially appointed her to the federal bench was certainly not lost on the administration when calculating both the nomination's viability and its own response to potential Republican intransigence. Third, the nomination appeals to two core constituencies while making Republican resistance laden with the risk of alienating Hispanic voters who voted 67 percent in favor of Obama. As to the latter point, Republicans must deal with the political reality that Senator John McCain received only 31 percent of the Hispanic vote in sharp contrast to 2004 when President Bush captured 43 percent of that vote. Some Republicans, however, have countered with the failed nomination of D.C. Circuit nominee, Miguel Estrada, who languished in the Senate before asking President Bush to withdraw the nomination. It will be interesting to see how these political dynamics unfold in Sotomayor's confirmation hearing. Regardless, one can expect Democrats to emphasize Judge Sotomayor's compelling personal journey.

Judge Sonia Sotomayor, the first Hispanic nominated to the U.S. Supreme Court.

Photo courtesy of Stacey Ilyse Photography.

PERSONAL BACKGROUND

Born in 1954, Sotomayor grew up in the South Bronx, the daughter of Puerto Rican parents. Her father, Juan Sotomayor, a manual laborer, worked at a tool-and-dye factory while her mother, Celina Sotomayor, went on to become a telephone operator at Prospect Hospital in the South Bronx, and later received her practical nurse's license. Sotomayor's father, at 42, died a year after Sotomayor was diagnosed with diabetes at the age of 8 and her mother began working two jobs to support Sotomayor and her brother who is now a doctor in Syracuse, New York.

Sotomayor attended Cardinal Spellman High School in the Northeast Bronx where she graduated as valedictorian in 1972. From there she attended Princeton University and then Yale Law School. At Princeton, she graduated *summa cum laude* and was awarded the Pyne Honor Prize, the university's highest undergraduate award, presented for a combination of strong grades and extracurricular work. She wrote her senior thesis on Luis Muñoz Marín, the first democratically elected governor of Puerto Rico, and dedicated it in part "to the people of my island-for the rich history that is mine." While at Yale, she continued to excel and served as an editor on the Yale Law Journal.

After graduation, New York District Attorney, Robert Morgenthau, hired Sotomayor on the recommendation of José A. Cabranes, then Yale's General Counsel and today her fellow brethren on the Second Circuit. In her fifth year in the office, she was interviewed for The New York Times Magazine and spoke of how she had coped in a job that some of her liberal classmates disapproved of. "I had more problems during my first year in the office with the low-grade crimes -- the shoplifting, the prostitution, the minor assault cases," she said. "In large measure, in those cases you were dealing with socioeconomic crimes, crimes that could be the product of the environment and of poverty." She stated that "once I started doing felonies, it became less hard. No matter how liberal I am, I'm still outraged by crimes of violence [because] regardless of whether I can sympathize with the causes that lead these indi-

viduals to do these crimes, the effects are outrageous."

In 1984, Sotomayor left the District Attorney's Office and joined Pavia & Harcourt, a commercial law firm in Manhattan. She spent much of her time in private practice representing Fendi in counterfeit actions. In doing so, Sotomayor often went to warehouses to have the counterfeit merchandise seized. In one case, there was a seizure in Chinatown where the counterfeiters fled and Sotomayor gave chase on a motorcycle. In July 1987, Governor Mario M. Cuomo, appointed her to the board of the State of New York Mortgage Agency, which helps low-income individuals obtain home loans. When she left the unpaid board position in 1992, the board passed a resolution honoring her for "consistently defending the rights of the disadvantaged to secure affordable housing" and serving as the board's conscience concerning "the negative effects of gentrification."

Senator Daniel P. Moynihan recommended her as a district court nominee to President George H.W. Bush. In 1991, President Bush appointed Judge Sotomayor to the United States District Court for the Southern District of New York where she served for approximately six years. In 1997, President Clinton elevated Sotomayor to the Second Circuit. In filling out her Senate Judiciary Committee questionnaire, Judge Sotomayor acknowledged the real-world impact of judicial rulings. "Judges must be extraordinarily sensitive to the impact of their decisions and function within, and respectful of, the Constitution," she wrote. It took the Senate over a year to confirm her when Republicans delayed a vote. This in turn drew an accusation from Senator Patrick J. Leahy, now the Senate Judiciary Committee chairman, that they feared that President Clinton would try to elevate her to the Supreme Court. Senator Alfonse M. D'Amato, then a Republican Senator, and fellow New Yorker, eventually facilitated a vote, and she was confirmed 67 to 29 in October 1998. Among those voting in her favor was Senator Orrin Hatch of Utah, who remains a leading Republican on the Senate Judiciary Committee.

As a judge, she lectured at the University of Puerto Rico School of Law and taught at Columbia and New York University. For a judge, Sotomayor has been especially candid about how her personal experiences and background inform her decision-making, leading to some controversy. "Personal experiences affect the facts that judges choose to see," Judge Sotomayor said in 2001, in a lecture titled "A Latina Judge's Voice." "My hope is that I will take the good from my experiences and extrapolate them further into areas with which I am unfamiliar. I simply do not know exactly what that difference will be in my judging. But I accept there will be some based on my gender and my Latina heritage." "Each day on the bench I learn something new about the judicial process and about being a professional Latina woman in a world that sometimes looks at me with suspicion," she said. "I can and do aspire to be greater than the sum total of my experiences but I accept my limitations," Judge Sotomayor added. "I willingly accept that we who judge must not deny the differences resulting from experience and heritage, but attempt, as the Supreme Court suggests, continuously to judge when those opinions, sympathies and prejudices are appropriate."

Former clerks sing her praises as a demanding, but caring, boss whose personal experiences inform a vigorous commitment to legal fairness rooted in pragmatism. "She is a rule-bound pragmatist -- very geared toward determining what the right answer is and what the law dictates, but her general approach is, unsurprisingly, influenced by her unique background," says one former clerk. "She grew up in a situation of disadvantage, and was able, by virtue of the

system operating in such a fair way, to accomplish what she did. I think she sees the law as an instrument that can accomplish the same thing for other people, a system that, if administered fairly, can give everyone the fair break they deserve, regardless of who they are."

While on the Second Circuit, Judge Sotomayor has heard appeals in more than 3,000 cases, writing approximately 230 opinions. The Supreme Court reviewed five of those opinions, reversing three and affirming two, although it rejected her reasoning while accepting the outcome in one of those it upheld. One was a 5 to 4 decision in 2001, reversing Sotomayor's opinion in *Malesko v. Correctional Services Corporation*, 229 F.3d 374 (2d Cir. 2000), involving an inmate who sought to sue a private contractor operating a halfway house on behalf of the Bureau of Prisons over injuries he sustained. Sotomayor authored an opinion holding that he could bring suit, but a majority of the Court disagreed. *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001).

The second reversal, in 2005, was a unanimous decision reversing Sotomayor's opinion in *Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395 F.3d 25 (2d Cir. 2005), where Sotomayor and her colleagues held that a class action securities suit brought in state court by a broker-stockholder was not preempted by the 1998 Securities Litigation Uniform Standards Act. The Supreme Court reversed, stating that it "would be odd, to say the least" if the law contained the exception set forth in the Second Circuit's opinion. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71 (2006).

In an environmental case, discussed below, *Riverkeeper v. EPA*, 475 F.3d 83 (2d Cir. 2007), Sotomayor wrote that under the Clean Water Act, the Environmental Protection Agency could not use a cost-benefit analysis to determine the best technology available for drawing cooling water into power plants with minimal impact on aquatic life. This year, in a 6 to 3 decision, the Supreme Court held otherwise in *Entergy v. Riverkeeper*, 129 S.Ct. 1498 (2009).

Finally, on June 29, 2009, the Court reversed a Second Circuit *per curiam* opinion, which Sotomayor joined, in which New Haven firefighters alleged Title VII violations. *Ricci et al. v. Destefano et al.*, --- S. Ct. ----, No. 07-1428, slip op. at 1 (June 29, 2009). Given her fairly extensive tenure on the Second Circuit, it should come as no surprise that she has participated in a variety of interesting cases, some of which are summarized below.

ABORTION

Sotomayor has managed, for the most part, to steer clear of the firestorm that is abortion rights. She did, however, author the opinion in *Center for Reproductive Law and Policy v. Bush*, 304 F.3d 183 (2d Cir. 2002), dealing with abortion funding. The case involved a challenge to the Bush administration's policy prohibiting foreign organizations receiving U.S. funds from performing or supporting abortions. The plaintiff argued that the policy infringed upon First Amendment, due process and equal protection rights.

The Second Circuit, relying on a prior case that raised the same argument, rejected the First Amendment claim outright. As to the due process claim, Sotomayor concluded that the group lacked standing because they alleged harm to foreign organizations rather than themselves. She determined that they had "competitive advocate standing" for purposes of the equal protection claim, but they could not prevail on the claim, because under rational-basis review the government was free to favor the anti-abortion position over the pro-choice position with public funds.

FIRST AMENDMENT

Like her record on abortion, Sotomayor's opinions on First Amendment speech issues are similarly scarce. In *Pappas v. Giuliani*, 290 F.3d 143 (2d Cir. 2002), Sotomayor authored a dissent in a case where the New York City Police Department fired one of its employees for mailing racist materials. The employee had received mailings from certain charities seeking contributions and he responded by mailing back racist and bigoted materials. On appeal, the Second Circuit held that the NYPD could terminate the employee for his behavior without violating his free-speech rights.

Sotomayor dissented from the majority's decision to award summary judgment to the NYPD. She conceded that the speech was "patently offensive, hateful, and insulting," but after some analysis concluded that the employee's First Amendment rights should prevail. Sotomayor argued that Supreme Court precedent required the Court to consider not only the NYPD's mission and community relations, but also that the employee was neither a policymaker nor a cop on the street. She also emphasized that the employee's speech was anonymous and occurred away from the office on his own time. Specifically, she noted that the employee did not identify himself or connect himself to the police department. She sympathized with the police department's concerns about community race relations, but found this argument unavailing because the department decided to disclose the investigation's results. The majority, however, specifically addressed this argument and found it "seriously misguided as a policy matter" as it would encourage the non-disclosure of such incidents to the public. Ultimately, Sotomayor reasoned that the NYPD's concerns related to the incident were so attenuated from the department's effective functioning that they could not trump the employee's free speech rights.

IMMIGRATION

Like any major metropolitan area, courts in such jurisdictions confront a large volume of asylum cases. In *Jiang v. Bureau of Citizenship and Immigration Services*, 520 F.3d 132 (2d Cir. 2008), Sotomayor authored an opinion reversing the Board of Immigration Appeals' denial of an asylum application and remanding for further proceedings. Chao Qun Jiang worked for approximately ten months at a local family planning clinic in her village. On two occasions Jiang worked a night shift where she guarded women who family planning authorities captured and held in the clinic overnight to undergo pregnancy examinations or a family planning procedure. On the first shift, she guarded women who no longer had their required intrauterine devices in place in violation of family planning policies. On the second shift, she guarded three women, one of whom was scheduled to receive a forced abortion, and two others who were scheduled for IUD insertions.

The pregnant woman begged Jiang to let her escape, and Jiang ultimately decided to release all three women. Jiang testified that it was a crime for her to release the women, and she fled China to avoid punishment. The

BIA rejected her asylum application, concluding that Jiang was statutorily ineligible for asylum because she assisted in the persecution of others by guarding over individuals who were subjected to a coercive population control policy, including perhaps abortions and sterilizations. Jiang argued that her actions did not amount to assistance in the persecution of others and that she therefore was not subject to the persecutor bar. Sotomayor, writing for the Court, determined that reversal and remand was proper because the BIA had not yet articulated in a precedential decision its position regarding whether and under what conditions involuntary insertion of an IUD constitutes persecution, and because the BIA had taken inconsistent positions on the issue. She found the BIA's apparent arbitrariness unsettling, stating: "We find it troubling that, in the context of an application for asylum, the BIA concluded that forcible IUD insertion does not constitute persecution, but then applied the persecutor bar to an applicant based on a conclusion that forcible IUD insertion does constitute persecution because a period of detention preceded it."

ENVIRONMENTAL

As evidenced by the Eleventh Circuit's recent opinion in *Friends of the Everglades v. South Florida Water Management District*, No. 07-13829, 2009 WL 1545551, at *17 (11th Cir. June 4, 2009), some of the most far-reaching and direct-impact cases are in the environmental realm. In the environmental context, Judge Sotomayor authored the opinion in *Riverkeeper v. EPA*, 475 F.3d 83 (2d Cir. 2007), which the Supreme Court reversed in April 2009. The case involved a change to the EPA rule regarding cooling-water intake structures at power plants. The rule aimed to protect aquatic life that could be trapped against the intake structures or otherwise harmed by the structures. The Clean Water Act dictates that the intake structures employ the "best technology available," but fails to specify what factors the EPA should employ in making the best-technology-available determination. The Second Circuit held that the EPA could not engage in a cost-benefit analysis to determine the "best technology available," and could only consider cost to determine what technology the industry could reasonably undertake and whether the technology was cost-effective. The cost-effectiveness inquiry, the Court held, requires the EPA to deter-

mine whether the proposed technology is "a less expensive technology that achieves essentially the same results" as the best technology that the industry could undertake. As such, she reasoned, "assuming the EPA has determined that…a technology costs $100 to save between 99-101 fish" it could choose that technology over one "that costs $150 to save 100-103 fish" on cost-effectiveness grounds. She also held that the EPA could not consider restoration measures such as restocking fish to compensate for fish lost in an intake system when determining the best technology available for a particular power plant. The Supreme Court reversed in a 6 to 3 decision, holding that it was reasonable to conclude that the Clean Water Act's silence with regard to determining the best technology available "is meant to convey nothing more than a refusal to tie the agency's hands as to whether the cost-benefit analysis should be used, and if so to what degree."

