

CUBAN AMERICAN BAR ASSOCIATION

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CABA Briefs is published quarterly by the Cuban American Bar Association, Inc. ("CABA"). CABA is a non-profit organization established on August 29, 1974. For over 30 years, CABA's mission has been to promote equality amongst its members and those of other minority groups in the state of Florida. Reproduction in whole or in part of any text, photograph, or illustration without written permission of the publisher is strictly prohibited. To submit an article or ad to CABA Briefs, please contact Sandra M. Ferrera via e-mail at sferrera@melandrussin.com



President's Message

The Best Is Yet To Come!

At the beginning of my term as President, I pledged that, together, we would advance CABA's tradition of service and excellence. In this first year of CABA's fourth decade, I am pleased that we have fulfilled that promise and much more.

Together, we have continued to ensure that diversity and equal opportunity are respected in the judiciary and in the legal profession. CABA is proud to have played a part in the judicial diversity training seminars instituted in the Eleventh Judicial Circuit of Florida, and we will work with Chief Judge Farina to expand the program to other circuits throughout the State. And for the first time ever, CABA successfully lobbied for the passage of legislation in Tallahassee, which now monitors appointments by the bench to ensure that Hispanics and other minorities are not excluded from the process.

We hosted a symposium regarding the judicial appointment process, in an effort to encourage qualified CABA members and others to participate in it; and we were gratified that Governor Bush and several members of the Judicial Nominating Commission attended and participated at the event. We hosted receptions for the new judges to the bench and for our Florida legislators. When any organization would consider itself fortunate to host one local mayor, CABA hosted *both* Manny Diaz and Carlos Alvarez in a celebration of what Cuban-Americans have accomplished in local government.

We prosecuted a petition on behalf of the 75 dissidents arrested and summarily sentenced in Cuba for having the dignity and the courage to peacefully battle against tyranny. While some merely took a position when the dissidents were jailed, CABA took action—legal action—before the Inter-American Commission on Human Rights, and we followed it through. We expect favorable findings from that Commission later this month.

We formed a committee charged with crystallizing CABA's role in a Cuba in transition toward democracy and the rule of law, so that we can be better prepared to act when that day finally arrives. And in the Spring of next year, CABA plans to host a symposium on the past, present, and future of Cuba's legal system.

We promoted the many qualified Hispanic jurists in Florida for consideration by the President for appointment to the United States Supreme Court. And although the vision for a truly diverse Supreme Court remains unfulfilled, we are confident that one day soon there will be a first Hispanic Justice of the United States Supreme Court, and we are hopeful that he or she will be from the State of Florida.

In continuing our tradition of excellence in education, this year CABA allocated \$60,000 to expand scholarships to assist qualified students in local law schools and throughout the State. We now award eight scholarships across the State of Florida, including the prestigious Mario P. Goderich Scholarship, named after CABA's first president and a pioneer in the legal community in South Florida.

We partnered with other local and minority bar associations, and in so doing, we forged alliances toward common goals that give us greater abilities than acting alone. And, along with other voluntary bar associations, we were honored to have been invited by Chief Judge Farina to participate in the selection of local magistrates to ensure that all segments of our community are adequately considered and represented.

We worked to improve the quality and quantity of legal services provided by our Pro Bono Project, so that we can better help the needy help themselves under the laws that serve us all. And in that spirit of helping the less fortunate, we gave our help to the victims of Hurricane Katrina.

There is much more, but the key to CABA's accomplishments this year has been a revitalization of our membership. A recent article in *The Miami Herald* noted CABA's ability to appeal to new generations of members, which allows us to continue to confront old problems in new and different ways. It is this dynamic diversity within our own membership that continues to make CABA great. Without a doubt, CABA's greatest assets are its members and our shared commitment to serve the community and to improve the legal profession.

Yet, despite our many successes, much remains to be done. The same challenges that brought our founding members together to fight discrimination and bigotry now beckon us to other parts of the State as well. United by confidence in purpose, we have an obligation to continue to share our leadership and experience with others throughout Florida and beyond. Again this year, CABA has demonstrated that its focus is not limited to Cuban American issues alone. Although we remain a crucial voice on matters that affect Cuban Americans, CABA also represents a struggle for diversity and equality of opportunity by all segments of our diverse State.

