FORUM 8

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President's Message

By Evan M. Gardiner

My daughter is now totally upright and walking. She was pretty slow to start crawling, so I wasn't expecting her to start fully walking so soon. The first few weeks, she would slowly stumble around. Her walk was more like a slow meandering shuffle. After a couple of weeks though, she began picking up momentum and now she only knows one speed: fast. I'm amazed that someone that's about 2 ½ feet tall can move so quickly! If I blink, I miss her running to the other end of the house.

Like my daughter, the EJCBA isn't going to slow down now and is running straight into 2022. We have a lot planned for this year. Our first event of the year is going to be on January 14th. This event will be special for not only the EJCBA, but the entire community as a whole. On January 14th, the Alachua County Criminal Courthouse will be renamed in honor of the late Judge Stephan P. Mickle. Judge Mickle was a trailblazer, whose legacy stands as an inspiration to all attorneys.

In order to make up for the lost luncheons of 2021, and to accommodate some unique speakers, we'll be having more frequent luncheons through the spring of 2022. As of now we are tentatively set for luncheons on January 21st, February 11th, March 4th, March 18th, April 8th, April 29th, and May 20th. We understand some of these luncheons are close to one another, but we hope that you'll make it to as many as you possibly can. To kick off the new year, Chief Judge Mark Moseley will give the traditional "State of the Circuit Address" at the January luncheon. From there we'll have the Florida Bar President Candidate's Forum with both Lorna Brown-Burton and Scott Westheimer. They will both be discussing their policy platforms and why they should be chosen as the next President-Elect of the Florida Bar.

The entire EJCBA Board is hard at work planning our traditional events. "The Gloria" Charity Golf Tournament, the EJCBA Professionalism Seminar, and Law Day are just a few of the events we have in store for you this spring. Keep an eye on your email inbox and our Facebook page (https://www.facebook.com/EJCBA) throughout the spring to stay up to date on the latest happenings!

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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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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 Deborah C. Drylie

Mediation Around the World…or at Least in China

Last month's mediation article had more to do with the benefits of travel than the benefits of mediation. However, in the interest of combining these ideas, I recently had the opportunity to mediate a dispute in which Chinese nationals were on both sides of the proverbial "V." With any mediation, it behooves the mediator to build rapport with the participants as well as gain insight into their views and understanding of the mediation process. Given my own lack of knowledge as to whether mediation in China was part of their judicial proceedings, reading articles allowed insight into the mindset of the participants and their overall willingness to compromise as a path toward resolving their dispute. In the event you find yourself with clients from China or a similar culture, here is an overview of what I learned.

First, mediation in China is "a thing." In fact, it has been said that China is the most heavily mediated nation on Earth as they average nine million civil disputes resolved through mediation each year. By comparison, somewhere between seven and ten million cases proceed to trial. Not only is China the most heavily mediated nation, their practice of mediation is one of the oldest forms of dispute resolution, dating back over 2000 years. In 770 BC, government officials called 'Tiaoren' were in charge of disputes and the harmonization of them. This concept of government officials or heads of towns serving as mediators exists to this day in China with the idea being mediators should be in a position of power, authority or an elder in the community. This authoritarian position is an important distinction between Chinese and US mediation proceedings.

In China, mediators take a much more active role in solving disputes. Chinese mediators may try to investigate and decide on facts, propose solutions to the dispute and give advisory opinions. Mediators may also educate or criticize one or both of the parties - something we in the United States are accustomed to from parents or teachers. In China, 'educating' the parties is a fundamental mediation technique which essentially takes the form of the mediator telling the parties how they should think or behave and even includes having the parties write a self-criticism essay as part of the resolution process. In such an essay, the parties explain in detail what they did that was wrong, why the wrong act was committed and how their behavior will change to prevent making the same mistakes in the future.

The above paragraph demonstrates the key differences between the practice of mediation in the United States and China. As part of our required mediation session with the participants, US trained mediators must confirm our role as a neutral and independent facilitator who is prohibited from giving any opinion on what the parties should do or not do, what the value of a case may be, what a judge or jury could do with the case, as well as stress the right of each party to make their own decisions as to outcome.

