FORUM 8

Volume 81, No. 8 | Eighth Judicial Circuit Bar Association, Inc. | April 2022

President's Message

By Evan M. Gardiner

It's hard to believe that we are back to in person events. We have had a couple of events that were in person throughout the year, but it's weird to really be back. I say that really confidently hoping that there's no new variant on the horizon. Fingers crossed it stays that way. The last in-person luncheon was the Diversity Roundtable in March of 2020. It's hard to imagine that it has been that long. For two years, we've been in this weird COVID limbo, and it's strange to seemingly be looking at COVID in the rearview mirror.

Thank you to Florida Bar President Mike Tanner and everyone who came to the March luncheon. Additionally, thank you in advance to everyone that will participate in the Professionalism Seminar on April 1. April also brings the 2022 Diversity Roundtable on Friday, April 22nd. This year's Roundtable will feature a three-part event. Part one will take place at the Stephan P. Mickle, Sr. Courthouse where the portraits from the 'Path to Unity' Campaign will be unveiled. Part two will be the April luncheon with one of the portrait honorees, Larry D. Smith, as our guest speaker. Part three rounds out the event with the roundtable discussion.

In May we will host our Law Day event. Join us on Sunday, May 1st to celebrate Law Day, with this year's theme being "Toward a More Perfect Union: The Constitution in Times of Change." Keep an eye on your email inbox and our Facebook page for details related to Law Day.

While our program year is rapidly coming to an end, we're not through yet. I really want to thank everyone on the Board and membership at large for their continued support in organizing, running, and attending all the events throughout the year, whether they have been through Zoom or in person. Looking forward to seeing everyone!

NOMINEES SOUGHT FOR 2022 JAMES L. TOMLINSON PROFESSIONALISM AWARD

Nominees are being sought for the recipient of the 2022 James L. Tomlinson Professionalism Award. The award will be given to the Eighth Judicial Circuit lawyer who has demonstrated consistent dedication to the pursuit and practice of the highest ideals and tenets of the legal profession. The nominee must be a member in good standing of The Florida Bar who resides or regularly practices law within this circuit. If you wish to nominate someone, please submit a letter describing the nominee's qualifications and achievements via email to Raymond F. Brady, Esq., rbrady1959@gmail.com. Nominations must be received via email by Friday, April 29, 2022 in order to be considered. The award recipient will be selected by a committee comprised of leaders in the local voluntary bar association and practice sections.

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Contribute to Your Newsletter!

From the Editor

I'd like to encourage all of our members to contribute to the newsletter by sending in an article, a letter to the editor about a topic of interest or current event, an amusing short story, a profile of a favorite judge, attorney or case, a cartoon, or a blurb about the good works that we do in our communities and personal lives. Submissions are due on the 5th of the preceding month and can be made by email to dvallejos-nichols@avera.com.

About this Newsletter

This newsletter is published monthly, except in July and August, by:

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Any and all opinions expressed by the Editor, the President, other officers and members of the Eighth Judicial Circuit Bar Association, and authors of articles are their own and do not necessarily represent the views of the Association.

News, articles, announcements, advertisements and Letters to the Editor should be submitted to the Editor or Executive Director by Email. Also please email a photograph to go with any article submission. Files should be saved in any version of MS Word, WordPerfect or ASCII text.

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Deadline is the 5th of the preceding month

Alternative Dispute Resolution

By Chester B. Chance and Charles B. Carter

Horns of Dilemma

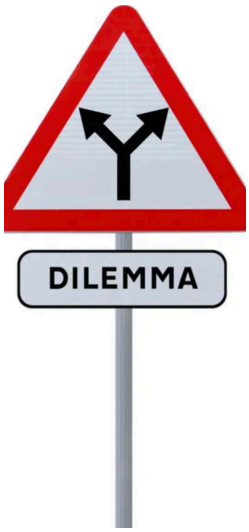
This month we need to go all technical on you. Why? Because in a Zoom mediation, getting a settlement agreement at mediation signed is sometimes not as easy as it sounds.

Rule 10.420(c), Rules for Mediators states:

> "The mediator shall cause the terms of any agreement reached to be memorialized appropriately and discuss with the parties and counsel the process for formalization and implementation of the agreement."

Well, that is easy when everyone is in the same building. You just have everyone sign the agreement, give everyone a copy, and prepare a disposition report for the court. Now that disposition report is governed by Rule 1.730, Florida Rules of Civil Procedure. That rule states:

> "If a partial or final agreement is reached, it *shall* be reduced to writing and *signed by the parties and their counsel, if any.* A report of the agreement shall be submitted to the court or a stipulation of dismissal shall be filed."



Rule 10.420 states the mediator shall discuss the process for formalization and implementation of a settlement agreement. Rule 1.730 describes that formalization and implementation by requiring the settlement agreement be reduced to writing ***and*** signed by the parties. Easy? In person, yes. Via Zoom, problems can and do arise.