PRIVACY & NATIONAL SECURITY

Sotomayor has also addressed the validity of statutes passed in response to heightened post-9/11 security concerns. In *Cassidy v. Chertoff*, 471 F.3d 67 (2d Cir. 2006), a group of ferry commuters sued the federal government and the Lake Champlain Transportation Company, among others, alleging that random, warrantless searches conducted by the ferry operator's employees, according to a Coast Guard-approved plan and pursuant to the Marine Transportation Security Act (MTSA), violated commuters' Fourth Amendment rights. In the wake of the September 11, 2001 terrorist attacks, Congress enacted the MTSA to detect and deter a potential "transportation security incident." 46 U.S.C. §70101(6).

Sotomayor acknowledged that, typically, the Fourth Amendment requires a finding of probable case before a search can take place. However, she relied on precedent allowing for suspicionless searches in those "limited set of circumstances" when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable. The plaintiffs argued that they had a full privacy interest in protecting their carry-on baggage and automobiles from random, suspicionless searches. Further, they argued that the searches conducted on the ferry's loading docks differed from searches the government conducts at inter-

national borders and traffic checkpoints because borders between countries -- unlike rural loading docks -- are sensitive locations that implicate a diminished expectation of privacy.

Sotomayor, on behalf of the Court, held that the plaintiffs had an "undiminished privacy interest" in their carry-on luggage, but a diminished privacy interest in their vehicles. The Court did not address the plaintiffs' expectation of privacy in their automobile trunks. Ultimately, the Court held that the government had demonstrated the requisite "special need" to justify the searches and that the government's determination of "high risk" deserved deference. She reasoned: "Although the plaintiffs may be correct that Lake Champlain ferries are a less obvious terrorist target than ferries in, for example, New York City or Los Angeles, [precedent in the airline context] make it clear that the government, in its attempt to counteract the threat of terrorism, need not show that every airport or every ferry terminal is threatened by terrorism in order to implement a nationwide security policy that includes suspicionless searches."

FEDERAL HABEAS

Appellate and federal habeas aficionados would find *Campusano v. United States*, 442 F.3d 770 (2d Cir. 2006) of some interest. In *Campusano*, Sotomayor addressed whether an attorney who fails to file a notice of appeal requested by his client is constitutionally ineffective when the client waived appeal in his plea agreement. Sotomayor, writing for the Court, held that even after a waiver, a lawyer who believes the requested appeal would be frivolous is bound to file the notice of appeal and submit a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). When counsel fails to do so, it held that for purposes of habeas review it would presume prejudice and the defendant would be entitled to a direct appeal without any showing on collateral review that his appeal will likely have merit. Perceived inefficiencies against her position did not persuade Sotomayor. "A defendant who executes a waiver may sign away the right to appeal, but he or she does not sign away the right to the effective assistance of counsel…We decline to adopt a rule that would allow courts to review hypothetical appeals as a substitute for real appeals that have been blocked by attorney error. As the Supreme Court has stated, '[t]hose whose right to appeal has been frustrated should be treated exactly like any other appellants; they should not be given an additional hurdle to clear just because their rights were violated at some earlier stage in the proceedings.'"

STATUTORY CONSTRUCTION

Many lawyers consider "statutory construction" on par with counting sheep, however, such cases are revealing because their outcome usually turns on what statutory-construction principles the judge finds most relevant. In *Gottlieb v. Carnival Corporation*, 436 F.3d 335 (2d Cir. 2006), Sotomayor drafted an opinion that relied extensively on statutory-construction principles. The issue was whether federal courts had diversity jurisdiction over private causes of action brought under the Telephone Consumer Protection Act, 47 U.S.C. §227. Section 227(b)(3) of the TCPA provides that "[a] person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State" an action for injunctive relief or damages. The plaintiff was a New York travel agent who, between early 2001 and 2004, received over 1000 unsolicited advertisements from Florida-based Carnival Corporation via facsimile. The Second Circuit had addressed the issue of TCPA federal-question jurisdiction in *Foxhall Realty Law Offices, Inc. v. Telecommunications Premi-*

um Services, Ltd., 156 F.3d 432 (2d Cir. 1998), and held that §227(b)(3) did not provide for federal-question jurisdiction. The issue in *Gottlieb* was whether the Court's reasoning in *Foxhall* also applied to diversity jurisdiction. The Court limited *Foxhall* to federal-question jurisdiction and held that §227(b)(3) did not foreclose diversity jurisdiction over TCPA causes of action. In reaching that holding, Sotomayor first concluded that §227(b)(3) was ambiguous and invoked two canons of statutory construction in her analysis. First, she determined that when considering the meaning of the statutory provision, the text should be placed in the context of the entire statutory structure. Second, Sotomayor deemed useful the background principles of law in effect at the time Congress passed the statute.

In analyzing the TCPA's statutory structure, the Court found it "significant" that in §227(f)(2), Congress vested "exclusive jurisdiction" in the federal courts over actions brought by state attorneys general on behalf of state residents. Sotomayor reasoned that §227(f)(2)'s explicit investiture of "exclusive jurisdiction" in the federal courts, and the absence of that language in §227(b)(3), meant that Congress did not similarly vest categorical, "exclusive" jurisdiction in state courts for private TCPA claims, and "therefore it did not divest federal courts of both federal question and diversity jurisdiction." She found Congress' failure to provide explicitly for concurrent jurisdiction in §227(b)(3) inapposite because "when used in or to describe federal statutes, the term 'concurrent jurisdiction' refers to state-court jurisdiction over cases arising under federal law." As for the background principles in place at the time Congress passed the TCPA, she relied on that principle providing that Congress legislates against the back-drop of existing jurisdictional rules that apply unless Congress specifies otherwise. She considered it the "better course" to proceed under the rule that the diversity-jurisdiction statute applies to all causes of action, unless Congress expresses a clear intent to the contrary. Sotomayor reasoned that the "usual admonition" that the diversity statute must be strictly construed against intrusion on state courts' right to decide their own controversies is "not relevant when a federally-created cause of action is at issue."

TITLE VII/DISCRIMINATION

The case that is garnering the most attention among pundits is *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008), which was pending before the Supreme Court at the time of the nomination. In 2003, the fire department in New Haven, Connecticut sought to fill captain and lieutenant positions. Because its union contract required promotions to be based upon examinations, the city contracted with an outside vendor to develop exams, which were administered to qualifying applicants. Pursuant to a city regulation known as the "rule of three", once test results are certified, the Department must promote from the group of applicants achieving the top three scores. Immediate application of

the "rule of three" to these exams would not have allowed for the promotion of any black firefighters. Black applicants' pass rate on the lieutenant exam was approximately half of the rate for white applicants. Because of these outcomes, the city's independent exam review board declined to certify the results, after hearing testimony that the results showed an "adverse impact" on black applicants. A group of white firefighters, including one Hispanic, filed suit against the city and its officials, alleging that the city's action violated Title VII and the Equal Protection Clause. The district court granted the city's summary-judgment motion, agreeing that the city did not need to certify the results because doing so could subject it to litigation for violating Title VII's disparate-impact prohibition.

On appeal, the Second Circuit affirmed the district court's opinion in a one page *per curiam* opinion that praised the district court for a "thorough, thoughtful, and well-reasoned opinion." It concluded that the city could not be held liable for its failure to certify the test results because "the Board, in refusing to validate the exams, was simply trying to fulfill its obligations under Title VII when confronted with test results that had a disproportionate racial impact." The Court, however, was not entirely dismissive of the plaintiffs' concerns noting that it was "not unsympathetic to the plaintiffs' expression of frustration." Three days later, the Second Circuit voted 7 to 6 to deny rehearing *en banc*, *Ricci v. DeStefano*, 530 F.3d 88 (2d Cir. 2008). The decision produced a dissenting opinion that criticized the panel's decision and the *en banc* denial as well as a concurring opinion that responded mainly to the dissenters' arguments.

The concurring opinion, which Sotomayor joined, reasoned that the district court's order followed Second Circuit precedent "clearly establishing" that a public employer who takes facially neutral, albeit race conscious, action to avoid liability when faced with a prima facie case of disparate-impact under Title VII, does not violate Title VII or the Equal Protection Clause. Sotomayor and her colleagues reasoned that while the City of New Haven acted out of a concern that certifying the exam results would have an adverse impact on minority candidates, its decision not to certify any of the exams was facially race-neutral: avoiding potential Title VII liability. The irony, of course, is that in attempting to avoid Title VII liability the city was nevertheless sued under Title VII.

Judge Cabranes—one of Sotomayor's long-time mentors—authored the dissent. Cabranes articulated the "core issue presented" as "the scope of a municipal employer's authority to disregard examination results based solely on the race of the successful applicants." He also asked whether such a practice constituted an unconstitutional racial quota or set-aside. It was the importance of these issues that led Cabranes to criticize the *en banc* denial, stating that "[t]he use of *per curiam* opinions…is normally reserved for cases that present straight-forward questions that do not require explanation or elaboration by the Court…The questions in this appeal cannot be classified as such, as they are indisputably complex and far from well-settled." He argued that the *per curiam* opinion's wholesale adoption of the district court's opinion "converted a lengthy, unpublished district court opinion, grappling with significant constitutional and statutory claims of first impression, into the law of [the] Circuit." The dissent drew a distinction between neutral administration and scoring of a race conscious employment exam, which is generally acceptable, and the neutral administration and scoring of such an exam that is followed by a race-based treatment of the exam results, which it viewed as an issue of first impression in the Circuit. The Supreme Court apparently found this distinction compelling because it granted certiorari and heard arguments on April 22, 2009.

On June 29, 2009, the U.S. Supreme Court reversed the Second Circuit panel, but did not strike down the Title VII statutory provision at issue. *Ricci et al. v. Destefano et al.*, --- S. Ct. ----, No. 07-1428, slip op. at 1 (June 29, 2009). The Court ruled that the tests at issue in the case were legally valid. It also ruled that the city failed to show that there were any alternative tests that could have had less of a disparate impact on minority test-takers. Further, it determined that the city failed to show a genuine fear that minority firefighters would sue the city if it gave most of the promotions to the plaintiff firefighters. The Court's logic also suggests that, even if New Haven uses the test results to promote the plaintiff firefighters for most or all of any open slots, minority firefighters will have no legal recourse because the city can claim that it had to make promotions to avoid violating Title VII's protection for the whites who scored best. The Court's opinion applies to Title VII cases a concept borrowed from race cases under the Constitution: that using a race-based selection criterion will be allowed only if it is shown, by "a strong basis in evidence," to be clearly necessary to remedy past racial discrimination.

This standard will require the employer to accept the results and implement them unless it can offer "objective" and "strong" evidence that the test was crafted to work against minorities, and unless it can offer "objective" and "strong" evidence that implementing the results will almost certainly lead to a lawsuit by minorities that the city would most likely lose. In *Ricci*, the exam at issue accounted for 60% of the promotion determination. The general consensus, however, is that the Court's decision will have limited "real world" effect because, at present, few employers promote based strictly or so heavily on exam performance.

CONCLUSION

In July, the Senate Judiciary Committee hearings on Judge Sotomayor concluded, and as we go to print, it is expected that she will soon be confirmed to the Court. Nevertheless, at this time, the committee must still decide whether to send the nomination to the full chamber, which will make the final confirmation decision in early August. President Obama wants Sotomayor confirmed before the Senate goes on its August break to ensure that Sotomayor, if confirmed, can be seated on the Supreme Court when it begins its new session in October. Some of Sotomayor's comments prior to her nomination, however, are still giving Republicans ammunition with which to rile their base. One of this author's favorite jurists was particularly fond of quoting Betty Davis' famous line from "All About Eve" (1950), which may foreshadow the remainder of Sotomayor's confirmation process: "Fasten your seatbelts, it's going to be a bumpy night!"

Armando Rosquete *currently serves as an Assistant U.S. Attorney for the Southern District of Florida in the Narcotics Section. Any views expressed in this article do not constitute the views of the U.S. Attorney's Office or the Department of Justice.*

[PICTORIAL]

CABA CLE: Condo Associations

The Colonnade Hotel • May 21, 2009

the interview

STEVE ZACK

being first

Interview by:
Roland Sánchez-Medina, Jr.
Augusto R. López

Editing and layout by:
Manuel L. Crespo, Jr.

RSM- I think the first thing that we would like to know is a little bit of biographical info: where you were born, a little bit of your family history; how you ended up in Miami; in other words, some general background.

SZ- My mother was born and lived in Cuba. She lived in Cuba until she was 17 yrs old and left to attend school in the States where she met my father. In 1945 my mother and Ricky Ricardo were the only 2 Cubans in America! They got married in 1947. I was born in Detroit Michigan. My father wanted his kids (I have a brother and sister) to have their place of birth be the United States. When I was 2 months old, we went back to Cuba. I lived there until I was 14 when we returned to Miami in 1961. My parents decided to leave the country after our family business' factories were 'intervened'. We went down to the airport, to the notorious "fishbowl," along with everybody else. Our names were called and we were taken away from the airport and taken to the 'G2' headquarters. The 'G2' is equivalent to Russian KGB and we were held overnight incommunicado, separated from each other, and for the first time there, I learned about what would later be explained to me as "habeas corpus." I didn't understand what that term meant, but I knew what was happening to me was wrong and I didn't know if I was going to see my family ever again. It was that evening that I decided to be a lawyer. The complete sense of powerlessness generates a desire to know what your rights are and to defend yourself.

AL- And obviously you were quite succesful in the law, becoming not only the first Hispanic President of The Florida Bar, but also one of the youngest.

SZ- It was kind of strange with that situation. When I was 40 years old I had been on the Florida Bar Board of Governors for ten years of my life. So, really, probably half of my life and a quarter of my adult life, and then I ran for election and I was successful and truly enjoyed that experience. I had been president of the State Young Lawyers previously so it was something that felt like a natural progression. When I got through being President of the Florida Bar I started being involved in ABA activities mostly at the behest of Chesterfield Smith. I later was elected president of the National Conference of Bar Presidents which is the all state and local bar associations in the country and after I did that I ran for the Board of Governors of the ABA. I then ran for the chair of the House of Delegates, served for two years in that position and ran for president and will be actually put in position for president-elect on August 1st of this year and later president. People very often ask me, "Doesn't it take up a lot of time, how do you do it, to do what you do and have to practice?" To me it's almost a strange question because I really like lawyers for whatever reason and enjoy spending my free time with colleagues. So for me it's a natural part of my life. I should have been investing in real estate in Miami Beach; it would've been a better return, but I've enjoyed it and I've been blessed. I wouldn't change a thing.

