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Obstacles Encountered Representing the Interests of Cuban Nationals in the American Courts

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Jose I. Valdes & Enrique Zamora***

Only in Miami is Cuba so far away. That lyric from a 1980 Bette Midler song is a metaphor which can be used to describe relations between Cuba and the United States during the last forty years. Even though Cuba and the United States are separated by a mere ninety miles, the profound differences that divide the two countries span generations and decades. An often overlooked consequence of these barriers is the obstacles that are created when representing the interests of Cuban nationals in litigation in the United States. These obstacles manifest themselves in a variety of areas of the law from civil litigation to probate matters. This Article will endeavor to guide the reader through the maze of regulations that make navigating these waters a perilous journey for both lawyers and clients.

One of the simplest manners in which to unravel this enigma is to follow the course of a wrongful death cases involving Cuban nationals who are the survivors and heirs of the deceased from the inception of the case to the conclusion of the probate proceedings. The problems confronting the lawyer will be encountered at the very inception of the representation. Any representation of a client in a wrongful death case commences with having the client sign a retainer agreement.¹ How does one sign up Cuban nationals as clients? While normally the client would come to the lawyer's office to

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1. Rule 4-1.5(f) of the Rules Regulating the Florida Bar requires that all contingency fee agreements must be in writing and signed by the client. The rule also requires that certain language be included explaining to the client how the fee is calculated, and the client must also be provided with a written statement of the client's rights which explains to the client the responsibilities and rights of the attorney/client relationship. While there are no specific requirements as to non-contingency fee agreements, the sounder practice is to reduce the agreement to writing and have it signed by the client and attorney. This will avoid misunderstandings later in the relationship. RULES REG. FLA. B. 4-1.5(f) (2002).

sign a retainer agreement, the realities of the relations between both countries do not permit such a meeting. The lawyer is thus going to have to travel to Cuba to have the necessary documents executed. The U.S. regulations commonly referred to as the "U.S. embargo" prohibit free travel to Cuba. In order to lawfully travel to Cuba, one needs to comply with these regulations.² Travel to Cuba is regulated by the Office of Foreign Asset Control (OFAC) of the Department of the Treasury. The OFAC regulations permit travel under a general license or the issuance of a specific license.³ In the context of legal matters, a specific license is required. Generally speaking, one has to satisfy the OFAC that the trip to Cuba is for a legitimate purpose reasonably necessary for the representation, prosecution, or defense of a legal matter. Strangely enough, this is not grounds for issuance of a license under the regulations, but the OFAC has created an administrative extension to permit such travel.⁴ The issuance of the license is largely discretionary with the OFAC, and the only recourse in the event a request is denied is to file a lawsuit to obtain one.⁵ Therefore, it is very important that any request for a specific license contain as much information and supporting documentation as possible justifying the need for the trip.

Once the license is issued, the complications do not end. The next step in this arduous journey is to obtain a Cuban visa and air transportation. Cuban travel visas can be obtained in the United States through the Cuban Interest Section in Washington. Cuba will not allow travel without a visa.⁶ After obtaining the license and visa, there are two more hurdles to

2. See 31 C.F.R. § 515(E) (1999) (for the regulations governing travel to Cuba).

3. See *id.* § 515.560 (for the requirements for issuance of a specific license for travel to Cuba).

4. Strangely enough, there is no specific code provision dealing with issuance of licenses for travel to Cuba for legal matters. The OFAC has authorized such travel under its own interpretation of 31 C.F.R. Section 515. *Id.* § 515.564(b) (this section governs travel to Cuba for professional research and meetings). While legal matters do not meet the strict definition for travel under 31 C.F.R. 515.564(b), the OFAC has extended this code section to authorize such travel.

5. Travel to Cuba without a license issued from the OFAC can subject a person to harsh penalties. See *id.* §§ 515.701-718 (for these penalties). The penalties include substantial fines and incarceration. Prosecution for a violation of the regulations is conducted before an administrative law court. In order to compel the OFAC to issue a license after the denial of a request, one must first exhaust remedies under an administrative review before resorting to review by the U.S. District Courts.