If an email chain of the agreement is started and everyone agrees to execute it and send a copy of the fully executed agreement to the mediator, ideally the mediator gets that executed agreement within a few minutes or at most the next day. But, that does not always occur. We have waited 3-7 days to get a copy. And so we wait. But the court is also waiting to see what happened at mediation and the mediator can't report there was a settlement agreement based on a kiss and a promise.

And so a mediator recently wrote to the Mediator Ethics Advisory Committee about this problem in Zoom mediations. He advised that at the end of a mediation a settlement agreement is drafted and emailed to parties/counsel for execution. The mediator does not file a disposition report to the court until the final executed agreement is returned to the mediator. That mediator notes:

> "However, I have noticed parties do change their minds as to what they agreed in the settlement *or* they take unreasonable time to return their signed settlement agreement even after several reminders from myself."

The mediator asked the Advisory Committee if he/she should delay filing a report with the court or should they file something before having proof the agreement was fully signed and executed.

The Advisory Committee first noted that it is permissible to have the parties sign an agreement electronically. But even that does not always happen promptly and so begs the question submitted by the mediator.

Regarding the mediator disposition report, the Advisory Committee clearly stated when there is no written *or signed* agreement the mediator should report 'no agreement' was reached.

But, you say, an agreement was reached. It is just taking an unusually long time to get it signed. But if the court is waiting on a report, how long should the mediator wait to get a signed agreement? We submit no more than 2 days. Why? Because anything longer is a logistical nightmare. And when counsel who has been trying to get the agreement finalized turn red in the face when they receive a report saying no agreement was reached, we say: When you get everything signed, let the court know because the mediator cannot assume that is going to happen at some point in the future.

And, to go all déjà vu on everyone: We just wrote an article on the benefits of having your client physically present with counsel during a mediation and one of those benefits was the ease to then have your client sign the agreement.

And, the mediator needs a ***signed*** agreement. Not one signed by some of the parties. Not one where plaintiff's counsel signs as counsel and on behalf of their client. What is needed is simple: a signed agreement by parties and counsel. We have had attorneys yell at the mediator because they said "we told you we reached an agreement, it is just not signed yet." We have had attorneys yell at us after sending an agreement where the attorney signed for his/her client. Neither of …

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Ch-Ch-Ch-Ch-Changes

By Krista L.B. Collins

As I'm sure many of you are aware, we civil practitioners are in for some big changes in the near future. The Florida Supreme Court's Workgroup on Improved Resolution of Civil Cases has proposed major changes to both the Florida Rules of Civil Procedure and the Rules of General Practice and Judicial Administration. In many ways, the proposed changes will bring Florida state courts more in line with federal court procedures. For instance, new subdivision 1.280(a) will require parties to make initial disclosures of certain basic discovery information, much like is required under the Federal Rules of Civil Procedure. However, the new Florida rule will go even farther than the Federal Rules, and will require parties to provide answers to all questions on any applicable standard interrogatory form approved by the Florida Supreme Court, as set forth in Appendix I to the rules. In fact, within 30 days of initial service of the complaint on the first defendant served, the parties shall meet, confer, and identify deadlines for anticipated disclosures, number of fact witnesses, whether expert witnesses will be used, how many depositions are anticipated, what motions they expect to file, and more. Parties will also be required to supplement both their initial disclosures and their discovery responses.

Case management, right from the beginning, will be much more active than most of us are used to. The court will be able to impose sanctions *sua sponte*, without first issuing an order to show cause, if a party fails to comply with the requirements of the case management order.[1] In fact, an entire new rule dealing with sanctions is proposed, giving the trial court the authority to enter a variety of sanctions, including but not limited to a written reprimand, refusing to allow a party to support or oppose a claim or defense, payment of expenses, reducing the number of peremptory challenges, striking pleadings, entering a default or a default judgment, referring an attorney to the Florida Bar, or finding the attorney or party in contempt. A continuance of a trial, which has already become more difficult to obtain over the past few years, will be granted *only* when required by "extraordinary unforeseen circumstances." The proposed rules also set deadlines for the setting of hearings – for instance, for motions with a hearing time of less than 15 minutes, the hearing should be no more than 30 days after the scheduling of the hearing.

Some of the other less dramatic changes will include: page limits on memoranda accompanying motions (other than motions for summary judgment and certain other motions); the ability of the parties to agree that the court can decide a motion without the need for a hearing and the ability of the court to decline to hold a hearing even if requested by the parties; a motion that requires the court to determine issues of material fact must specify in the title of the motion that it is evidentiary; the time for a lack of record activity to lead to dismissal for lack of prosecution shall be reduced from 10 months to six.

These are just *some* of the changes contemplated. While the proposed changes are not yet completely finalized, the time for public comment on them expired on March 31, 2022. We should all become familiar with these proposed changes, as it is very likely we will soon be living with many, if not all, of them.