CABA is an extraordinary organization, and it has been a tremendous privilege to lead it as President. I personally thank the 2005 Board of Directors, and all of our members, for making this a remarkable year befitting of the CABA tradition. But, the tradition begins anew. On January 20, 2006, Cori Lopez-Castro will be installed as CABA's thirty-second President. I wish her and the 2006 Board of Directors even greater success in the year ahead. Though now at the end of my term as CABA President, I am confident that even after 31 years of achievements, *the best is yet to come!*

Antonio C. Castro

Editor's Note

Cuba Libre



In 2005, CABA has yet again, had a wonderful year in fulfilling its missions (see President's Message on Page 3). While we are proud of our accomplishments and the promise of the future that lies ahead of us there is always an underlying desire within each of us that Cuba once again be free. Living in a democratic country we are thankful and appreciative of the freedom and opportunity available to us. It is this freedom and opportunity that we hope one day soon will be available to our family and friends in Cuba.

CABA has always been dedicated to promoting human rights and a transition to democracy and the rule of law on the island of Cuba. In the hopes that we are ready for the day that Cuba does in fact become "libre" this past year we created a new committee titled "CABA on Cuba." The purpose of the CABA on Cuba committee was to recommend to the CABA Board what position and role, if any, CABA would have when a political transition occurs in Cuba. For detailed information on the CABA on Cuba Committee and CABA's position Statement see Page 14. Next year CABA will be hosting a seminar by its CABA on Cuba Committee to further discuss the various issues that lie before us. We hope to see you there!

Below you will also find polo shirts made by a friend of mine with a "Cuba Libre" logo that I found very fitting for this edition of the CABA Briefs.

Finally, it has been my privilege this past year to once again serve on CABA's Board and specifically serving as Editor-in-Chief of the CABA Brief's. I hope you each enjoyed reading the briefs as much as I enjoyed preparing them.

Sandra M. Ferrera
Editor-In-Chief

"The sufferings endured for the sake of winning freedom make us love it the more. The repose produced by tyrannical rule allows the spirit to purify and strengthen itself"

Jose Marti

For polo shirts ordering info, please contact: Johnnie Manfrediz at 305-934-7810 or via e-mail at elcubiche@aol.com



Demystifying the JNC Process with Governor Jeb Bush August 12, 2005 — The Biltmore Hotel



4th Annual CABA/CACPAA Golf Tournament

The Biltmore Hotel, Coral Gables, Florida



SPECIAL THANKS from the Golf Tournament Committee

On behalf of the Cuban-American Bar Association (CABA) and the Cuban-American CPA Association (CACPPAA), the golf tournament committee would like to sincerely thank all of the sponsors and participants of the Fourth Annual CABA and CACPAA Golf Classic. As a result of your generous support, we raised over \$15,000 for minority scholarships. The funds raised through this tournament will be made available to law and accounting students at our local colleges and universities through CABA and CACPAA's respective scholarship funds. It has been a privilege organizing this tournament.

Gracias,
Manuel A. Garcia-Linares, Jose Ramon Gomez, Eugenio Hernandez, Richard Montes de Oca, and Carlos Perez-Abreu



THE THIRD DISTRICT COURT OF APPEAL FIELDS ITS FIRST ALL-HISPANIC PANEL...OR IS THAT ALL-CUBAN?

By: Edward G. Guedes*

An historic event occurred on Monday, October 3, 2005, at the Third District Court of Appeal. For the first time in the court's 48-year history, oral argument was heard before a panel consisting entirely of Hispanic judges. The panel was comprised of Judges Juan Ramirez, Rick Suarez and Angel Cortiñas. Both Judge Suarez and Judge Cortiñas were recently appointed by Governor Jeb Bush and took the bench in January of this year. Judge Ramirez, a long-time CABA member, took the bench in 2000 after also being appointed by Governor Bush.

Some might forget that the Third District has previously had three Hispanic judges simultaneously on its roster. From 2000 until 2002, Judges Mario Goderich, Rudy Sorondo and Juan Ramirez sat on the court at the same time. For some reason, though, the three judges never sat together on a panel. It took an additional three years and a slight reshuffling of the bench to achieve this historic first. As it happens, a little less than seven months earlier, the court had its first all-female panel, when Judges Melvia Green, Linda Ann Wells and Leslie Rothenberg heard oral argument. It has been a banner year at the Third District.

It turns out that the Third District does not enjoy the distinction of being the first appellate court in the state to have an all-Hispanic panel. The Second District Court of Appeal in Tampa holds that honor, having previously fielded two all-Hispanic panels. On December 19, 2001, and again on October 1, 2002, Judges Darryl Casanueva, E.J. Salcines and Virginia Covington heard oral argument at the Second District. Before anyone questions the fact-checking of this article, Judge Covington's full name is Virginia Maria Hernandez Covington. She is a Cuban-American and currently a United States District Judge in the Middle District of Florida, having been appointed to the federal bench by President George W. Bush in 2004. She had previously been appointed to the Second District by Governor Bush.

