



# DADE COUNTY TRIAL LAWYERS ASSOCIATION

Editor: Manuel L. Dobrinsky  
Assistant Editor: T. Omar Malone

January 2006



*Jonathan Friedland*

## PRESIDENT'S MESSAGE

As my term as President comes to a close I would like to thank my Executive Board, Board of Directors and general membership for their dedication and support in making this

year truly special for our organization. Our Luncheon series was a tremendous success. We increased attendance by bringing in national speakers like Governor Howard Dean. Public Service continued to be a priority for the organization with the feeding of the homeless and our adoption of the Pediatric Unit at Jackson Memorial Hospital where DCTLA teddy bears brought smiles to hundreds of children. Our website continues to grow with online payment of yearly dues and luncheon fees and the commitment of our corporate sponsors allows this organization to continue in its pursuit of justice and access to courts. Additionally, I am proud to say that with the support of Mellon and our valued corporate partners, the DCTLA First Annual Golf Tournament at the Doral Country Club raised significant money for Easter Seals and "Camp for Kids".

I feel truly blessed to have served this organization for the last 11 years and expect that the future will be even brighter for this organization. I would urge each and every member to take pride in the job we perform on behalf of our clients and to continue to GIVE BACK to this great community.

Finally, the success of the DCTLA would not be possible without Yara Garcia, our Executive Director. Thanks Yara for all you have done in making this organization truly special.

## DCTLA Golf Tournament a Success!!

by Michael B. Feiler, Tournament Chair

On Saturday, November 19, 2005, I had the pleasure of hosting the first annual DCTLA Charity Golf Tournament on the Great White course at the Doral Resort and Spa.

Even though the weather was a little spotty, we had a full roster of 88 golfers. As always, our sponsors came through for us in a big way – we had great food, refreshments and gave away a slew of raffle prizes, including golf lessons, Dewars products, dinners, golf clubs, and a foursome on the world famous Blue Monster.

Most importantly of all, though, I am pleased to report that at our Presidential Ball on January 28, 2006, I will have the pleasure of handing the proceeds of the tournament to our charities, Summer Fun for Kids and Easter Seals.

My thanks to our tournament co-chairs, Rob Boyers and Omar Malone, and especially to our sponsors. It looks like this will be a yearly tradition where we can all have a great time and do something for the community.

## The DCTLA congratulates *Judge Robert Scola*

Recipient of the 2006 Judge Steve Levine Award. Join us on January 28, 2006 at the Ritz Carlton as we honor Judge Scola for his commitment to justice, individual rights, access to courts, education and trial advocacy.

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and Welcome new  
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The heart of an organization resides within its service to the public. This year DCTLA's heart was bigger than ever. In July, through our members' generous donations we again were able to deliver Teddy Bears to the children of the JMH pediatric cancer unit through our "KIDS" program. In August, we sponsored and served over 400 meals to Miami's homeless at the Community Partnership for the Homeless. In September, "Team DCTLA Walks for a Cure" raised over \$2,000.00 to benefit the Leukemia & Lymphoma Society. On October 1st we joined John Kozak's team and co-sponsored the Second Annual Minority Mentoring picnic. DCTLA members united with members and leaders of the Florida Bar, other voluntary bar organizations, community leaders and judiciary to meet and "adopt" minority law students to serve as mentors helping grow students into tomorrow's community and legal leaders. Finally, in November, DCTLA hosted its first Annual Charity Golf Tournament, raising thousands of dollars for two separate charities.

In summary, this was our busiest year ever. Benefiting from our members' support were JMH "KIDS," Community Partnership for the Homeless, The Leukemia & Lymphoma Society, Summer Fun for Kids' Program, Easter Seals, and Tomorrow's Colleagues. Pictures from all these events can be found on our website. Thank you all for your support.

Arthur Garcia, Jr. and Garrett Biondo – Public Service Committee.

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# Luncheon With *Governor Howard Dean*



## What a year for luncheons!

By – Manuel L. Dobrinsky

We began the year with an instructive presentation by Judge Robert Mark and DCTLA member, John Kozyak on Bankruptcy-Before & After 2005. Judge Paul Siegel presented “Florida Trial Objections” and provided our members with “keen insights into proper trial practice”. DCTLA member and certified financial planner, Keith Singer, with the assistance of Lauren Lipcon, Injury Funds Now delivered an informative PowerPoint presentation on financial issues and their impact on cases. Leading a three-panel group, Judge Ronald Friedman spoke on the benefits of using technology in the courtroom. In observation of Florida Mediation Week, the firm of Upchurch Watson White & Max presented “Advanced Mediation Techniques” assisted by Judge Ellen Leesfield who provided the judicial approach and her forthright suggestions based on years of experience. In September, State District Court Judges Cecilia Altonaga, Paul Huck and Donald Graham provided insight into Federal trial practices. The year ended with Governor Howard Dean, Chairman Democratic National Committee, taking the podium and applauding the work of all lawyers throughout the nation. We were, once again, reminded of the contributions made by our profession to our country’s history and the community. DCTLA President, Jonathan Friedland, along with the DCTLA Executive Board and Board of Directors thanked Governor Dean with an Appreciation Plaque and paid special tribute to the DCTLA stalwart supporters for 2005; all stalwart sponsors received DCTLA Appreciation Plaques. It is worth noting that, without the participation of our members in attendance, our luncheons would not be as successful; thank you DCTLA members!

