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ON THE COVER:
A Primer for Lawyers on Drug Testing During the Olympics and International Competitions. Read more on page 18.

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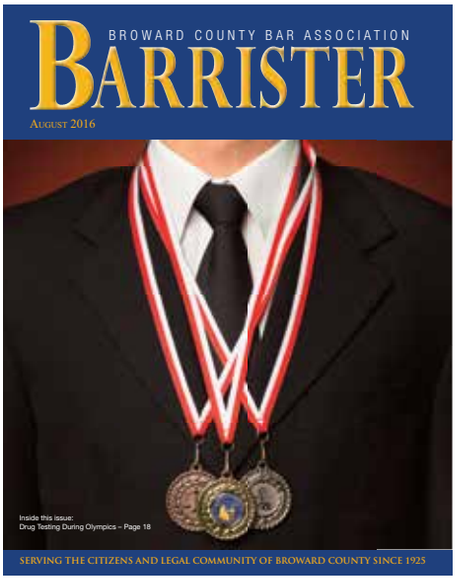

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letter from the president

Charles A. Morehead III

We had an outstanding night at Pier 66 for the 2016 Officer Installation and Awards Banquet. Next year, we plan to have the event on Saturday night and emphasize the entertainment side of the event and de-emphasize the speech making.

As I noted in my brief acceptance speech, the Broward County Bar Association will be heard on issues of importance. This month that includes The Florida Bar's attempt to change the rules pertaining to "for profit" lawyer referral services.

Rule 4-7.22 of the Rules Regulating the Florida Bar currently requires lawyers who participate in "for-profit" referral services to maintain legal malpractice liability coverage in amount not less than $100,000, place notations on all advertisements for the referral service that the lawyers are paying to be a member, and that the service is in fact a lawyer referral service as opposed to a bona fide ad by a particular lawyer. All of these things would be deleted under the new rule. "Qualifying providers" would become the euphemism for lawyer referral services. The malpractice insurance requirement is dropped, as are the current disclosures pertaining to the service itself.

On June 29, 2016, the Broward County Board of Directors unanimously voted to support a Resolution, which can be viewed at http://bit.ly/2aG9xXR, opposing the new rule changes.

Following our Resolution being furnished to the Board of Governors, we met with Jay Kim and Lorna Brown-Burton, two members of the five-member delegation of the Broward County Florida Bar Board of Governors contingent, and are grateful for their time and explanations at our recent board meeting held on July 19, 2016.

After listening to their explanations and the presentation of information, the Board took another vote as to whether or not anyone wished to revisit our resolution to change or modify it in any way.

The vote was unanimously no.

Most respectfully and not wishing to be at odds with our Board of Governors, but feeling that there is no other reasonable choice, the Broward County Bar Association continues to oppose the amendments to the for-profit lawyer referral service rules. Much is made of the fact that the proposed changes would not impact "non-profit" lawyer referral services as the Broward County Bar. Nothing could be further from the truth.

Non-profit organizations state-wide will be impacted by a giant influx of for-profit services who no longer carry malpractice coverage, who do not have the restrictions holding themselves out as lawyer referral services and who have budgets far greater than the non-profit organizations ever will.

It is the position of the Broward County Bar that the rule changes are wrong for the citizens of Florida, wrong for the legal profession and contrary to the requested changes that the Florida Supreme Court ordered last year—specifically that the Bar propose rules that forbid affiliating with non-lawyer owned "for profit" services in Florida. This was not done.

We will be filing our comments before the September 15, 2016 deadline with the Florida Supreme Court and will keep you updated on this very important issue. B

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letter from the young lawyers' president

Todd L. Baker

This past month, members of your BCBA attended the Florida Bar 2016 Voluntary Bar Leaders Conference. It was well attended by active members of Bar organizations throughout the state and was a think tank of ideas to improve the quality and services of Voluntary Bar Organizations in Florida. While we learned many things at the conference, there are a few in particular that I'd like to share with you.