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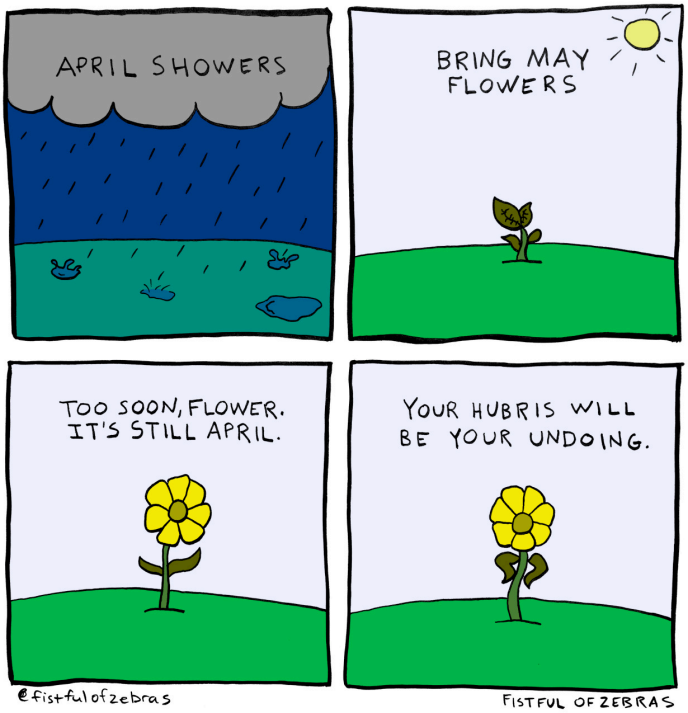
[1]All of the proposed rules and changes discussed herein can be viewed in the appendix to the *Workgroup on Improved Resolution of Civil Cases – Final Report* which was issued on November 15, 2021.



It's that time again! The Eighth Judicial Circuit Bar Association Nominations Committee is seeking members for EJCBA Board positions for 2022-2023. Consider giving a little time back to your local bar association. Please complete the online application at https://forms.gle/xeD8NMVu3c53coi2A. The deadline for completed applications is May 2, 2022.

Criminal Law

By Brian Kramer

I am gravely concerned. There has been a convergence of circumstances that I feel is likely to lead to a degradation of our profession, and to the criminal justice system. The arc of this problem is long. It didn't start today and we will need to make some fundamental changes if we are to avoid it. The problem is a lack of well-trained, experienced litigators. In essence, what we have today is likely what we are going to have for a very long time.

Litigation is like piloting fighter jets: both can be very exciting to do, both take special people to even want to do it, both take significant experience to do it well, and it's expensive to train people how to do it. It takes approximately 250 flight hours and 18 months training to become a competent fighter pilot at a cost between 5 and 10 million dollars. According to the Civil Litigation Cost Model produced by the National Center for State Courts, the median costs of litigation broken down by case type are as follows: Automobile $43k, Premises Liability $54k, Real Property $66k, Employment $88k, Contract $91k, and Malpractice $122k. Those numbers illustrate the expense of litigation which most certainly includes trained and experienced litigators working those cases. Imagine the expense if that included the staggering costs to civil firms to train litigators from scratch. It takes years of practice and working on dozens of cases that proceed from the pretrial phase, to discovery, to motion practice, and finally conclusion at the trial stage to become a proficient litigator.

Of course, we all know this. You need only look at the experience of many litigators in our local community to know that many have spent years training with either the Public Defender's Office or the State Attorney's Office where they have access to resources and cases that are able to regularly proceed to trial on the merits. As State Attorney for the Eighth Judicial Circuit, I want to keep every lawyer that I invest the time and resources into training. I have no doubt my counterpart at the Public Defender's Office, Stacy Scott, feels the same. However, I fully recognize and embrace the role that the State Attorney's Office plays in training future civil litigators. So, what's the problem? There are several.

Zoom. Zoom and its cohorts degrade and impede less experienced lawyers' skills in the courtroom. Trials and hearings are as much a physical activity as they are a mental one. Presence is meaningful. Seeing another human being in real life communicates more about that person than a 2" x 3" computer screen could ever provide. I hear tales of civil lawyers playing a videotape deposition of a witness in a trial in lieu of calling that witness for live testimony in all its glory. How does that work out? Being there matters. Enough said.

Zoom is trivial if you don't have any new lawyers learning to litigate. That is what's happening. Why? In our community, there are two main reasons. First is money, and this is a problem everywhere. The Public Defender and the State Attorney are quickly becoming non-factors in the job market. Our starting salary is $50,000 for licensed attorneys. This amount is shamefully low. Other government jobs for lawyers pay more, and salaries in the private sector are so far above us that we just don't compete. We used to tell new lawyers that while the pay is low the benefits are great! And, they are. The problem is that the private sector has heard that too and upped their game. And, good for them. I begrudge nothing to the private sector. I just want to be able to compete fairly for good lawyers to work in my office, and I cannot. I still offer experience that only the Public Defender can rival, but the number of new lawyers for whom that is an option continues to decrease.

The other problem is this: We are dependent on the law schools to help us train these new lawyers and to encourage them to move into public service. I do not blame the Dean of our law school for not focusing on the practical aspects of training new lawyers. I really don't blame the University at all. The University of Florida is, and should be, a preeminent University with a preeminent law school. The Dean has done the job that she was asked to do and has done it well. We are and should be proud that our law school is the 6th highest ranked public law school in the country, and 21st overall. It is not the fault of the University, the Law School, or the Dean that the national rankings and the determination of preeminence does not value, and in fact punishes, practical education. Some of those factors are: the school's acceptance rate, job placement rate, bar passage rate, expenditures per student, the student to faculty ratio, and median LSAT scores and GPAs of those that are accepted. There is nothing in this model that is designed to capture the value of practical education.

