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Broward County Bar Association BARRISTER

April 2008 VISIT OUR WEBSITE AT WWW.BROWARDBAR.ORG VOLUME 38, ISSUE 4

Tuesday, April 8, Noon BCBA North Luncheon

Speakers Include:
Judge Louis H. Schiff
Judge Steven P. DeLuca
Judge Jill K. Levy

Location:
Galuppi's at the Pompano
Municipal Golf Course
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For more information:
Alan Fishman 954-975-7800
or Jorge Hurtado 954-777-4711

Friday April 11 Noon

BCBA South Luncheon
Guest Speakers:
Judge Sharon Zeller
Judge Arlene J. Simon

Dave and Busters
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Chair: Michele A. Cavallaro



Current Crisis Avoided, But Chief Judges Express Concern About Future Budget Cuts

By Vic Tobin

On Monday March 17 2008, during the Chief Judges conference call we were informed that the legislature is requesting a further ten percent budget cut in the State Courts budget for FY 2008-2009 that would go into effect in just a few short months. Such a budget cut would have a severe impact on the courts and their ability to function.

This projected ten percent cut will impact each of us. I feel you have an absolute right to know that a cut of this magnitude would cause a one third reduction in the state courts' work force and return us to the work force level of approximately 1975. It would require the court system to reduce its work force by 822 positions state wide and eighty positions in the 17th Judicial Circuit starting July 1, 2008.

We should make every effort to contact not only our legislators but other leaders in the community who may use services of the court system. Please voice your concerns to your representatives in Tallahassee.

The courts escaped one crisis when on Friday, March 14, 2008, Governor Crist signed into law the State of Florida's budget reduction bill for the current fiscal year. While we

absorbed some cuts statewide, state courts avoided a major budgetary crisis.

At this juncture, we are uncertain as to the extent additional cuts will impact the future operations of the court system. But, realistically, we are certain that *every* aspect of the courts will be adversely impacted should these additional reductions come to pass.

Furthermore, and most importantly, we need your cooperation. We know that this is unsettling news. The Office of State Court Administrators and the Trial Court Budget Commission are working to coordinate statewide strategy for addressing this crisis. In the coming days, as we develop the "Circuit Court's Call to Action Plan", we will keep you abreast of our progress and provide you with information to convey to our legislative delegation and local business leaders. It is crucial that we present a united front and that our message is clear in this battle to maintain a competent and viable court system for the people of Florida.

As the state courts budget hearings progress, I will keep you apprised of the situation.

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19th Annual Red Mass, Reception & Dinner
Thursday, April 24, 2008

Red Mass Celebrated by Archbishop John C. Favalora
6:00 P.M.

St. Anthony Catholic Church
901 N. E. 2nd Street
Fort Lauderdale, Florida

Complimentary Reception-7:30 P.M.

Dinner - 8:30 P.M.

Marriott Harbor Beach Resort
3030 Holiday Drive
Fort Lauderdale, Florida

Guest Speaker: Hon. Gerald B. Tjoflat

Federal Circuit Judge, Eleventh Circuit Court of Appeals
The Edward A. McCarthy Award will be presented at the dinner to:
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APRIL 2008

CALENDAR OF EVENTS

Wednesday, April 1

Ballots being mailed out for the new Board of Directors and are due on April 15!!!

Thursday, April 3

Clerk and Bar Committee meeting at noon. Broward County Courthouse 201 SE 6th Street, Fort Lauderdale

Monday, April 7

17 G Florida Grievance Committee Meeting at the Broward County Bar Association 1051 SE 3rd Avenue, Fort Lauderdale

Monday, April 7

Traffic Magistrate lunch at noon. Broward County Bar Association 1051 SE 3rd Avenue, Fort Lauderdale

Tuesday, April 8

North Broward Bar Association luncheon at 12:00p.m. Location:Galuppi's at the Pompano Municipal Golf Course 1103 North Federal Highway, Pompano Beach, FL 6300 North Andrews Avenue, Fort Lauderdale Guest Speakers: Judge Martin Schiff, Judge Steve DeLuca and Judge Jill Levy RSVP to (954) 975-7800

Friday, April 11

Southeast Bar Association luncheon at 12:00p.m. Dave & Buster's, Oakland Plaza Hollywood

Saturday, April 12

4 Hour Minor Guardianship Class held at the Broward County Bar Association 1051 SE 3rd Avenue, Fort Lauderdale, 9:00 a.m.- 1:00p.m. Cost to attend: \$100.00. Please call Jane (954) 764-8040 ext. 202 to register.