Florida Bar President, William J. Schifino, Jr., spoke about the state of our Florida Bar and the important role that we play as attorneys. As Mr. Schifino noted, lawyers rise to the top. While this may mean different things to different people, I took it to mean that, as lawyers, we find a way to make a difference. We need to maintain an active role in local nonprofits, chambers of commerce, and local politics, not only for the benefit of our profession, but for the benefit of our community. Mr. Schifino's Bar involvement began when his boss told him he had to join a local committee and he credits her to this day with what has become the best thing for his career. We heard many similar statements from the various speakers. I hope all of you reading this, especially the younger attorneys, will "rise to the top" by taking that next step and getting more involved in your local Bar association, the BCBA. It truly will have a positive impact on your legal career.

President of the Young Lawyers Division (YLD) of the Florida Bar, Katherine Hurst Miller, focused on the mission of the YLD, which is to inspire and empower young lawyers to succeed and serve their communities. Your YLS strives to do the same thing. It was shocking to hear, although it makes sense with what we know about the amount of law schools in Florida, that there are almost 26,000 young lawyers (under 36 or in practice for 5 years or less) in our state. Some of the ideas and community events that were recommended at this conference are already fully in place here in Broward. It was amazing to hear the strong reputation our Bar Association has and how attorneys throughout the state wish that their local bars had similar programming, involvement, charitable fundraising, and membership benefits.

As great as we are, we must not rest on our laurels. We must continue to provide high-quality educational programming, effective networking opportunities and increase the benefits provided to members. Our YLS Town Hall Meeting will be on August 4 and I encourage anyone reading this to come and share their ideas on how we can improve the YLS. There will be an election for an open YLS Board of Directors position. Anyone who is interested should email me directly so I can answer any questions you may have about the expectations and responsibilities that accompany the position and to appear on the ballot. That being said, you do not have to be a member of the board to create or host a YLS event. Your YLS is here to inspire and empower you. It only takes a desire to get involved and you will, surely, rise to the top. We want you to succeed because your success is our success. I'll see you on August 4.

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Young Lawyers Section

SAVE THE DATE!

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The Broward County Bar Association Young Lawyers Section is proud to announce 4KIDS of South Florida as its charitable beneficiary for the 29th Annual Charity Golf Tournament! All tournament and event related proceeds will be donated directly to 4KIDS of South Florida.

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For more information contact our Co-chairs
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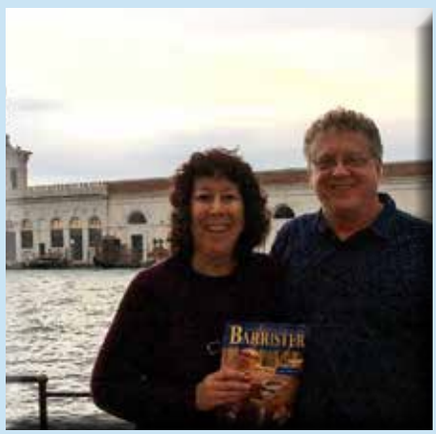

Lisa Goldberg, BCBA Member with her husband Glenn Garrett in Venice, Italy celebrating their 30th wedding anniversary.

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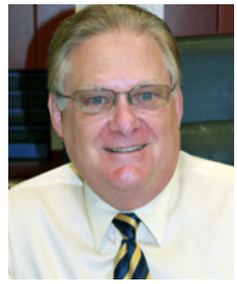

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A Primer for Lawyers on Drug Testing During the Olympics and International Competitions

by Michael L. Buckner and Jared S. Guberman

As the 2016 Summer Olympic Games approach, it is important for Florida lawyers representing qualifying athletes to have a thorough understanding of the World-Anti Doping Code ("the Code") and Court of Arbitration for Sport ("CAS") procedures, as well as to arrange for clients to be educated on all aspects of anti-doping rules. Although international anti-doping protocols are complex, effective preparation will ensure Olympic and international athlete clients can concentrate on the joy of reaching the medal stand without the distractions of a positive drug test.