AL- You've served as the first Hispanic Counsel to the Governor, the first Hispanic Florida Bar President, and now the first Hispanic ABA President-elect. I was wondering, in light of the recent Sotomayor nomination, which I presume you can't comment on specifically, would you give us your thoughts on the importance of being "the first", in your case Hispanic, but the first African-American, the first Jew, the first woman, in other words, the trailblazer.

SZ- I think you have an obligation to break down as many barriers in your lifetime as you can. To do that, I also look at President Obama, the first African-American president. People said his election was an impossibility. But once it becomes reality, the possibility for others to follow is in place. There's a statement that says, "Once the mind is stretched by a new idea it never goes back to its old shape." I think you can say the same about society. Once there is no limitation or glass ceiling for anybody in our society, that is a good day for us all.

RSM- If you had to pinpoint one thing about you, what is it that really lead you to take these leadership positions whether it was the The Florida BAR, the ABA, is it the sense of doing good?

SZ- Well I think it has something to do with my first senior partner which was Bill Freites. He was very active with his community. He helped established the Public Health Trust, for example. Bill always said to me that the practice of law by itself is not enough to achieve your full potential. I still love trying cases to this very day, but if that was all I did, I believe that I wouldn't have the enjoyment out of life that I received. When I talk to young lawyers today and see burn-out occurring in the first five years of their practice, I believe it's because that they don't do other things. You need to do other things than just go to the library and read cases and talk to clients; you need to participate in your communities.

AL- You've obviously been very involved in politics right from the beginning of your legal career, working alongside some pretty big players in Florida politics, Senator Claude Pepper, Governor Lawton Chiles, and Senator Bob Graham, to name a few. So I guess most folks would assume that you pursued the opportunity to represent Al Gore during the 2000 election debacle; or it would have certainly attracted you, when it was first proposed, but that doesn't seem to have been the case. Could you let us know how it actually played out?

SZ- Well certainly it was one the great privileges of my legal career to have represented the Vice President at the trial. However, it was really in spite of myself. I had been asked to take part in what was going to be "something" because no one knew what to call it. On election evening, I got a call from Tennessee and declined the opportunity because, frankly, I was involved in a number of trials and didn't think I had time.

AL- I don't know if you want to be quoted on this, but you mentioned it earlier, and I think our readers would appreciate it. What was the exact line?

SZ- I got the call from the Vice President and the exact quote was, "Steve it seems like we are going to need a couple lawyers in Florida and being a Democrat for many years I know that you can translate that as meaning ,'We have no money and we don't know what we are going to do.'" So in light of those considerations and my own work load I gratefully and politely took a pass.

AL- So after you turned down a personal request from the Vice President of the United States how did it happen that you ultimatley came to represent him?

SZ- Actually what happened is that I had gone to school with Judge Donald Middlebrooks and I wanted to see how the hearing was going to be conducted. A number of my friends were part of that hearing and this was here in Miami-Dade County. As I walked in, I got the last seat that happened to be next to Kendall Coffey. They closed the door and the rest of the people had to hear it on the monitors. But after the hearing Kendall said that they had been unsuccessful the day before trying to get the canvassing board to continue counting the votes. He asked me to argue in favor of continued counting, and I told him I'd love to but I didn't have time. He said "It's only going to take 15 minutes, we just need to load you up and send you in," and I said, "Of course Kendall, I always have 15 minutes," and of course two months later, I walk back to my office after being trial counsel with David Boies in Tallahassee, and cross-examining the experts in voting rights and the machine experts.

AL- How did you and David Boies end up working together on the case?

SZ- David is actually a good friend of mine whom I had met many years earlier and had done some legal work with. He saw me because the argument to the canvassing committee went live around the world. There were about 150 television cameras in the little room there and he saw me argue the request to begin the recount. He called me and said he had been hired by the Democratic Party that was in Tallahassee and they were going to try the case up in Tallahassee and asked if I would come up there. I said it would be my pleasure to work with him in any capacity he thought appropriate. He asked me to deal with the machines and I had never seen a voting machine from the inside; we had no experts. The Republicans had hired experts and you name it. I flew back down here to take one of these machines apart to see how it works and hire some experts of our own. I examined Mr. Ahmman, who was a designer of, and expert on, the Vote-a-Matic, and asked him, "Have you ever asked for a patent of any other product?", (because he was the owner of the patent for the Vote-a Matic) and he said, "Yes, I tried to patent a stylus that was a more efficient stylus so there would be no chads." I thought that was interesting so I went home after the deposition and I'm thinking to myself that maybe I ought to see if there is anything else out there, so I called my office and asked an associate to go online and see if there were any more patents for Mr. Ahmann. I will tell you that I had never been more worried about cross examining a witness. Ahmann looked just like Charleton Heston, it was like cross examining Moses! He was a soft-spoken, elegant, handsome fellow and I was thinking to myself, "My God what am I going to say?" Well, I'm standing up to cross-examine him, and someone puts a white manilla folder next to me. It could still be sitting there to this day because it had nothing on it as to what it was. I don't even know how the clerk got the information to me, but I opened it and there was a patent proposal from Mr. Ahmann for a new voting machine! As I'm walking to the podium I'm trying to read it, and it was all technical engineering terms, but when I got to the fifth page there was a notation that read, "There is a defect in our existing Vote-a-Matic and on a close vote you need to have a hand recount." And that's what you had on the front page of *The New York Times*. That was my question.

AL- And that wording is in his patent?

SZ- Yeah, in his patent, so I asked a couple questions and the other Republican lawyer held back because they hadn't seen it. And of course after he had admitted the defect, there were only about six questions in my cross. I didn't want to ask him any more questions because he had admitted that they needed a hand recount, which really, at that point, made us think the case was over. Of course we were wrong, but it was an amazing experience.

AL- Justice Scalia seems to have contempt toward those who disagree with him with respect to the *Bush v. Gore* decision. What is your take on it?

SZ- I think that if I were a Supreme Court Justice that spent all my time writing opinions that would say that voting is a uniquely state activity and then wrote an opinion like *Bush v. Gore*, and at the end of the opinion it said that it really doesn't have any precedential value, I might have to be prepared that history will judge that opinion very harshly, with good reason.

RSM- In terms of your practice, it seems like you're doing a lot, but in terms of actual courtroom work representing clients, what kind of stuff are you doing?

SZ- One of my most most recent cases ended up in the U.S Supreme Court. That's a case involving

copyrights. I represented National Geographic in a case where the issue was whether the digital republication of the magazine constitutes a new publication, or whether it is an existing publication, and if it is a new publication should you have to pay for the rights and so forth. It's a fascinating area. We always look at cutting edge type issues. That's the kind of case I'm working on today.

RSM- You mention a lot of people of profound character, Claude Pepper, Chesterfield Smith, etc. Are there 2 or 3 people that you would say have had a really a significant impact on your life?

SZ- Yes. Chesterfield Smith surely had a profound influence in my life, in my bar life, especially. Chesterfield Smith was, as Tom Brokaw called him when he wrote *The Greatest Generation*, "America's Lawyer." When Chesterfield was president of the ABA, he was the first public official who called for the impeachment of Nixon. He was a great man, truly believing that no man is above the law, including the President of the United States. It was one of the great moments in ABA history. You left every meeting with him excited with what you were doing with the law. I was once in a room with Hilary Clinton, Rosemary Barkett, Janet Reno and Justice Ruth Bader Ginsberg and each one of them said how Chesterfield helped them get where they were.

AL- I was wondering, given that you chaired the House of Delegates of the ABA, if maybe you can tell me how political the organization gets in terms of what policies it chooses to take on or to make public. For example, in the Spring 2009 issue of *CABA Briefs*, we ran a piece on Judge Cindy Lederman's decision overturning the ban on gay adoption, and one of the ancillary issues we examined was the effect of The Florida Bar's Family Law Section's decision to submit an *amicus* brief in support of the decision to the Third District Court of Appeals. So I'm wondering is an issue like gay adoption, for example, the sort of thing that's too much of a "hot potato'" for the ABA?

SZ- Well, the ABA has dealt with a lot of "hot potatoes." But let me take what you just said as an example. When I was president of the Florida Bar in 1988, the Florida Bar Board of Governors would have to authorize anything that the sections did. If they went to the legislature they had to get the Florida Bar Board of Governors' authorization. At that time I was successful in passing a new policy

From left: Luis Suárez, Roland Sánchez-Medina, Jr., Steve Zack, Augusto R. López

that gave the sections complete autonomy to go and lobby directly on behalf of the section of the Florida Bar. Since you can have a Business Law section and a Litigation Section with different points of view on tort reform, for example, unless we allowed the sections to be a resource to legislature, what was going to happen? We would have a spin-off organizations like the Academy of Florida Trial Lawyers, the corresponding defense groups, etc. Therefore, it depends on if something is a procedural issue or a legal issue. I would say the Florida Bar and the ABA shouldn't focus on the non-procedural issues because those should be lobbied by the plaintiff and defense organizations. The ABA should be worried about ethics and education and so forth. As a matter of fact, there was a very difficult period within the ABA concerning the abortion issue and some people stopped being members. The ABA's position now is we what we call the "Germanous Doctrine": germane to the practice of law before it comes to the House of Delegates --- not germane to the practice of law, then we might question it.

AL- Who makes the call? Is it a simple majority of the full membership of the House of Delegates?

SZ- Yes.

RSM- You become President-elect in August 2009?

SZ- Yes, August 1st.

RSM- It's a short while before you become president. Can you identify some of your objectives?

SZ- Yes. Civic education is going to be one of my objectives. The Cuban constitution before Fidel came to power was exactly what the United States Constitution is today. Constitutions are meaningless unless people understand what they are. We need to ensure that people accept those obligations, and understand their rights as fundamental. Eighty percent of high school students last year thought that the three branches of government where Democratic, Republican, and Independent. I also want there to be a commission on Hispanic legal rights. There has not been such a commission in the United Sates. Hispanics are the largest minority in this country and growing everyday. There are issues of immigration, criminal law, healthcare law, voting rights, and they all need to be viewed by a commission that can get their arms around these issues and give traction to them. I will also be looking at the international footprint of the ABA and the role it plays around the world in establishing the rule of law as a fundamental principle.

The Color* of Justice.

***gender, ethnicity, or sexual orientation**

Illustration by
Augusto R. López

Diversity, Identity Politics and Categorical Representation on the Bench.

By **Augusto R. López**

According to some Supreme Court observers, the lone African-American justice on the U.S. Supreme Court has decided that racism in America is dead, as are the vestiges of racism. The basis for this contention is Justice Clarence Thomas' dissenting opinion in the recent case of *Northwest Austin Municipal Utility District Number One v. Holder, Attorney General, et al.*, 557 U.S. _____ (2009), a case involving the landmark Voting Rights Act of 1965, and specifically Section 5 of same, which provides that if one of 16 states designated by the statute, or one of its subparts (county, district, municipality, etc.), desires to change its voting rules, it must seek approval from the federal government before doing so.[1] The purpose of Section 5 was to avoid the pernicious result of having a case-by-case factual analysis each time an affected polity changed its voting rules; prior to the Act, whenever a political sub-division was found to have enacted rules violative of the Fifteenth Amendment, it simply promulgated new rules that achieved the same discriminatory result, forcing the victims of discrimination to challenge the constitutionality of each new set of rules over and over again.

In the *Northwest Austin* case, a small political sub-division in Texas applied to the relevant federal authority to grant it authority to modify its voting rules pursuant to Section 5. The District Court rejected the sub-division's application, claiming that it had no standing because it was not one of the statutorily defined polities qualified to make such an application under the Voting Rights Act. The sub-division appealed, and once the issue was before the Supreme Court, it argued that either it did have standing under the Section, or in the alternative, that Section 5 was unconstitutional.

The *Northwest Austin* opinion, authored by Chief Justice John Roberts and joined by all of the remaining justices on the Court, found that indeed the sub-division did have the requisite standing, and thus the Court refrained from finding that Section 5 was unconstitutional. On this latter issue, the majority refused to go as far as Thomas would have liked, and so he dissented, arguing that Section 5 was unconstitutional and minimizing the current state of voter discrimination by referring to the mere "handful of examples cited by the District Court" as "discrete and isolated incidents of interference with the right to vote".[2] In Thomas' view, "the violence, intimidation, and subterfuge that led Congress to pass Section 5 and this Court to uphold it no longer remains".[3]

Setting aside the substance of the *Northwest Austin* decision (and that of Thomas' dissent), the circumstances of Thomas' opinion prove instructive for another reason: the single African-American justice on the U.S. Supreme court has (once again) made an argument regarding racial discrimination in America that most African-Americans in this country likely do not support. In fact,

Diversity, Identity Politics and Categorical Representation on the Bench.