Sunday, April 13

The Twenty-Eighth Annual Installation Brunch of the Officers and Directors of The B'nai B'rith Justice Unit #5207 with TENATIVE Keynote Speaker Governor Charlie Crist Time: 9:30a.m. Location: Weston Hotel Fort Lauderdale 400 Corporate Drive(I-95 & Cypress Road) A Gourmet Brunch will be served. Cost is \$50.00. RSVP to Michael Fischler-ffpa@bellsouth.net (954) 763-5778

Tuesday, April 15

17H Florida Grievance Committee Meeting at the Broward County Bar Association 1051 SE 3rd Avenue, Fort Lauderdale

Tuesday, April 15

Bench and Bar Committee Meeting Noon. Lunch included. Broward County Bar Association 1051 SE 3rd Avenue, Fort Lauderdale RSVP to (954) 764-8040

Wednesday, April 16

Myles German, Financial Advisor offers a FREE seminar at the Broward County Bar Association 1051 SE 3rd Avenue, Fort Lauderdale 4:00p.m.-6:00 p.m For more information and to RSVP, please call Mr. German 561-961-9311

Friday, April 18

Federal Bar Association Broward Chapter Luncheon, Riverside Hotel, Noon- 1:30 p.m. Speaker: Alan S. Gold, United States District Judge Southern District of Florida. RSVP to Candice D. Tobin, ctobin@abravermanlaw.com

Thursday, April 24

19th Annual Red Mass Complimentary Reception- 7:30p.m. and Dinner- 8:30p.m. at St. Anthony's Catholic Church 901 N.E. 2nd Street, Fort Lauderdale Cost to attend: \$65.00 Guest speaker: The Honorable Gerald B. Tjoflat, Federal Circuit Judge, 11th Circuit Court of Appeals Mail checks to: Donald A. Wich, Jr., 2400 East Commercial Blvd., Suite 620 Coastal Tower, Fort Lauderdale, FL 33308 Made payable to: "St. Thomas More Society".

Friday, April 25

"Bankruptcy for the Family Law Attorney" Noon to 1:30 p.m. at the Broward County Bar Association This lunch seminar will emphasize changes in the bankruptcy law as they pertain to family law attorneys. Cost \$20 includes lunch. RSVP Required to (954) 764-8040 ext 204 or 210.

Saturday, April 26

8 Hour Adult Guardianship Class held at the Broward County Bar Association 1051 SE 3rd Avenue, Fort Lauderdale, 9:00 a.m.-5:00p.m. Cost to attend: \$180.00. Please call Jane (954) 764-8040 ext. 202 to register.



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PRESIDENT'S MESSAGE by Barbara K. Sunshine

NORTH AND SOUTH AREA MEMBERSHIP LUNCHEONS APRIL 8 AND APRIL 11

We have combined the Northeast and Northwest into the North luncheon and the Southeast and Southwest into the South luncheon.

Please come to the North Membership Luncheon on Tuesday, April 8 at Noon at Galuppi's on the Green, 1103 North Federal Highway, Pompano. The speakers are the North Satellite Judges: Steven DeLuca, Jill Levy, and Louis Schiff.

Don't forget the South Membership Luncheon on Friday, April 11 at Noon at Dave & Buster's, 195 and Stirling Road. Administrative Judge Sharon Zeller will be speaking along with South Satellite Judge Arlene Simon.

NATIONAL ADMINISTRATIVE PROFESSIONALS DAY APRIL 23

Wednesday, April 23 is the day set aside to honor your assistant for his or her hard work. Administrative Professionals Day, formerly Professional Secretaries Day, is an annual event originally organized in 1952 as National Secretaries Day by the National Secretaries Association (now known as the International Association of Administrative Professionals). My assistant, Joan Moehle, has been with me for over fifteen years. We go to lunch and visit on a personal basis, something we often don't have time to do.

In my other careers, I was a legal secretary for ten years in Dade County and a columnist for the "Miami Review." I attained my goal of becoming a PLS in 1977, the first in Miami. The one-day, four-part examination can be taken by a person with three years' experience in the legal field. It is administered by NALS which is dedicated to enhancing the competencies and contributions of members in the legal services profession.

I also have a degree in English literature and a teaching certificate, so I braved an eighth grade classroom for student teaching a loooong time ago.