## EMPLOYMENT DISCRIMINATION LITIGATION:

# TRAP FOR THE

Prior to passage of the Civil Rights Act amendments of 1991, there was no right to a jury trial in employment discrimination cases. As a result, trial attorneys seldom heard about these types of cases and they were thought of, as most other areas of labor law were and are, as something of a mystery. However, with the creation of a right to a jury trial, some trial attorneys have ventured into the area, and many of them have found that it is very difficult to tell a good case from a bad case and, after hours of labor intensive work and costs expended, ended up losing the case on summary judgment.

Indeed, in what can only be described as the understatement of the year, the Eleventh Circuit observed in *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1081 (11th Cir.1990), that summary judgments for defendants are not rare in employment discrimination cases. The Seventh Circuit conducted an analysis and concluded that summary judgment is hardly unknown, or for that matter rare, in employment discrimination cases, more than 90 percent of which are resolved before trial, ... many of them on the basis of summary judgment for the defendant. *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1396 (7th Cir.1997). See also Administrative Office of the U.S. Courts, Judicial Business of the United States Courts: 2004 Report of the Director, p. 160-62 (indicating that 94.09% of employment civil rights cases are resolved before trial).

The central problem plaintiffs face is that it is very difficult to prove the essential element of discriminatory motive. Indeed, questions of fact in discrimination cases are both sensitive and difficult because there will seldom be eyewitness testimony as to the employers

mental processes. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 524 (1993). A plaintiff may use three different kinds of evidence to prove discriminatory motive: direct evidence, circumstantial evidence or statistical evidence. The analytical framework and burden of production varies depending on the method of proof chosen.

Direct evidence is seldom available. The Eleventh Circuit has defined direct evidence as evidence from which a trier of fact could find, more probably than not, a causal link between an adverse employment action and a protected personal characteristic. *Wright v. Southland Corporation*, 187 F.3d 1287 (11th Cir. 1999). More specifically, slur. . . made by a person in charge of making evaluations and suggestions for rehiring constitutes direct evidence of discrimination. *Wilson v. City of Aliceville*, 779 F.2d 631 (11th Cir. 1986). Unfortunately for plaintiffs, employers are seldom so candid. Moreover, there are often evidentiary issues relating to the admissibility of such statements.

As a result, in most cases, plaintiffs are required to build their cases through circumstantial evidence. The method of proving a case through circumstantial evidence is somewhat complicated. Specifically, courts apply the so-called burden-shifting framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) and *Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Under this framework, the plaintiff has the initial burden of establishing a prima facie case of discrimination. Unfortunately, the specifics of the framework vary based upon the type of discrimination

# UNWARY

By Martin E. Leach

alleged (e.g., discrimination in hiring, discrimination in promotions) and the protected personal characteristic involved (e.g. race, sex). As a result, there is no simple formulation and there is often argument about what the prima facie case even is.

If that burden is met, then the burden of production shifts to the defendant to produce admissible evidence of at least one legitimate, nondiscriminatory reason for each of the adverse actions taken. Legitimate refers to the requirement that the explanation provided must be legally sufficient to justify a judgment for the defendant and that the defendant must frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. *Burdine, supra*. Defendants never have any trouble conjuring up such an explanation, so the burden almost always shifts back to the plaintiff. The factual inquiry then proceeds to a new level of specificity, with the burden shifting back to plaintiff to proffer evidence showing that the reasons offered by the defendant were pretextual.

The concept of pretext is critical to the evaluation of an employment discrimination case. This is where most seemingly good cases turn out to be fatally flawed. And the problem is, most lawyers inexperienced in this field have difficulty with this concept and its application to different factual scenarios. A plaintiff can prove pretext either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. *Burdine, supra*. It is in the application of this principle

that some cases that look good actually are not and some cases that seem problematic may actually be provable in court.

Unfortunately, no article on the subject can provide a guaranteed method for analyzing cases in this complex area. Ultimately, the factual details of every case must be carefully analyzed. The client must be questioned at length. At the end of a careful vetting process, an attorney can still be in doubt about whether there is a good case or not. But through experience in this area of law, at least 80% of the cases can be properly evaluated prior to the commencement of formal litigation and, hopefully, summary judgment for the defendant avoided.



