FORUM 8

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President's Message

By Robert Folsom

Happy Holiday Season, everyone! Although there will be no monthly luncheon in December, we look forward to seeing everyone at our holiday social. Additionally, we encourage all of you to take part in the EJCBA Annual Margaret Stack Holiday Project which gives back to children in our circuit. This year the project will be donating to schools in Alachua, Union, and Bradford Counties. We are ready to accept your contributions and expect Santa to make an appearance to the designated schools. Beyond the Holiday Project, please consider giving back to the community, and particularly to those in need, this holiday season.

This time of year I often reflect on a word that gives me perspective on life: blessed. We, as attorneys, are blessed. Our profession gives us the knowledge and access to do good in the world and in our communities. It is important to be mindful that not everyone has those privileges; and that many in our community struggle, particularly children, as they are especially vulnerable to circumstances over which they have no control. Recently, a substantial part of my time has been reviewing the childhood of folks on death row. For those of you who are familiar with death penalty litigation, you know the horrific abuse and neglect that most inmates on death row experienced as children. Many other children end up serving prison sentences that amount to a substantial portion of their lives. It is important for children to be loved and supported; and to not have a hopeless existence. There are so many ways that we as attorneys can make a difference in children's lives; and help them avoid decisions and actions that affect not only their own lives, but our communities. We can serve on boards of organizations that protect and advocate for children. We can volunteer our time to advocate for children in the court system. And we can reach out to community organizations, such as CDS Family & Behavioral Health Services, to find ways that we can help. This time of year is especially hard on children who are struggling. So, please take the time to consider how you, as an attorney, can make our community a safer, more supportive, and more loving environment. Most importantly, be mindful of the needs of others.

Transitioning into the new year, you can expect a busy schedule of events. Florida Bar President Gary Lesser will be visiting and speaking with us on Wednesday, January 11, 2023. Our intent is that this event will be available both in-person and by Zoom. Chief Judge Mark Moseley will present the annual State of the Circuit at our January monthly luncheon on Friday, January 20, 2023. Our annual Charity Golf Tournament will take place on Friday, March 10, 2023. And Chief Justice Carlos Muñiz will be speaking at our monthly luncheon on Friday, May 12, 2023. There is so much more planned in addition to these events. And we would love to have your participation, ideas, suggestions, and general feedback about how to make the EJCBA a better organization for our members.

Make sure to follow our Facebook page for posts about future events, and for photos of past events. And keep an eye out for our email blasts. If you follow us on Facebook, you can see that we are having a great time this year. Thank you to all our members who have come out to our events!

On behalf of the Board of Directors of the Eighth Judicial Circuit Bar Association, I wish everyone a happy and joyous holiday season of giving and sharing.

2022 - 2023 Board Officers

Robert E. Folsom
President
220 S. Main Street
Gainesville, FL 32601
(352) 374-3634
folsomr@circuit8.org

Monica Perez-McMillen
President-Elect
101 NW 75th Street, Ste 1
Gainesville, FL 32607
(352) 327-8251
monica@mcmillenfamilylaw.com

Evan M. Gardiner
Past President
2700 NW 43rd St., Ste C
Gainesville, FL 32606
(352) 332-7688
egardiner@boginmunns.com

Mikel Bradley
President-Elect Designate
1000 NE 16th Ave, Ste I
Gainesville, FL 32601
(352) 415-2304
mikel.bradley@trls.org

Dominique Lochridge-Gonzales
Secretary
1000 NE 16th Ave, Bldg 1, Ste B
Gainesville, FL 32601
(352) 415-2324
dominique.lochridge-gonzales@trls.org

Sharon T. Sperling
Treasurer
PO Box 358000
Gainesville, FL 32635
(352) 371-3117
sharon@sharonsperling.com

Members at Large

Jan Bendik
3600 SW 19th Ave, Apt 13
Gainesville, FL 32607
(352) 374-4122
prague@mindspring.com

Samantha Howell
1000 NE 16th Avenue, Ste I
Gainesville FL, 32601
(352) 372-0519
samantha.howell@trls.org

Raymond F. Brady
2603 NW 13th St, Box #403
Gainesville, FL 32609
(352) 554-5328
rbrady1959@gmail.com

Frank E. Maloney, Jr. - Historian
445 E. Macclenny Ave, Ste I
Macclenney, FL 32063
(904) 239-3155
frank@frankmaloney.us

Cherie Fine
622 NW 1st Street
Gainesville, FL 32601
(352) 372-7777
cfine@ffplaw.com

James H. McCarty Jr. (Mac)
2630 NW 41st Street, Ste A
Gainesville, FL 32606
(352) 240-1226
mac.McCarty@mccartyfocks.com