While the Third District cannot lay claim to the first all-Hispanic appellate panel in the State of Florida, it is probably fair to say that it can claim the first all-Cuban-American appellate panel anywhere in the United States. Though the issue has not been exhaustively researched, it is likely accurate to assume that there is no other appellate court in the country with three judges who are either Cuban or of Cuban ancestry. Judges Ramirez and Cortiñas were both born in Havana, Cuba. Judge Suarez, who was interviewed for this article, admits to a well-defined Cuban heritage. Two of his grandparents were born in Cuba. A third grandparent was born in Spain, but emigrated to Cuba where he lived with his family for a number of years, before moving the family to Tampa.

Judge Ramirez, who headed the historic panel, took a moment before oral argument commenced to acknowledge the occasion publicly to the lawyers and litigants present. He also praised Governor Bush's commitment to diversifying the appellate bench.



*Edward G. Guedes is a CABA member and shareholder in the appellate department at Greenberg Traurig, P.A. He is a graduate of the Harvard Law School and is one of only two Hispanic attorneys (and the only Cuban-American attorney) in the State of Florida Board Certified in appellate practice. Ed is co-chair of the committee organizing the celebration of the Third District Court of Appeal's 50th anniversary in 2007. He also happens to have stumbled into being the first Hispanic attorney to present oral argument before an all-Hispanic panel at the Third District Court of Appeal.

**JUDICIAL DIVERSITY SENSITIVITY WORKSHOPS
PROVE TO BE A HUGE SUCCESS!**

By: Elizabeth M. Hernandez

Seldom do we finish a project and universally agree - "Why did we wait so long to do this?" The judges, special masters, hearing officers and magistrates of the Eleventh Judicial Circuit attended a series of diversity workshops held over the past year. Why? To encourage them to view the judicial process through the eyes of our diverse community.

Chief Judge Joseph Farina and his staff, including the general counsel of the court, Linda Kelly Kearson, worked closely with Donna Ginn of Ginn Scroggins & Associates and various local bar associations to present a successful program. The participants attended a two-day session that discussed the court process from the viewpoint of litigants and their attorneys - individuals of varying cultural, ethnic and religious backgrounds and sexual orientations. More valuable was the self-evaluation that the participants underwent, the exchange of ideas with colleagues and the observations and concerns communicated by members of local organizations.

I was proud to represent the Cuban American Bar Association at the workshops. While CABA was instrumental in encouraging the bench to host the workshops and my presence there was as a representative of CABA, I personally found the experience to be rewarding and eye opening. The frankness and enthusiasm shown by the participants, the panel, the coordinator, and the representatives from the local bar associations was both encouraging and energizing.

The panel on which I served included representatives from the Miami-Dade County Bar Association, Florida Association of Women Lawyers, Miami-Dade Chapter, Wilkie D. Ferguson Jr. Bar Association, Caribbean Bar Associations, Gay and Lesbian Rights, Brothers of a Like Mind, SantLa and representatives for disabled litigants and attorneys. Many of the panel members provided compelling testimonials with which we can empathize and appreciate. At the end of the session we came away with greater appreciation for each person's unique qualities and struggles.

The panel members discussed their personal experiences and their organization's experiences, as well as their perceptions of the judicial system on topics related to issues of diversity (race, gender, sexual orientation, religion, social class, and disability).

These topics included respect shown by the court, and specifically, as perceived by litigants, and their attorneys; fairness and whether that standard is met satisfactorily by the courts; sensitivity and how the court system responds to individuals whose English language skills are either limited or nonexistent; and what we believe judges can do inside and outside the courtroom to improve their interactions with the public.

One of the most important results of the workshops was acknowledging the need of having a mechanism in place to receive and process complaints of insensitive behavior on the part of court personnel. Some panel members opined that having a designated office or individual with the responsibility of coordinating future workshops, receiving anonymous complaints, and reviewing complaints from litigants or attorneys may be in the best interests of this Circuit.

Another valuable suggestion resulting from the workshops was to expand the program to other Circuits in the State of Florida. Chief Judge Farina has already been communicating with other Circuits as well as the State, to bring about additional programs in other areas and perhaps to the judicial colleges. He has also committed to continue with the program for new judges, hearing officers, magistrates and special masters.

*Elizabeth "Liz" Hernandez is a CABA Board Member and the City Attorney for Coral Gables since 1985.



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Judicial Profile



The Honorable Nuria Saenz de la Torre
“Good things come in small packages”
By Corali Lopez-Castro*

Judge Nuria Saenz de la Torre was one of the most recent appointments made by Governor Jeb Bush to the County Court of the Eleventh Judicial Circuit bench. Once you meet her, you will know why Governor Bush appointed her the first time her name was sent to him by the Judicial Nominating Commission.