The review of mediation practice in China certainly provided insight into the cultural differences between our countries, and what to expect when mediating a dispute between citizens of China. However, it also reinforced why our local mediation practice seems to have an edge over what occurs in the Chinese judicial system. Granted, while the sheer number of cases which resolve via mediation in China is impressive, as a percentage it equates to an approximate 50% resolution rate. While similar information is not readily available for US civil disputes, our local experience suggests the number of civil disputes pale in comparison to the number of Chinese disputes while the mediation resolution rates far exceed the 50% Chinese rate.

There are certainly times when, as a mediator, one may long to simply tell the parties what they should do to resolve their differences. And while the idea of requiring a self-criticism essay would be amusing, the distinctions between Chinese and our local mediation practice and customs is what makes our mediation process so incredibly effective. Here, the parties themselves are the participants with the power to resolve their own disputes. And while parents and teachers may 'fix' a dispute with a short term dictated solution, in the world of mediation, self-directed solutions are what resolve lawsuits.

While travel can open your mind and increase your appreciation of another country or culture, travel can, in turn, increase your appreciation for your own culture and customs. Learning about the Chinese mediation system and techniques likewise increases the appreciation for our own system of mediation rules and practice as a form of dispute resolution.

Criminal Law

By Brian Kramer

End of Year 1 Report

I have learned that there is a lot to learn. At the end of my first year in office, I now know that having a front row seat to watch the State Attorney doesn't hurt, but it isn't enough to prepare for the job. I have made many good decisions that reflect 20 plus years of prosecution and 15 years as a supervisor in the office, but I have made other decisions that more so reflect my naiveté as a politician, and evolving experience as the final arbiter of all that occurs in this office. There is much to report on this first year.

We experienced far more turnover than I anticipated. My plan was to maintain as much consistency as possible through the transition from Mr. Cervone's administration to mine. But I can only control what I can control. While vacancies occur regularly in our office, I could not account for a thriving economy and a starved labor market. We lost many great employees to positions in good organizations that have greater economic control than we do as a government agency. We have, however, been very fortunate to hire some great new people. We hired two attorneys who have been living in Gainesville but worked in Ocala. These two, Celeste Ramirez and Meredith Poisson, have been wonderful. We have also hired Daniel Ley. Daniel left Gainesville to pursue prosecution in Maryland, and we are ecstatic that he chose to return to Gainesville for his forever home. We have also had many new support staff come on board, and they have been fantastic as well.

I am extremely proud of how our office and the Public Defender's office have worked collaboratively to deal with the ongoing problems that the pandemic inflicted on the criminal justice system. We started by working together to identify people who could be released from jail either pending trial or nearing the end of their sentence. While the courts were closed, and even when the courts were open, but not having trials, we worked together to resolve cases so that when the courts fully reopened, we experienced a much reduced backlog compared to other circuits. One unexpected benefit of the pandemic was learning that many depositions can be handled effectively by video teleconferencing in lieu of live testimony.

We do have a backlog of cases that are awaiting trial. We have worked with both the courts, the defense bar, and the Public Defender to prioritize in-custody defendants' cases. Working through this backlog has often resulted in our office assigning an assistant state attorney to try cases that were not their own. This is never our first choice, but my staff has been up to the challenge. We have tried more cases in the last 6 months than we would normally try in a year. We are well positioned to resume fully normal operations, including the resumption of the speedy trial rules, next year.

I have made prosecutorial efficiency the cornerstone of this administration. We have approached this effort with several new programs, and we have several other programs in the works. I have assigned one of my most senior prosecutors, Marc Peterson, to a new position, Felony Intake Division Chief. This new role has several responsibilities that have greatly improved the efficiency of our office. Marc reviews every new felony offense that is not assigned to either the S.A.F.E. (firearms crimes) or S.V.U. (intimate partner domestic violence and sex crimes). He reviews these cases for the following pathways through the office: deflection of sworn complaints, pre-trial intervention, diversion, or our new Early Resolution Court.

I have made another significant change that I hope ensures the success of this office long after I am gone. Traditionally, our most serious cases have been handled solely by our most experienced lawyers. The result of this tradition is that the number of prosecutors adept at handling the most serious cases has been very limited. I now personally assign each of these cases. In doing so, I choose a senior prosecutor and a newer prosecutor to work together as "case partners." Both have full responsibility for the case and participate in every aspect of the prosecution. This will ensure that the community has prosecutors well-versed in the most serious and difficult cases for the foreseeable future.