LEGAL AID SERVICE OF BROWARD COUNTY AND COAST TO COAST LEGAL AID SERVICE

Broward County lawyers are lucky to have Tony Karrat as Executive Director of Legal Aid Service of Broward County and Barbara Prager as Executive Director of Coast to Coast Legal Aid of South Florida. We started a new program this year to assist members in signing up for pro bono service by inserting the information on our Membership Application. As you know, reporting pro bono hours is mandatory, but performing the pro bono services is voluntary. We give members a choice of volunteering for pro bono services or contributing the sum of \$350 to Legal Aid. Kim Ligman-Zaffere, Assistant Development Director of Legal Aid and Pro Bono Coordinator for Broward Lawyers Care, was enthusiastic about the response: "We received an additional 14 new members who pledged a minimum of \$350 to satisfy their annual buy-in for a total of \$4,900. Thank you to all who participated in helping make equal justice more of a reality. Thank you Broward County Bar Association for spearheading the effort to include information regarding BLC's annual campaign on the annual Bar dues Statement allowing attorneys to sign up for BLC when filling out the Application. Remember, your Florida Bar dues Statement

arrives in June, so there is still time to buy-in for \$350 or volunteer a minimum of 20 hours."

Broward Lawyers Care, the pro bono attorney program, enables attorneys to make a difference in their community. Legal Aid manages the administrative issues so that the attorney's time is spent directly on the clients' legal needs. Broward County Bar Association Board member, Jorge Hurtado, has been named Broward Lawyers Care 2008 Pro Bono Attorney of the Year: "I encourage and challenge my colleagues to become proactive not only in accepting BLC cases, but also in promoting BLC to our community."

FOR THE PUBLIC GOOD APRIL 25

Legal Aid Service will host its 7th Annual For the Public Good on Friday, April 25 at 6:00 at the Ft. Lauderdale Grande Hotel and Yacht Club. This is a great event for a worthy cause—children's programs.

LAW WEEK ACTIVITIES MAY 5 AND MAY 12

The annual Law Day Luncheon which is chaired by hardworking Board member Angel Petti Rosenberg, will be held on Monday, May 5 at the Tower Club. The keynote speaker is The Florida Bar President Francisco Angones.

Monday, May 12 at 5:30 we are partnering with The Jewish Federation of Broward County and several other voluntary bar associations on an event at the Ft. Lauderdale Museum of Art. The topic will be "Dirty Money! What is the Attorney's Responsibility to Ensure Fees are Clean?"

COOPERATIVE FEEDING PROGRAM BROWN BAG LUNCH DAY—MAY 21

Social/Sports/Goodwill Chair Diana Santa Maria chose the Cooperative Feeding Program as one of our charities this year. We started the day before Thanksgiving when Board members Bruce Weihe, Diana, and I went to their facility on Broward Boulevard and handed out Publix Gift Certificates and boxes of food from the Program's warehouse. The Gift Certificates were purchased from donations from the Board of Directors.

The letter of thanks for my donation from Marti Forman, Chief Executive Officer of the Cooperative Feeding Program, said that in November, 2007, the daily kitchen service provided 11,750 meals and distributed over 3,340 boxes of pantry supplies to struggling individuals and families. The Program also feeds hot meals to the homeless, and furnishes showers, fresh clothing, and referrals to shelter and employment opportunities.

Now every member has a chance to help. We are declaring Wednesday, May 21, BROWN BAG LUNCH DAY. Whatever amount you spend on lunch, please send a check made payable to the Cooperative Feeding Program to the Broward County Bar Association, 1051 Southeast Third Avenue, Ft. Lauderdale, Florida 33316, to the attention of Tish. She will gather the checks and send them on to the Program.

Let's help fight hunger in Broward County.

A Special Thank You...

At press time, these are the individuals who have made contributions this current fiscal year to our Mortgage Reduction program that was created to help BCBA pay down the mortgage on the Norma B. Howard Bar Center
Each individual received a blue and gold BCBA lapel pin.

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Message From Broward County Bar Association's Young Lawyers' Section President
by Chris D. Connally

March was another busy and exciting month for the YLS. We would like to thank all of those who came out to Himarshee Side Bar and Grille for the

Friday, March 7th, 2008 happy hour to kick off the Saturday night Bowl-A-Thon. The March 8th Bowl-A-Thon held at Manor's Lanes in Wilton Manors benefited the Cystic Fibrosis Foundation. It was an amazing turnout and we filled each and every lane! All of the money raised went straight to this year's beneficiary. As usual, YLS Board Member, Bart Ostrzenski and his wife, Jamie, did a fantastic job, as did co-chair Joy Huppert. The YLS would like to thank former YLS Board Member, Debra Klauber, and Vicky Shahady for their assistance in making this a truly successful event. We hope that all of you will continue to support this wonderful organization and come out to Birch State Park in Ft. Lauderdale at 8 a.m. on April 5th for the C.F.F. Great Strides 5k Walk / Run in an attempt to raise money for a truly amazing organization!