Many have commented that her rise in the court system has been nothing short of meteoric. Her first position with the court was as a Staff Attorney Case Manager in the Family Division of the Eleventh Judicial Circuit. She practiced family law but not in the traditional sense. As a Staff Attorney Case Manager, she reviewed numerous cases on a weekly basis to verify process, compliance and prepared orders directing attorneys and parties to comply with various requirements. In effect, she was an extension of the judge. She likens the role of Staff Attorney Case Manager to the role of a Guardian Ad Litem. Judge Saenz de la Torre did not represent a party but she was nevertheless an active participant in the process.

Judge Saenz de la Torre was then appointed as a General Magistrate in the Child Support Enforcement Division. Once again, she presided over a high volume calendar. The cases handled involved establishment of paternity, initial awards of child support and enforcement and modification of previous child support orders. She recognized that special skills were required of her since many parties appeared pro se. She had to assist pro se litigants without providing legal advice. Her most recent appointment in the court system was General Magistrate for the Family Division in January 2005. The issues with which she dealt were difficult, such as domestic violence, neglect, abandonment and dependency. In fact, Judge Nuria Saenz de la Torre has been serving in quasi-judicial roles for many years and has probably received some of the best training to serve on the bench.

Judge Saenz de la Torre’s parents came from Cuba when she was nine years old. They struggled to give her brother and her a better life. Certainly, her parents now know that the struggle was worth it. As far back as junior high school, Judge Saenz de la Torre told everyone who would listen that she was going to be a lawyer and one day, a judge, because she wanted to be part of the great judicial system in the United States. She went on to graduate from Barry University *cum laude* and St. Thomas University School of Law, where she received academic scholarships

CABA is particularly proud that Judge Saenz de la Torre was appointed as she was the first recipient of the Outstanding Young Lawyer Award by the Cuban American Bar Association in 2003. As noted at her investiture, the nomination was memorable due to what her fellow workers said about her. There was no doubt in the nominating committee’s mind that she was a woman of substance and was deserving of the award.

Judge Saenz de la Torre is just shy of five feet, but she is certainly a powerhouse. We look forward to working with her to serve this wonderfully diverse community we live in.

* Corali “Cori” Lopez-Castro is Caba’s President-Elect for 2006 and a partner at Kozyak, Tropin & Throckmorton in Coral Gables, Florida. Ms. Lopez-Castro’s areas of practice include Bankruptcy and Creditor’s Rights.

Cuban American Bar Association



September 24, 2005



ART IN THE TROPICS



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GRACIAS AMIGOS!

Secretary Carlos Gutierrez Our Secretary of Commerce

By: Francisco Ramos, Jr.*



“On February 7th, 2005, Carlos Gutierrez was sworn in as Secretary of the United States Department of Commerce, the first Cuban American to hold the office. Gutierrez left behind a profitable and rewarding job as Kellogg’s CEO and Chairman of the Board to become Secretary of Commerce, where he took a 95% pay cut. He went from making over seven million in salary and stock options to making \$175,000. He has no regrets. “It was a once in a lifetime job opportunity,” Gutierrez says. “It was an opportunity to work with President Bush - someone I admire, someone who shares my values.”

In 1954, Secretary Gutierrez was born in Havana, Cuba. Six years later, Castro confiscated his family’s fruit business. The family fled the dictator, arriving in Miami Beach. From Miami Beach, they moved to New York City and eventually settled in Mexico City, where Gutierrez would get his start at Kelloggs. In 1975, as an English teacher in Mexico City, he heard from a friend that Kelloggs was hiring sales representatives. It turned out the job was little more than selling Frosted Flakes out of the back of a van to local grocery stores.

Though not glamorous, Gutierrez applied himself and learned an important principle that he still lives by today. “I focused on the job I was doing. I wasn’t focused on the next position, the next job, the next employer. I believed if I did my job and did it as well as possible, the future would take care of itself.” It did. He sold a lot of cereal to those grocery stores and was soon promoted, and promoted again and again. By thirty, he was the general manager of Kellogg’s operations in Mexico. In 1996, he was transferred to Kellogg’s corporate headquarters and in 1999, was appointed CEO, the youngest in the company’s 100 year history. A year later he was appointed Chairman of the Board.

As CEO, he changed the way the company looked at success, and in doing so, helped Kelloggs achieve the success which had proven

so elusive. When he became CEO, Kelloggs measured success by the pound, literally. The more volume it sold, the better the company thought it was doing. They thought that selling big boxes, heavy boxes, would result in greater profits. But their belief didn’t reflect reality. They were losing market share, particularly to generic brands.

Gutierrez changed the company’s philosophy from “volume to value.” More wasn’t necessarily better. Instead of measuring productivity and sales by the pound, he measured it by profits. This change in focus led to a change in product lines - a move to higher quality cereal products with a higher profit margin. He taught the company an important lesson. It wasn’t about doing more, it was about doing it better. It wasn’t about how much you did, but about how well you did it.