We are also in the process of developing two new programs. We are about to launch a new traffic diversionary program to assist defendants in obtaining valid drivers licenses. This program is intended to help break the repeating cycle of suspension leading to convictions leading to suspensions. We are in the process of soliciting help with the formation of the program from the Public Defender and the local defense bar.

I am also starting a program that we are calling V8th. When Amendment 4 passed, it restored voting rights to people who had a prior felony conviction (other than murder or sex crimes) if they had completed all the terms of their sentence. What it did not do is provide a method for those folks to know if they had completed that sentence. The Supervisor of Elections is charged with making that determination after the person registers to vote, but by then, it could be too late. The person may commit a crime by registering when they are not eligible.

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Probate Section Report

By Blake Moore, Guest Columnist

Statutory Signatory, Is Your Signature Mandatory?

What happens if the attestation clause in a last will and testament is not signed but the will includes a self-proving affidavit which was signed? The answer to this question likely depends on whether the self-proving affidavit is a part of the will itself or is a separate document. A will that has not been signed by the testator may still be probated if the will (1) contains a signed self-proving affidavit and (2) the self-proving affidavit is incorporated into the will.

In order for a last will and testament to be probated in Florida, that will must be either signed by the testator at the end of the will or signed by another person in the testator's presence and at the testator's direction. Fla. Stat. § 732.502(1)(a). Indeed, the Supreme Court of Florida has held that "where a testator fails to sign his or her will, that document will not be admitted to probate." *Allen v. Dalk*, 826 So.2d 245, 247 (Fla. 2002). Strict compliance with this rule is required. *Jordan v. Fehr*, 902 So.2d 198, 201 (Fla. 1st DCA 2005). However, Florida courts have sometimes interpreted this rule broadly, allowing some wills to be probated that do not appear at first glance to satisfy this requirement.

In the case of *In re Estate of Charry*, two witnesses signed on the self-proving affidavit but not on the attestation clause in the will. 359 So. 2d 544, 544 (Fla. 4th DCA 1978). The question before the court was whether these witness signatures counted as witnessing the will. Somewhat surprisingly, the court held that the witness signatures did count and that the will was valid. In its reasoning, the court noted that "attestation clauses and self-proof affidavits are not necessary or essential parts of a will but when incorporated into a will they are not improper parts of it." To be clear, the word "incorporated" here does not refer to incorporation by reference as discussed in Fla. Stat. § 732.512. The court was not claiming that the self-proving affidavit was an outside document referenced by the will; rather, the self-proving affidavit was a part of the will itself. In other words, if the self-proving affidavit and the will are both parts of the same document, then the signatures on the affidavit count as signatures on the will itself. However, if the self-proving affidavit is a separate document from the will, then a signature on the affidavit cannot serve as the signature on that will.

The importance of incorporating the self-proving affidavit can be further seen in the case of *Bitetzakis v. Bitetzakis*, 264 So. 3d 297 (Fla. 2d DCA 2019). In *Bitetzakis*, the attestation clause of a will was left unsigned by the testator while the self-proving affidavit was properly signed days later. However, unlike *Charry*, the self-proving affidavit was not incorporated into the will, but was instead "another document." The court ruled that the will was not validly executed. Although the court did not explain its reasoning as to why the signature on the self-proving affidavit was not sufficient, the court's holding is consistent with the reasoning in *Charry*. Signatures on unincorporated self-proving affidavits are not signatures on a will, but signatures on incorporated self-proving affidavits are.

This rule on self-proving affidavit incorporation provides estate planning attorneys with an opportunity to draft redundancies into their wills to create a layer of protection in case the testator's signature is either missing or challenged. First, you can use page numbers that include the total number of pages in the document (for example, "Page 5 of 24"), with the self-proving affidavit given the final page number. Second, you can state the number of pages in the text of the will itself, again giving the self-proving affidavit a page number. Finally, you can explicitly state in the text of the will that the self-proving affidavit is part of the will. For example, a will might state "This Will contains 24 pages, including the self-proving affidavit, which is incorporated into this Will." Of course, the safest bet is always for everyone to sign both the attestation clause in a will and the self-proving affidavit. However, should a signature be missed on accident or challenged after the testator passes away, these drafting tips may save the will.