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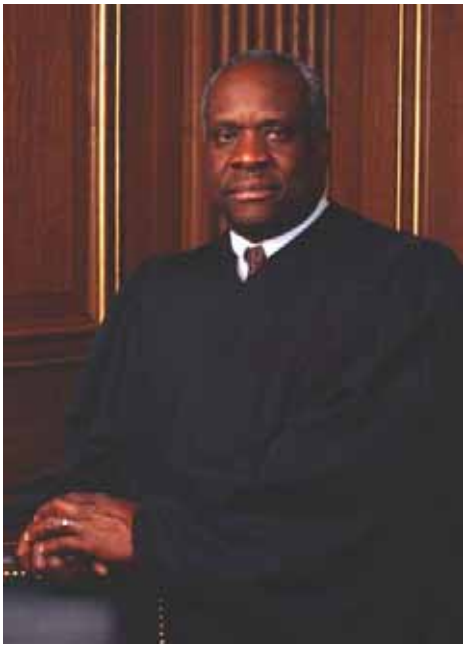
even though as drafted by Roberts, the majority opinion suggests that some members of the Court were inclined to agree with Thomas, not a single one of the remaining justices ultimately joined Thomas in his dissent.[4]

The irony of course is that to many observers, it is Thomas himself who personifies the cynical bastardization of efforts aimed at curbing racial discrimination in America, such as affirmative action and other diversity initiatives. Nominated to the Court as a sop to the most conservative elements of the Republican Party, Thomas was chosen not *despite* the color of his skin but precisely *because* of it, for purposes of filling what unfortunately was perceived at the time by many as "the black seat" on the U.S. Supreme Court. In sum, the circumstances surrounding his nomination are the very epitome of identity politics at their worst, and the man himself is a living rebuke to the notion of categorical representation.



JUSTICE CLARENCE THOMAS

IDENTITY POLITICS

The issue of identity politics and the propriety of categorical representation on the bench are once again in the news because of the nomination to the U.S. Supreme Court of Judge Sonia Sotomayor -- the first Hispanic nominated to Court -- by President Barack Obama -- the first African-American President of the United States.[5] If "identity politics" can be defined as making political decisions based on, among other things, considerations of race, gender, ethnicity or sexual orientation, then it seems clear that the choice of Judge Sotomayor by Mr. Obama was indeed an example of identity politics, albeit one no different than that practiced by several of Mr. Obama's Democratic as well as Republican predecessors with respect to four of their own Supreme Court nominees.[6] Mr. Obama vetted nine candidates to replace outgoing Justice Souter, only one of which was a white man, and of the four finalists ultimately considered, all four were women. Thus, Mr. Obama seems to have purposefully taken gender -- and in the case of Judge Sotomayor, ethnicity -- into consideration when choosing his first nominee to the U.S. Supreme Court.[7]

THE CONSERVATIVE RESPONSE

For his sins, Mr. Obama has come under considerable criticism, some reasoned, some preposterous, and mostly from the conservative side of the political spectrum.

For example, radio talk-show host Rush Limbaugh and former House Speaker Newt Gingrich, in response to the now famous comment she made during a 2001 speech that "a wise Latina woman with the richness of her experience would more often than not reach a better conclusion than a white male who hasn't lived that life," immediately branded Judge Sotomayor a "racist".

As noted by *The New York Times* editorial board, Judge Sotomayor in that speech "was pointing out that throughout history even esteemed white male justices like Oliver Wendell Holmes voted to uphold race and sex discrimination," and that in such instances, a person with a different life experience than that of a white man in America

might have reached a different conclusion. While Mr. Gingrich has since attempted to back-pedal from his initial comments, Limbaugh, rather than take the point, went even further, proclaiming that he would be sending Sotomayor and the other members of Belizean Grove -- an all female club created as an alternative to the 130-year-old, all male Bohemian Grove – vacuum cleaners to help them clean up after their meetings, a comment which some may consider to have *racist* as well as *sexist* overtones given the prevalent stereotype in this country of Hispanic women as maids and housekeepers.[8]

Not to be outdone, former Republican congressman, Tom Tancredo, also joined the chorus, viciously criticizing Sotomayor's membership in the National Council of La Raza – the largest non-profit, non-partisan Hispanic advocacy group in the U.S. – by claiming that it was a "Latino K.K.K." Florida residents will recall that this is the same Tom Tancredo who once referred to majority Hispanic Miami as "a third world country."

CATEGORICAL REPRESENTATION

A more thoughtful critique of Mr. Obama's nominee was proffered by conservative commentator George Will, who in his columns as well as his television appearances, loudly bemoaned the fact that the nomination of Sotomayor represents the worst sort of identity politics, one which he argues is based on the unwavering, "liberal" belief in categorical representation. Categorical representation is the notion that only someone who shares the same physical attributes, cultural experiences, or sexual preferences as a certain group of people can ever truly represent, understand or empathize with that group. As Will sees it, progressives inappropriately take into account race, gender, ethnicity and sexual orientation when making political decisions because of a desire to be inclusive, a misguided desire precisely because it is informed by categorical representation.

In his critique of categorical representation, Will has a valid point. As noted above, one need only look at the case of Justice Clarence Thomas to appreciate that the color of one's skin, in this case, does not necessarily guarantee an affinity for the prevalent ideology shared by the majority of individuals who possess that same skin color. This may seem an obvious point given that members of American minority groups are not, and have never been, monolithic in their thinking, yet far too many well-intentioned individuals stress the value of diversity *for diversity's sake* without giving due weight to other variables such as ideology and beliefs, and at times, even experience or qualifications.

This is all the more corrosive in the context of judicial elections where, in the case of the average voter, categorical representation is too often manifested in the form of tribalism: "I know nothing about these two candidates but rather than refrain from casting an ill-informed vote, I will vote for the candidate who is 'one of us'" -- the white candidate, the black candidate, the Hispanic candidate, the female candidate, the Jewish candidate, etc. Practiced at its most extreme, this means that some voters cast their vote *without even knowing what a candidate looks like*, much less what he or she stands for, and thus vote strictly on whatever conclusions they draw about a candidate's race, ethnicity or gender based exclusively on the candidate's *name* as it appears on the ballot (which they typically see for the first time at the polling station).[9] This is probably not the ideal way for judges to be seated.

Whether through selection or election, the composition of the judiciary should arguably not be influenced by considerations of categorical representation to the exclusion of other, perhaps more important, variables. Choosing an individual *exclusively* based on

a physical attribute related to race, ethnicity, gender or sexual orientation offers no guarantee of what sort of judge that individual will make once seated, or what will inform his or her thinking when rendering opinions. If a black or Hispanic woman were concerned with upholding affirmative action programs and diversity initiatives, for example, she might better be served supporting a judicial candidate with the ideology and beliefs of a William Brennan, a white man, rather than adhering to the dictates of categorical representation and supporting a candidate with her same skin pigmentation, such as a Clarence Thomas or a Miguel Estrada, respectively. Neither race, ethnicity, gender nor sexual orientation are a proxy for diversity of thought, and none of these descriptive characteristics on their own can predict how a judge will render decisions.

Racist!

Latina K.K.K.

Reverse racist!

I'm gonna send her a vacuum cleaner!

THE VALUE OF DIVERSITY

This is not to say that diversity should not play a role in decisions involving the judiciary. Even if diversity for diversity's sake is not a worthwhile goal and likely does a disservice to the bench, Will's concerns about identity politics and categorical representation in the case of Judge Sotomayor ring hollow in light of the fact that of the 110 individuals who have served on the U.S. Supreme Court throughout its illustrious, 220 year history, only *four* were not white males. For over two centuries, the powers that be – the white, heterosexual men that have held the seats of power in America since the country was founded -- have freely and consistently exercised identity politics and categorical representation *in their own favor* to the exclusion of all other races, ethnic groups, women and homosexuals.

Thus, placed in the proper historical context, the outcry over Mr. Obama's decision to nominate Judge Sotomayor based on, among other things, her identity as a woman as well as a Hispanic, might be correctly characterized as a case of "methinks thou doth protest too much." Not only is Judge Sotomayor an exceptionally qualified jurist with more experience serving on the bench than any current Supreme Court justice had when they faced the Senate Judiciary Committee during their own confirmation hearings, but she is indeed a wise Latina woman who brings with her -- as every other justice has before her -- political views and philosophical orientations informed by the breadth of her experience as a human being on this planet. At his own confirmation hearing, Justice Samuel Alito, an American of Italian descent, acknowledged the influence that personal experience may have over a jurist testifying that, "When I get a case about discrimination, I have to think about people in my own family who suffered discrimination because of their ethnic background or because of religion or because of gender. And I do take that into account." And just as the overwhelming majority of justices who preceded her brought with them a world view shaped by their experience as white men in America -- a condition which generally speaking is, at worst, one that is free of discrimination and preju-

dice, or at best, one of opportunity and preferential treatment -- Judge Sotomayor will assuredly bring with her to the Supreme Court a unique perspective shaped by her experience as a Puerto Rican woman growing up in the United States, a reality that is unfortunately quite discomfiting to too many people.

THE REAL-WORLD EFFECTS OF DIVERSITY ON THE BENCH

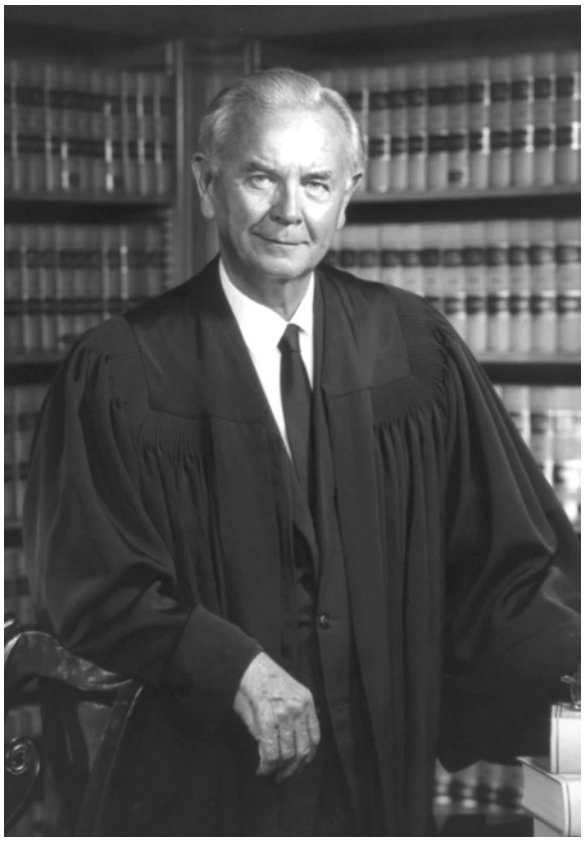
Such a unique perspective, when considered in conjunction with other variables such as experience, qualifications, and judicial philosophy, can be a testament to the benefits of diversity, particularly in the context of real-world decision making on the bench. In the case of gender, for example, "a study of federal appeals court judges by three university researchers shows that the gender of judges makes no difference in the way they vote most of the time. But in sex discrimination cases, [where the plaintiffs are overwhelmingly women], female judges were 10 percent more likely to rule for the plaintiff. More intriguingly, when men and women decided such cases together, the men were 15 percent more likely to rule for the plaintiffs than when they made decisions with only men."[10]

THE RIGHT RESPONDS TO THE SOTOMAYOR NOMINATION

Consistent with these findings, Justice Ruth Bader Ginsburg recently explained in an interview published in *The New York Times Magazine*, that the presence of female judges on a court reviewing sexual discrimination cases would have a definitive impact on rulings "because the women will relate to their own experiences."[11] Presumably, this would also apply in cases where gender sensitivity were similarly an issue. For instance, in the Supreme Court case of *Safford Unified School District #1, et al. v. Redding*, 557 U.S. _____ (2009), an 8-1 decision rendered on June 25, 2009, the Court ruled that school officials violated an Arizona teenager's rights by strip-searching her for prescription-strength ibuprofen, holding that U.S. educators cannot force children to remove their clothing unless student safety is at risk. Subtly commenting on the possible influence that her insight as the only female justice on the Court might have had on the other justices, Justice Ginsburg observed, "I think it makes people stop and think, 'Maybe a 13-year-old

girl is different from a 13-year-old boy in terms of how humiliating it is to be undressed.' I think many of the male justices first thought of their own reaction. It came out in the various questions. You change your clothes in the gym, what's the big deal?"[12] Never one to disappoint, the lone dissenter in *Safford Unified* was again none other than the sole African-American on the Court, Justice Thomas.

Extrapolating from the findings involving the influence of gender on judicial decision-making, one can reasonably conclude that, as with female judges, judges who are members of other historically discriminated minority groups, by virtue of their unique insight, are likely to have both a greater appreciation for cases involving aggrieved members of that group as well as a heightened ability to influence their associates on the bench who are not members of the group. Justice Sandra Day O'Connor, in her eulogy to Justice Thurgood Marshall, the first black justice of the Supreme Court and her friend and colleague for over 10 years, seemed to acknowledge as much when she spoke about how his stories "would, by and by, perhaps change the way I see the world."[13] Similarly, Justice Anthony Kennedy has explained that the "the compassion of Thurgood Marshall is exhibit A for the proposition that judicial reason cannot be divorced from the life experience of judges."[14]

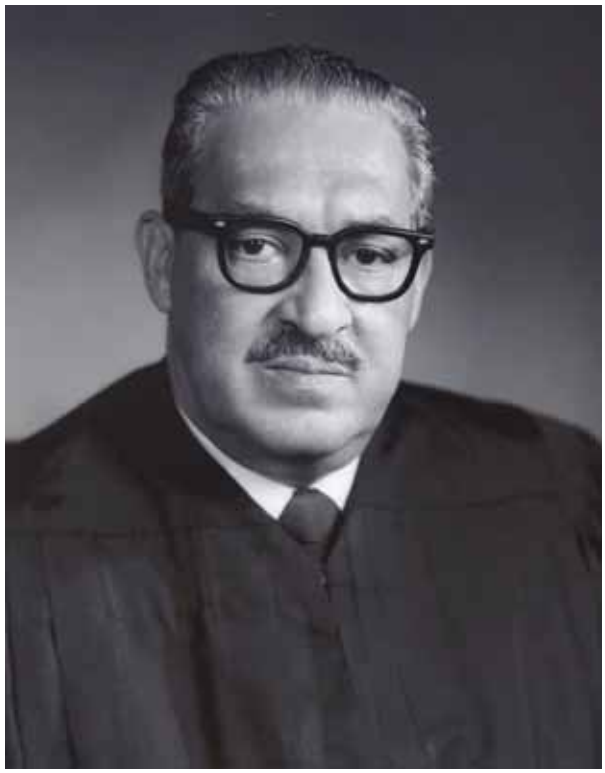


JUSTICE WILLIAM BRENNAN

Conversely, those who lack certain life experiences, or at a bare minimum, the ability to empathize with others with whom they have little in common other than their shared humanity, will view the world and render decisions through a far narrower prism than their more enlightened brethren. This point was well-illustrated by the case of *Bowers v. Hardwick*, 478 U.S. 186 (1986), in which "a gay man, Matthew Hardwick, had been arrested for having sex in his Georgia home, in violation of the state sodomy law. Hardwick claimed that state law violated his right of privacy, his ability to act as a consenting adult in his home. But the high court ruled, 5-4, to criminalize consensual gay sex; as the majority wrote, 'the Constitution does not confer a fundamental right upon homosexuals to engage in sodomy.' The swing vote was Lewis Powell, a Republican appointee who knew nothing about gay people. His earlier life experience as a Southern establishment lawyer had left him clueless. We know this because Powell essentially said so himself. During deliberations, he asked one of his law clerks to estimate the prevalence of gay people in America. The clerk (who recounted the incident in a book) put the figure at 10 percent of the population – to which Powell replied, 'I don't believe I've ever met a homosexual' – ironic, because Powell was talking to one."[15]