The International Olympic Committee and other international governing bodies use the Code and CAS as part of a comprehensive drug testing program. American athletes who compete in international competitions are subject to these measures. In fact, the United States District Court for the Northern District of Florida, in Gatlin v. U.S. Anti-Doping Agency, Inc., Case No. 3:08-cv-241/LAC/EMT (N.D. Fla. June 24, 2008), concluded that disputes arising from international sports drug testing processes must be addressed in CAS, or other agreed-to arbitration, and not through state or federal court litigation.

It is vital for Florida lawyers who serve as sports agents or attorneys for Olympic athletes to understand the governing rules and communicate them effectively to their clients. Below is a list of questions and answers to help prevent the intentional or unintentional violation of the Code:

1. What is the Whereabouts Rule?
The goal of the Whereabouts system is to simplify out-of-competition testing. This system requires an athlete to confirm his or her exact location to the relevant testing authority for one hour a day, seven days a week, 365 days a year. During the 60-minute time slot the athlete selects, he or she is required to be available for testing at the designated location. If an athlete needs to change this, he or she can do so right up until the start of the 60-minute slot. The athlete must stay at the designated location for the whole 60 minutes. If the athlete is not at the specified location, it will count as a missed test. Three missed tests within a twelve-month period constitutes an anti-doping rule violation.

2. What are the penalties for committing an anti-doping violation?
An anti-doping violation in individual sports in connection with an in-competition test automatically leads to disqualification of the result obtained in that competition including the forfeiture of any medals, points and prizes. Although the period of ineligibility will vary on a case-by-case basis, a third anti-doping rule violation results in a lifetime period of ineligibility.

3. What substances are prohibited?
The World Anti-Doping Agency maintains a list of banned substances that are: (a) banned at all times; and (b) prohibited during the in-competition period. The Code places the responsibility for the use of any and all medications, antibiotics and supplements on the athlete.

4. What is prohibited association?
Under the Code, an anti-doping rule violation occurs when an athlete associates (e.g., obtains training, strategy, nutrition or medical advice, therapy, treatment or prescriptions) with coaches or other individuals who have been determined to have committed an infraction under the Code (or other applicable anti-doping rule) or criminally convicted for a violation of a performance-enhancing drug law.

5. Does intent matter when it comes to an anti-doping rule violation?
No. Athletes are strictly liable for anything and everything in their system—it is not necessary to demonstrate intent, fault, negligence or knowing use.

6. What is a Therapeutic Use Exemption ("TUE")?
If the medication an athlete is required to take to treat an illness or condition happens to fall under the prohibited list, a TUE may give that athlete the authorization to take the needed medicine. A TUE must be obtained in advance, not retroactively.

7. What are the special CAS ad hoc divisions that are used during the Olympic Games?
CAS forms special ad hoc divisions to hear urgent cases that arise during the Olympic Games. The turnaround time for arbitration decisions made by the ad hoc division is as short as 24 hours. B

Michael L. Buckner, Esq. is president and shareholder of Buckner, an education and sports law firm. He conducts investigations of alleged misconduct, regulatory infractions, doping violations and unethical conduct for universities, sports organizations and business entities. He can be reached at mbuckner@bucknersportslaw.com or 951-941-1844 ext. 1. [Note: Buckner summer associate Claudia Harke also contributed to this article.

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Practical Tips for Mediating Labor and Employment Law Cases

by Bruce A. Blitman and Kimberly A. Gilmour

During the past twenty-plus years, we have been privileged to mediate thousands of disputes. Although every case is unique, we have found that there are certain common denominators to cases that are resolved at mediation (or shortly thereafter). We hope that the following tips will help you and your clients effectively mediate your labor and employment law disputes and achieve durable mediated settlement agreements:

1. Know what you and your clients want and need.

Your clients can not get what they want from others if you do not know what your clients want for themselves. Establish specific goals. Consider what it will take to satisfy your clients' interests, needs and objectives. If you are an attorney representing a client on a contingent fee basis, would not it be helpful to know as early as possible that your client only wants an apology, rather than money damages?