Allison Derek Folds
527 E. University Ave
Gainesville, FL 32601
(352) 372-1282
derek@foldsandwalker.com

George Nelson
81 N. 3rd Street
Macclenny, FL 32063
(904) 259-4245
nelsong@pdo8.org

Blake Fugate
P.O. Box 98
Williston, FL 32696
(352) 528-0019
blake@normdfugatepa.com

Peg O'Connor
102 NW 2nd Avenue
Gainesville, FL 32601
(352) 372-4263
peg@toklegal.com

Norm D. Fugate
P.O Box 98
Williston, FL 32696
(352) 528-0019
norm@normfugatepa.com

Lauren N. Richardson
3620 NW 43rd Street, Unit B
Gainesville, FL 32606
(352) 204-2224
lauren@laurenrichardsonlaw.com

Christopher Hopkins
2815 NW 13th Street, Ste 305
Gainesville, FL 32609
(352) 373-3334
chris@knellingerlaw.com

Dawn M. Vallejos-Nichols - Editor
2814 SW 13th Street
Gainesville, FL 32608
(352) 372-9999
dvallejos-nichols@avera.com

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:

Eighth Judicial Circuit Bar Association, Inc.
P.O. Box 140893
Gainesville, FL 32614
Phone: (352) 380-0333
Fax: (866) 436-5944

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.

Judy Padgett
Executive Director
P.O. Box 140893
Gainesville, FL 32614
Phone: (352) 380-0333
Fax: (866) 436-5944
execdir@8jcba.org

Dawn M. Vallejos-Nichols
Editor
2814 SW 13th Street
Gainesville, FL 32608
(352) 372-9999
(352) 375-2526
dvallejos-nichols@avera.com

Deadline is the 5th of the preceding month

Alternative Dispute Resolution

By Deborah C. Drylie

Mentoring and Mediation

The idea of mentoring is not new or novel and it is likely a concept everyone supports. But where did this idea come from? It is the hope of this article to review the background and history of mentoring and the need to support this concept, not just by recognizing it in theory, but incorporating it into your practice.

Think back to your 7th grade World History class - why did the Industrial Revolution take place in Europe rather than somewhere else in the world? In the 18th Century, the Middle East and Asia were developmentally comparable to Europe. However, over the next 200 years, the Western economies rapidly outpaced the economies of both Asia and the Middle East. A recent study by two economists and an economic historian suggest that part of the Western advancement is attributed to intergenerational dissemination of knowledge and the transmission of craftsmanship. In that regard, when is the last time, if ever, that you thought of lawyers as a guild? Again, think back to World History. Guilds existed to teach skills - how to build a boat, work in textiles, printing or a variety of other artistic or handmade items. The expertise gained over time was valued and passed down through a guild and mentoring process. It was understood that 'explicit knowledge' may be helpful - learning how to operate a loom or printing press - but there is a more important component to learning which involves 'tacit knowledge.' Explicit knowledge is something that can be taught and codified - i.e., law school. But tacit knowledge is not so easy to communicate and must be learned from training with highly qualified and experienced people.

Since medieval times, craftsmanship has been passed down from one generation to the next mainly through apprenticeship between a competent adult (the master) and a young person learning a craft. In Europe, more than elsewhere, apprenticeship was governed by guilds. Thanks to this system, apprentices had exposure to the best techniques and knowledge was not limited to family units. As apprentices became masters in their own right, they could travel from village to village further disseminating tacit knowledge to another set of novices. While apprenticeship was also found in Asia and the Middle East, it was typically kept within the family and is arguably the main reason the Industrial Revolution took place in Europe centuries before other regions of the world.

Disseminating tacit knowledge is what makes us better lawyers and ensures the next generation of better lawyers. Picking up the proverbial baton from the law professors who (hopefully) transmitted explicit knowledge to the next generation of lawyers requires all of us to do our part to mentor young lawyers to represent the guild to which we all belong. So, take those young lawyers under your wing, take them to hearings, to depositions and especially to mediations. The art of war, the art of compromise, the art of negotiation and the art of helping a client through a difficult time in their life are all skills best learned by observing a mediation. Mediators should and do welcome the opportunity to do our part in the mentoring of novice litigators in the art of mediation.

!! SAVE THE DATE !!

The annual EJCBA Charity Golf Tournament – "The Gloria" Benefiting the Guardian Foundation/Guardian ad Litem Program will be held on Friday, March 10, 2023 at UF's Mark Bostick Golf Course. Add it to your calendar now!

Wishing you a Magical Holiday!

By Samantha Howell, Pro Bono Director, TRLS

"The Joy of brightening other lives, bearing each other's burdens, easing each other's loads and supplanting empty hearts and lives with generous gifts becomes for us the magic of the holidays."