So what to do? The state attorneys and public defenders across the State are working tirelessly to convince the Florida Legislature to increase funding for our lawyers' salaries. We also ask them to continue to provide loan forgiveness programs. We hope that they will do so this session. You can help by supporting these efforts.

Both Stacy and I regularly speak to law students about the benefits and value of public service, including training new lawyers to litigate and be litigators. You can help by encouraging new lawyers to start their careers…

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Three Rivers Legal Services Receives Funding for Housing Preservation

By Marcia Green

Three Rivers Legal Services and the City of Gainesville recently launched a project, targeting specific neighborhoods in Gainesville, to focus on issues of heirs' property and obtaining clear title. Beginning in December, 2021, the **Heirs' Property Assistance Program** seeks to "increase neighborhood stability by growing individual wealth and access to property ownership."

What has become apparent is that family members and descendants of many homes and properties located within the Gainesville Community Reinvestment Area (GCRA) do not have clear title. Without clear title, the homeowners are unable to obtain loans, homeowners insurance, property tax homestead exemption, repairs through local and state programs, and/or FEMA disaster relief. Without the ability to obtain needed repairs, many homes are at risk of demolition. Without property tax exemptions, many homes are lost to increased tax burdens. The loss of these properties, in predominantly low income and minority neighborhoods, leads to the degradation of the surrounding neighborhood, greater blight and, most importantly, the loss of what is known as "generational wealth" and the ability to pass a home from one generation to the next.

The Alachua County Property Appraiser's Office and the Alachua County Tax Collector's Office located more than 800 heirs' properties within the City of Gainesville. Of those, one-third are located within the GCRA boundaries. The goal of the project is to provide the legal assistance needed to these property owners to obtain clear title. The residents must be at or below 120% of the annual federally established Gainesville median income for household size.

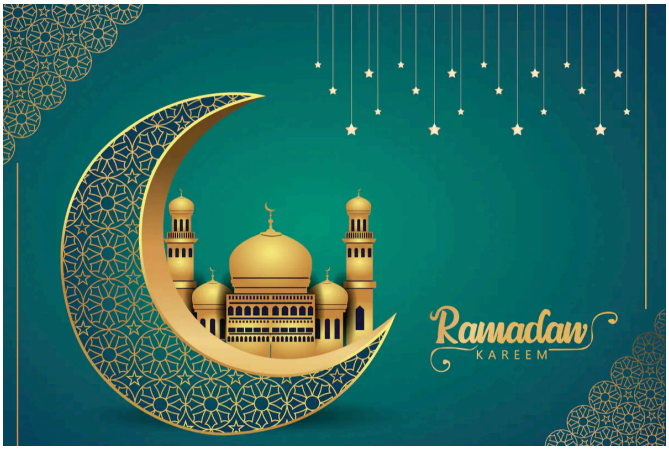
Although it is not news to many of you, when a homeowner dies, with or without a will, the estate must be probated. Sometimes, there is a will but it is not valid; most often, there is no will at all. Further, just because there is a will does not mean the property is automatically owned by the person named in the will. Because many of the heirs, especially in some of these targeted communities, are low income and cannot afford an attorney or may have some misgivings or distrust for the legal system, the properties remain in the original owners' names. The individual or family who lives in the home may, in reality, be one of many heirs, some of whom are known to the individual and, oftentimes, some are not. Sometimes, there can be as many as 40 heirs.

Three Rivers attorney Rachel Rall, who concentrates her work in estate planning, probate and clearing title, is the lead attorney under the grant from the City. At the time of submission of this article, more than 12 clients have been on-boarded into the three-year project. Seminars and webinars have been and will continue to be conducted to inform residents of their rights, with explanations of the program, services available and the importance of proper estate planning.

Most of the clients eligible for this project will qualify for a filing fee waiver with the court; however, funds are available through the grant to cover filing fees for those who do not qualify. Additional funding is available should a title search be necessary, however, according to Rall, that is not generally required.

Clients complete an application with the GCRA and must provide proof of income, the deed to the property and a family tree. Once qualified under the grant, the City forwards the application to Three Rivers. Further information and review with the family may include instructions on locating extended family members, including reviews of family bibles, visiting the cemetery where family members are buried, and reviewing birth and death certificates.

Another grant from the City of Gainesville also focuses on housing stability. The **Housing Preservation Project** provides funding to Three Rivers to help tenants living within the city limits with eviction advice, defense, and negotiation assistance. As a "legal assistance" grant, there is no financial help for the tenants; however, the grant greatly expands Three Rivers' ability to serve Gainesville residents facing eviction. The three-year grant includes direct advice and representation as well as community education. As with the Heirs' Property grant, specific neighborhoods within the City are prioritized, e.g., NW 5th Avenue, Pleasant Street, Porters, Duval, Lincoln Estates and Grove Street.