Criminal Law

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I am going to provide a method for any resident of the Eighth Judicial Circuit to get this question answered.

My first year seemed to go by in the blink of an eye. I am both thrilled and truly humbled to have been entrusted with this position. I have more plans and programs that I intend to institute in the next year. I will update you all periodically. In the immortal words of Karen Carpenter, "We've only just begun."

Happy New Year and Thank You from Three Rivers Legal Services!

By Marcia Green
Pro Bono Director, Three Rivers Legal Services

When I reflect on 2021 and how I felt a year ago as I prepared an article for the January newsletter, I was full of hope and anticipation for a better year. Although I can't say it turned out quite as I had envisioned, we still experienced exciting changes, opportunities and new collaborations.

What has been most exciting and endearing to me is that, through all of the difficulties and inconveniences, Three Rivers was able to serve our clients and we still experienced the generous support and dedication of this legal community.

Our Pro Bono Celebration, during the October EJCBA Zoom, gave us an opportunity to recognize and thank our volunteer attorneys. We made a CLE presentation "Working with Pro Bono Clients" as a way of encouraging more volunteers to consider participation. The presentation was recorded and is available if you are interested.

Once again, however, we were unable to engage in one of my favorite annual activities. I missed the ability to shake hands, hug, share a meal and chat with the attorneys in our community who provide services, make donations and otherwise support Three Rivers Legal Services throughout the year.

The support of volunteer attorneys and donors increases our ability to address the legal issues facing our community. We could not do much of what we do without your help and our accomplishments are greater as a result. It is a pleasure to share this list of very special lawyers who donated their time and/or financial support in 2021. These attorneys recognize that there are residents in Gainesville and the surrounding communities who need help in navigating the legal system, who face poverty, domestic violence, homelessness, and age and disability-related impairments. This list is a "shout out" and thank you for continuing to care!

Amy Abernethy
Natasha Allen
Scott Anderson
Hillary Arnaoutakis
Cole Barnett
Marilyn "Lynn" Belo
James Biggart II
Marvin Bingham, Jr.
Sam W Boone, Jr.
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Wanda M Yachnis
Nick Zissimopulos

My sincerest apologies to any names omitted in error or enrolled or donated after publication deadline

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Framing a Deadly Force "Self-Defense" Case

By Steven M. Harris

Framing is critical to the outcome of a trial where justified use of deadly force is the defense. I discussed case law on framing constraints for victim perspective and selected statutes as applied to defendant and victim circumstances in the October 2021 Forum 8. I was inspired to write more generally on framing by a recent judgment of the Canadian Supreme Court.

In *R. v. Khill*, the Crown appealed a jury acquittal; the high court affirmed the intermediate appellate court's order for a new trial. The basis for reversal was the trial judge's failure to specifically instruct the jury to consider one of the statutory "factors" used to determine self-defense reasonableness -- the defendant's "role in the incident." "Role in the incident" was described to include actions, omissions and exercises of judgment over the entire course of the incident, from beginning to end, which could bear on reasonableness. (Think *behavioral* and *temporal* framing.)

The facts of *Khill* are similar to several widely-reported Florida incidents: Khill was alerted to a noise outside his home. He peered outside and noticed the interior lights on in his truck. He then armed himself and went outside to investigate. He came upon a stranger rummaging around in the truck and ordered him at gunpoint to put his hands up. Khill then shot and killed the stranger. After determining the stranger was not armed, he called police. He claimed he shot in self-defense because, based on his military training, he believed he had confronted a person whose movement (hands to gun-holding height) suggested he was armed and about to shoot. The writing justice noted that Khill's conduct increased the risk of a fatal confrontation and the jury should have weighed his decision to advance armed into the darkness against other available alternatives.

Framing dispute is common when an armed person leaves a safe location and legally goes to a place of likely danger, or a person leaves a dangerous location to apparent safety, but then returns soon thereafter, armed. See, e.g., *Alexander v. State*, 146 So.3d 27 (Fla. 1st DCA 2013); *Salomon v. State*, 267 So.3d 25 (Fla. 4th DCA 2019); *Little v. State*, 111 So.3d 214 (Fla. 2d DCA 2013). A frequently cited federal case (construing the New York Penal Code) illustrative of this point is *Davis v. Strack*, 270 F.3d 111 (2d Cir. 2001), where the court held that the justification defense remains available "even if a prudent person in the defendant's position might have retreated earlier, or avoided the area where the potential assailant was to be found."