- W.C. Jones

I couldn't have said it better myself! I love this time of year, not only because there are so many holidays, or because the leaves turn and leave (pun intended) a crisp smell in the air, but because the holidays remind me of the truly important things in life: health, family, giving, and gratefulness. These themes transcend any singular holiday and can serve to unite us despite our differences.

And, while many of us will be enjoying vacations over the next month, I hope we will also remember how hard the holidays can be for others. Perhaps a family member passed away, or someone lost their job or home, or the paycheck just isn't stretching as far as it used to. As W.C. Jones noted though, helping others ***is*** the magic of the holidays. So, as this is my last newsletter article of the year, I implore you to consider signing up for a pro bono opportunity with Three Rivers, so you can share the magic with others. Available opportunities include:

Telephonic Housing Clinic - This advice-only clinic is offered every Tuesday from 5pm-6:30pm. Appointments are scheduled for 45 min. TRLS staff screen and schedule clients, notifying volunteers of their assignments on the Friday (or Monday) prior to the clinic. Volunteers complete an online form so that TRLS knows what advice was given and if any follow-up by TRLS is needed. This is the easiest way for you to assist your community.

Pro Se Divorce Clinics - The next clinic will be offered at the TRLS Gainesville Office on December 19 (Mon). The clinic is broken into two sessions - 9am-12pm is for petitioners with minor children and 2pm-4pm is for petitioners without minor children. Volunteers at this clinic will guide participants through the packets, so they can file for divorce pro se. TRLS will be present to assist and notarize. Volunteers can assist at one or both sessions.

Ask-A-Lawyer - These "pop-up" clinics are hosted at local shelters including Grace Marketplace, St. Francis House, Peaceful Paths, and the VA Honor Center. Volunteers will meet with individuals in need of legal assistance, and provide advice/counsel and, perhaps, even a brief service. These clinics are held one Saturday a month, typically between 10am-12pm. Our 2023 calendar will be posted on our website soon.

Law in the Library - These are community outreach events, wherein a volunteer presents on a legal topic for about 40 minutes and then answers a few audience questions. The clinics are presently being held via Zoom and will be at the Alachua Library Main Branch when they return to in-person (recordings of the session are available on the Library website). They are scheduled for the 1st Wednesday of each month at 5:30pm.

January 4th - Estate Planning with Leigh Cangelosi
February 1st - Car and Pedestrian Accidents with Ray Brady and Peg O'Connor
March 1st - LITC/Taxes with Derek Wheeler

Finally, you can take on a client matter for **limited scope or full representation** in a variety of areas including: bankruptcy, special education, family, housing/property, consumer, income maintenance, and trusts & estates. We are in particular need of attorneys to assist with probate cases, guardianship and guardian advocacy, and landlord/tenant. Summaries of a couple available cases (as of the writing of this article) follow:

1. Alachua County - Client needs to probate his mother's will. Decedent passed intestate and there is one other heir, also in Alachua County. (22-0342800)
2. Alachua County - Client wants to become the guardian to his 17-year-old child. Child has been diagnosed with autism and has mobility issues. Needed to help maintain housing. (22-0343831)
3. Suwannee County - Client purchased a home with a mortgage and paid it off. Seller refuses to provide the satisfaction of the mortgage. We are seeking an attorney to help the client obtain documentation that the mortgage has been paid in full. Can be done remotely. (22-0342594)
4. Levy County - Client would like to add his children to his deed. Can be done remotely (22-0345358)
5. Alachua County - Client would like to have temporary relative custody over grandchildren. Parents are incarcerated. (22-0344834)

If you would like to take on any of the above, please contact me and include the identification number (XX-XXXXXXX).

Finally, I want to kindly remind you, dear reader, that attorneys are encouraged to provide at least 20 hours of pro bono service each year. Volunteering with TRLS is a great way to take care of this duty while meeting colleagues, learning about the community, and trying out a new area of law.

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The Legal State of Race: Looking Ahead to 2023

By Conor Flynn

The U.S. Supreme Court is, once again, widely expected to overturn longstanding precedent and do away with race-conscious admissions policies in higher education. In 1978 (*UC Regents v. Bakke*), 2003 (*Grutter v. Bollinger*), and 2016 (*Fisher v. UT Austin*), the Court affirmed universities' right to consider applicants' race as part of a holistic review process. The current conservative supermajority's hostility to race-conscious admissions policies was on display in a five-hour oral argument, and absent an unprecedented shift in the Court's composition, race-conscious admissions policies appear to be on their way out come June 2023.