COVID for employees: who writes the rules? These days, it's usually whoever signs the checks.

By Conor Flynn

Entering March, 2022 – now two years removed from the original COVID shutdown – the state of workplace guidance on COVID-19 has become increasingly balkanized. In February 2022, the Supreme Court struck down OSHA's ETS (test or vaccine) mandate for large private employers in a 6-3 vote following the Court's ideological lines. The OSHA mandate would have covered 84.2 million Americans, per the agency's estimate.

Medical facilities in Florida, however, remain caught between federal regulation and state-level resistance. The federal mandate associated with the Center for Medicare and Medicaid Services – regularly referred to as the mandate for healthcare workers – was left in effect by the Supreme Court in a January 7, 2022 decision. Florida's state government has refused to enforce the federal mandate. On March 1, the United States Senate voted 49-44 to pass a measure aimed at ending the CMS vaccine mandate, but with President Biden promising a veto, the Senate's measure appears dead in the water.

Medical employers are caught in the middle of a federal-state power struggle. For these employers, failure to completely comply with the federal mandate could trigger the complete loss of Medicare and Medicaid funding. So why don't these employers just fire unvaccinated employees? If Florida employers terminate employees for failure to get vaccinated, they can face staggering fines: $10,000 per employee for companies with fewer than 100 employees, and $50,000 per employee for companies with more than 100 employees.

Those major fines are separate and apart from any legal recourse the terminated employees may seek. A federal court has ruled that a terminated, former employee of iAero Thrust, LLC may not seek a claim under the Florida Civil Rights Act, but the claim may proceed under federal discrimination and retaliation statutes.

So what is a company to do? One example of a workaround for a major employer is Amazon. On February 18, Amazon announced that it will no longer be requiring facemasks in its warehouses. However, if an Amazon employee is unvaccinated and contracts COVID-19 after March 18, the infected employee will not receive paid leave. Employers should remain vigilant and up to date on federal, state, and local regulations, and keep an eye toward any funding sources that may come with COVID-regulation-type strings.

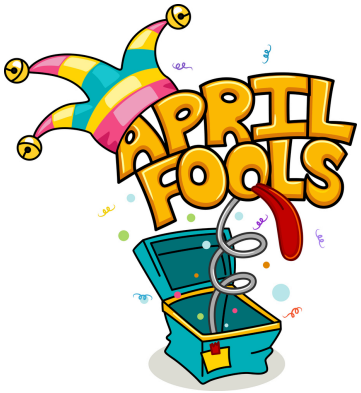
A COLLABORATION BETWEEN THE EIGHTH JUDICIAL CIRCUIT AND EIGHTH JUDICIAL CIRCUIT BAR ASSOCIATION

DRIVER'S LICENSE REINSTATEMENT CLINIC (ON-LINE)

Attorneys are needed to assist local citizens in seeking the reinstatement of their driver's licenses. Volunteers will receive substantial training and support throughout the clinic, and will be assigned a law clerk to assist.

THE CLINIC WILL RUN FROM APRIL 4 - 8, 2022, WITH COURT HEARINGS ON APRIL 8, 2022

To volunteer, contact
Raymond F. Brady, Esq.
rbrady1959@gmail.com



Deadly Force in Self-Defense: Venire Enlightenment and Jury Instruction

By Steven M. Harris

Rule 3.390, Fla.R.Crim.P., states that the Florida Standard Jury Instructions in Criminal Cases "may be used." Those instructions are formulated by a Florida Bar committee without review or approval of the Florida Supreme Court. See Fla.R.Jud.Admin. 2.270(a); *In re Amendments to the Fla. Rules of Judicial Admin*., 312 So.3d 445 (Fla. 2021). They establish no precedent, are not considered authorized for use, and should not be presumed correct or complete. See Fla.R.Jud.Admin. 2.580(c).

Language in a standard instruction can be unnecessary or inappropriate, incorrect due to a grammatical error (see, e.g., *Sims v. State*, 140 So.3d 1000 (Fla. 1st DCA 2014)), or simply misstate the law. Giving one can even be fundamental error. See *State v. Montgomery*, 39 So.3d 252 (Fla. 2010). The presiding judge has the liberty to determine that a standard instruction is "erroneous or inadequate." In such case, the judge "shall modify the standard instruction or give such other instruction as the trial judge determines to be necessary to instruct the jury accurately and sufficiently on the circumstances of the case." Fla.R.Jud.Admin. 2.580(a).

A defendant is entitled to a proffered instruction when it is a correct statement of the law, not misleading or confusing, and supported by the evidence. *Stephens v. State*, 787 So.2d 747 (Fla. 2001). Jurors must understand fully the law that they are expected to apply. Clarity is the yardstick. The preferred practice should be to direct the jury beyond standard instructions. See *Perriman v. State*, 731 So.2d 1243 (Fla. 1999); *State v. Bryan*, 287 So.2d 73 (Fla. 1973); *Dooley v. State*, 268 So.3d 880 (Fla. 2d DCA 2019); *Garrido v. State*, 97 So.3d 291 (Fla. 4th DCA 2012). Especially if necessary to resolve issues properly. See *Dorsett v. State*, 147 So.3d 532 (Fla. 4th DCA 2013).