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# 2nd Annual Minority Mentoring Picnic



On Saturday, October 1, 2005 DCTLA members, along with Florida Bar President Alan Bookman, and many members of our Federal, District, Circuit and County judiciary joined the festivities at Amelia Earhart Park in Hialeah to welcome minority law students from all over the state. The event, spearheaded by DCTLA member, John Kozzak, and sponsored by local and state-wide bar organizations, including DCTLA, evidenced a true showing of solidarity among Florida lawyers. Guests enjoyed good food, great music, a volleyball game, pony rides, face painting and more and were not put off by the occasional down-pour typical of South Florida in October.

Law students came out in numbers, met fine mentors and were genuinely happy and appreciative of the opportunity, even though they were all going home that evening to study for finals. We applaud John Kozzak for what will undoubtedly become an event to look forward to year after year. Thank you DCTLA members for your support and thank you, John Kozzak, for giving us the opportunity to participate in this event.



## Judge Jerald Bagley

*by Janpaul Portal, Esq.*

Judge Jerald Bagley commands and expects integrity, dignity and professionalism in his courtroom. As a devout student of the law, Judge Bagley strongly believes in the principles of fairness and justice, and the efficacy of our judicial system. Therefore, it is no surprise that understanding, compassion, intelligence and fairness are words that come to mind when you sit in Judge Bagley's courtroom.

Judge Bagley was born in New Jersey and graduated from Bloomfield College with a degree in political science. He went on to obtain a law degree from Rutgers School of Law in 1981. Inspired by the turbulent times in Miami during the early 1980's, including, the McDuffie riots, Mariel boat lift and drug trade, he applied for a position with the State Attorney's Office. In 1984, after being recruited by Janet Reno, he moved to Miami. As an Assistant State Attorney he quickly rose through ranks from the juvenile division to the felony division, and became the Assistant Chief Attorney to Katherine Fernandez Rundle.

In 1995, he was appointed by Governor Lawton Chiles to the bench. Upon his appointment, Judge Bagley chose to go the Juvenile Division. For Judge Bagley, this was a great opportunity to give back to the community and become a role model for troubled youths. His goal was to work with young kids to make a positive impact in their lives, which he soon learned meant he would play the role of civil activist, surrogate parent and social worker. Judge Bagley embraced this opportunity and gallantly rose to the occasion.

In his ten and a half years on the bench, Judge Bagley has also presided over criminal and civil court. He believes that each has been a unique experience. He spent six years in criminal court, electing to forego his first year of rotation into civil court because he was presiding over major criminal cases that were still pending. Undoubtedly, Judge Bagley is a committed jurist and he believes in taking a proactive role in his cases.

Among the celebrated cases over which Judge Bagley has presided, one of the most memorable and challenging cases for him involved Rory Conde a/k/a the "Tamiami Strangler." During questioning by authorities, Conde admitted killing six prostitutes and dumping their bodies on roadsides along the Tamiami Trail between 1994 and 1995. Conde pleaded guilty to five of the killings and was sentenced to life in prison in each of those cases.

On October 1999, Conde was condemned for the 1995 murder of his last victim, Rhonda Dunn. The jury recommended the death sentence. Judge Bagley grappled with the jury's recommendation, but ultimately concurred and sentenced Conde to death. The Florida Supreme Court agreed with Judge Bagley's ruling and upheld Conde's conviction and death sentence.

On January 2004, Judge Bagley rotated into the Civil Division. During his two years in the Civil Division, he has quickly earned the respect and admiration of the local bar for his hands-on and proactive approach to his cases. Judge Bagley prides himself on being as prepared, if not more prepared, than the lawyers who practice before him. He believes that judges are challenged and at their best when lawyers are prepared and at the top of their game. As such, he demands a hard work ethic not only of himself, but of the lawyers practicing before him. His philosophy is that although the judge controls the courtroom, the lawyers should be allowed to establish their presence before the court and jury.

Judge Bagley also believes in an "open door" policy and encourages litigants to seek judicial recourse to resolve their disputes. However, he is emphatic that lawyers undertake a good faith effort to communicate and cooperate before resorting to judicial intervention. He believes that most disputes can be resolved if an earnest and good faith effort to communicate is attempted by opposing lawyers. Nevertheless, he eagerly accepts the duty to resolve these disputes consistent with a fair and equal application of the law. His goal is to ensure that cases proceed forthwith and without unnecessary delay.

Judge Bagley is expected to be rotated to the Family Division before the end of January 2006. Judge Bagley elected to go to Family, rather than returning to Criminal, to broaden his judicial experience. He believes that judicial rotation is healthy in that in the end it produces seasoned judges, which benefits the respective bars – i.e., civil, criminal and family bars.

It takes courage, compassion and unyielding drive to be the best that you can be. Judge Jerald Bagley is the epitome of this maxim.

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# Joy and Smiles for the Children

In December, DCTLA donated 30 teddy bears to the Miami Children's Home Society for the Holidays; once again bringing joy and smiles to many children in our community.



## UPCOMING EVENTS

### Seventeenth Annual Presidential Ball

on Saturday, January 28, 2006  
at the Ritz Carlton in Coconut Grove.  
RSVP to Michael B. Feiler, (305) 441-8818  
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