6. Travel to Cuba on legal matters is currently authorized by the Cuban government by means of a tourist visa. Needless to say, such travel is not for purposes of tourism. The Cuban government is currently reviewing their own visa requirements with the aim of creating a different category of visas for travel related to legal matters. Authors' conversations with Juan Mendoza Diaz and Rodolfo Davalos Fernandez, Facultad de Derecho, Universidad de la Habana.

overcome. Travel to Cuba from the United States is carried out by means of daily chartered flights from three points (Miami, New York, or Los Angeles); regular air service does not exist. One has to travel to one of those cities first before leaving for Cuba. The next obstacle concerns payment of expenses while in Cuba for such items as transportation, lodging, and meals. There are strict limitations on the money that one can spend in Cuba for those expenses. Current regulations only permit an authorized traveler to spend up to \$166.00 per day for their living expenses while in Havana, and \$125.00 per day in the remainder of the island. This includes expenditures for lodging, transportation, and meals. This per diem allowance is periodically changed.⁷ The last obstacle at this stage of the representation involves how to pay for the expenses. Credit cards issued by U.S. financial institutions cannot be used in Cuba. Therefore, one must take cash to pay for the expenses incurred while in Cuba. Under limited circumstances, travelers checks can be cashed at certain financial institutions in Cuba, but this process is time consuming and burdensome. Only after satisfying all of these regulations and restrictions can one lawfully travel to Cuba.

Once in Cuba, the lawyer will meet with the Cuban survivors or heirs. It is a better practice to have any retainer agreement prepared and executed in Spanish. This will avoid misunderstandings with the Cuban nationals. Should enforcement be necessary, Spanish translation of the documents will facilitate the process and preclude disagreement with the client regarding payment of attorney's fees. Once the retainer agreement is signed, there are both civil and probate issues that need to be discussed with the Cuban nationals. The U.S. legal system is a mystery to most Cuban nationals and great care should be taken to explain to them how it works. From the civil litigation standpoint, it should be explained to them that their portion of any recovery or inheritance will be deposited in what is commonly known as a Cuban Blocked Account (CBA) in a financial institution in the United States, and that they will not be able to use or dispose of those funds.⁸ Failure to explain this from the outset may result in disagreements and misunderstandings later on.

From the probate side, it should be explained to them that all claims are handled by a personal representative. The Cuban survivors or heirs will have to agree to the appointment of the personal representative or sign a written waiver of any objections to the appointment of a specific personal representative. Should the decedent name a personal representative under

7. U.S. State Department, Foreign Per Diem Rates, *available at* <http://www.state.gov/m/als/prdm/> (last visited Feb. 20, 2003) (which contains the current monetary restrictions).

8. 31 C.F.R. §§ 515.319, 515.523, 515.327, 515.407.

a valid will, then that person will serve as personal representative. Absent a valid will naming the personal representative, Florida law grants preferences to certain categories of individuals.⁹ In addition, it has to be explained to the Cuban nationals that a guardian ad litem will be appointed to represent their interests. This requirement is mandatory and applies regardless of the age, competency, or other circumstances of the Cuban nationals. More will be said about this topic later.

Before instituting any civil lawsuit, it is necessary to initiate the probate proceedings to open the estate. This is very important since all the claims, whether of the estate or the survivors, can only be brought by the personal representative.¹⁰ The OFAC, in conjunction with local court systems, has implemented a system for identifying cases involving Cuban heirs. When an estate is opened, the lawyer must disclose it in the petition for administration and advise the clerk of the court that Cuban heirs are involved. This is done by making the necessary notations on the petition for administration and sending copies of the same to the OFAC. As previously indicated, current regulations require appointment of a guardian ad litem for the Cuban nationals. Due to the large Cuban community in Miami, the Miami-Dade county court system in conjunction with the OFAC have implemented uniform policies.¹¹ Under the leadership of the Honorable Maria M. Korvick, who is the administrative judge for the Probate Division in Miami-Dade County, the guardian ad litem wheel consists of lawyers who have received a specific license from the OFAC to represent Cuban national heirs in probate matters. Other counties in Florida, most notably Broward County under the direction of the Honorable Melvin B. Grossman (administrative judge of the probate court), are implementing their own guardian ad litem program based upon the Miami model.