There can be little doubt a "self-defense" trial is extraordinary. The defendant admits to committing a serious criminal act; the focus of the trial is the state's disproving justification, usually by refuting subjective or objective reasonableness, imminence, or necessity. Justification for the use of force has been referred to as a "somewhat complex area of law that will necessarily yield complex jury instructions." *State v. Floyd*, 186 So.3d 1013, 1022 (Fla. 2016). Thus, routine default to simply giving what is in SJI (Crim.) 3.6(f) is imprudent.

The venire has certainly been exposed to interminable digital media and pundit interview (law enforcement official, law professor, use of force expert, current or former State Attorney or assistant, defense attorney) that delivered an incomplete or incorrect narrative with inappropriate incident framing (see January 2022 ***Forum 8***) and misstatement of the actual or applicable law. Such media has likely produced egregious confusion and unsuitable sentiment about when deadly force is lawful under Chapter 776 or § 782.02, *Fla. Stat*., the almost always irrelevant "Stand Your Ground" and its alleged controversial nature, the history of "duty to retreat" and what it actually means, the nature, process and effect of a pretrial determination or denial of § 776.032, *Fla. Stat*., immunity, and the application of the deadly force prerequisites of reasonableness, necessity and imminence. Those sources also routinely reprise a comparison to a ruling or verdict in some other (but inapposite) Florida "self-defense" case. The actual factual and legal particulars of which are usually similarly misstated. One need only read the comments to digital media to confirm the venire is likely emotionally tweaked and dreadfully misinformed.

Educating the venire and instructing the impaneled jury (during voir dire, opening statement, closing argument and by admonishment and written instruction) is critical. Some thoughts on what is and is not in SJI (Crim.) 3.6(f):

- The incorporated instruction for § 782.02, *Fla. Stat*., misstates the law. That statute is directed to resisting an attempted murder or felony. Reasonable belief, necessity, and imminence (in relation to death or great bodily harm) are not pertinent. See SJI (Crim.) 7.1 for the correct statute-tracking language.
- Wherever language instructs on the state's failure of proof (either for the crime(s) charged or to disprove justification), the jury should be instructed it "must" (not "should") find the defendant not guilty.
- If the defendant asserts justification based on preventing the commission of a forcible felony, the jury should be specifically instructed that deadly force in such circumstance is lawful without belief of imminent death or great bodily harm and it is the burden of the state to prove beyond a reasonable doubt that the alleged victim was not committing the identified felony. See *Routenberg v. State*, 301 So. 3d 325 (Fla. 2d DCA 2020).
- The language applying § 776.041(2), *Fla. Stat.*, should only be given when requested by the state and a reasonable jury could find there is evidence sufficient for such finding under the law. "Provoked" should be explained to exclude words

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Deadly Force in Self-Defense

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not threatening imminent unlawful force, and any threat or use of force which is lawful.

- An instruction to prevent consideration of the alleged victim's hypothetical self-defense viewpoint should be given. See October 2021 ***Forum 8***.
- The jury should be informed that the law does not require the defendant to do any of the following before using deadly force: Use nondeadly force; see a weapon; issue a verbal warning; disclose or warn that he is armed; visibly brandish or otherwise threaten with a firearm; take a warning shot. See *Mobley v. State*, 132 So.3d 1160 (Fla. 3d DCA 2014).
- When "duty to retreat" is in play, that phrase and the asserted prerequisite (engaged in a criminal activity or not in a place one has the right to be) should be explained. An instruction should clarify the temporal limitation (moments just before deadly force was used) and that retreat is not required when an avenue of retreat is not readily discernible or could not be effected safely. See March 2021 ***Forum 8***. Mention of the prerequisites should be omitted if the state has not asserted required retreat.
- A law enforcement defendant should get an instruction relating the use of deadly force to police service. See February 2022 ***Forum 8***.
- The venire should be admonished to discard "Stand Your Ground" notions from media and punditry, and that jurors must apply the law the court instructs without consideration of perceived moral or public policy on firearms or self-defense. (See *Bouie v. State*, 292 So.3d 471 (Fla. 2d DCA 2020)). The venire should also be informed of the right to keep and bear arms for all lawful purposes, including for self-defense. (Art I, Sec. 8(a); § 790.25(4), *Fla. Stat.*), and that the Florida Constitution provides all persons inalienable rights, including the right to enjoy and defend life. (Art. I, § 2, and see Justice Kogan, specially concurring, in *Perkins v. State*, 576 So. 2d 1310 (Fla. 1991)).
- "Great bodily harm" should be defined (see SJI (Crim.) 3.3(d)). The definition should inform that head, fists and feet are capable of inflicting such harm, and recognize loss of consciousness, serious internal injury, broken bone, disability or disfigurement, and loss or impairment of the function of a bodily member, organ or mental faculty.
- "Imminent" should be explained as what the defendant believed was about to happen, informed by what has already occurred. Hence, deadly force can be a lawful response to a nondeadly force injury when there is a reasonable expectation of imminent escalation of force or injury. See May 2020 ***Forum 8***.
- The jury may be called upon to determine the applicable level of force the defendant threatened or used. In such case, *nondeadly* force instructions would also be required. See, e.g., *Croft v. State*, 291 So.3d 1285 (Fla. 5th DCA 2020); Jackson *v. State*, 179 So.3d 443 (Fla. 5th DCA 2015). Gunpointing coupled with verbal command, the use of nondeadly force as a matter of law, requires special consideration and instruction if it is argued to constitute the threatening of deadly force. See November 2020 ***Forum 8***.