Court watchers further anticipate that the conversative supermajority's reasoning will not be restrained to higher education, but will take aim at the military, private corporations, and broader government as well. Further, while Florida's Stop W.O.K.E. Act has been blocked by the District Court for the Northern District of Florida (as of this writing), the Eleventh Circuit Court of Appeals appears poised to reverse and permit the legislation to take effect. Critics argue the Stop W.O.K.E. Act unlawfully limits an employer's right to address employees regarding workplace culture, mutual respect, racism, and implicit bias. The Florida legislature disagrees.

The Eleventh Circuit will likely render a decision on the legality of the Stop W.O.K.E. Act before the Supreme Court strikes down affirmative action. Practically speaking, employers of all types and sizes would do well to conduct an inventory of their policies, procedures, and practices as they relate to Diversity, Equity, and Inclusion efforts.

Advisors to multi-state corporations should make any out-of-state leadership aware of the State of Florida's current posture on "culture wars" issues and the likely turbulence ahead of the 2024 election cycle.

SIEGEL HUGHES ROSS & COLLINS

Brent G. Siegel, W. Charles Hughes, Jack M. Ross, & Krista L.B. Collins

We are excited to share the news regarding the recent evolution of our firm.

It is with great pleasure that we announce our firm name has changed from Siegel Hughes & Ross to **SIEGEL HUGHES ROSS & COLLINS** effective November 2, 2022.

It is an exciting time for the firm, and we are happy to add our partner, Krista L.B. Collins's name to the firm.

Please update your records to reflect the new firm name and new email addresses listed below. Let us know if you have any questions.

Brent, Charlie, Jack, & Krista

SIEGEL HUGHES ROSS & COLLINS
4046 W. Newberry Road
Gainesville, Florida 32607
352-375-7700

Partner Email Updates:
Brent G. Siegel: brent@shrc-law.com
W. Charles Hughes: charlie@shrc-law.com
Jack M. Ross: jack@shrc-law.com
Krista L.B. Collins: krista@shrc-law.com

Associate/Staff Email Updates:
Eric M. Siegel: eric@shrc-law.com
Kathleen R. Norman: kathleen@shrc-law.com
Sheffia Siler: sheffia@shrc-law.com
Barbara Wilhite: barbara@shrc-law.com
Debi Martinez: debi@shrc-law.com
Marie Graham: marie@shrc-law.com

Wishing you a Magical Holiday!

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If you have questions or would like to participate in any of the above, please contact me at samantha.howell@trls.org or 352-415-2315. You can also select an available case and learn more about TRLS's Pro Bono Legal Assistance Program (PBLAP) at https://www.trls.org/volunteer/.

State Must Disprove Self-Defense Beyond a Reasonable Doubt -- But the Jury Instruction is a Unicorn

By Steven M. Harris

The district courts have recognized that the State has the burden to disprove self-defense beyond a reasonable doubt. See *Andrews v. State*, 577 So.2d 650 (Fla. 1st DCA 1991); *Fowler v. State*, 921 So.2d 708 (Fla. 2d DCA 2006*); Behanna v. State*, 985 So.2d 550 (Fla. 2d DCA 2007); *Valdes v. State*, 320 So.2d 235 (Fla. 3d DCA 2021); *Testerman v. State*, 966 So.2d 1035 (Fla. 4th DCA 2007); *Sipple v. State*, 972 So.2d 912 (Fla. 5th DCA 2007); *Fields v. State*, 988 So.2d 1185 (Fla. 5th DCA 2008); *Falwell v. State*, 88 So.3d 970 (Fla. 5th DCA 2012). A defendant is entitled to the court's judgment of acquittal if the State fails to sustain its burden of proof. *Stieh v. State*, 67 So.3d 275 (Fla. 2d DCA 2011). The State has not contested its burden to disprove self-defense. See *Bretherick v. State*, 170 So.3d 766 (Fla. 2015) (observation of Canady, J., dissenting).

A jury in many states (including North Carolina, Vermont, Alabama, Minnesota, California, New Jersey, Georgia, Oklahoma and Michigan) will receive an instruction which directly informs that self-defense must be disproved by the State beyond a reasonable doubt. However, a Florida jury will not; it will instead hear this, from Std. Jury Inst. (Crim) 3.6(f) and 3.6(g):

> If in your consideration of the issue of [self-defense] [defense of another] [defense of property] you have a reasonable doubt on the question of whether (defendant) was justified in the [use] [or] [threatened use] of [non-deadly] [deadly] force, you should find [him] [her] not guilty.
>
> However, if from the evidence you are convinced beyond a reasonable doubt that (defendant) was not justified in the [use] [or] [threatened use] of [non-deadly] [deadly] force, then you should find [him] [her] guilty if all the elements of the charge have been proved.