For example, in a Fair Labor Standards Act (FLSA) dispute, is the client entitled to unpaid overtime or is it a half-time case? Was the employee paid for any overtime? Was the employee paid an hourly rate for all hours worked, but not the half time rate? Other issues might involve the Statute of Limitations-is it two years or three years? Plaintiff's counsel will argue it is three years and claim there is intent not to comply with the FLSA and the defense attorney will argue compliance or "good faith" mistake. The parties need to know that the FLSA allows for liquidated damages-doubling the amount of unpaid overtime owed and, more importantly, a Prevailing Plaintiff attorney fee statute. As long as the Plaintiff is entitled to $1.00 in unpaid overtime, the Defendant is required to pay the Plaintiff's attorney fees and costs.

PRACTICE TIP: *It is essential that the attorneys and the parties know and understand the applicable law.*

2. Develop a game plan.

Once you know what your clients want, establish a negotiating strategy to achieve their objectives. Before presenting your first offer, consider where you and your clients want to start and where you want to finish. Give yourselves some room in which to negotiate.

You and your clients need to present a unified presence (united front). Clients should be advised prior to the mediation that the lawyer will do most of the talking. When the lawyer and client meet in private sessions with the mediator, then the client can do all-or some-of the talking. This strategy may vary from case to case, but it should be discussed with the client well before the scheduled mediation. The client should also be advised that the opposing counsel may say things that would not be admissible at trial, but this is the only opportunity for them to address the party. Sometimes attorneys in their opening statements will ask the other party a question. Please make sure that your client is aware of this and prepare your client as to how you would like the client to respond-if at all.

PRACTICE TIP: *Lawyers and their clients must be fully prepared for the mediation process.*

3. Know what the other party needs.

It takes two to tango and to negotiate. To reach an agreement, all parties must feel that some, if not all, of their interests have been satisfied. Your negotiating partners also have motivations and concerns. Ask open-ended questions to gather information in order to understand their positions, perspectives, motivations and concerns.

Mediation is the art of compromise-know what the other parties want or need to come to an agreement. Make sure that your clients know what their "best case" (Best Alternative To A Negotiated Agreement-BATNA) and "worst case" (Worst Alternative To A Negotiated Agreement-WATNA) would look like. Prepare yourself and your client to answer the mediator's questions that are likely to arise during your private conversations. Be prepared and let the mediator know in advance that an interpreter may be needed. Do not rely on the mediator

to serve as the interpreter nor should you rely on a family member, who may have no understanding of the law, to faithfully and accurately interpret what is being said during the mediation process. If a party does not have a good command of the English language and does not have the benefit of a skilled interpreter, it may be virtually impossible for them to meaningfully participate in the mediation process and resolve the case.

Employment discrimination cases are not always about money. Sometimes the former employee may want an apology or wants to know if there is some kind of awareness training so that the problems do not continue in the future. Another option to consider is whether the former employee wants to be rehired. This can be very effective, but employers have to remember that the lawsuit may not end just because the employee has accepted a position with the company.

PRACTICE TIP: *Know what the parties need to satisfy their interests in order to resolve the case. Let the mediator know in advance about any special considerations, issues and accommodations for your clients and participants. These should include physical accommodations under the ADA, language and other cultural matters, as well as potential safety issues. This should touch on the importance of having a professional interpreter rather than a family member-or the mediator (who is prohibited by mediator standards of conduct from serving in this capacity), as well as the significance of making sure the mediation conference will be held in a safe and secure environment. Safety of the participants must always be the highest priority. If there are any concerns about safety, these must be addressed with the mediator immediately in order to determine whether the case is appropriate to be mediated, and if it is, where it can be conducted so that all of the participants will be safe.*

4. Be an empathetic listener.

Attentive listening enables us to better understand the motivations of others. Make eye contact when anyone in the mediation is speaking. Pay attention to the words and language they use, as well as their body language. At one recent mediation training course, a student in the class said that her child would admonish her by saying, "Mommy, listen to me with your face!" when she was distracted and not paying attention. This is outstanding advice for all of us to follow.