Under these programs, the first task of the guardian ad litem is to file an oath and notice of assets subject to Cuban Asset Control regulation. This

9. FLA. STAT. § 733.301 (2002) (designates the categories of individuals who are granted statutory preferences. For example, in an intestate estate, the surviving spouse is the first order of preference).

10. *Id.* § 733.612. In 1972, the Florida Legislature amended the wrongful death statute and abolished a direct first party survivorship action by the survivors. Since then, the personal representative is the only party authorized to prosecute the claims of the survivors and the estate. *See id.* § 768.20.

11. The procedures currently in place were adopted in the late 1980s and early 1990s and were the culmination of discussions between the Probate Division of the Eleventh Judicial Circuit in Miami-Dade County, Florida, and the OFAC in order to provide a framework for handling the increasing number of probate cases involving Cuban nationals as heirs or beneficiaries. Prior to that there was no uniform standard and cases were handled on an individual basis. Authors' conversations with Clara David of the OFAC and the Honorable Maria M. Korvick.

is mailed to the OFAC via certified mail, and a copy is filed with the local court. Other tasks which the guardian ad litem will involve themselves in are homestead issues, transfers, and sale of real estate interests by the Cuban nationals, wrongful death support and apportionment issues, search and determination of heirs, and obtaining discovery in Cuba. The latter two involve researching birth certificates, marriage certificates, divorce decrees, adoption proceedings, and death certificates amongst others. Once the preliminary proceedings are completed in the probate case, the civil lawsuit can be filed.

The first requirement that has to be satisfied when the civil lawsuit is filed is the posting of a non-resident cost bond for the Cuban nationals.¹² Failure to post the bond can result in dismissal of the lawsuit. The other obstacles encountered in the civil lawsuit will involve discovery issues. The problem here is in obtaining discovery from plaintiffs who are Cuban nationals. While the process is essentially the same as with any other foreign litigant, Cuban nationals present unique difficulties. These problems most often manifest themselves with interrogatories, requests for production, production from third parties, and depositions. Discovery by way of interrogatories is governed by both federal and Florida Rules of Civil Procedure.¹³ Normally, compliance with such a discovery request is simple, but such is not the case with Cuban nationals. First, it will be necessary to confer with the Cuban nationals in order to prepare the responses. Secondly, the responses have to be notarized. In the case of Cuban nationals this involves having them sign the responses before a Cuban notary and then having the document legalized at the U.S. Interest Section in Havana. It is not permissible to pay a Cuban notary for their services without prior authorization from the OFAC.¹⁴ The difficulties involved with interrogatories will usually result in foregoing the discovery process and simply resorting to depositions.

Production of documents in Cuba from parties or third parties also presents problems. Federal and Florida procedure rules simply do not furnish any assistance when attempting to obtain documents located in Cuba.¹⁵ As previously indicated, one of the duties of the guardian ad litem is to verify information. When dealing with public records such as birth, marriage, and death certificates, the guardian ad litem will travel to Cuba and go to the relevant jurisdiction and obtain copies of the records.

12. FLA. STAT. § 57.011 (2002) (requires a non-resident plaintiff or their attorney to file a \$100.00 cost bond).

13. FED. R. CIV. P. 33; FLA. R. CIV. P. 1.340.

14. 31 C.F.R. § 515.203 (1999).