Secretary Gutierrez attributes his success at Kelloggs to the “Cuban experience.” “Leaving Cuba like we all did,” Gutierrez says, “you realize that anything can happen in life. That you can lose it all. And because of that, you realize that you have to work harder to make something of yourself, to get ahead in life. We have to strive to get back what we lost.” Secretary Gutierrez considers all Cuban Americans as “ambassadors of this point of view.” We have all learned the “value of freedom, individual accountability and free enterprise. Our experiences have taught us these values, and it is up to us to bring these values to light.”

In 1999, he met President Bush for the first time during Bush’s first campaign for President. Last November, President Bush called him and asked him to be Secretary, a once in a lifetime opportunity. As Secretary, he oversees a budget of over 5 billion dollars and supervises over 40,000 employees. His Department also runs the U.S. Census Bureau and the Patent and Trademark Office. As Secretary, Gutierrez is working to expand free trade, create higher paying jobs and strengthen America’s economy.

Today, he works hard to help the business community rebuild in the wake of Hurricane Katrina. “We must rebuild the Gulf Coast economy so businesses can reopen and displaced workers can once again have jobs and paychecks,” Gutierrez says. His office has set up a call center where businesses can make in kind contributions to give a helping hand with the businesses struggling to recover in the aftermath of the storm. He encourages all of us to call 1-888-4USADOC to contribute to this worthy cause. Together, he hopes to help those who lost everything recapture their American dream. A dream, which for Gutierrez, started with selling cereal out of a back of a van and culminated in becoming the Secretary of Commerce.

*Francisco Ramos, Jr. is a CABA Member and on the CABA Briefs Editorial Committee. Mr. Ramos is a certified mediator and partner at the law firm of Clarke Silvergate Campbell where he practices commercial and personal injury litigation.

CABA ON CUBA

By: Manuel A. Garcia-Linares*

This year, the CABA Board of Directors created a new committee titled "CABA ON CUBA." The purpose of the committee was to recommend to the CABA Board what CABA's position and role, if any, would be when a political transition occurs in Cuba. I had the pleasure of being named the chair of the committee. In determining who would be asked to serve, we selected prominent members of CABA who have either been involved in Cuba issues in the past or had an interest in this area. The other committee members are Pedro Freyre, Nicholas Gutierrez, Nelson Bellido, Laline Concepcion-Veloso, Jorge Mestre, Roland Sanchez-Medina, Eduardo Palmer, Marlene Quintana, Osvaldo Soto and Antonio C. Castro.

The committee has met throughout the year. We initially met to gather ideas as to what Caba's role, if any, would be in a post-Castro Cuba. The committee members quickly determined that CABA not only has a right, but the obligation, as a not-for-profit organization whose members are primarily Cuban American lawyers, to promote a peaceful transition to democracy in Cuba. As you can imagine, the committee comprised of lawyers with diverse points of views had various ideas on all ends of the spectrum. However, after a couple of meetings, the committee adopted a position statement which was presented to the CABA Board of Directors. The statement is reproduced below.

The committee then met with leaders in our community to become educated about the legal process in Cuba pre and post Castro and on how transitions have occurred in other communist countries. The committee had presentations from Professor Jaime Suchlicki of the University of Miami, and Salvador J. Juncadella, who has agreed to join our committee.

I am very excited to report that during our last meeting, the committee decided to organize a seminar with the assistance and guidance of El Colegio de Abogados de la Habana, the University of Miami and the Institute For Cuban & Cuban-American Studies that will focus on the past, present and future of the legal system in Cuba. The seminar will likely take place in late March or early April of next year at Casa Bacardi. More information will be available later this year.

If you would like more information regarding our committee, please email me at mlinares@richmangreer.com.

CABA ON CUBA POSITION STATEMENT

The Cuban American Bar Association ("CABA") was established in Miami in 1974 by a small group of Cuban-born attorneys adapting in a different culture. They depended on each other as resources to function in a foreign legal community. Today, as an organization with over 1300 members, CABA functions similar to other voluntary bar associations, but with some significant differences. CABA engages in a broad range of pro bono activities that include a pro-bono clinic, scholarship programs for law students at various law schools, the defense of human rights in Cuba, and the active promotion of sound judicial practices and judicial sensitivity training. In keeping with its proud tradition of defending and promoting due process and human rights in the United States and Cuba, CABA has adopted this position statement on a transition to democracy in Cuba.