We would also like to thank everyone for coming out to a truly unique happy hour organized with co-hosts, the Young Benefactors, which was held at the Museum of Art in Ft. Lauderdale on Thursday, March 20th. We are hopeful to continue to work with the Young Benefactors and continue to branch out in terms of our social events.

As the YLS has done with past BCBA Presidents, we invited current President, Barbara K. Sunshine, to speak at our March 27th luncheon. The YLS is very appreciative and thankful to Barbara for all of her hard work and efforts on the "Big Bar", as well as her continued support of the YLS!

We also want to remind everyone that the Judicial Reception will be held on May 1, 2008 at the Sun Sentinel building! As in the past, we are expecting to have a large turnout. Please make sure to RSVP and contact, President-Elect, Scott Chitoff, for sponsorship opportunities. Keep an eye out for the email blasts for more details.

On behalf of the Young Lawyers' Section, we would like to send our deepest condolences to the family, friends, co-workers and the legal community as a whole for the loss of one of Broward County's finest, attorney Melissa

Lewis. Those who knew Melissa had nothing but wonderful and positive things to say about her. She is someone who will truly be missed.

Remember, you do not have to be young or a lawyer to attend our events! As always, should you have any questions, please do not hesitate to contact Chris D. Connally at CDConnally@hotmail.com.

The YLS Board will be selecting its charitable beneficiary on May 21, 2008 for the 2008 YLS Golf Tournament, which is scheduled to take place on October 18, 2008.

Any charities interested in attending the May 21, 2008 meeting should contact David Hirschberg, Esquire at either 954-967-5458 or via email at dlh@mjalaw.net.

The Broward Barrister is published by the Broward County Bar Association as a part of our commitment to provide membership with information relating to issues and concerns on the local level. Opinions and positions expressed in the signed materials are those of the author and may not necessarily reflect the views of this publication or the Broward County Bar Association.

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RECENT DEVELOPMENTS IN THE LAW

by Nancy Little Hoffmann

1. Attorney's Fees/Specificity of Motion

Parrot Cove Marina, LLC v. Duncan Seawall Dock & Boatlift, Inc.,

33 Fla. L. Weekly D575 (Fla. 2nd DCA February 20, 2008).

On rehearing, the Second District has modified its opinion (reported in the January issue of the Barrister) in several respects. Notably, it deleted that portion which had held that a request for attorney's fees was required to include "at a minimum" the amount of fees sought, supporting affidavits, copies of bills, and identities of witnesses. In the revised opinion, the court suggested that Civil Procedure Rules Committee address the issue.

2. Attorney's Fees/Timeliness of Motion

Cardillo v. Qualsure Insurance Corporation,

33 Fla. L. Weekly D550 (Fla. 4th DCA February 20, 2008).

A motion for attorney's fees filed more than 30 days after entry of a declaratory judgment was held to be untimely. The Fourth District affirmed, rejecting the argument that a declaratory judgment determining coverage was not a "final judgment."

Barco v. School Board of Pinellas County,

33 Fla. Weekly S87 (Fla. February 7, 2008).

The supreme court has held that the language of rule 1.525 requiring that a motion for fees and costs be served "within" 30 days after a judgment establishes the outside limit after which a motion may not be served. The rule does not mean, as the Second DCA held in this case, that a motion is untimely if served before the judgment. The supreme court approved contrary opinions from the other four districts.

3. Automobile Accident/Failure to Use Child Restraint

Quarantello v. Leroy,

33 Fla. L. Weekly D517 (Fla. 5th DCA February 15, 2008).Section 316.613(3), Florida Statutes, states that the failure to provide and use a child passenger restraint is not comparative negligence and is inadmissible at trial. However, the Fifth District, in a two to one opinion, held that the statute does not prohibit such evidence in a negligence action brought by the child against the caretaker who allegedly failed to secure the child. The court reversed a summary judgment which

had been entered in favor of the caretaker based on the statute.