15. See FED. R. CIV. P. 34; FLA. R. CIV. P. 1.350.

Likewise, the guardian ad litem can obtain documents in the possession of the Cuban nationals such as letters and photographs. The guardian ad litem can also obtain documents from third parties in Cuba. The principal obstacle involves situations where the third party Cuban will not voluntarily provide the records or submit to a deposition due to confidentiality or other concerns such as in the case of medical records. In such a situation it may be necessary to hire a Cuban lawyer and resort to the Cuban legal process to obtain the documents. The hiring of a Cuban lawyer and payment of their fees is prohibited without authorization from the OFAC.¹⁶ It is advisable to obtain authorization from the judge presiding over the civil lawsuit and the OFAC prior to hiring a Cuban lawyer. Utilizing the Cuban legal process, most third party documents can be readily obtained. The major problem encountered stems from documents which Cuban authorities deem to involve issues of national security, such as a Cuban national's military records.

The best method for obtaining discovery in Cuba is by way of depositions. In order to take depositions in Cuba, one will have to travel with the interpreter, court reporter, and (preferably) a videographer. The Federal Rules of Civil Procedure govern the taking of depositions in foreign countries.¹⁷ Since a court reporter, as a notary public, cannot administer oaths outside of Florida, the lawyer will have to apply to a civil court for a commission appointing and authorizing the court reporter to take the depositions. Specific licenses from the OFAC and the proper visas from the Cuban government will be necessary for all attorneys attending the deposition, the court reporter, interpreter, and videographer. A tourist visa will not suffice. The preference for videotaping the depositions is that in all probability the Cuban nationals will not be authorized to travel to the United States to attend trial, unless the witness is over sixty years old, and thus it is better practice to record their testimony on videotape for use at trial. This procedure is permitted under the Federal Rules of Civil Procedure.¹⁸ If the Cuban witness does not want to voluntarily submit themselves for a deposition, it will be necessary to retain a Cuban lawyer and resort to Cuban legal process to obtain their appearance. The same requirements as with production of records must be complied with prior to

16. 31 C.F.R. § 515.203.

17. See FED. R. CIV. P. 28; FED. R. CIV. P. 30; FLA. R. CIV. P. 1.300(b); FLA. R. CIV. P. 1.310.

18. See FED. R. CIV. P. 30(b); FLA. R. CIV. P. 1.310(b)(4).

retaining Cuban lawyers or paying their fees. In addition, the Cuban lawyer will be present during the entire deposition and a second lawyer may be required to represent the interests of the witness.¹⁹

Due to current immigration restrictions, it is highly unlikely that Cuban nationals under sixty years of age will be allowed to travel to the United States to attend trial. One can petition the Cuban government to issue a travel visa and the Immigration and Naturalization Service (INS) to issue a U.S. visa. The request for the U.S. visa is handled through the INS desk at the U.S. Embassy in Mexico City. This process is extremely time consuming and fraught with bureaucratic obstacles. However, should the lawyer have the persistence and patience to do so, both the Cuban government and INS have occasionally granted such requests under compelling circumstances.²⁰

With the exception of a few notable areas, the trial of cases involving a Cuban national proceeds along the same lines as any other similar lawsuit. There are two particular areas where they present unique issues. The first has to do with the measure of damages. Under Florida law, survivors of the decedent can recover economic damages; principally, loss of support and services.²¹ Under current U.S. regulations, remittances to Cuba by family members in the United States are limited to \$300.00 per person each quarter.²² Despite these regulations, it is common knowledge that many Cuban-Americans living in the United States send remittances to relatives living in Cuba in amounts that far exceed these limitations. It is estimated that these remittances represent the second largest source of hard currency for Cuba after tourism.²³ This situation raises two problems: a legal one,

19. The Cuban government has recently conducted a review of its procedures for authorizing discovery in Cuba. This review resulted in the current requirements which govern the retention of a Cuban lawyer for the depositions and the hiring of a second Cuban lawyer for the witnesses. Author's conversations with Juan Mendoza Diaz and Rodolfo Davalos Fernandez, Facultad de Derecho, Universidad de la Habana.

20. The authors have been involved in a number of cases where attempts were made to obtain permission for the Cuban nationals to travel to the United States to participate in legal proceedings. Results are varied and dependent upon the individual facts of each case.

21. FLA. STAT. § 768.21(1) (2002).

22. 31 C.F.R. § 515.560(c)(4) (1999).