A trial court's refusal to give a direct burden to disprove instruction was affirmed in *Bowen v. State*, 655 So.2d 1208 (Fla. 4th DCA 1995), when the defendant had received a standard instruction. In *Mosansky v. State*, 33 So.3d 756 (Fla. 1st DCA 2010), *review denied*, Case No. SC10-821 (Sept. 20, 2010), the district court held it was not fundamental error not to directly instruct the jury that the State had the burden to disprove self-defense beyond a reasonable doubt. The court distinguished affirmative defenses from elements of a crime. See also *Elliot v. State*, 49 So.3d 269 (Fla. 1st DCA 2010) (". . . jury instructions explicitly stated the State had the burden of proving the crime and that the defendant did not have to prove anything. Thus, there was no reason for the jury to think a different standard applied to the instruction on justifiable or excusable homicide.").

In *Tyler v. State*, 131 So.3d 811 (Fla. 1st DCA 2014), a defense of duress case, the court explained *Mosansky*, observing that neither the common law nor any constitutional requirement mandated the giving of a direct burden to disprove instruction. Although not cited by either party, the court referenced *Dixon v. United States*, 548 U.S. 1 (2006), where the Supreme Court held that there is no *constitutional* requirement to disprove beyond a reasonable doubt an affirmative defense that controverts an element of an offense.[1]

Notwithstanding *Dixon*, when self-defense is at issue in a U.S. District Court, the jury will likely receive a direct burden to disprove instruction. A good explanation why is found in *United States v. Corrigan*, 548 F.2d 879, 883 (10th Cir. 1977):

> In the case of an affirmative defense, however, the potential for misinterpretation is too great to permit ambiguity. An affirmative defense admits the defendant committed the acts charged, but seeks to establish a justification or excuse. In the absence of clear instructions, it is not unlikely that the jury would infer that the government has borne its burden and that it is up to the defendant to establish his justification. This is contrary to the standard of proof beyond a reasonable doubt on all elements of the offense; the defense of self-defense is directed toward negating the element of criminal intent.

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[1] In *Martin v. Ohio*, 480 U.S. 228, 235 (1987), the Court observed "the common-law rule was that affirmative defenses, including self-defense, were matters for the defendant to prove."

Self-Defense Beyond a Reasonable Doubt

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See Tenth Circuit Pattern Instruction 1.28. See also *United States v. Thomas*, 34 F.3d 44 (2d Cir. 1994).

> The current Sixth Circuit Pattern Instruction 6.06(3) includes:
>
> The government has the burden of proving that the defendant did not act in self-defense. For you to find the defendant guilty, the government must prove that it was not reasonable for him to think that the force he used was necessary to defend himself against an immediate threat. Unless the government proves this beyond a reasonable doubt, you must find him not guilty.

A comment explains:

> Including a specific statement of the burden of proof in a self-defense instruction is preferable to relying on a general burden of proof instruction. *DeGroot v. United States*, 78 F.2d 244 (9th Cir. 1935); *United States v. Corrigan*, 548 F.2d 879 (10th Cir. 1977); *United States v. Jackson*, 569 F.2d 1003 (7th Cir. 1978).

The current Ninth Circuit Model Criminal Jury Instruction 5.10 includes: "The government must prove beyond a reasonable doubt, with all of you agreeing, that the defendant did not act in reasonable self-defense." The related comment explains:

> Failure of the trial court to instruct the jury that the government has the burden of disproving self-defense is reversible error. *United States v. Pierre*, 254 F.3d 872, 876 (9th Cir. 2001). When there is evidence of self-defense, an additional element should be added to the instruction on the substantive offense: for example, "Fourth, the defendant did not act in reasonable self-defense."

Various comments in the current Eleventh Circuit Pattern Jury Instructions cite *United States v. Alvarez*, 755 F.2d 830, 842-43, 846 (11th Cir. 1985), for the proposition that the government must prove the absence of self-defense beyond a reasonable doubt. The current Eighth Circuit Model Jury Instructions and commentary are similar.

The enactment of a pretrial immunity hearing process where the State has the burden to disprove justification by clear and convincing evidence (see § 776.032(4), *Fla. Stat.*, and November 2022 *Forum 8*), confirms the Florida Legislature deemed it settled law that at trial the State has the burden to disprove Chapter 776 justification beyond a reasonable doubt. Giving a separate and direct burden to disprove instruction is thus clearly within the sound discretion of the trial judge under Fla. R. Jud. Admin. 2.580(a). The standard instruction language (see above) is unnecessarily complex and probably a bit confusing. I suggest this would be better:

> *The State must prove beyond a reasonable doubt that (defendant) was **not** justified to [threaten] [use] [deadly][non-deadly] force [in self-defense] [in defense of another] [in defense of property] [to prevent the imminent commission of a forcible felony]. If the State has not proved beyond a reasonable doubt that (defendant) was **not** justified, you must find (defendant) **not** guilty.*

Privileged Until It's Not

By Krista L.B Collins

Oftentimes during litigation, discovery will run up against the brick wall of privilege. Spousal. Therapist-patient. Attorney-client. As solid as that wall may initially seem, it is possible to knock some holes in it.