4. Jurisdiction/Class Actions

Hernando County v. Morana,

33 Fla. L. Weekly D562 (Fla. 5th DCA February 22, 2008).

According to the Fifth District, a class action filed in county court seeking refund of franchise fees, where no individual claim exceeded \$15,000.00 but the aggregate amount was in excess of that amount, jurisdiction belonged exclusively in circuit court. Accordingly, the circuit court should have granted a petition for writ of prohibition to prevent the county court from proceeding with the case based on lack of subject matter jurisdiction.

5. Product Liability/Defective Design

Liggett Group, Inc. v. Davis,

33 Fla. L. Weekly D549 (Fla. 4th DCA February 20, 2008).

The Fourth District has certified to the supreme court the question of whether a plaintiff is required to establish an alternative safer design in order to prevail on a design defect claim for an inherently dangerous product. It also certified the question of whether Florida should adopt the Restatement (3rd) of Torts for design defect cases. In October of 2007, the court had affirmed a verdict for the plaintiff based on a defective design theory; this recent opinion did not disturb that ruling.

Nancy Little Hoffmann is a Board-Certified Appellate Lawyer practicing in the Fort Lauderdale area since 1974. She may be contacted at 954-771-0606 or by e-mail at NLHappeals@aol.com.

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"THE TIMES - THEY ARE A-CHANGIN' - MEDICAID & OTHER MUSINGS"

As the country faces a looming recession, ongoing war in Iraq and Afghanistan, as well as the uncertainty as to who our new president will be, everyone looks at their financial picture from their own perspective. For the very wealthy, many are hoping that estate tax will be permanently repealed. For the middle class, it may all be about keeping their jobs, feeding their families, and keeping a roof over their heads. And, for the poor, "the Medicaid crowd," or the "wannabe Medicaid crowd," the situation is becoming very ominous.

As to Medicaid, back in 2005, President George W. Bush, convinced that oodles of millionaires were all getting on Medicaid, passed legislation called the Deficit Reduction Act of 2005 or, simply, the "DRA" (signed into law in February 2006) to make eligibility even more difficult than it already was. New asset transfer rules were enacted, and each state then implemented the DRA. Florida did not implement the DRA until November 1, 2007. And we did not implement the DRA exactly as the DRA reads.

For example, look-backs (those "nasty" time frames which the Department of Children and Families [DCF] looks at to see if applicants have been divesting themselves of assets to look poor), were extended to 5 years under the DRA. But, Florida's enactment of the DRA in November of 2007, currently maintains the same 3 year look back (5 years for transfers to irrevocable trusts). We have no way of knowing when DCF will "fix" this odd little glitch, and some others. We also do not know whether these "corrections" will be retroactive to November 2007.

Annuities are, for whatever reason, "personas non grata" under the DRA, so one needs to be wary of annuities in Medicaid planning.

And certain techniques, not even mentioned in the DRA, are now, without warning, being challenged by DCF. Personal service agreements, sometimes referred to as lifetime care contracts, are now on the new DCF "hit list." As they are submitted, Medicaid applicants/recipients or their elder law attorneys are receiving a form letter requiring us to rebut the presumption that the Agreement was done solely for Medicaid eligibility, and that the funds used to pay a family member to care for the Medicaid applicant really constituted an improper "transfer" (or gift).

More recently, spousal refusal, a technique wherein the ill spouse transfers their assets to the well or community spouse, then applies, and the community spouse signs a "spousal refusal of support" statement, well, this technique is now being challenged as well. The concept of spousal refusal is based on the law wherein a spouse is not responsible for the debts of the other spouse, unless they share a joint debt. Not that there is any public policy to support it, but, apparently some other states have successfully fiddled with spousal refusal and eviscerated its ability to help qualify a married individual for Medicaid. It has been suggested that the amount of assets transferred from one spouse to the other may be "capped" at what is called the community spouse resource allowance or CSRA (currently \$ 104,400.00).

Ironically, the primary facet of Medicaid that has not

changed is that an unmarried applicant cannot have assets in excess of \$ 2,000.00 plus a limited number of exempt assets. With numbers like that, almost no one would ever be eligible unless they seek advice from an elder law attorney. But the government, concerned about all those millionaires getting on Medicaid, has made it nearly impossible to qualify people today.


And so, in this "Brave New World," it is more important than ever for the practitioner to be very wary of the various remaining planning techniques, and that attorneys who do not practice in this area of law, need to know when to say "when," and to refer these matters off to those attorneys who specialize in this difficult area of the law.

And a final friendly tip from one legal colleague to another, be sure you and everyone you know or care about, plans for their future, and not a future wherein one can rely on Medicaid. Find a good insurance agent and take out the best long term care policy you can qualify for.