In Florida, "self-defense" justified use of deadly force is tethered to a narrow frame. We look to imminence and necessity tested against reasonable belief, with a narrow temporal frame. See, e.g., *Morris v. State*, - So.3d - (Fla. 1st DCA August 4, 2021); *Radler v. State*, 290 So.3d 87 (Fla. 4th DCA 2020); *Jenkins v. State*, 942 So.2d 910 (Fla. 2d DCA 2006); *Brown v. State*, 454 So.2d 596 (Fla. 5th DCA 1984). The unsuitability of a wide behavioral frame appears in Florida appellate precedent. See, e.g., *Bouie v. State*, 292 So.3d 471 (Fla. 2d DCA 2020); *Garamone v. State*, 636 So.2d 869 (Fla. 4th DCA 1994). See also my article in the May 2020 Forum 8.

The narrow behavioral frame may be expanded to offer necessary proof of an element of the charged crime; for example, the often inappropriately charged "depraved mind" murder. See, e.g., *Salomon*, above; *Baxter v. State*, - So.3d - (Fla. 3d DCA, Feb. 17, 2021); *Antoine v. State*, 138 So.3d 1064 (Fla. 4th DCA 2014); *Dorsey v. State*, 74 So.3d 521 (Fla. 4th DCA 2011); *Nagy v. State*, 459 So.2d 1107 (Fla. 5th DCA 1984). Or, to admit relevant evidence specific to the factual contours of the defense. See, e.g., *Rasley v. State*, 878 So.2d 473 (Fla. 1st DCA 2004); *Chavers v. State*, 901 So.2d 409 (Fla. 1st DCA 2005); *State v. Wonder*, 128 So.3d 867 (Fla. 4th DCA 2013).

Restricting the incident frame recognizes that a defendant should not suffer conviction for conduct or omission prior to the use of deadly force that would, upon detached reflection, be considered careless, negligent or impulsive. A person acting in self-defense is not held to the same course of conduct which might be demanded if given an opportunity of cool thought as to possibilities, probabilities and alternatives. See *Price v. Gray's Guard Service, Inc.*, 298 So.2d 461 (Fla. 1st DCA 1974). (Consider the maxim a*ctus reus non facit reum nisi mens sit rea*).

When justification is asserted under Chapter 776, the frame is the reasonableness of the force user's belief that, just prior to the moment deadly force was used, such force was necessary to immediately counter an unlawful imminent deadly force threat or to prevent the imminent commission of a forcible felony. (Although nondeadly force is lawful when deadly force would be justified, deadly force is prohibited to counter *nondeadly* force threats or in mere defense of property. See §§ 776.012(1), 776.013(1)(a), 776.031(1), *Fla. Stat.* Of note: The use of *nondeadly* force to protect property isn't unlimited either; it isn't lawful in defense of all real and personal property). Under § 782.02, *Fla. Stat.*, the …

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What to do While Federal COVID-19 Vaccination ETS is up in the Air? (And why is a ping-pong ball involved?)

By Conor Flynn

Here's the relevant timeline as of this writing: On November 4, the Occupational Safety and Health Administration (OSHA) announced an emergency temporary standard (ETS) requiring employers of 100 or more employees to meet specified standards regarding Covid-19 safety. On November 6, 2021, the Fifth Circuit Court of Appeals issued a temporary stay blocking nationwide implementation of the ETS, citing "grave statutory and constitutional issues" raised by petitioners. On November 12, the Fifth Circuit extended the stay and ordered OSHA not to implement or enforce the ETS.

But the Fifth Circuit won't have the final say. Federal rules call for a Multidistrict Litigation Panel to consolidate litigation that spans across multiple circuits into one unified action. Since suits supporting and opposing the ETS have been filed in every circuit, the panel had to hold a selection process to select the circuit to address the claims. How did the panel pick the circuit to hear the consolidated claims?