ADR

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those situations meets the requirements of a signed agreement by the parties and counsel.

So, the court is told there was no agreement and the lawyers are hollering there is an agreement, it is just not finalized. Then: there is no agreement. Any harm done in telling the court there was no agreement when two days after the mediation the mediator did not receive an agreement? We suggest: no. Counsel can confirm a settlement with the court the minute the settlement agreement is signed, whether on the fourth day following the mediation or on the seventh day. Report settlement when you have it signed.

We told you we would go all technical on you. Why did we go deep into the technical weeds? Because the court is waiting to see what happened at mediation. There is case law that says a mediator cannot tell the court there was a settlement agreement unless there was one in writing and *signed* by the parties. That is not complicated. How do you get it signed at a Zoom mediation? Either electronically or by each attorney and party signing it and sending it to opposing counsel and to the mediator. That is not complicated. But it is definitely required.

Probate Section Report: Due-on-Sale Clauses and Transfers into Trust

By Blake Moore, Guest Columnist

A common estate planning technique is to use a revocable living trust to avoid probate. All assets moved into a properly-drafted trust avoid the probate process, which hopefully will simplify matters for the loved ones of the decedent. However, sometimes a problem arises when mortgaged real property is moved into trust: the due-on-sale clause is triggered.

A due-on-sale clause is commonly contained in mortgage documents. This clause states that if the mortgagor transfers the mortgaged real estate to a new owner, then the mortgagee can accelerate the loan, making the entire amount still owed due immediately. And moving a house into trust is transferring the mortgaged real estate to a new owner because the trust becomes the new owner of the property. This is obviously not an outcome most people desire. Thus, some attorneys worry that moving the property into trust will trigger the due-on-sale clause.

Thankfully, 12 U.S.C. § 1701j–3(d)(8) states that a due-on-sale clause cannot be used when (1) the real property is residential, (2) the real property contains fewer than five dwelling units (a house is a single dwelling unit), (3) the real property is transferred into a properly-drafted revocable living trust, and (4) the transfer does not change who has a right to reside in the dwelling. As long as these requirements are met—which is the case for most residential transfers—the statute forbids the use of the due-on-sale clause. However, there is a federal regulation as well, found at 12 CFR § 191.5. This regulation narrows the rule down to the residence of the transferor. Thus, the statute states that all dwellings are immune to due-on-sale clauses, but the regulation states that only the transferor's personal residence is exempt. This is a clear conflict.

Unfortunately, this conflict has not yet been resolved. The statute should overrule the regulation, but we have yet to see this occur. Our only hint regarding a resolution is found in an unpublished opinion: *Baldin v. Wells Fargo Bank*, N.A., No. 3:12-CV-648-AC, 2013 WL 794086 (D. Or. Feb. 12, 2013). *Baldin* held that the regulation was incorrect to limit the scope of the statute. However, the precedential value of that case is murky, leaving us with little real clarity on the matter. In the meantime, loan servicers are split on how to handle transfers into trust. Section D1-4.1-02 of the Fannie Mae Servicing Guide generally exempts a transfer into trust from triggering the due-on-sale clause on all mortgage loans created after June 1, 2016. However, the Freddie Mac Servicer Guide has no such exemption, instead only exempting transfers of homestead property in section 8406.3.

So, what does this all mean for our clients? For homestead transfers, it means your clients have nothing to fear, so long as the transfer does not change the beneficial interest of the homestead. However, if you are considering a transfer of mortgaged residential property that is not your client's homestead, then it is not clear whether the due-on-sale clause will be used against your client. More often than not, the due-on-sale clause will not be invoked as long as your client is paying the loan as agreed; lenders typically do not want to risk losing a paying customer. Furthermore, if your client has a Fannie Mae loan issued in the last few years, a transfer into trust will very likely not trigger the due-on-sale clause. However, the best course of action is to avoid lifetime transfers into trust when possible, perhaps with the use of a lady bird deed.

Criminal Law

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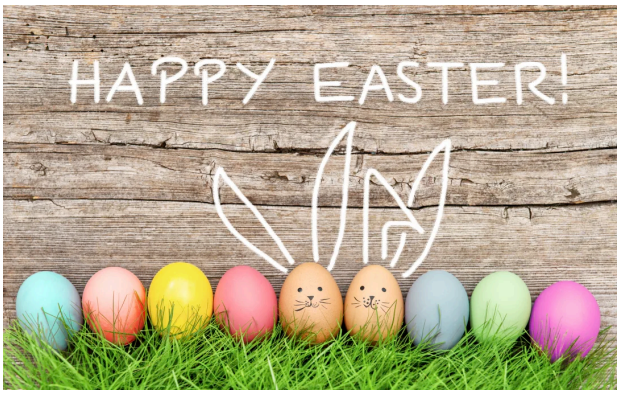
by working in the public sector.