"The times , they are a-changin' " and elder law practitioners need to be more vigilant than ever.

Submitted by Arlene Lakin, Esq.
Florida Bar Board Certified Elder Law Attorney
Co-Chair of the BCBA Elder Law Section
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Poor Spouse, Rich Spouse: Utilization of Irrevocable Lifetime Q-TIP Trusts

by Laurence I. Blair

The Irrevocable Lifetime Q-TIP Trust (hereinafter referred to as "Inter Vivos Q-TIP Trust"), is a useful estate planning technique for equalizing the estates of a married couple. An Inter Vivos Q-TIP Trust enables one spouse to transfer assets to their spouse to increase the other spouse's gross estate for federal estate tax purposes. The transfer of assets between spouses will not result in a taxable gift from taking place. In addition, the transfer to the trust will prevent the donee spouse from having control over the transferred assets while allowing the donor spouse the ability to enjoy the benefit of the property for the balance of his or her lifetime in the event the donee spouse should predecease the donor.

By example, Husband currently has assets for federal estate tax purposes equal to \$700,000. Wife currently has assets for federal estate tax purposes equal to \$6,000,000. Husband and Wife have not entered into a prenuptial agreement. Husband and Wife each have two children from a prior marriage. It is the Wife's goal to provide for her Husband if she should predecease him and to minimize federal estate taxes and generation skipping taxes when Wife's assets are transferred to her children. If Wife establishes an Inter Vivos Q-TIP Trust for the benefit of Husband and funds the Trust during her lifetime, then if she predeceases Husband, he would receive all of the income from the Trust. If Wife so desires, Husband can also receive the principal for his health, support and maintenance. If Husband predeceases Wife, the Inter Vivos Q-TIP Trust can continue for Wife's benefit with her receiving all of the income and so much of the principal for her health, support and maintenance. Upon Wife's death or if she predeceases her Husband, then the remaining Trust corpus would be distributed to her beneficiaries as she determined when the Trust was drafted. The remaining corpus of this Trust will be included in the Husband's estate for federal estate tax purposes and for generation skipping transfer taxes. This technique, based on the net worth listed above and utilizing a \$2,000,000 estate tax exemption, would reduce the taxes to Wife's children (the ultimate beneficiaries of the Trust) in the approximate amount of \$585,000 (i.e., \$1,300,000 x 45%).

The benefits of utilizing an Inter Vivos Q-TIP Trust in a married client's estate plan are as follows:

1. The gift to an Inter Vivos Q-TIP Trust will increase the donee spouse's gross estate, and may enable the donee spouse to use all of his or her unified credit exemption and generation skipping transfer tax exemption.
2. The use of an Inter Vivos Q-TIP Trust will allow the donor's spouse to control the ultimate distribution of the assets upon both spouse's demise.
3. The donor's spouse may serve as the trustee of the Inter Vivos Q-TIP Trust retaining control over the management of the trust assets. This will not cause the trust to be includable in the donor's gross estate if the donee spouse predeceases the donor spouse.
4. The donor's spouse, upon the donee spouse's demise, can provide in the trust that the trust shall continue for the donor spouse's lifetime with the donor spouse receiving all of the income and so much of the principal for their health, support and maintenance, or other ascertainable standard.
5. A donor spouse that is married multiple times may create a Q-TIP Trust with respect to each donee spouse. Each Q-TIP Trust that is established will utilize the donee spouse's generation skipping transfer tax exemption and estate tax exemption.
6. The Intervivos Q-TIP Trust will have the benefit of spendthrift provisions and will provide a level of creditor protection for the donee spouse.

When discussing the implementation of an Inter Vivos Q-TIP Trust, one must discuss with their client the ramifications that the utilization of this trust might have with regard to any prenuptial or postnuptial agreements. This planning technique is a very effective method of equalizing the spouses' estate and utilizing generation skipping transfer tax and estate tax exemptions.