We, CABA members, believe that we have a right and an obligation as Cuban Americans to participate and promote a peaceful transition to democracy in Cuba. To achieve this goal, we acknowledge and support the following fundamental principles:

1. That the Cuban people are entitled to live and enjoy the rights and duties of a functioning true democracy;

2. That the Cuban people are entitled to enjoy the fundamental human rights encompassed by the United Nations Universal Declaration of Human Rights;

3. That all the Cuban people, including those Cubans who have been forced to leave Cuba for political reasons, and their children, have an inalienable and fundamental right to participate in promoting and establishing of democracy and human rights in Cuba;

4. That the Cuban people are entitled to a free and fair process to draft a new constitution and an explicit Constitutional guarantee of personal rights, to establish of an independent judiciary, to elect legislators, and elect executive officials; and

5. As a starting point for Cuba's transition to democracy, CABA petitions the immediate release of all prisoners of conscience held in Cuban jails, the dissolution of all internal state security organizations, the establishment of freedom of speech, religion, and association, the recognition of private property rights, and the open and unequivocal commitment of the Cuban government to the promotion and protection of human rights and a democratic process.

As Cuban-American attorneys, we can best assist the Cuban people by offering our collective and individual services. CABA does not espouse any individual political objective other than establishing a true democracy and respect of human rights in Cuba and we offer our help and that of our members in this process.

*Manuel A. Garcia-Linares is a CABA Board Member and Assistant Managing Shareholder at Richman Greer Weil Brumbaugh Mirabito & Christensen. Mr. Garcia-Linares' areas of practice include commercial and class action litigation.

Wage and Hour Suits: Has Your Company's Logo Turned Into a Bull's Eye?

By: Marlene A. Quintana*

Employees are filing hundreds of lawsuits against employers across the country alleging violations of the Fair Labor Standards Act ("FLSA"), outnumbering by far the filing of federal employment discrimination suits. Employers have long neglected this area of the law. However, as the filing of FLSA lawsuits mounts at an ever-increasing pace, employers must ensure that they are in full compliance to avoid becoming the next target.

The FLSA is the federal law that requires payment of the federal minimum wage and the payment of premium wages for hours worked in excess of 40 hours per workweek ("overtime"). (Florida law presently requires payment of a minimum wage of one dollar per hour more than the federal minimum wage.)

A trilogy of FLSA developments has pushed the FLSA closer than ever to the forefront of employer concerns. These factors present a triple threat to employers trying to navigate the dangerous course to compliance. They are:

- The number of class action wage and hour lawsuits continues to grow as plaintiffs' attorneys recognize the potential for large payouts.
- Department of Labor ("DOL") wage and hour settlements have reached an all-time high, with record increases in back pay settlements and civil money penalties.
- The release of new FLSA regulations affected the classification and overtime eligibility status of millions of employees.

The DOL has estimated that more than one-half of employers have incorrectly classified employees under the FLSA. In each of these cases, only one employee complaint to the DOL concerning overtime is required to open an investigation of the entire company's classification methods. It is imperative that employers begin auditing their organizations now, before they face a DOL audit or expensive lawsuit.

Why are we seeing such an increase in wage and hour lawsuits? The drive for employers to cut costs and increase productivity has made exempt employees more attractive because they can work unlimited hours without receiving overtime pay. As a result, there is a temptation for employers to classify workers as exempt when that status may be questionable.

The FLSA also provides significant financial incentives to employee-plaintiffs and their attorneys to aggressively bring wage and hour lawsuits. In many cases, the FLSA allows for double (liquidated) damages and attorneys' fees. FLSA lawsuits continue to be popular because they offer employees a low risk means to recover large money judgments.

Another reason that FLSA lawsuits are popular is because the back pay recovery period can be extended from two to three years if the employee can prove that the employer willfully violated the FLSA. That one-year extension of the recovery period, moreover, also exposes the employer to another year of liquidated damages.

Wage and hour class action lawsuits are also big business for plaintiffs' attorneys. The number of FLSA class action lawsuits filed in federal court has increased dramatically over the last few years. Class action lawsuits, whether litigated or settled, often run into the millions of dollars. For example:

- Farmers Insurance lost a class action lawsuit brought by 2,400 claims adjusters. The jury's verdict against the company was \$90 million for failure to pay overtime.
- Pacific Bell settled a lawsuit brought by 1,500 personal bankers misclassified as exempt. The cost was \$35 million.
- Coca-Cola paid \$20 million to settle misclassification charges brought by California employees.
- United Parcel Service workers misclassified as exempt settled with the company for \$18 million.

Considering the potential for sizable settlement and judgment amounts, it is entirely likely that the number of FLSA lawsuits brought against employers will continue to increase.

How can employers prevent these costly and time-consuming lawsuits and DOL investigations? Be proactive in learning and understanding the FLSA's requirements and conduct careful audits of exempt/nonexempt classifications. Seek advice from counsel in suspect or problematic cases.