The spousal privilege is codified at Section 90.504, *Fla. Stat.*, which provides that a spouse has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, communications that were intended to be made in confidence between the spouses while they were spouses.[1] Three limited exceptions are provided for in the statute itself: proceedings between the spouses, and two relating to criminal proceedings. But in civil litigation, there is another situation that may result in the spousal privilege not applying to communications between spouses. While Florida courts have been loathe to extend exceptions to the privilege beyond those in the statute, the key language from the statute is that the privilege applies to those communications *intended to be made in confidence*. Courts have found that "spousal communications are not intended to be confidential if they relate to business matters—matters which are inherently subject to conveyance to third parties." *Hanger Orthopedic Group, Inc. v. McMurray*, 181 F.R.D. 525, 530 (M.D. Fla. 1998). In *DHA Corp. v. Hardy*, 15-MC-80201, 2015 WL 3707378, *3 (S.D. Fla. June 15, 2015), the Southern District held that because the spouses were business associates with respect to the corporate entity at issue, "any business-related communications between them may not be shielded from discovery as privileged marital communications, unless specific circumstances show the conversations to have been confidential in nature." [Internal quotation marks and citations omitted.] In other words, in litigation related to the business, spouses who work together cannot automatically assume that their communications are privileged simply by virtue of their marriage.

Like the spousal privilege, mental health records and communications are also protected by a statutory privilege. Sec. 90.503, *Fla. Stat.*, provides that a patient has the privilege to refuse to disclose and to prevent any other person from disclosing, confidential communications or records made for the purpose of diagnosis or treatment of the person's mental or emotional condition, including both the diagnosis and advice given. The statute specifically sets forth a common exception to this privilege: "For communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of his or her claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense." Sec. 90.503(4)(c), *Fla. Stat.* However, the proper procedure as set forth in case law may be surprising.

To determine whether mental health records are subject to disclosure, the trial court must determine whether the statutory privilege applies or whether there has been a waiver *and* must conduct an in camera review to ensure that only relevant records are produced, to prevent disclosure of information that is not relevant to the proceeding. *Whittington v. Whittington*, 331 So.3d 278 (Fla. 1st DCA 2021); *also see Ern v. Springer*, 315 So.3d 706 (Fla. 4th DCA 2021). In other words, even where a party relies on a mental or emotional condition as an element of the party's claim or defense, the opposing party is not automatically entitled to *all* of the party's mental health records. The disclosure and production will be limited to those records and information that are relevant to the action.

As attorneys, we often think of the attorney-client privilege, set forth in Sec. 90.502, *Fla. Stat.*, as the most sacrosanct of privileges. But even this privilege is not inviolable. Sometimes the privilege is waived as the result of an innocent mistake, such as the client forwarding an email from their attorney to a third party. Not-so-innocent actions can defeat the privilege as well: if the party asserting the attorney-client privilege employed counsel or sought the lawyer's advice to commit, or attempt to commit, a crime or fraud, then the crime-fraud exception applies and the privilege will not attach. How does the court determine if the crime-fraud exception applies? First, as one might expect, the party seeking disclosure of the privileged communications must allege the communication was made as part of an effort to commit a crime or fraud, specifying the crime or fraud. *Butler, Pappas, Weihmuller, Katz, Craig, LLP v. Coral Reef of Key Biscayne Developers, Inc.*, 873 So. 2d 339, 342 (Fla. 3d DCA 2003). Next, that party must establish a prima facie case that the party asserting privilege in fact sought the attorney's advice to commit or attempt to commit the crime or fraud. *Id.*

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[1] While many cases refer to the "spousal privilege" or "marital privilege," the actual language of the statute is outdated, as it is still titled "husband-wife privilege." The statute was last revised in 1978.

Criminal Law

By Brian Rodgers [1]

At the beginning of every episode of “Law & Order: SVU,” just before that iconic ‘dun-dun’ rings out, viewers are told that “in the criminal justice system, sexually based offenses are considered especially heinous.” Surely nobody within or without our legal system would take exception to that notion. While all crimes are wrong and many crimes cause victims and their loved ones undue trauma to go along with the loss of property and safety, sexually motivated crimes stand out as particularly repugnant. But the line from the popular, long-running show continues by informing its viewers that there are specially trained, elite investigators and prosecutors who are tasked with seeking justice in such cases. Indeed, this is the norm. Law enforcement agencies and prosecution offices across Florida and the rest of the country generally have so called Special Victims Units that handle sexually motivated crimes. There are a myriad of reasons for this that range from the need to deploy resources to ensure appropriate handling of very serious cases to the requirement that SVU staff have deep understanding of certain fields of forensic science.