On November 16, a clerk of the US Judicial Panel on Multidistrict Litigation used a wooden raffle drum and twelve ping-pong balls, one for each of the twelve circuits. The clerk randomly selected the Sixth Circuit, which is widely regarded as one of the most conservative circuits in the nation. The Cincinnati-based Sixth Circuit (including senior judges) is comprised of twenty-six judges; twenty have been appointed by Republican presidents. As for the Sixth Circuit's full-time judges, eleven of sixteen were Republican appointees. It is expected that the court will hold an initial en banc hearing, which is highly unusual, rather than an initial three judge panel.

OSHA has asked the Sixth Circuit to dissolve the Fifth Circuit's stay, but with a filing deadline of December 10, it remains unclear whether the Sixth Circuit will act before Christmas. As of this writing, the ETS is stayed and is not in effect. Regardless, it is reasonable to expect that the Sixth Circuit will continue the stay of the ETS for the same reasons as the Fifth Circuit, that the losing parties will appeal and that the Supreme Court will not decide the issue until after the winter holidays.

Meanwhile, affected employers should prepare for the ETS as if it will take place but wait to implement its measures until the final judicial outcome is certain. This means having a vaccination and masking policy, a reporting and record keeping policy for records, and other technical standards in place as these things will be difficult to develop overnight. This includes being prepared, if the stay is lifted and the ETS becomes effective.

Framing a Deadly Force "Self-Defense" Case

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… incident is framed by the *resistance to an attempt to murder*, or the *opposition to the commission of a felony* upon the force user or on or about a dwelling house where the force user is present.

Chapter 776 contains express provisions to expand the frame for behavioral fault or blame; a conduct mandate is imposed before the use or threatening of deadly force can be justified, or the defense of justification is removed entirely: Forcible felony conduct, § 776.041(1), *Fla. Stat*. Aggressor provocation (not mere presence or lawful conduct), § 776.041(2), *Fla. Stat*. Duty to retreat imposed for being engaged in a criminal activity or in a place one has no right to be, §§ 776.012(2); 776.013(2)(c); 776.031(2), *Fla. Stat*. Deadly force to oppose criminal conduct is limited to forcible felonies; §§ 776.012(2); 776.013(1)(b); 776.031(2), *Fla. Stat*. When § 782.02, *Fla. Stat*. is invoked, actual happenings control, not reasonable belief of something imminent, and § 782.11, *Fla. Stat*. (applicable to a *Khill*-like incident), imposes a necessity requirement on the frame.

Framing is apparent in an "always give" portion of Std. Jury Inst. 3.6(f): You must consider the circumstances by which he or she was surrounded at the time the force was used. The appearance of danger must have been so real that a reasonably cautious and prudent person under the same circumstances would have believed that the danger could be avoided only through the use of that force.

The notion that a defendant must be completely free from moral or societal blame or fault to be legally justified in using deadly force is dubious at best. It can engender an inappropriate charging decision and improper trial presentation and argument. The use of deadly force should not be second-guessed by framing an incident outside the bounds of established *legal* principles. Although a "totality of the circumstances" proposition, "went looking for trouble" refrain, or a "but for" causal rant might be suitable for media commentators or philosophical debate, they have no place in the courtroom.

Medicare/Medicaid “Debarment”

By Robert S. Griscti and Chloe Morgan Horton[1]

Summary

Increasingly, healthcare professionals and entities encounter adverse consequences arising from criminal cases (federal or state) and other proceedings that lawyers must be cognizant of. One of those is Medicare/ Medicaid “debarment” and associated penalties.

Authority[i]

The Office of the Inspector General (OIG) has the authority to exclude individuals and entities from being able to benefit from federally funded health care programs, including Medicare and Medicaid, and to prohibit their employers from profiting from their labor. Individuals and entities who are included on the List of Excluded Individuals/Entities (LEIE) provided by the OIG, are not able to receive payment from federal healthcare programs for any items that they furnish, order or prescribe. Employers can also be subject to civil monetary penalties if they hire entities or individuals that are on this list. See http://apps.ahca.myflorida.com/dm_web/(S(ipizfpejvmafkiemeccdpafr))/default.aspx for Florida’s exclusion database, per Section 409.913, *Florida Statutes*.

In addition to the OIG, employers must refer to the System for Award Management, or SAM exclusion list, developed by the General Services Administration (GSA). This list is focused on businesses, organizations and other entities obtaining governmental contracts. There is a large amount of overlap between SAM and OIG, but searching the SAM list can be more complicated because the database does not contain license information or National Provider Identifier (NPI) records. The website to the GSA SAM database is located at the following link: https://sam.gov/content/exclusions/federal.