23. While the nature of the remittances do not lend themselves to accurate quantification, it is estimated that remittances exceed the revenues generated by the sale of sugar and are only surpassed by revenues generated by tourism. According to the available information, it is calculated that the annual value of these remittances are in the range of \$300-\$400 million at the low end and nearly \$1 billion at the high end. Sergio Diaz-Briquets, "Emigrant Remittances in the Cuban Economy," paper presented at the 1994 meeting of the Association for the Study of the Cuban Economy (ASCE), available at <http://lanic.utexas.edu/la/cb/cuba/asce/cuba4/diaz.html> (last visited Mar. 6, 2003).

and one of proof. Even though a Cuban national may in fact be receiving more than \$1,200.00 per year in support from their relatives in the United States, a compelling argument is made that the Cuban national should not be allowed to recover damages for support in excess of the legal limits. In addition, the vast majority of remittances from relatives in the United States to Cuban nationals are effectuated by means or avenues which do not lend themselves to proof. The typical avenue for these remittances is a relative or friend traveling to Cuba. To a lesser extent, the remittances are handled through private companies which are authorized to do so. There also exists an underground industry which uses persons as "mules" to carry remittances. The remittances are done on a cash basis and there is typically a complete absence of documentation to substantiate the remittances. For example, the Cuban national might testify that their relative in the United States called to let them know that a friend was traveling to Cuba and was bringing the Cuban national money. The absence of any documentation to prove or disprove the amount of remittances is very disconcerting to lawyers usually accustomed to following "the paper trail." In an effort to maximize their recovery, Cuban nationals at times tend to embellish the amounts actually sent to them. The authors have been involved in cases where a Cuban national claimed remittances in an amount that exceeds or is disproportionate to the disposable income of the person who sent the remittances. In such cases, it becomes evident that the amounts claimed are exaggerated.

Assuming a successful recovery at trial, the fees and costs for the lawyer will be paid from the gross proceeds. The Cuban national's portion of the proceeds is then deposited into a Cuban Blocked Account (CBA).²⁴ If there is a settlement, the terms of any settlement must be approved by the guardian ad litem as well as the probate judge and the judge presiding over the civil case. Additional problems could arise where some of the heirs reside in the United States and others in Cuba. That scenario will give rise to issues of apportionment among the heirs, requiring a judicial determination of what each heir will receive. The Cuban nationals cannot dispose of or otherwise utilize the monies, and any transfer, such as a waiver or disclaimer, is expressly prohibited.²⁵

Once the proceedings in the civil lawsuit are concluded, the arduous journey takes the lawyer back to the probate proceedings. As indicated before, all the claims (including those of the Cuban heirs) flow through the personal representative. Once the proceeds from either the civil lawsuit or

24. See 31 C.F.R. §§ 515.319, 515.523, 515.327 (for the regulations governing the CBA that will be established for the benefit of the Cuban nationals).

25. *Id.* §§ 515.523, 515.524.

settlement are obtained, additional restrictions apply. The first task is to open the CBA.²⁶ The account is opened in the name of the Cuban national as a beneficiary.²⁷ Only certain qualified domestic financial institutions can serve as the recipient of the funds, but many institutions which would otherwise qualify are not interested in assuming the liability. Once the blocked account is opened and funded, it then comes under the jurisdiction of the OFAC.²⁸ The guardian ad litem is responsible to the OFAC for overseeing the CBA and must report to the OFAC on the status of the account when it is opened. The funds will remain in the CBA until and unless current U.S. restrictions are changed or the Cuban national establishes legal residency in any country outside of Cuba with whom the United States has trade relations.²⁹ Any remittance from a blocked account is expressly prohibited.³⁰ There are currently hundreds of CBAs in Miami-Dade County alone. The possibility that these funds could remain there for years or decades is a troubling one.