Another important reason for the existence of specialized SVUs is that sexually motivated crimes are resolved by way of a jury trial more often than any other types of crimes. This is because sex crimes typically carry heavy consequences including incarceration, lifelong designation as a sexual offender or predator, and the possibility of indefinite confinement in a civil commitment facility until a court decides the perpetrator is no longer a threat. The thing is, while sex crimes are substantially more likely to proceed to a jury trial, they are also substantially less likely to result in a conviction by those juries. Why is this? While we can never know for sure why any given jury decides on any given verdict, lower conviction rates in sex crimes cases are often attributable to juror prejudices and the resilience of several common myths regarding victims of sex crimes.

“Rape myths” ask things like ‘what was the victim wearing,’ ‘would the victim have been raped if she had not been drinking,’ ‘was she asking for it,’ ‘why didn’t she fight more,’ etc. Rape myths cause jurors to believe that they know what a victim looks like, they know what a perpetrator looks like, and they know what trauma looks like. Rape myths leave jurors speculating as to how they would react under the same circumstances about which the victim has testified – ‘if this happened to me, I would fight back…’ ‘if I was raped, I would immediately call the police…’ ‘if somebody attacked me the way that victim described, I would proudly come to court and fight through my tears to tell my story.’ These expectations for victim behavior seem to be founded in the belief that all victims experience trauma in the same way. This belief is plainly wrong.

In a general sense, it may seem obvious for the public to grasp the physical, emotional, and psychological toll of sexually motivated crimes, especially when victims present from the witness stand as crying, emotional wrecks alongside the many photographs of their injuries and the recording of their calls to 911 that they made in the immediate aftermath of the crime. Never mind the fact that such evidence in sex crimes cases is rare. Indeed, because of the trauma, humiliation, fear, and confusion that sex crimes victims experience after having been victimized in such an intimate manner, it is exceedingly common for such crimes to be reported days or even years later, which leaves these cases wanting for admissible victim statements and physical evidence that may have been there but that went uncollected as these victims suffered in silence. Notwithstanding the truth of all of this, juries remain suspicious whenever victims do not act as they are expected to act. Therein lies what I believe to be the biggest reason for lower conviction rates for sexually motivated crimes: a lack of understanding that there is no such thing as typical or intuitive when it comes to victim behavior – either at the time of the crime, at the time of reporting the crime, or certainly at the time of the trial, which is often conducted months or years later.

So how do prosecutors best combat this so that justice may be appropriately served in these especially heinous criminal cases while ensuring respect for the constitutional rights of the accused? Ideally, the rape myths that continue to persist even in these modern times will be discarded by the community at large such that they no longer present as unspoken challenges in our criminal courtrooms, but also such that they stop working to inhibit victims from reporting to authorities when a crime has been committed. Since that solution lays in the indefinite future, though, the answer is simple: expert testimony. Prosecutors may be able to call experts in trauma and victim behavior to provide insights and opinions to assist juries in understanding why a victim may have behaved a certain way at the time of the crime, at the time of reporting, or in the courtroom. However, the decision to do so relies upon the lawyers and the trial court to litigate over the issue of whether a jury even needs an expert to assist them in determining an important fact versus whether they can rely upon their own lay experience.

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If an expert is useful, there will then be litigation over the qualifications of the expert and the expert's principles and methods. This will necessarily result in inconsistency. Some juries would benefit from expert insight while others would be left to their own speculation and possible prejudices.

The better solution would be a rule of criminal procedure or evidence that normalized and standardized expert testimony on trauma and victim behavior in cases involving sexually motivated crimes. Such a rule would end unnecessary litigation on this issue and ensure against inconsistent rulings from case to case. This could provide for standards as to qualifications of experts. It would, of course, require the expert to have specialized knowledge beyond that possessed by the average layperson based on the witness's experience with, or specialized training or education in, criminal justice, behavioral sciences or victim services issues. The rule would allow such experts to testify to facts and opinions regarding specific types of victim responses and victim behaviors to assist the jury in understanding the dynamics of sexually motivated crimes, victim responses to such crimes, and the impact of such crimes on victims both while the crime is being perpetrated and afterwards. This rule could further codify a provision that already exists in the evidence code against any improper comments by experts on the credibility of any testifying witnesses. Of course, the rule would not be designed solely for use by prosecutors. Certainly, such a rule would allow the defense to also call an expert to provide insights when they deem it necessary for their case. Florida's legislature should consider updating the evidence code by adding a rule like this.

The fact is, responsible sex crimes prosecutors have to present juries with the most information they can. This not only requires that they learn skills and understand a variety of forensic sciences that ordinary prosecutors likely do not need. But also, it is essential that sex crimes prosecutors have tools to educate juries in an effort to dispel common rape myths that play a key role in low conviction rates for sexually motivated crimes.