Enforcement

There are two kinds of exclusions that the OIG can issue. According to the State Fraud Policy Transmittal No. 2020-1 from Suzanne Murrin, Deputy Inspector General, to all Medicaid Fraud Control Unit Directors, available at https://oig.hhs.gov/exclusions/files/sab-05092013.pdf, the OIG has the legal authority to issue these exclusions through Section 1128 of the Social Security Act. The first is the mandatory exclusion and the second is the permissive exclusion. An explanation of these exclusions can be found on the OIG website under “*Background Information*” at https://oig.hhs.gov/exclusions/background.asp.

Briefly, the OIG must issue a mandatory exclusion if the individual or entity is convicted from the following offenses: “Medicare or Medicaid fraud, as well as any other offenses related to the delivery of items or services under Medicare, Medicaid, SCHIP, or other State health care programs; patient abuse or neglect; felony convictions for other health care-related fraud, theft, or other financial misconduct; and felony convictions relating to unlawful manufacture, distribution, prescription, or dispensing of controlled substances.” *Background Information*, HHS Office of Inspector General, https://oig.hhs.gov/exclusions/background.asp; *see also* 42 U.S.C. § 1320a-7(a) (stating the mandatory exclusions).

Permissive exclusions can be issued if the individual has “misdemeanor convictions related to health care fraud other than Medicare or a State health program, fraud in a program (other than a health care program) funded by any federal, state or local government agency; misdemeanor convictions relating to the unlawful manufacture, distribution, prescription, or dispensing of controlled substances; suspension, revocation, or surrender of a license to provide health care for reasons bearing on professional competence, professional performance, or financial integrity; provision of unnecessary or substandard services; submission of false or fraudulent claims to a federal health care program; engaging in unlawful kickback arrangements; defaulting on health education loan or scholarship obligations; and controlling a sanctioned entity as an owner, officer, or managing employee.” *Background Information*, HHS Office of Inspector General, https://oig.hhs.gov/exclusions/background.asp; *see also* 42 U.S.C. § 1320a-7(b) (stating the permissive exclusions).

Even though mandatory and permissive exclusions are clear that individuals are excluded based on convictions, this does not necessarily answer whether plea negotiations, deferred prosecution agreements, deferred adjudications, or withholding from a judgment of conviction meet the standard of “conviction” for exclusionary purposes. According to State Fraud Policy Transmittal No. 2020-1, the definition of “convicted” includes “when the individual or entity has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld.” Other disposition …

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[1]Chloe Morgan Horton is a second year law clerk for the Griscti Firm and a current Articles Editor for the University of Florida Law Review.

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Medicare/Medicaid “Debarment”

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… arrangements not specifically included in this provision may not meet the definition of conviction for purposes of exclusion; the precise disposition and methodology must be examined.

A mandatory exclusion can be issued for a minimum of five years and can be imposed for as long as fifty years. A permissive exclusion can be up to five years and usually are one to three years. At the end of these exclusion periods, the excluded individual or entity may apply for reinstatement, which is not automatic.

Individuals or entities that are subject to either a mandatory or permissive exclusion may not receive any federal funding for services they have furnished or provided. OIG, *Special Advisory Bulletin on the Effect of Exclusion from Participation in Federal Health Care Programs* 1, 6 (May, 8, 2013), available at https://oig.hhs.gov/exclusions/files/sab-05092013.pdf; *see* Social Security Act Section 1128(a) (“The Secretary shall exclude the following individuals and entities from participation in any Federal health care program”)(42 CFR § 1001.1902). They may also not cause claims for payment to be submitted on their behalf, including for patient care and administrative services; *see* Social Security Act Section 1128(b)(6)(A); *see* 42 CFR § 1003.102(a)(2). If an employer offers services by an individual or entity that is excluded under the federal laws, the employer must not submit claims for these services to Medicare, Medicaid or any other federal healthcare program if the employer knows or has reason to know of the entity’s or individual’s exclusion.