THE PSYCHIC AND SYMBOLIC BENEFITS OF DIVERSITY

Finally, diversity is of critical importance not only because of the practical effects that it has on real-world decision making on the bench, but also because of the symbolic and psychological benefits that it confers upon *all* Americans, not just on members of historically disenfranchised minority groups. This past February, three weeks after having undergone yet another operation in her battle against cancer, Justice Ginsburg attended President Obama's first address to Congress. Given the circumstances, no one was expecting her to attend. Yet, "she went, she said, because she wanted the country to see that there was a woman on the Supreme Court."[16] Not because she wanted *women* to see, but because she wanted the *country* to see. To a nation that cherishes equality of opportunity and yet has practiced discrimination and prejudice against all minorities for most of its history, the effect on the national psyche of having a judiciary that actually reflects the citizenry at large is profound.



JUSTICE THURGOOD MARSHALL

Recognizing as much, CABA justifiably trumpets the achievements in the legal field of Cubans, Cuban-Americans and Hispanics, as well as those of other minority groups. When Raoul Cantero III became the first Hispanic justice on the Florida Supreme Court, we celebrated. When Francisco Angones became the first Cuban-born President of the Florida Bar, we celebrated. When Steve Zack became the first Hispanic President-Elect of the American Bar Association, we celebrated. And when Katherine Fernández-Rundle became the first Hispanic Miami-Dade County State Attorney, and the first in all of Florida, we celebrated. The psychic and symbolic victories that these milestones represent offer hope that the days of bigotry and exclusion from the process -- of discrimination practiced against Hispanic, black, and female attorneys by those whom do not feel that brown and black-skinned folks deserve, or are worthy of, a seat at the table -- are slowly but surely coming to an end.

Though spoken in a slightly different context, President Obama's words to the NAACP at its 100th Anniversary Convention are especially apropos in this regard: "We've got to say to our children, yes, if you're African American, the odds of growing up amid crime and gangs are higher. Yes, if you live in a poor neighborhood, you will face challenges that somebody in a wealthy suburb does not have to face. But that's not a reason to get bad grades. That's not a reason to cut class. That's not a reason to give up on your education and drop out of school. Your destiny is in your hands, you cannot forget that. That's what we have to teach all of our children…I want them aspiring to be scien-

tists and engineers, doctors and teachers, not just ballers and rappers. I want them aspiring to be a Supreme Court Justice. I want them aspiring to be the President of the United States."

With Justice Sotomayor on the Court and President Obama in The White House, it thankfully becomes that much easier for the next generation of boys and girls, whatever their skin color or sexual orientation, to see that in America, what was once only a distant dream has now become an achievable reality.

CONCLUSION

In conclusion, the landmark decision to nominate Judge Sotomayor to the U.S. Supreme Court will benefit the Court by adding to its ranks a jurist with impeccable academic and professional credentials, a keenly analytical mind, and a diversity of thought attributable to a life rich with experiences heretofore unknown on the Court. The resonance of having both a Hispanic and another woman on the Court reaches far beyond Latinos, women and other minorities, benefiting *all* Americans, regardless of race, ethnicity, gender or sexual orientation. And for that, we celebrate.

Augusto R. López *practices commercial litigation and intellectual property law with the firm of Sánchez-Medina, González, Quesada and Lage in Coral Gables. Email your comments to alopez@smgql.com.*

1-- The 16 states are mostly in the South and at the time the statute was enacted, were found to have been the most flagrant violators of the rights afforded to blacks by the Fifteenth Amendment to the U.S Constitution.

2-- *Northwest Austin*, Thomas' dissent at 18.

3-- *Id.*, at 19.

4-- Though I disagree with Thomas' reasoning, he seems to have been the only "conservative" justice on the Court willing to boldly take said reasoning to its logical conclusion: to wit, if one agrees that discrimination is a thing of the past, then one must necessarily find that Section 5 is no longer constitutional. Whether the result of political calculation or not, Roberts and the other conservatives purposefully sidestepped the core issue at the heart of this case rather than have to admit and defend the logical consequence of their presumptive reasoning. Perhaps the color of Thomas' skin gave him both the psychic assurance he personally needed in order to advance his agenda, as well as the sociological cover necessary to do so without fear of reprisal. Whatever the reason, I credit Thomas for having the courage of his convictions, however much I may disagree with same.

5-- Mr. Obama is the progeny of a white mother and a black father, and thus, technically speaking, is actually half black and half white. In other words, Mr. Obama is as much *white* as he is *black*, and thus all other things being equal, there is no real justification for racially labeling him black rather than white. However, due to socio-historical issues of racial classification too complex to address here, a child of mixed parentage in this country -- with one of the two parents being white -- has historically been categorized as belonging to the race of the non-white parent. Moreover, and perhaps more importantly, Mr. Obama himself has clearly expressed that his own race-consciousness is that of a black man. Thus, Mr. Obama will be referred to herein as black or African-American.

6-- As used here, the term "identity politics" is confined to the meaning that the term is given in modern political discourse: that of political choices made based on race, gender or sexual orientation *other than white, male, or heterosexual*, respectively. Of course, practically speaking, *all* political choices involve "identity politics" in some way, even when (or perhaps *most especially when*) white, heterosexual men are choosing other white, heterosexual men for positions of power.

7-- Which is not to say that this is all that he took into consideration. As noted by Supreme Court observers, Judge Sotomayor comes to the confirmation process with more judicial experience than any current sitting justice had at the time of his or her own confirmation. She also received a unanimous rating of "well-qualified" from the American Bar Association.

8-- Mr. Limbaugh is the same conservative radio talk-show host who once advised a black caller to "take that bone out of your nose".

9-- Voting in this way is not only common, but it has been purposefully exploited in the past by some candidates in order to take advantage of existing demographic trends.

10-- Goodman, Ellen. "The Goal is Wisdom on the Court." *The Miami Herald*, p. 19A (May 30, 2009).

11-- Bazelon, Emily. "The Place of Women on the Court: An Interview with Justice Ruth Bader Ginsburg." *The New York Times Magazine*, p. 46 (July 12, 2009).

12-- Id.

13-- Goodman, Ellen. "The Goal is Wisdom on the Court." *The Miami Herald*, p. 19A (May 30, 2009).

14-- Hentoff, Nat. "Missing the Point on Thurgood Marshall." *The Seattle Times* (November 24, 1992).

15-- Polman, Dick. "Life Experience a Factor for All Judges." *The Miami Herald*, p. 13A (June 4, 2009).

16-- Bazelon, Emily. "The Place of Women on the Court: An Interview with Justice Ruth Bader Ginsburg." *The New York Times Magazine*, p. 25 (July 12, 2009).

CABA President-Elect Manny Garcia-Linares
and CABA Director Sandra Ferrera

[PICTORIAL]

CABA's Tribute to Steve Zack

Banker's Club • June 8, 2009

[CABA TRIBUTE TO STEVE ZACK]

[CABA TRIBUTE TO STEVE ZACK]

Be a fan of a runner so fast, he can outrun prejudice.

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Donte Stallworth's Plea Deal: Pro

Miami-Dade County's SAO did the right thing.

Donte Stallworth pled guilty to DUI Manslaughter. He is a convicted felon. He received thirty days in jail and two years of house arrest to be followed by eight years of reporting probation.He must be tested for alcohol at the whim of the Department of Corrections. His driver's license has been suspended for life. He cannot drive a vehicle during his period of supervision. He must perform 1,000 hours of community service, which may only be performed after consulting with and receiving approval from the State Attorney's Office. He faces up to 15 years in prison if he violates any term of his supervision. Justice served? Absolutely.

By **Patrick Trese**

On March 14, 2009, Stallworth was driving while under the influence when he struck and killed Mario Reyes at the Terminal Isle-Macarthur Causeway intersection in Miami Beach. Mr. Reyes was a 59- year-old crane operator who worked for many years at the Port of Miami. He was a family man who supported and loved his family and his young daughter.

The legal system provided fair and equal justice in this case. In every case a prosecutor must weigh certain factors in assessing whether a plea should be extended and, if so, what the terms of such a plea should be. Some of these factors include: the facts of the case, the actual strength or weakness of evidence, the criminal history of a defendant, the input of the victim and/or the victim's family, whether a defendant was cooperative with law enforcement, and any other mitigation relating to the character of the accused.

Causation was a central issue in this case. Why was there a causation issue? The State has the burden of proving all charges against a defendant beyond a reasonable doubt through actual evidence. A Florida Power and Light video catches the instant of the collision, but little more. There were no eyewitnesses to this tragic incident. The video depicts Mr. Reyes darting out from behind a palm tree across the Macarthur Causeway towards a bus stop located on the westbound side of the causeway. As Mr. Reyes darted out across the roadway, he was 10-15 feet east of the crosswalk. The traffic control device facing the direction Mr. Reyes came from was red. The bend in the eastbound flow of the Macarthur Causeway immediately approaching the Terminal Isle intersection allows for very little reaction time. Stallworth was in the far left lane as he approached this bend. As he approached the intersection, he had a green light and his vehicle abutted a barrier wall on the left and Mr. Reyes darted out from his right. As such, Stallworth had limited time and maneuverability to react to Mr. Reyes.

The defense certainly would have asserted that Stallworth is guilty of DUI but he did not contribute to or cause Mr. Reyes' death. Instead, Mr. Reyes caused his own death by darting into the intersection. Specifically, the defense could have utilized Stallworth's statement, the FPL video, and expert testimony for the purpose of asserting that Stallworth react-

ed the way a reasonably prudent person would have under the existing driving conditions and that his impairment did not cause Mr. Reyes' death. This defense theory may have been amplified by testimony related to what Mr. Reyes was doing prior to darting out into the intersection. Did he give Stallworth an indication that he would not cross the street in response to Stallworth flashing his lights and honking his horn? Did Mr. Reyes change his mind and dart into the intersection? Would a jury find that because Mr. Reyes darted into the intersection in a manner that was not legal that he caused his own death? We will never know, but these are reasonable and appropriate issues to consider in assessing the causation element of the crime.

KATHERINE FERNANDEZ-RUNDLE
Miami-Dade County State Attorney

Stallworth did not have any misdemeanor or felony convictions of any kind. He did not have any civil traffic history. These are critical facts we use in assessing a defendant's potential threat to the general public's safety. Stallworth also had impressive character references dating back a decade. These included more than high profile sports figures such as Alonso Mourning, Desmond Howard, and Wesley Welker. Many ordinary citizens sought to vouch for his character as well. Equally impressive was the fact that Stallworth immediately cooperated with law enforcement from the very moment of the incident. He called 911 himself; he consented to providing a blood sample; he consented to a search of his car and phones; he provided a full and complete statement waiving his Miranda Rights. Almost immediately, he was publicly apologetic and remorseful for his actions and for the harm that came to Mr. Reyes and his family. In short, he accepted full responsibility for his actions contrary to the approach often taken by criminal defendants.

The Reyes family's wishes were taken into account in extending this plea. The family wanted this case resolved sooner rather than later because of the impact protracted litigation would have on Mr. Reyes' daughter. Will the Reyes family gain financially as a result of the actions Stallworth and his lawyers took after this tragedy? Yes. Is that a bad thing? No. Stallworth and his lawyers could have delayed the civil and criminal cases, including appeals, for 5 to 7 years. While the civil case negotiations were totally and completely separate from the criminal case itself, restitution is a weighty factor in both the criminal and civil arenas. Why should this case be different? Should Stallworth be punished more than a similarly situated person just because he is a celebrity or because he so publicly accepted both moral and financial responsibility?

Some critics have said that Stallworth and his lawyers only took steps to resolve the civil wrongful death claim for the purposes of trying to play in the NFL again or to avoid prison time. Possibly true. However, now Mr. Reyes' daugh-

ter may not have to worry about financial matters, a fate unlike most other crime victims and their families. Having met this young girl and her mother, I am glad for that small benefit. As every good lawyer knows, protracted litigation rarely benefits a victim. In this case, the best interests of the family and their wishes for a quick and appropriate resolution were honored. Questioning the genuineness of their pain or indirectly insinuating that money mattered more than a father or a husband's life is not just.

Justice requires that Stallworth not be treated differently. A prosecutor should consider every factor used to assess the plea extended to Stallworth in every single criminal case. Would Stallworth have received this plea if there was not a genuine causation issue? No. Would Stallworth have received this plea if he had a criminal history? No. Would Stallworth have received this plea if he had not cooperated with law enforcement? No. Would Stallworth have received this plea if the family had not endorsed the plea? No. Would Stallworth have received this plea without accepting responsibility for his actions? No. Was this case disposition within an appropriate range of other similar cases taking into account the same factors? Absolutely.