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by Loring N. Spolter

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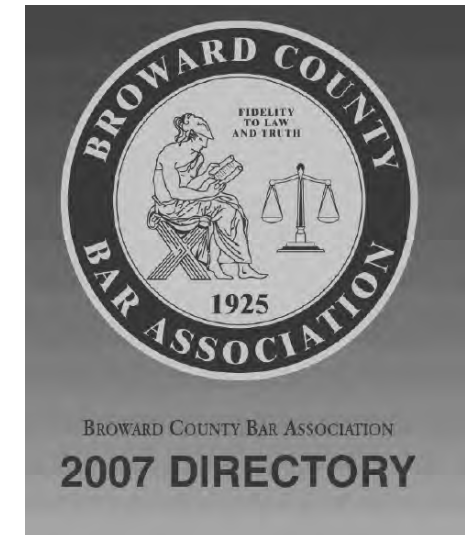
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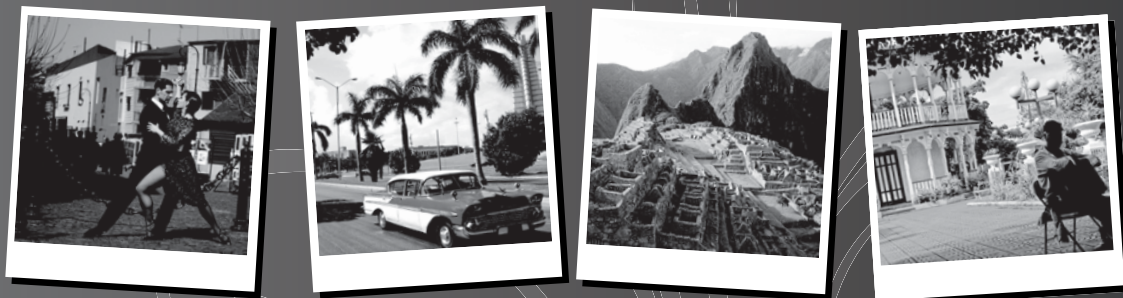


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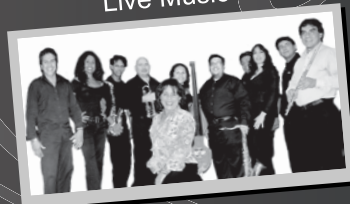
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**Broward County Bar Association
Law Day Luncheon**

** Make reservations early as seating is limited

LAW DAY LUNCHEON

DATE: Monday, May 5, 2008
TIME: 12:00 Noon
SPEAKER: Francisco R. Angones, Esq.
LOCATION: Tower Club, 1 Financial Plaza
100 SE 3rd Avenue, 28th Floor

LEVELS OF SPONSORSHIP

LIBERTY SPONSORSHIP.....\$1,000.00 (8 lunch tickets)
JUSTICE SPONSORSHIP.....\$500.00 (4 lunch tickets)
FREEDOM SPONSORSHIP.....\$250.00 (2 lunch tickets)

All sponsors will also receive:

- Name and sponsorship level in the Law Day Program.
- Name displayed on signage at events.
- Recognition in the BCBA monthly newsletter, the *Broward Barrister*, which will be distributed to all Broward County Bar Members.

- ** Additional seats for luncheon are \$30.00 per person
- ** Members of the Judiciary - complimentary entrance

Please make checks payable to "The Broward County Bar Association" and mail to:

Angel Petti Rosenberg, Esq.
Hall & Rosenberg, P.L.
14 Rose Drive

Fort Lauderdale, Florida 33316

e-mail questions to: angel@hallrosenberg.com

R.S.V.P. to Broward County Bar Association at (954) 764-8040



Hand-On Deliberations: When Juries Experiment with Evidence

by Kristin Bianculli and John Uustal, Kelley Uustal, PLC

Having expert witnesses conduct experiments or demonstrations in front of the jury is an intricate part of proving or disproving a claim at trial. While these demonstrations and experiments engage the jury and are undoubtedly persuasive, allowing the jurors to recreate the experiments during deliberation may be detrimental to your case and may ultimately warrant the granting of a new trial.

At the beginning of this year, in the case of *Castillo v. Visual Health & Surgical Center, Inc.*, 2008 WL 34813 (Fla. 4th DCA 2008), the Fourth District Court of Appeals affirmed a trial court's decision allowing the jurors to replicate a demonstration conducted by an expert before them during trial. The plaintiff in *Castillo* brought a medical malpractice action against a surgical center and the operating surgeon alleging that the surgeon injured her eye by leaving a piece of a sponge in her eye following her surgery. The surgeon testified that in performing surgeries such as the one he performed on the plaintiff's eye, part of his established routine is to use pieces of sponge cut from various larger sponges, soak them in a highly potent chemotherapy solution, and leave the pieces on the affected area of the eye for three minutes. According to the opinion, the defendants admitted that a sponge fragment was left in the plaintiff's eye, but disputed that the sponge caused her injury.