A Changing Landscape

On January 12, 2017, the OIG published new regulations regarding the exclusion of individuals and entities from federal healthcare programs. These new regulations gave the OIG more permissive exclusionary power, allows the OIG to have broader authority in the permissive exclusion category, and gives guidance on what factors are considered in determining the length of exclusionary periods. The new rule also establishes a 10-year limitations period for OIG’s exercise of permissive exclusion authority based on violations of the Anti-Kickback Statute.

Conclusion: Compliance or Consequence

In summary, employers who receive federal funding for healthcare services necessarily must be pro-active to avoid the hefty civil penalties that accompany the hiring of excluded individuals and entities. One of many compliance strategies is to regularly check the excluded persons lists, pre- and post-hiring, to help insure they are not employing an individual or entity that is or predictably may get added to the list later. Similarly, lawyers who represent clients that have or are billing federal and state funding resources – must candidly assess the potential for disbarment, including in negotiating criminal and licensing matters, as well as other administrative and civil controversies for their clients.

Three Rivers Legal Services

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We can make it easy for you to join this list!

Volunteer attorneys are referred cases in your area of expertise; we can provide training opportunities and information to assist you in other areas of law. You can participate in clinics or outreach events or accept referrals for brief services or ongoing court issues. Clients are pre-screened for financial eligibility and, if needed, we can connect you with other attorneys willing to discuss the case with you and share their legal expertise. We provide malpractice insurance coverage and some litigation cost reimbursement. Once our offices have fully re-opened for in-person meetings, we can offer office space for you to meet with your referred client. We will make every effort so that your experience is positive while recognizing that our clients are often needy and confused with the legal system.

For those who donate money, we thank you for your kindness and generosity. As you are aware, funding for Three Rivers Legal Services is a constant challenge. Our program survives with good management, dedicated staff, and generous donors and volunteers.

Please contact me to volunteer at marcia.green@trls.org or call me at 352-415-2327. Check out our website at http://www.trls.org/ for opportunities to volunteer and to donate. We look forward to your continued support and working with you in 2022.

EJCBA Fall Family Friendly Social

November 20, 2021

Professionalism Seminar – SAVE THE DATE

Inexpensive & Enlightening CLE Credits

By Ray Brady

Mark your calendars now for the annual Professionalism Seminar. This year the seminar will be held on Friday, April 1, 2022, from 9:00 a.m. (registration begins at 8:30 a.m.) until Noon at Trinity United Methodist Church on NW 53rd Avenue or via Webcast if necessary. Our keynote will be a moderated panel discussion on the topic of "Has Professionalism Evolved (or #Devolved)?" The moderator will be Stephanie Mickle, Esq., and the panelists will be Charles "Chic" Holden, Esq., Frank Maloney, Jr., Esq., AuBroncee Martin, Esq, and Mary K. Wimsett, Esq.

We expect to be approved, once again this year, for 3.5 General CLE hours, which includes 2.0 ethics hours and 1.5 professionalism hours.

Watch your email and the Forum 8 newsletter for reservation information. Questions may be directed to the EJCBA Professionalism Committee chairman, Ray Brady, Esq., at (352) 554-5328.

January 2022 Calendar

5 Deadline for submission to February Forum 8
5 EJCBA Board of Directors Meeting, Office of the Public Defender, 151 SW 2d Ave., (or via ZOOM), 5:30 p.m.
12 Probate Section Meeting, 4:30 p.m. via ZOOM
14 Criminal Courthouse Renaming Ceremony in Honor of Judge Mickle (TBD)
17 Birthday of Martin Luther King, Jr. observed, County and Federal Courthouses closed
21 EJCBA Monthly Luncheon Meeting, Chief Judge Moseley, "The State of the Circuit,"The Wooly, 11:45 a.m.

February 2022 Calendar

2 EJCBA Board of Directors Meeting, Office of the Public Defender, 151 SW 2d Ave., (or via ZOOM), 5:30 p.m.
4 Deadline for submission to March Forum 8
9 Probate Section Meeting, 4:30 p.m. via ZOOM
11 EJCBA Monthly Luncheon Meeting, Candidates for Florida Bar President-Elect, The Wooly, 11:45 a.m.
14 Valentine's Day – show the love!
21 President's Day (observed) – Federal Courthouse closed
25 EJCBA Charity Golf Tournament – "The Gloria" – Mark Bostick Golf Course at UF, 11:30 a.m. – 5:00 p.m.