A much more difficult problem is how to convince the greater public that practical education is important in evaluating the merits of a law school. However, I don't pretend to have the solution to this problem.

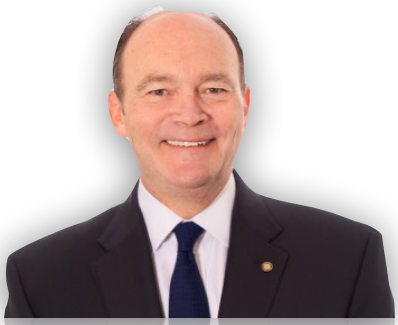
Once again, I sound like the proverbial old man standing on the porch yelling get off my grass and wishing for the days of nicer lawns. I fear that soon there will be no grass at all. Then where will be?



10th Annual Leadership Roundtable:

The Eighth Judicial Circuit's Diversity Conference

Path to Unity
Featuring Trailblazer Larry Smith



The Path to Unity tells the story of the Bar's journey from its segregated past to the rich, multi-cultural organization that it is today. Sponsored by the Florida Bar Standing Diversity Committee, this program features five portraits by student artists highlighting Florida lawyers whose significant contributions paved the way for others based on their achievements championing race, gender, ethnicity, sexual orientation, and disability issues. The program begins with the unveiling of traveling portraits at the Stephan P. Mickle, Sr. Criminal Courthouse with special remarks from Evelyn Mickle.

A luncheon and roundtable focusing on LGBTQ rights featuring Larry D. Smith will follow. Smith has made numerous civic and community contributions advocating for the LGBTQ community, including helping persuade Orlando to amend its human rights ordinance to prohibit workplace, housing, and public discrimination on the basis of sexual orientation. Students from P.K. Yonge will join the roundtable moderated by Simone Chriss.

The cost for the luncheon and roundtable is $20 for EJCBA members, $26 for non-members, and free for students. Space is limited and pre-registration is required. CLE and CJU credit is anticipated.

For more information contact

Mary K. Wimsett: mkwimsett@adoptionlawfl.com

Friday, April 22, 2022
Register Online: www.8jcba.org

Introduction and Unveiling: 10:30
Civics introduction by the judiciary and unveiling of portraits
Stephan P. Mickle, Sr. Criminal Courthouse
220 S. Main Street

Luncheon and Roundtable: 11:45 - 2:00
Keynote Speaker Larry Smith followed by a roundtable discussion
The Wooly
20 N. Main Street

Sponsored by: Eighth Judicial Circuit Bar Association, Florida Association For Women Lawyers, Eighth Judicial Circuit Chapter, The Florida Bar Diversity Leadership Grant, Josiah T. Walls Bar Association, North Central Florida Chapter of the Federal Bar Association

April 2022 Calendar

1 EJCBA Annual Professionalism Seminar, Trinity United Methodist Church, 4000 NW 53rd Ave., 9-12 noon (registration begins at 8:30)
5 Deadline for submission of articles for May Forum 8
6 EJCBA Board of Directors Meeting, Office of the Public Defender, 151 SW 2d Ave., (or via ZOOM), 5:30 p.m.
13 Probate Section Meeting, 4:30 p.m. via ZOOM
15 Good Friday – County Courthouses closed
22 EJCBA Leadership & Diversity Conference - Path to Unity Portrait Unveiling – 10:30 a.m., Stephan P. Mickle, Sr. Criminal Courthouse
22 EJCBA Leadership & Diversity Roundtable and Luncheon, Larry D. Smith, Esq., The Wooly, 11:45 a.m. - 2:00 p.m.
29 Deadline to deliver nominations for 2022 James L. Tomlinson Professionalism Award

May 2022 Calendar

1 Law Day 2022: "Toward a More Perfect Union: The Constitution in Times of Change"; Event to be Announced
4 EJCBA Board of Directors Meeting, Office of the Public Defender, 151 SW 2d Ave., (or via ZOOM), 5:30 p.m.
5 Deadline for submission of articles for June Forum 8
10 Spring Fling, Depot Park, 6:00 p.m.
11 Probate Section Meeting, 4:30 p.m. via ZOOM
20 EJCBA Monthly Luncheon, Speaker TBA, The Wooly, 11:45 a.m.
30 Memorial Day, County & Federal Courthouses closed

Have an event coming up? Does your section or association hold monthly meetings? If so, please fax or email your meeting schedule to let us know the particulars, so we can include it in the monthly calendar. Please let us know (quickly) the name of your group, the date and day (i.e. last Wednesday of the month), time and location of the meeting. Email to Dawn Vallejos-Nichols at dvallejos-nichols@avera.com.