The attorneys' opening statements are the only opportunity for them to address the opposing parties. Some attorneys use this time to scare and intimidate the opposing parties, and may sometimes even go as far as to threaten them. This strategy does not usually work and can even cause a mediation conference end abruptly. On the other hand, attorneys who are well prepared can advise the opposing party how they see the case unfolding and identify the problems with the case. An effective mediator will be able to ask open-ended questions based on what has been said by the attorneys in order to facilitate the discussions and move the mediation forward. Attorneys who are prepared and able to deliver a well-structured and developed opening statement will usually have a more successful and productive mediation experience. Just because the parties may not like one another does not mean that their attorneys should treat each other in a hostile, antagonistic manner. The attorneys and the mediator should treat everyone with dignity and respect, and model good behavior for the other participants in the mediation process. Attorneys who yell, scream and threaten each other do not help their clients or themselves achieve a mutually acceptable agreement.

PRACTICE TIP: *Be prepared to deliver a compelling and effective opening statement. leave your "boxing gloves" home.*

This article is a two-part series. The second article in this series will address the issues of attacking the problem and not the people, how to treat people at mediation and several other topics. Please look for part two of the article in our next month's publication. B

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Going Fourth: Taking the Initiative

by Alan B. Grossman

The Fourth District wrote an opinion to clarify application of F.S. 57.105(1), "when a trial court, on its own initiative, may order a party to pay attorney's fees."[1] Under the rule announced in *Watson*, the court has the discretion to award fees even where a defective motion is filed that fails to comply with the safe harbor provisions. However, the record must demonstrate that the court truly acted on its own initiative and did not simply adopt the moving party's motion.

The facts of the case in *Watson* are crucial to understanding the Fourth District's clarification. An initial hearing on fees resulted in the court asking for written memoranda as to its authority to grant fees on its own initiative. At the continuation hearing, the initiative of the court was addressed and the trial court provided commentary as to its thinking, and then granted the fee motion. The trial judge pointed to prior rulings that indicated the judge's thinking that the claims had no merit.

The Fourth Circuit upheld the fee award and determined that the trial court properly exercised its discretion to award fees on its own initiative, and did not simply adopt the movant's motion. The Fourth District followed other courts and expressly failed to adopt a bright-line rule preventing a court from exercising its initiative where an improper motion for fees was filed. The court distinguished its prior opinion in *Santini*.[2] There, the Fourth District reversed the fee award because the record indicated that the trial court entered the sanction only after an oral motion was submitted, by adopting the movant's motion. The court held that the reasoning of the trial court was in error and the trial court's adoption of the motion was "*solely* to circumvent the safe harbor period."

The court limited the scope of a similar case from the Second District[3] The distinction as clarified in *Watson*, is that the trial court cannot partially or wholly adopt the defective motion, in acting on its own initiative. There must be some indication in the record that the trial court developed concern that there was probable merit to a fee sanction that existed before the defective motion was filed.

Judge Warner specially concurred in *Watson* offered a warning to practitioners. His concern is that it may be difficult in a typical case to find such indication in the record of the trial court's concerns of the existence of prior merit to a fee sanction. Because nothing requires judges to indicate their thoughts prior to ruling, practitioners should be wary of reliance on the court's initiative for an award of fees resulting from frivolous claims or defenses. It is only where the record discloses the trial court's prior concerns that an award of fees will be upheld in the face of a defective fee motion B

Alan Bryce Grossman is a sole practitioner in Cooper City, practicing in South Florida, and around the state, and elsewhere, for 26 years. His areas of practice include litigation and appeals in commercial, property, and probate matters. He is a graduate of the University of Florida and the University of Baltimore School of Law. He can be reached at alan@abgrossman.com or by calling 954-364-6294.

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BCBA Meatballs and Martinis
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Time: 12:00 p.m. – 1:30 p.m.
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September 30
CLE: Do I Need an "Appellate" Lawyer Before an Appeal?
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