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[1] Mr. Rodgers is the Office of the State Attorney's Division Chief, Crimes Against Women and Children

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Privileged Until It's Not

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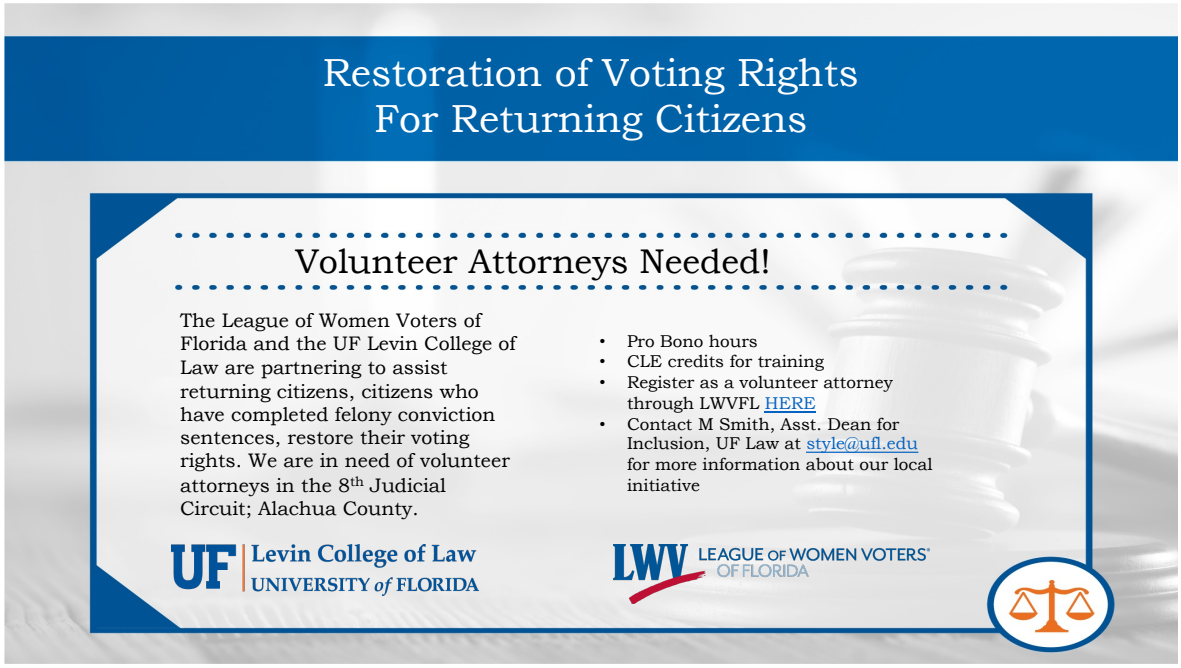
The disputed documents cannot be used for this purpose, unless the party asserting the privilege agrees. *First Union Nat. Bank v. Turney*, 824 So.2d 172, 183 (Fla. 1st DCA 2001). The court may then review attorney-client communications *in camera* to determine the applicability of the exception. *Id.* Finally, the court will conduct an evidentiary hearing at which the client may provide a reasonable explanation for the communication or conduct. *Butler* at 342. If no such explanation is forthcoming, then the court may order that the communications can be disclosed.



December 2022 Calendar

3 SEC Football Championship, Atlanta, GA – 4:00 p.m.
5 Deadline for submission to January Forum 8
7 EJCBA Board of Directors Meeting, Stephan P. Mickle, Sr. Criminal Courthouse, 220 South Main Street, 3d Floor Conference Room, or via ZOOM, 5:30 p.m.
14 Probate Section Meeting, 4:30 p.m. via ZOOM
23 Christmas Eve (observed), County Courthouses closed
26 Christmas Day (observed), County & Federal Courthouses closed

January 2023 Calendar

2 New Year's Day (observed), County & Federal Courthouses closed
5 Deadline for submission to February Forum 8
7 EJCBA Board of Directors Meeting, Stephan P. Mickle, Sr. Criminal Courthouse, 220 South Main Street, 3d Floor Conference Room, or via ZOOM, 5:30 p.m.
11 Florida Bar President Gary Lesser, Stephan P. Mickle, Sr., Criminal Courthouse Jury Assembly Room (or via Zoom), Noon
11 Probate Section Meeting, 4:30 p.m. via ZOOM
16 Birthday of Martin Luther King, Jr. observed, County and Federal Courthouses closed
20 EJCBA Monthly Luncheon Meeting, Chief Judge Moseley, "The State of the Circuit," The Wooly, 11:45 a.m.

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.