One effective and efficient way to prevent FLSA lawsuits is through a comprehensive FLSA audit. Casual and periodic spot checks are not sufficient because of the complexity and broad scope of the FLSA, as well as the numerous DOL regulations and opinion letters that interpret the FLSA. It is only through an in-depth investigation into an employer's time keeping and compensation practices, and an analysis of how those particular practices measure up to FLSA requirements, that an employer can be fully assured of its FLSA compliance. An FLSA audit may also create a good faith defense. The FLSA provides a defense to liquidated damages to those employers who can prove that they had a good faith belief that their pay practices complied with FLSA requirements.

To help ensure that your company will not be subject to a multimillion-dollar FLSA claim or a DOL audit, conduct an internal audit now. You will preempt the DOL and the plaintiffs' attorneys, and discover any misclassifications before it is too late. As part of your audit, you should do a number of things. Review job descriptions to determine whether they are still accurate, reflect the jobs being performed, and reflect the skills necessary to perform the job. In conjunction with that, review employees' actual job duties to ensure that they still fall within the administrative, executive, professional, computer, or outside sales exemptions. Make sure you have properly calculated overtime for nonexempt employees. For instance, nondiscretionary bonuses and shift premiums should be included in the calculation of the regular rate of pay. If you discover you have misclassified or mispaid employees in the past, pay them now what they are owed. Paying them now will be far less expensive than paying them in a DOL settlement or class action lawsuit.

Going forward, make sure your company has in place policies and practices that will avoid common FLSA problems. For example, many employers erroneously believe that they can avoid paying overtime premiums simply by paying any employee a salary. To be truly exempt, an employee must fall into one of the exempt categories expressly defined in the FLSA. Because innocent classification mistakes do not mitigate liability for owed overtime premiums, employers

must learn and understand the FLSA's various statutory exemptions and become proficient in properly classifying employees.

Proper classification is only the beginning. Improper employment practices can defeat an exemption that is otherwise proper, that is, you can change an exempt employee into one who must be paid overtime. Generally, employers may not reduce an exempt employee's salary for absences of less than a full day, absences caused by illness or jury duty, or unavailability for work. Because improper deductions can negate an employee's exempt status, employers should carefully review their employee handbooks, personnel policies, and practices to ensure that such deductions do not occur. Have a clearly communicated written policy that includes a complaint mechanism and that prohibits improper pay deductions. Reimburse employees for any improper deductions. Make a good-faith commitment to comply with the regulations in the future; an employer who willfully violates the policy by continuing to make improper deductions after receiving employee complaints, will lose the exemption.

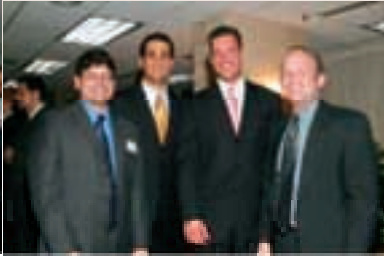
Make sure you pay non-exempt employees properly. The FLSA requires that employers pay nonexempt employees for all hours worked. Although this rule sounds simple, it can be confusing for employers to apply in practice because of the many specific rules that must be applied to determine whether overtime, time for meals, training time, travel time, on-call time, and time spent donning protective gear should be considered compensable hours worked. Employers must be aware of these "hours worked" rules and apply them correctly. Moreover, once employers have properly classified employees as exempt/nonexempt and are correctly paying nonexempt employees for all hours worked, employers must be sure to pay overtime correctly. The major mistake employers make in calculating overtime results from the misconception that overtime is calculated simply by multiplying the nonexempt employee's hourly rate by 1.5. The FLSA requires that an employee's overtime pay must be computed based on the employee's "regular rate," which includes almost all types of compensation. Specifically, in addition to the employee's hourly rate, non-discretionary bonuses, commissions, and compensation for attendance, production, and quality of work are included in the "regular rate."

Employers who do not conduct workforce assessments to ensure that employees are correctly classified under the FLSA's rules take the serious and potentially expensive risks of employee class action lawsuits and DOL audits. With FLSA litigation on the rise and damage awards skyrocketing, the risk employers face for FLSA noncompliance is far too significant to ignore. Employers should be proactive to learn and comply with the FLSA's requirements in order to avoid the costly ramifications of noncompliance.

*Marlene A. Quintana is a CABA Board Member and is a Shareholder at the law firm of Akerman Senterfitt. Ms. Quintana's practices in the area of labor and employment law, management defense, and she is Board Certified by the Florida Bar in Labor and Employment Law.

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A Call for Help!