Even the local chapter of Mothers Against Drunk Driving understands that DUI related case dispositions can vary depending on the specific facts of each case. The local chapter of MADD fully supported this case disposition stating that it was the best outcome because of the Reyes family's wishes. "I think there are a lot of kids as well as adults who will listen to his message," Miami-Dade MADD Executive Director Janet Mondshein said of Stallworth. "I think he'll do more good being out of jail and being active in prevention than he would be in jail." Stallworth's attorney, Christopher Lyons, also understands this fact and has repeatedly stated, "Ms. Fernández-Rundle stood up and did the right thing. We want prosecutors like Ms. Fernández-Rundle who despite public perception will do what is right even if it is publicly unpopular."

Prosecutors cannot and should not be robots. No one can put a price on any human life. The legal system is imperfect. However, prosecutorial discretion by definition requires ferreting into the details of every case with an eye towards reaching justice. Just because Stallworth is a celebrity and has economic resources does not mean that the wishes of Mr. Reyes' family should not be respected, especially when this case disposition is within an appropriate range for similar case dispositions irrespective of the Reyes' family's wishes.

Nearly a decade ago, another NFL player received a much more lenient sentence for a similar charge. St. Louis Rams defensive end Leonard Little pleaded guilty to involuntary manslaughter after killing a mother of two while driving drunk in 1998. He was sentenced to a 90-day jail term followed by four years of probation. He did not plead guilty to DUI manslaughter, he did not go on house arrest, he did not have a ten-year period of supervision attached to his plea. He also did not have many of the intensive conditions associated with this plea. Yet, that case never received the type of public outcry that this one has.

Some will never agree with this plea. However, I stand behind it 100%. The politically expedient step to take in this case would have been to not extend a plea. I am proud to work for Katherine Fernández-Rundle, a State Attorney that has the courage to stand up for what is right. That is what the public should expect from its elected officials. The Reyes family and their wishes have been respected. The public has been protected and a just and equitable resolution of a complex case has been reached in a timely manner. Equal and fair justice? Absolutely.

Patrick Trese *is an Assistant State Attorney with Miami-Dade County's State Attorney's Office.*

Donte Stallworth's Plea Deal: Con

Was justice truly served?

Thirty days in jail, two years of house arrest and eight years on probation. Mandatory drug and alcohol testing, a lifetime driver's license suspension (possible lifting of suspension for employment purposes after five years) and 1,000 hours of community service. This hardly seems like justice served.

By **Jorge A. Pérez Santiago**

On March 14, 2009, Cleveland Browns wide receiver Donte Stallworth killed Mario Reyes, a 59-year-old construction worker and family man returning from his late-night shift, by hitting him with his 2005 Bentley at 7:15 AM while under the influence of alcohol. Donte Stallworth was out drinking late at the recently renovated Miami Beach Hotel, the Fontainebleau, a night after receiving a $4.5 million roster bonus from the Browns.

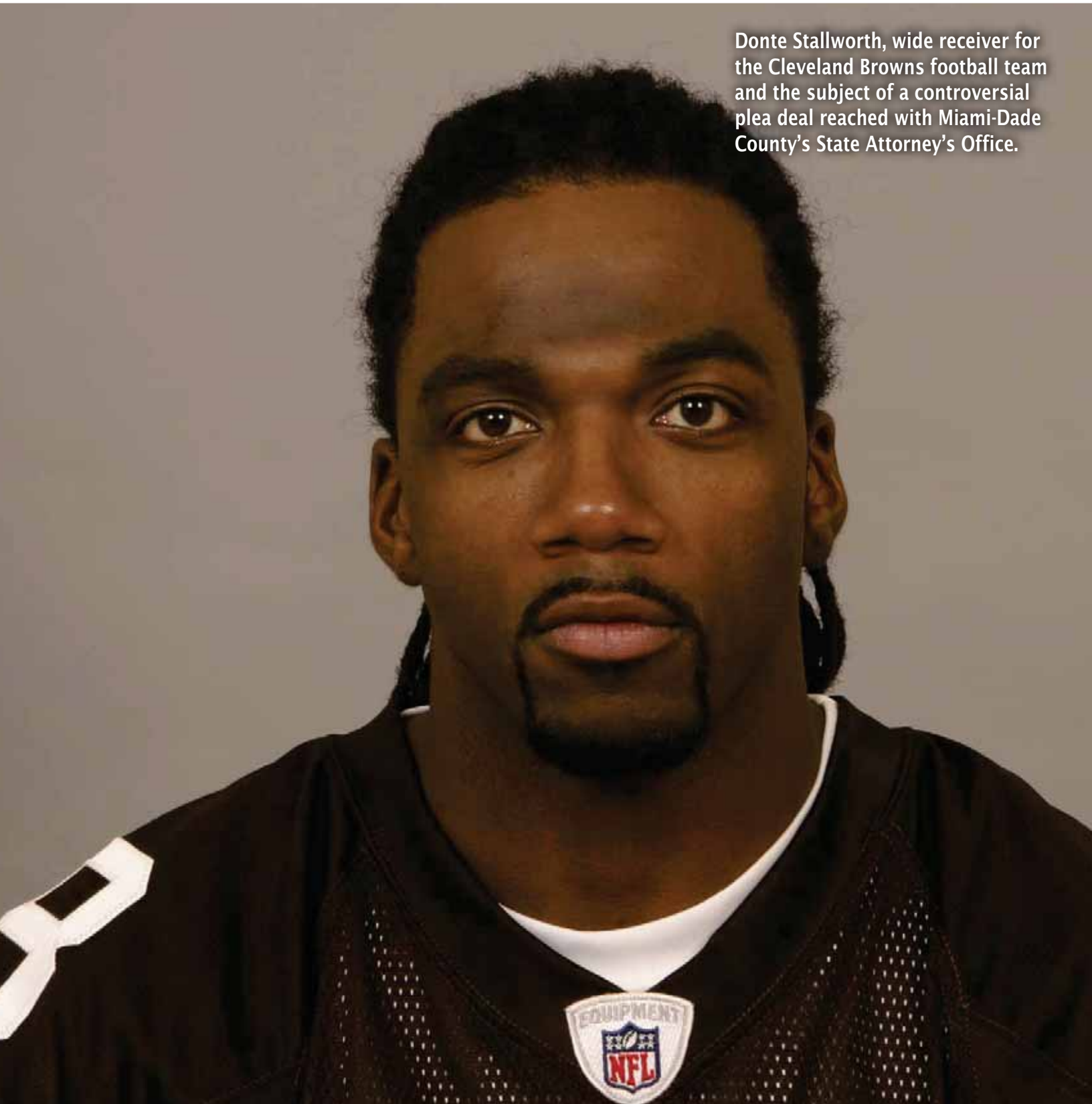
Yes, we have all heard the justifications. Reyes was jay-walking and negligent in attempting to catch his bus-ride home. Stallworth immediately stopped and took responsibility, and he even cooperated with investigators. However, it seems inappropriate to suggest that jay-walking, a minor offense, exculpates Stallworth to such a degree. It also seems disturbing that cooperation in this case is seen to be such a spectacular achievement. It is illegal for Stallworth and others to flee the scene of an accident and had Stallworth fled the scene, his crime would have been worse. He had limited options. The biggest justification of all, unfortunately, is not one that I am prepared to accept.

The rich and famous athlete reached a confidential financial settlement with the family of the 59-year-old construction worker. In other words, Stallworth's financial status affected his sentencing, not his cooperation with the government, as is the case for most criminals in similar situations who enter guilty pleas. Not Reyes' jaywalking, as Stallworth admitted flashing his lights, while driving 50 in a 40 mph zone, in an attempt to warn Reyes as he approached him, negating the possibility that Stallworth had not seen him. Not a low blood-alcohol level, as the legal limit in Florida is 0.08 and Stallworth easily surpassed that figure with a reading of 0.126 (and furthermore, had traces of marijuana in his system) even after several hours had passed since Stallworth had purportedly last consumed alcohol. What really diminished this sentence was the Reyes family's desire to resolve the case to avoid more pain after a hefty financial settlement had been reached.

I can appreciate a family wanting to put such a horrible situation behind them and the government facilitating that process by working swiftly to reach a plea deal. What I cannot understand is how the legal system can suggest that they administered equal and fair justice. Would Donte Stallworth have received such a light penalty and

and would the Reyes family have wanted such swift and light justice if Donte Stallworth were not a rich NFL athlete? Luckily for Donte, we will never have to answer that question. Unfortunately, for the rest of us, we might have uncovered the value of a human life.

Jorge A. Perez Santiago *will be entering his second year at the University of Miami School of Law this fall. He is currently interning for U.S. District Judge Patricia Seitz. He welcomes your comments at jperez1@students.law.miami.edu.*



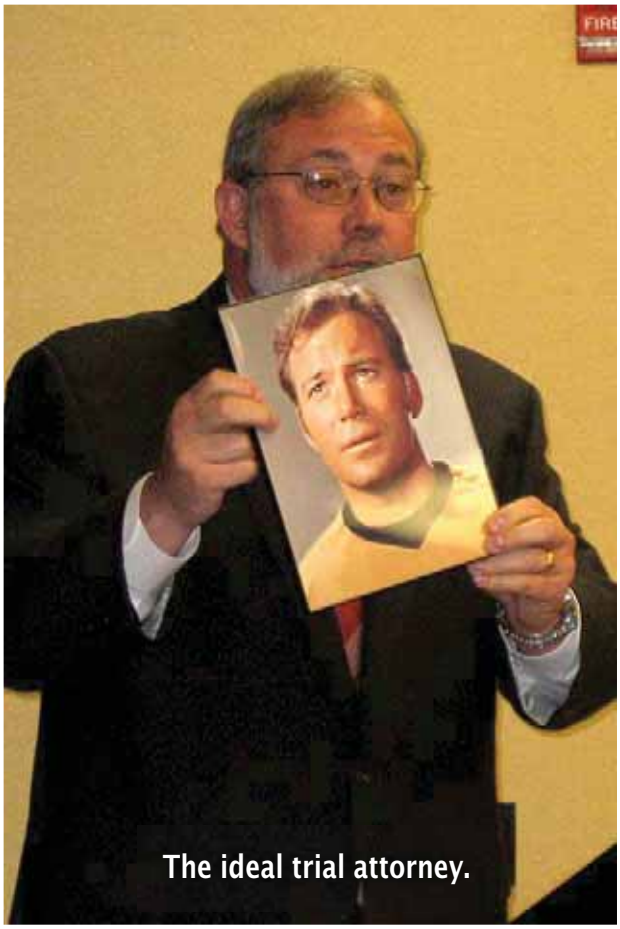
Donte Stallworth, wide receiver for the Cleveland Browns football team and the subject of a controversial plea deal reached with Miami-Dade County's State Attorney's Office.

Former judge on the Third District Court of Appeal, Rodolfo Sorondo, Jr., and former justice of the Supreme Court of Florida, Raoul G. Cantero III.

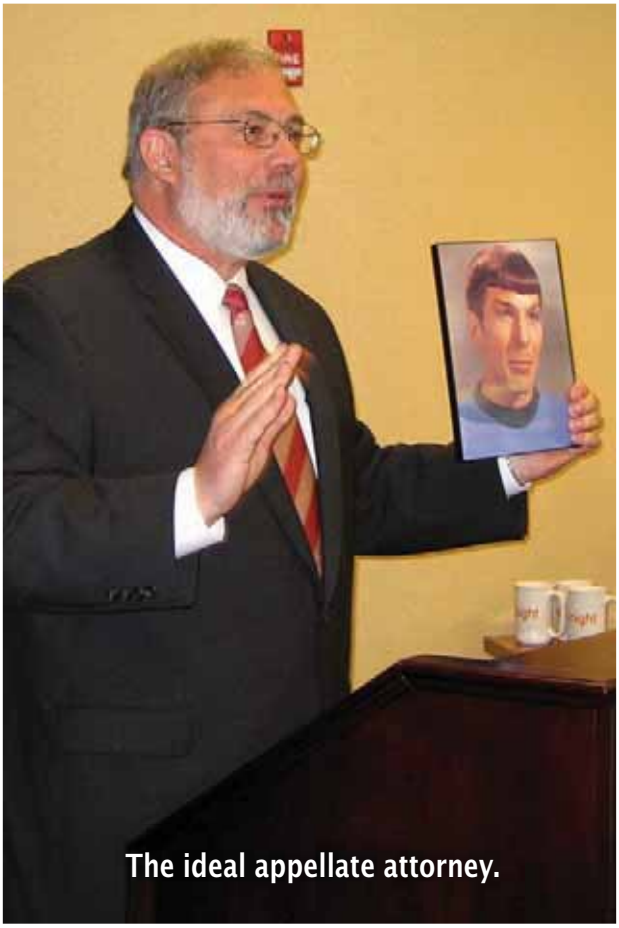
[PICTORIAL]

CABA CLE: Appellate Practice

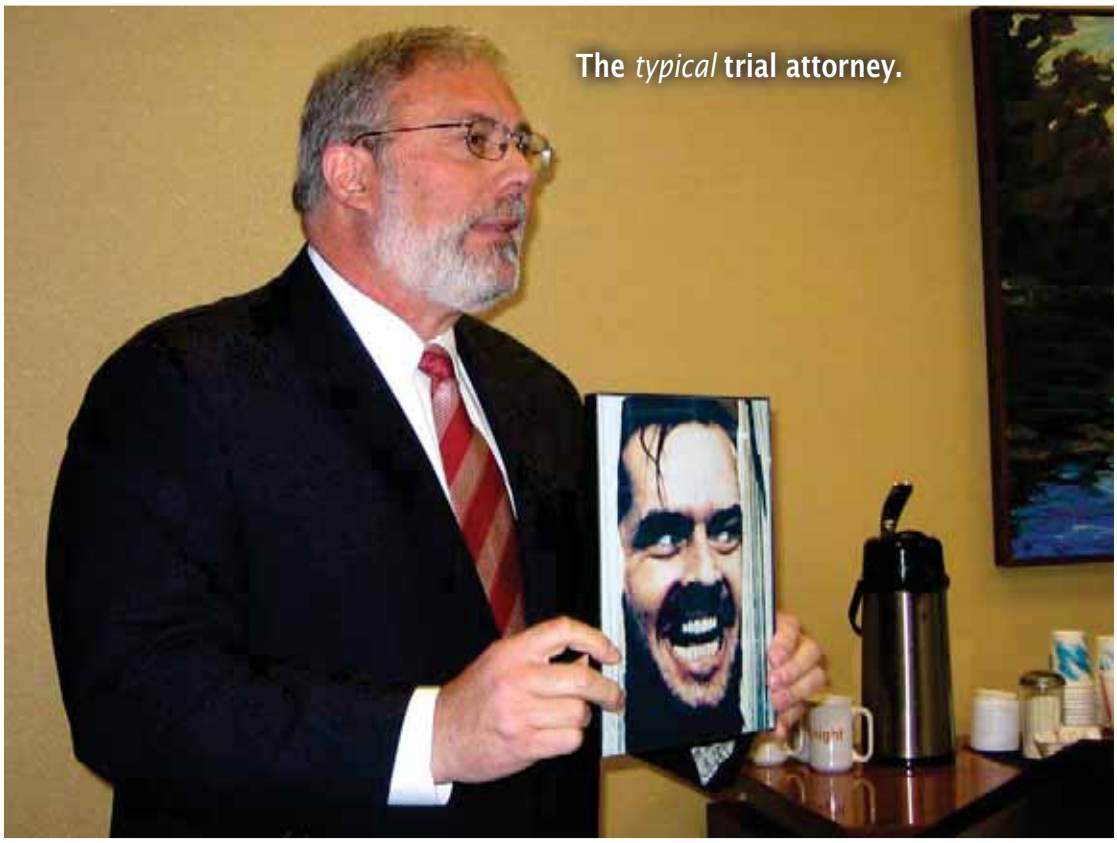
Holland & Knight • June 17, 2009



The ideal trial attorney.