A Cuban national considering evading the strict limitations placed upon the CBA may attempt to transfer their interest in the account in order to lift the restrictions. The U.S. Treasury Department has enacted extensive regulations designed to defeat such transfers and has taken precautions to prevent and discourage activities designed to evade the restrictions. For example, a Cuban national may try to give a power of attorney to a third person living outside of Cuba. No such power directed to funds held in a CBA will be honored by the OFAC.³¹ Likewise, the OFAC will not honor a request by a Cuban national to renounce his or her interest in the blocked account in favor of a third party.³² In fact, the institution where the CBA is held cannot act upon any request or instruction from a Cuban national.³³ The litany of restrictions placed upon a CBA begs the question, how does one unblock the funds in the account? The possibilities are limited.

As previously indicated, should the Cuban national establish residency outside of Cuba, then they can lawfully petition the OFAC to unblock the funds in the account.³⁴ This does not necessarily require establishing residency in the United States; residency in any other country that has trade relations with the United States will suffice. If a Cuban national dies before

26. *Id.* § 515.319.

27. *Id.* § 515.523.

28. *Id.* § 515(E).

29. 31 C.F.R. § 515.522.

30. *Id.* § 515.570.

31. *Id.* § 515.529.

32. *Id.* § 515(B).

33. *Id.* § 515.524.

34. 31 C.F.R. § 515.522.

his or her funds are unblocked, then the funds will be unblocked as to qualified heirs.³⁵ In other words, if the heirs of the Cuban national are not themselves Cuban nationals, then the funds will be unblocked. However, if the heirs are themselves Cuban nationals, then the process repeats itself all over again as to that person. In order to obtain the unblocking of any account, a petition must be made to the OFAC; the financial institution controlling the account is not authorized to unblock the funds without a specific license from the OFAC.³⁶

On July 22, 2002, the U.S. House of Representatives voted 262 to 167 to approve an amendment to the appropriations bill of the U.S. Treasury Department which would eliminate funding to enforce travel restrictions.³⁷ Afterwards, the U.S. House of Representatives voted by a vote of 251 to 177 to lift the current limitations on the amount of remittances that Cuban-Americans can remit to family members in Cuba (currently three hundred dollars per person per quarter).³⁸ While these measures in the Congress have prompted many to predict that the U.S. embargo could be over within two years,³⁹ it is unlikely that the current Administration will move actively to sign any such legislation or dismantle the U.S. embargo. In any event, the body of regulations which make up the U.S. embargo consist of countless restrictions. Lifting of some restrictions (e.g., travel and trade) will not necessarily result in the lifting of the restrictions affecting property in the United States belonging to Cuban nationals. Until and unless those restrictions are lifted, lawyers representing the interests of Cuban nationals must be mindful and adhere to all relevant regulations and restrictions.

This Article began with the quote from the Bette Midler song that only in Miami is Cuba so far away. After having laboriously navigated through the ocean of regulations that affect litigation involving Cuban nationals, one is left with the disconcerting feeling that it can be a stormy journey. Precisely for that reason, any lawyer who may wish to take on litigation involving Cuban nationals must be cognizant of the myriad of regulations

35. *Id.*

36. *Id.* § 515.522(b).

37. Press Release, Office of Congressman Jeff Flake, Congressman Flake Dismisses Castro Remarks (July 26, 2002), available at <http://www.house.gov/flake/pressshop/072602Castro.htm> (last visited Mar. 26, 2003).

38. *Id.*

39. The Miami Herald report by Andres Oppenheimer dated December 15, 2002, quoting Representative William Delahunt, Democrat from Massachusetts, one of forty-six lawmakers in Congress on the bipartisan Cuban Working Group which is pushing a broad series of steps to ease U.S.-Cuban relations. Andres Oppenheimer, *U.S. May Tighten Cuba Travel*, MIAMI HERALD, Dec. 15, 2002, available at <http://www.miami.com/mld/miamiherald/news/world/cuba/4742283> (last visited Feb. 20, 2003).

governing those situations and must strictly adhere to them. It is not a journey that should be undertaken by those who are not knowledgeable in the field or by those who are weary of protected regulation. Those who do not heed this caution will find the journey from Miami to Cuba very, very long.