At trial, the defense had an expert perform a demonstration for the jury in which he submerged a sponge similar to the one used in the plaintiff's procedure in water to show the jury how the sponge expands. During deliberations, the jurors asked the judge whether they could perform their own similar test by wetting a sponge that had been entered into evidence. The judge gave them permission to conduct the test over the plaintiff's objections. The jury ultimately returned a verdict in favor of the defendants. The plaintiff filed for a new trial arguing that juries are not entitled to conduct their own experiments with evidence and that allowing the jury to do so results in the creation of new evidence in the jury room. The crux of the plaintiff's argument was that neither the parties nor the judge were present during the experiment, and thus, were completely in the dark as to what the jurors used to wet the sponge and what they actually did with it during their deliberations. The trial court rejected the plaintiff's motion for a new trial, and she appealed.

The primary focus of the Fourth District in determining the issue of permissible juror experimentation was whether the deliberating jury's replication of the demonstration or experiment amounted to extraneous evidence. At the outset, the court made it clear that the trial court has *considerable discretion* to determine whether to allow exhibits introduced at trial to be taken to the jury

room for the jury to use during its deliberation. The court cited the seminal case of *Lamb v. State*, 107 So. 530, 532 (Fla. 1925), in which the Supreme Court of Florida held that a new trial will not be granted on the grounds that the jury was permitted to take evidence with them into the jury room during deliberations unless there is a showing that the jury received testimony regarding the evidence other than what was adduced at the trial and that the additional testimony was prejudicial. The court further noted that several jurisdictions have addressed the issue of juror experimentation and have generally found it to be acceptable. Relying on case law, the court found that juries may replicate tests performed in the courtroom while they are deliberating and that the parties may not be present during those deliberations.

The opinion also distinguished this case from cases in which appellate courts in various jurisdictions held that it was error to allow jury experimentation, and in doing so, gives some indication as to when it too would find error on the part of a trial court judge for allowing juror experimentation. The majority of those cases involved situations in which jurors reenacted experiments or demonstrations outside of court using items not in evidence, conducted the experiment at home and later testified in front of the other members as an expert would, used tools and objects which were never present during the trial or were not used to aid the jury's understanding, substituted materials to conduct the experiment even though the actual conditions were different, or used evidence that was not in the same condition as it was in the relevant incident.

The holding in *Castillo* provides the test for determining whether jury experimentation is appropriate: If jurors are merely duplicating tests performed in the courtroom on exhibits sent with them to the jury room, it is not extraneous evidence, and accordingly, a new trial is not warranted. With the Fourth District ruling that juries can recreate experiments during deliberations, attorneys in Broward need to think about the risks and benefits that come with admitting evidence that the jury may be able to take with them and with having experts conduct experiments with that evidence during their testimony. Often, the most powerful and persuasive testimony comes from an expert witness who can testify about a scientific method or test, apply it to the evidence, and walk the jury through the experiment step by step. However, the complexity, presentation, and the jury's potential understanding or confusion of the precise methods involved should all be considered. Attorneys must take care when planning their trial strategies since, after *Castillo*, the expert may not be the only one conducting the experiment.

Traffic Court Program Terminated Due to Lack of State Funding

by Brenda DiIoia
Chief Adm Traffic Magistrate

The Broward County Traffic Court Program, after 19 years, has been terminated due to lack of State funding. All Traffic Hearing Officer programs throughout the State have been eliminated from the budget as the court system endures further reductions. The Broward Traffic Program assists the County Court by resolving non-criminal traffic infractions.

At the request of Chief Judge Tobin, Judge Zeller and Judge Lee the Broward Commission has given our program funds to remain working until June 30, 2008 at which time the approximately 60,000 cases processed per month in this division will be turned over and added to the County Court Judges existing caseloads.

We have suggested 4 alternative funding plans that could be used to save this and other support programs. A proposed funding package can be found on our website's main page, www.browardthos.org. Anyone who would like to express how this funding cut affects your agency can help by:

Download:
<http://www.browardthos.org/courtfundpkg.pdf>

1. Contact your legislators and request adequate funding for the court system. (Contact information for the Broward Delegation is <http://www.browardthos.org/fundingexh.pdf>)
2. Contact your local Commissioners and request that they use their resources to get adequate funding for the court system from the State. <http://www.broward.org/countygov.htm>
3. Contact your professional colleagues, local businesses, Chambers of Commerce, friends and neighbors and have them help express how critical these services are to all Floridians.

If you have any questions call

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