The ideal appellate attorney.



The *typical* trial attorney.

No half-naked models.
No goofy pirates.
No silly bats.

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Ron
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of CABA's Art in the Tropics
October 2009

Diversity in the Legal Profession

Top 5 Ways to Ensure that Your Firm's Diverse Lawyers Will Leave

I. SQUANDER THEIR AFFINITY CONTACTS AT THE FIRM...

The Opportunity - As lawyers, we are all too familiar with the power of affinity. After all, our profession is the quintessential "contact sport" where professional success is informed not just by technical expertise but by relationships - family relationships, community contacts, college and law school contacts, clerkships and the like. Along with their educational and professional credentials, diverse lawyers usually bring a rich and unique tapestry of familial contacts, life experiences, cultural insights and perspective that might be leveraged to drive business development, recruitment of talent and other important firm objectives.

By **John Lewis, Jr.**

The Best Practices - Celebrate differences. Facilitate purposeful affinity connections within firm. Involve diverse lawyers in critical strategic planning discussions (not just the diversity and pro bono committees).

II. DON'T GIVE THEM OPPORTUNITIES FOR "HEROISM"...

The Opportunity - Through your firm's rigorous recruiting and hiring standards, you have hired (at least on paper) the best and the brightest diverse lawyers available. Now, you can focus on a return on your investment by purposefully ensuring that they have work that is challenging - tight deadlines, long shot deals, difficult clients and intractable legal and business problems. Not only will you get tough work done, but you also communicate to the diverse lawyer that the firm is willing to take chances and give them a "shot" at the work upon which professional reputations are built.

The Best Practices - At the practice group leader (or firm management) level, regularly consider where such opportunities are presented. Inventory the opportunities and specifically match opportunities with "high potential" lawyers, including diverse lawyers. Be transparent about how these assignments are made. Celebrate and recognize "heroics" when a "save" occurs.

III. DON'T DEBRIEF THEM WHEN THEY LEAVE THE FIRM (OR DEBRIEF BUT DO NOTHING WITH THE FEEDBACK YOU RECEIVE)...

The Opportunity - A wealth of blunt, candid and unfiltered feedback usually attends the departure of any of the firm's lawyers. In particular, when diverse lawyers leave (even on good terms), perceptions that are not necessarily apparent to firm management can be shared. That feedback drives meaningful cultural change in the firm and informs better firm management practices. Unfortunately, many firms do little or nothing in the way of debriefing exiting diverse

lawyers. The "exit interview" is either performed by a "non-lawyer" administrator rather than the senior lawyers with whom the departing lawyer actually worked. Alternatively, where debriefing data is gathered, it goes nowhere. Thus, the firm continues to make the same mistakes and retention opportunities for future diverse lawyers are lost.

The Best Practices - Develop a robust routine for exiting attorneys to understand their impressions of the firm culture, and their views on their prospects for success at the firm. Optimally, include practice group leaders, senior firm lawyers and even firm management in the discussions.

IV. AVOID TOUGH CONVERSATIONS (REFUSE TO GIVE THEM HARD, HONEST AND CONSTRUCTIVE FEEDBACK)...

The Opportunity - No matter how bright or accomplished the young lawyer was in law school, we all know that law school does little to prepare students for the rigors of practice or how to become successful practicing attorneys. Potential is realized not just through hard work and effort, but also through feedback. All attorneys, especially your diverse lawyers need this feedback to improve. Feedback is critical. It tells you whether a young lawyer is "teachable." It tells the young lawyer who is teachable that the firm wants him/her to develop and get better. It improves the work more quickly (i.e., happier clients) and builds bridges for dialogue on other important issues.

The Best Practice - Give the gift of candor regularly, but first establish a rapport. Be honest but fair. Encourage the lawyer to get the perspectives of others within the firm. Don't sugar coat underperformance.

V. AVOID MAKING PERSONAL INVESTMENTS IN THEM...

The Opportunity - We all look for signs that our contributions are valued and that we have a future where we are. The diverse lawyers at your firm are no different. They are reading the proverbial tea leaves to determine what unspoken impressions have been formed about them. The single most valuable thing that any lawyer can give to another is time. It is, after all, our stock and trade. Whether you label it "mentoring" or something else, spend time getting to know your diverse lawyers. Get to know their career ambitions, their interests and how the firm can meet or help with their developmental needs. Leverage the firm's (and its partners) collective influence to identify community volunteer opportunities, bar leadership opportunities or internal firm leadership opportunities.

The Best Practices - Champion the firm's involvement in diverse bar organizations. Create linkages between the community and bar work of the partners with the interests and developmental needs of all young lawyers, and in particular diverse lawyers. Seek out opportunities for writing and speaking and other value added professional development opportunities for diverse attorneys. Consider the creation of a committee for this purpose.

John Lewis, Jr. *is the Senior Managing Litigation Counsel for The Coca-Cola Company. He delivered a speech based on this outline at the American Bar Association's Nation Presidential Summit "Diversity in the Legal Profession" which was held at the Gaylord Hotel, National Harbor, Maryland on June 19, 2009.*

The CABA Pro Bono Project

Now more than ever.

By **Sandra M. Ferrera**

Dear CABA Members:

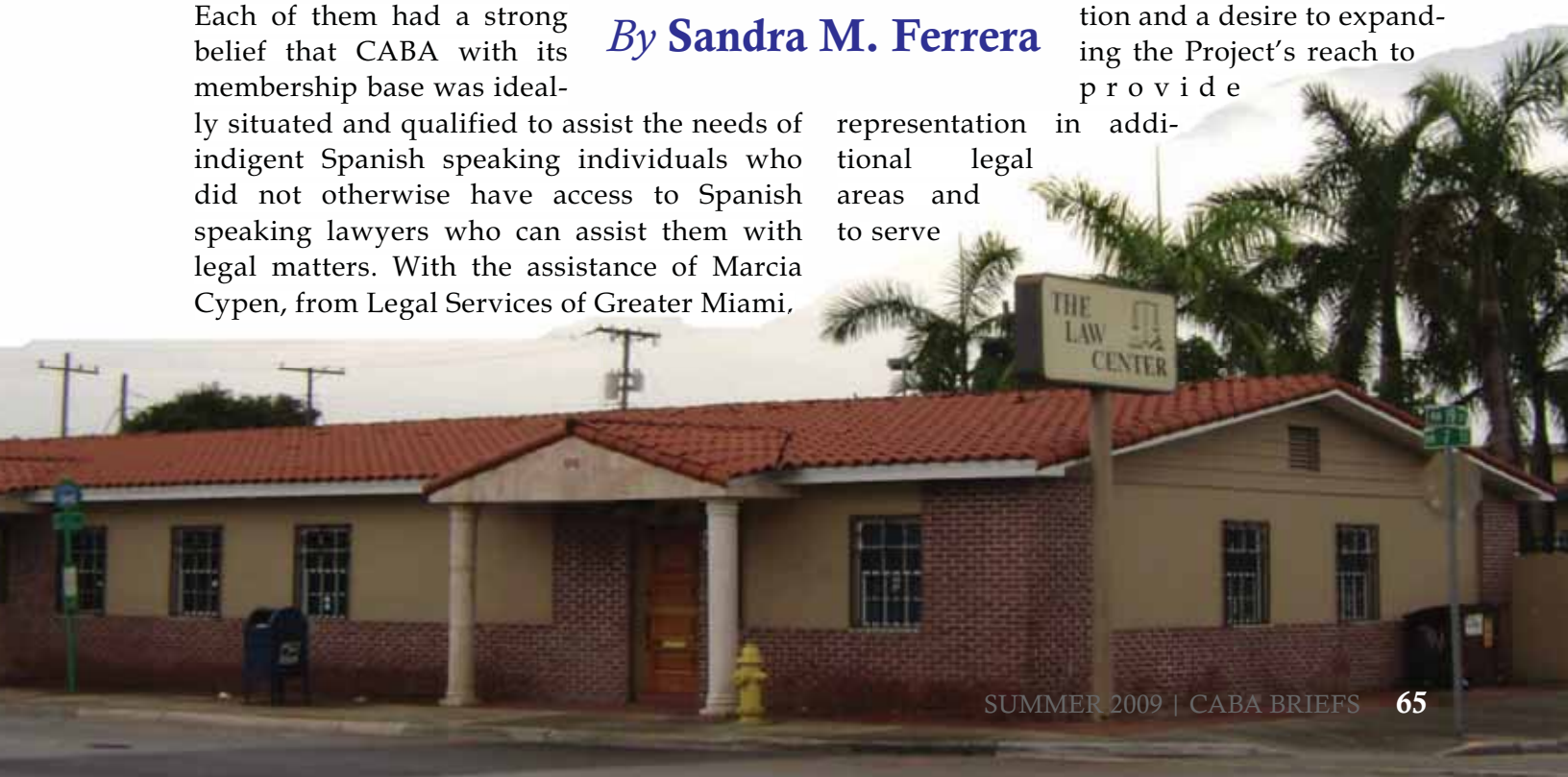
I wanted to take this opportunity to provide you with information regarding the work and achievements that CABA's Pro Bono Project has been presently involved in, as well as, to provide you with a perspective on our history and our future.

Past (Nuestro Pasado)

I recently had the opportunity to sit and speak with one of CABA's past presidents, Mr. Junior Garrido, who was very much involved with the establishment of CABA's Pro Bono Project from its inception in 1984. The Project was established with the persistence and perseverance of a number of our past president's including, Manuel Morales, Jr., Rene Murai and Junior Garrido. Each of them had a strong belief that CABA with its membership base was ideally situated and qualified to assist the needs of indigent Spanish speaking individuals who did not otherwise have access to Spanish speaking lawyers who can assist them with legal matters. With the assistance of Marcia Cypen, from Legal Services of Greater Miami, CABA was able to hire a paralegal to perform intake at various locations throughout Little Havana, including San Juan Bosco, Gesu, and the Little Havana Activity Center, to be placed for pro bono legal representation with CABA members. In 1992, CABA's Pro Bono Project was nationally recognized as a Point of Light by President George H. W. Bush. In 1996, the Project partnered with the Florida Immigration Advocacy Center ("FIAC") and for several years specialized in placing immigration and uncontested divorce matters with the assistance of a paralegal and managing attorney of FIAC. During this time, the Project also conducted quarterly divorce clinics at no cost to pro se litigants.

Present (Nuestro Presente)

With heartfelt conviction and a desire to expanding the Project's reach to provide representation in additional legal areas and to serve



more clients, on March 29, 2007, CABA's Board, incorporated a separate 501(c)(3) entity for its Pro Bono Project, the "Cuban American Bar Association Pro Bono Project, Inc." The recently formed entity has its own separate board of directors overseen by CABA's board who meet on a quarterly basis. The Project is presently housed at the "Law Center" located in 1898 NW 7th Street, Miami, Florida, and staffs three employees. The Project is fortunate enough to have its charitable pro bono mission overseen by Raul Flores, Executive Director. For those of you who do not know Mr. Flores, he received his JD from the University of Miami School of Law in 1996 and his MS in Criminal Justice from Florida International University. Prior to joining CABA's Pro Bono Project, Mr. Flores had a solo practice professional association where he practiced civil litigation in the areas of corporate, labor, family and real property. Mr. Flores is well qualified to oversee the administrative and referral functions necessary to effectively run the Project and counts on the support and assistance of the Project's two staff employees, Jacqueline Rodriguez and Rosalba Penaherrera. Ms. Rodriguez, who used to practice law in Cuba, has been with the Project since 2007 and handles all of the initial intake and eligibility procedures. Ms. Rodriguez is also able to help clients with various other non-legal issues that arise in the office such as assisting clients filling out immigration forms, applying for benefits, etc. Ms. Penaherra serves as Mr. Flores' assistant and handles the various day to day administrative functions needed at the Project.