Mental Health Crisis in our Community

By: Steve Leifman, Associate Administrative Judge,
Miami-Dade County Court, 11th Judicial Circuit

Miami-Dade County is home to the largest percentage of people with serious mental illnesses of any urban community in the United States. Roughly 9.1% of the population (210,000 persons) experiences a serious mental illness, yet public funding for treatment is provided for fewer than 13% of these individuals. As a result, law enforcement and correctional personnel have increasingly become the lone responders to persons in crisis due to untreated mental illnesses. On average, our police handle more mental health calls than burglaries, assaults, and DUI cases; yet these officers rarely receive any kind of training to deal with this population.

On January 11th of this year, Miami-Dade County Grand Jury released a report entitled, *Mental Illness in the Criminal Justice System: A Recipe for Disaster, A Prescription for Improvement*. After a year of investigation, the Grand Jury disclosed what those involved with the criminal justice system have known for years; we have a mental health crisis in our community, in our state, and in this country. The Grand Jury's report concluded that state and local agencies are not adequately funded to provide necessary assistance to those with mental illnesses, either before or after they become involved in the criminal justice system.

On any given day, the Miami-Dade County Jail houses between 800 and 1200 defendants with serious mental illness. This represents approximately 20% of the total inmate population, and costs taxpayers approximately \$15 million annually. The County Jail now serves as the largest psychiatric facility in the state of Florida. People with mental illnesses remain in jail eight times longer than persons without mental illnesses for the exact same charge, and at a cost seven times higher. With little treatment available, many individuals cycle through the system for the majority of their adult lives. As a result of this system, we have seen an increase in homelessness, increased police injuries, increased police shootings of people with mental illnesses and wasted tax dollars. The reality is that we have made mental illness a crime in this country.

Five years ago, we sought to address this problem by convening a two-day summit meeting of traditional and nontraditional stakeholders to review how the Miami-Dade community deals with individuals entangled in the criminal justice system due to untreated mental illnesses. The result was the establishment of the 11th Judicial Circuit Criminal Mental Health Project (CMHP). This initiative brings together and coordinates the resources and services of healthcare providers, social-service agencies, law enforcement personnel, and the Courts; and has resulted in remarkable gains in the effort to reverse the criminalization of people with mental illnesses. Miami-Dade County has seen reductions in arrests among misdemeanor offenders in acute psychiatric distress from 70% to 18%. Individuals with mental illnesses are spending less time in jail and more time engaged in treatment. Crisis Intervention Team (CIT) training, a collaborative effort between law enforcement and the mental health community, to teach officers how handle incidents involving mentally ill people more effectively, has been adopted by 20 of Miami-Dade's 32 police agencies. CIT officers at the City of Miami Police Department, who respond to over 3,600 mental health calls annually, have not discharged a firearm or experienced a fatality since the implementation of this program three years ago. The burden of providing psychiatric services through our jails has been eased, and Miami-Dade County is estimated to be saving more than \$2.5 million annually.

Despite these successes of the CMHP, we continue to struggle with the issue of securing appropriate long-term care for people with immigration issues. Due to the constraints on access to care, people with immigration issues typically receive services from the most expensive sources available - emergency rooms, hospitals and jails. For individuals who experience chronic mental illnesses which require ongoing treatment, this means a cruel cycle of despair involving crisis oriented care, followed by inevitable periods of psychiatric de-compensation.

Last year we brought this issue to the Florida State Legislature in the form of a legislative budget request. Our intention was to demonstrate that providing funding for housing, meals, medication, and wrap-around case management services for people with immigration issues was more cost-effective than continuing to fund more expensive emergency services that do little to ensure long-term well being.

Although, the Legislature chose not to fund this request, we have made strides in raising awareness of the issue of untreated mental illnesses among unauthorized immigrants. Recently, I was asked by Mayor Carlos Alvarez to co-chair the Mayor's Mental Health Task Force, a committee of community leaders assembled to address the recommendations set forth in the Grand Jury's report. A primary interest of this body will be to develop and implement recommendations regarding the financing and provision of mental health services in this community. Issues relating to services for those with immigration issues will also be addressed. In addition, the local district office of the Department of Children and Families has included recommendations to provide \$500,000 in funding for wraparound services for persons with mental illnesses who experience immigration issues.

It is our hope that as we further develop and employ appropriate mental health strategies, we can accomplish the goals of the Task Force, shed more light on this crisis, and help direct more resources to this problem.

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The CABA Board wishes to honor the American service men and women who continue to promote our freedom and liberty. Since September 11, 2001, each and every one of us has a fonder appreciation of the sacrifice, dedication and loyalty that our armed forces provide to our great nation every day. We are especially proud to acknowledge and pay tribute to the son one of our own (CABA's director, Bob Pardo) Manny Pardo who arrived home on September 22, 2005.



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