RAUL FLORES, Exec. Dir. CABA Pro Bono Project

The Project is funded in large part through grants awarded by the Florida Bar Foundation and through proceeds raised at the annual "Art in the Tropics" fundraising party thrown by CABA for its benefit. In order to continue the work and expand on the services being provided we need to make sure that the Project continues to receive funding and that our members continue taking on pro bono matters.

Future (Nuestro Futuro)

So far in 2009 the Project has closed 161 cases that have come through its doors. With your anticipated help and cooperation we hope to increase that number in the months and years to come. We as lawyers are each fortunate and privileged to have the necessary skills and education to help those less fortunate than us. It is important to give back to our community that has given so much to us. Doing pro bono work is a moral responsibility to the career choice we have made. I challenge and encourage each and every one of you to take just one (1) pro bono referral case from CABA's Pro Bono Project per year. A little time and dedication on your end will leave a priceless impact in the life of another.

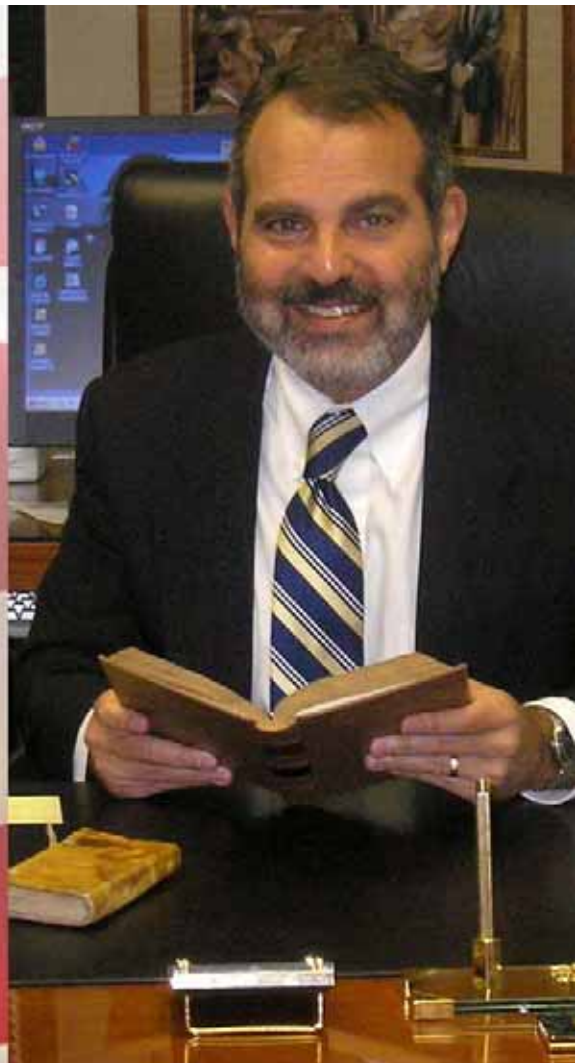
Recent Victories (Felicidades!)

Congratulations to the Pro Bono Project's team on their latest immigration victory! On

June 11, 2009, the team was able to successfully prevent the Department of Homeland Security from removing a Cuban immigrant who had been living in the United States for the past 47 years with parole status as a Cuban refugee. While in Cuba, the client, LT, had been a strong activist against the communist Cuban regime. Like many other Cuban refugees, LT found it necessary to seek refuge in the United States, to avoid persecution in Cuba. While in the United States, LT continued his strong anti-communist philosophy and he joined many anti-Castro groups when he arrived in 1962. At his hearing, the immigration judge, listened closely to LT's detailed testimony where he had trained for years in the Everglades with militant groups, and how they had actually travelled to the Dominican Republic with the aid of the CIA, during President Kennedy's term. Unfortunately, LT never adjusted his immigration status and in 1980 was convicted of a felony in an unrelated matter which resulted in his being placed on Removal Proceedings under Section 240 of the Immigration and Nationality Act in 2006. CABA's Pro Bono Project was able to successfully defend LT's removal and deportation utilizing the I-589 Convention Against Torture Act ("CAT") and LT was awarded asylum and withholding of the removal under Article II of the CAT.

CABA Pro Bono Mission Statement (Nuestra Misión)

CABA's Pro Bono Project's mission is to assist the poor and indigent community in Miami-Dade County Florida by serving as a nexus and providing a referral source between needy clients and pro bono attorneys who can provide direct legal services to them. To that end CABA's Pro Bono Project assists in providing well-trained attorney volunteers to help meet the legal needs of our indigent community regardless of race, creed, color, gender, sexual orientation or national origin. The Project further strives



to support its volunteer attorneys with access to training, CLE education and mentoring.

Honorable Mentions (Gracias Amigos)

The Project wishes to extend its warm appreciation to the following CABA Members who have recently taken of their time and skills to take on pro bono representation on behalf of the Project:

• Javier Banos, Esq., Taxes
• Manuel L. Crespo, Jr., Esq., Landlord Tenant
• Amaury Cruz, Esq., Child Support Modification
• Rogelio Del Pino, Esq., Removal Proceedings and Immigration
• Jorge Del Valle, Esq., Foreclosure
• Sandra Ferrera, Esq. and Nora Galego, Esq., Probate
• Manuel Garcia-Linares, Esq., Divorce with Alimony
• Grace M. Gomez, Esq., Removal Proceedings and Immigration
• Patricia Ann Kopco, Esq., Divorce with Child Abuse
• Corali Lopez-Castro, Esq., Bankruptcy
• Nicole Mestre, Esq., Divorce
• Eliana Poveda, Esq., Mediation
• Alicia Santana Torres, Esq., Custody / Visitation
• Robert Wayne, Esq., Ownership / Real Property.

How can you help?

The success of CABA's Pro Bono Project is reflected in the strength of our referral attorneys, members, friends, law firms, institutions, and organizations who have demonstrated their commitment to our future by volunteering of their time, efforts and monetary donations.

The following levels of needed donations have been established for your participation that will heavily contribute to the Project's success. We welcome your assistance in any manner you can provide.

Honor Roll of Donors

I. Monetary Commitment:

Pro Bono Inner Circle (Gifts of 1,001 and above)

Pro Bono Partner (Gifts up to $1000)

Pro Bono Of Counsel (Gifts up to $500)

Pro Bono Fellow (Gifts up to $250)

Pro Bono Associate (Gifts up to $100)

Pro Bono Friend (Gifts up to $50)

II. Pro Bono Representation:

Pro Bono Advocate (have contributed of their time by taking on more than five pro bono cases)

Pro Bono Supporter (have contributed of their time by taking on more than one pro bono case)

In order to help CABA's Pro Bono Project through monetary donations and/or by providing pro bono legal services, please contact Raul Flores, Esq., or his assistant Rosalba Penaherrera at 305-646-0046 or via their e-mail addresses: raul@cabaonline.com and rosalba@cabaonline.com.

Save the Date – October 17, 2009

On October 17, 2009 at 7:30 pm, CABA will host its 5th annual "Art in the Tropics" fundraiser party hosted by Linq Financial Group's Outdoor Terrace located at 2100 Ponce De Leon Boulevard, Sixth Floor, Coral Gables, Florida. As in years past, "Art in the Tropics" will feature a silent art auction, food sampling donated by area restaurants, mingling and dancing, as well as additional auction items never before available. The cost of the event is $75 per person and includes an open bar sponsored by Linq. All proceeds made go directly to benefit the Project. For sponsorship or donation of auction items, please contact Sandra Ferrera by telephone at 305-358-6363 or via e-mail at sferrera@melandrussin.com.

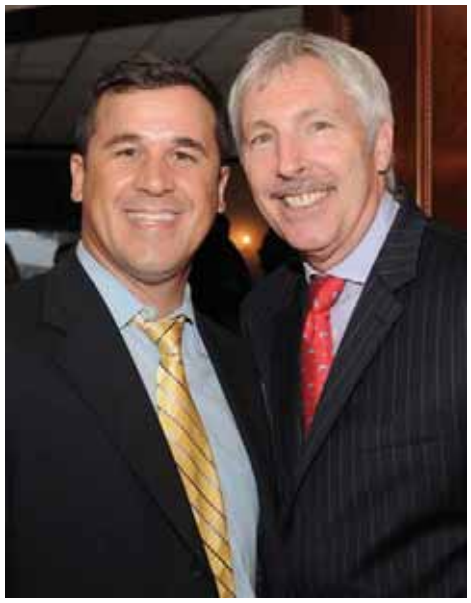
***Sandra M. Ferrera**, CABA's Vice-President and Chair of CABA's Pro Bono Project is a partner at Meland Russin & Budwick, PA., specializing in real estate and business matters covering a broad range of activities. Although Ms. Ferrera concentrates her practice in real estate matters, she has also developed the firm's probate and guardianship practice areas.*

Justice Jorge Labarga of the Supreme Court of Florida and Miami-Dade County State Attorney Katherine Fernández-Rundle.

[PICTORIAL]

CABA Appellate Reception

The Banker's Club • June 19, 2009



[CABA APPELLATE RECEPTION]


Javier
Reyes
Alex


EXIT

[CABA APPELLATE RECEPTION]

CABA

congratulates
one of its own

JOE GARCIA

on his nomination as
Director of the Office of
Minority Economic Impact
for the U.S. Dept. of Energy.
Once confirmed by the Senate,
Joe would become the highest
ranking Miami-Dade County
resident and South Floridian
in the Obama administration.

FELICIDADES, JOE!

Vote to retain

Judge

RODNEY "ROD" SMITH

Appointed by Gov. Charlie Crist, Judge Smith has been serving on the bench since 2008 laboring to ensure those who appear before him receive the full benefit of the rule of law.

Que Pasa CABA?

Recent and upcoming CABA activities.

CABA continues its commitment to raising awareness for a variety of not for profit organizations and their missions by introducing them to our community. We also continue to improve the benefits to our members by offering a variety of membership events, CLEs and other opportunities for networking during these challenging times.

In late April, CABA co-sponsored an Art Party networking event hosted by the Young Professional Committee for Drug Free Youth In Town (DFYIT). DFYIT is a non-profit organization that provides its drug prevention program and activities to the youth in Miami-Dade and Broward Counties. DFYIT is a FREE program for middle and senior high school students in most public schools in Miami-Dade County.

By **Anna M. Hernández**

In early May, CABA once again participated in the annual Service Juris Day. For a second time in consecutive years, CABA along with members of the judiciary, other voluntary bar organizations, law firms and volunteers from Hands on Miami, spruced up the halls and surroundings of the Children's Court Center and Juvenile Detention Center. The participants painted murals designed by local artists, did some gardening, and gave an overall "positive" makeover to the Juvenile Justice Center. Later that week, CABA also co-sponsored Child Welfare Day at the Juvenile Justice Center, which celebrated all of the child welfare professionals and their ongoing work with the troubled and abandoned youth in this community.

Later that month, CABA sponsored a networking reception at the United Way's Center for Excellence in Early Education to raise awareness for the plethora of programs and organizations that depend on the United Way and its contributors. Local 10 News Anchor and United Way Member, Laurie Jennings, greeted guests and warmed their hearts with anecdotes from her years of involvement with the United Way. The event was co-sponsored by the Cuban-American CPA Association, along with a number of minority voluntary bars. Attendees were given a tour of the United Way's Center for Excellence in Early Education, and were given an opportunity to participate in a silent auction that included artwork from the students at New World School of the Arts.

May was also the month in which CABA kicked off its Members' Only Monthly CLE Speaker series. The first installment of the series was hosted by Sigfried, Rivera, Lerner, De la Torre & Sobel, P.A., at the Westin Colonnade. Oscar Rivera and Roberto Blanch spoke on "Community Association Issues in the Current Economic Climate." The complimentary CLE event was well attended and regarded, and was the perfect start to this new members' only programming.

The second installment of the Members' Only Monthly CLE Speaker Series was held in June at Holland & Knight. White and Case and Holland & Knight co-sponsored "The Fundamentals of Briefing Appeals and Oral Argument" where former Third District Court of

Appeal Judge Rodolfo Sorondo, Jr., and former Florida Supreme Court Justice Raoul G. Cantero, III, delighted the audience with an informative, animated and anecdotal presentation about the nuts and bolts of appellate practice from their unique perspectives in private practice and from the bench.

July was jam packed with events dedicated to our members and this community. First, CABA hosted an intimate luncheon for its members at the Bankers' Club with the 11th Judicial Circuit's incoming Chief Judge Joel H. Brown. A limited number of members were given an opportunity to dine and converse with Judge Brown to find out what he hopes to accomplish in his term as Chief Judge. The luncheon was followed that evening with a membership and community networking reception to raise awareness for the University of Miami's Linda Ray Intervention Center ("LRIC") at Novecento Bistro in Coral Gables. The LRIC helps newborns to 3 year olds who have been challenged by issues such as parental substance abuse, the instabilities associated with being in the child welfare system, developmental delays that ultimately have an impact on school readiness, and the lack of access to quality early childhood programs. The Center offers specialized intervention programs and provides a "one-stop shopping" environment for the affected children and their families.

The speaker series continued in July at Greenberg Traurig with a CLE on Creditor's Rights in Bankruptcy presented by Luis Salazar, and a new Members' Only CLE will be held every month for the remainder of the year. Make sure to check CABA's website regularly for updates on all upcoming events and photographs of past events.

Anna M. Hernández *serves on CABA's Board of Directors as its Secretary, and is the Chair of the Community Liaison Committee and Co-Chair of the Membership Committee. She is a senior associate in the litigation department of Pathman Lewis, LLP, where she practices in the areas of commercial foreclosures, commercial tenant disputes, title insurance/real property litigation and general business litigation.*

Save the Date

Tuesday
December 1, 2009

CABA Elections for 2010

Regions Bank
Coral Gables
6:00 p.m. to 9:00 p.m.

CASAVANA
CUBAN CUISINE

The best black beans and rice north of Havana.

CASAVANA

INTRODUCING A NEW FAMILY RESTAURANT
SERVING MODERATELY PRICED HOMESTYLE CUBAN FAVORITES AND MUCH MORE.

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