FORUM 8

Volume 80, No. 7 | Eighth Judicial Circuit Bar Association, Inc. | March 2021

President's Message

By Philip N. Kabler, Esq.

It occurs to me that by the time this column is read three-quarters of my term will have passed. *Already.* Which leads me to the following thought - *I am grateful.* I am grateful during this unusual period for the collaborations our circuit has developed *together*. For the creativity we have employed in fostering our well-recognized collegiality. For the patience we have shown by our professionalism. And for the support we have given to each other and to our communities.

So I take this opportunity to thank *everyone* who participates in or interacts with the EJCBA: Chief Judge Moseley, our bench, judicial assistants, court clerks, constitutional officers, administrators, bailiffs, and staff. Our bar, state attorneys, public defenders, paralegals, and legal assistants. Our EJCBA officers, directors, committee chairs, *and* Executive Director Judy Padgett. (*Plus* the editor of the *Forum 8*.) Our YLD. Our Florida Bar partners. And while the following will certainly overlap with the preceding - *you*, our members. So thank you for what has been to-date.

Nevertheless, there is more to follow. We are presently in the midst of what I have dubbed 'Town and Gown' month. Given our proximity to the University of Florida {*Go Gators!*} with its many colleges, including the law, business, and medical schools, we have an array of resources right here for us to access. During the past weeks we have enjoyed presentations by Professor Stacey Steinberg and Dean Laura Rosenbury. And on March 12, by President Kent Fuchs.

And one more University event this month. On March 5 we will host one of our longstanding community events – "*The Gloria*" charity golf tournament at the UF Mark Bostick Golf Course honoring the late Gloria Fletcher and financially benefiting The Guardian Ad Litem Foundation.

Which leads us to an active April. Hold April 1 for the annual Amaze-Inn Race. And also April 16 for the Leadership Forum/Diversity Roundtable.

Please do register for all programs which interest you.

As this programming year inexorably moves forward to its end, let us appreciate what we share. (*See above.*) Let us commit to being mindful. By engaging in inwardly-directed wellness we can motivate ourselves to then look *outward* and support the six counties of our circuit. One way to do that is to engage in *pro bono* service activities. Let us likewise commit to appreciating our clients and office colleagues. By focusing on those sorts of outcomes we will stand as servant leaders to elevate the law and our communities at-large. Not a bad way to pivot to the second quarter of 2021.

As mentioned in previous columns, the EJCBA is a members-focused association. Accordingly, if you as a member have suggestions for programs, this is a standing invitation to bring them forward. Please do that by sending your ideas to pnkejcba@gmail.com. For updates please regularly visit our website at www.8jcba.org, and consider joining our Eighth Judicial Circuit Bar Association Facebook page.

With best wishes for a productive, enjoyable, and meaningful March,

Phil

So they are always readily at-hand, the following are links to

The U.S. Constitution: https://constitution.congress.gov/constitution/

The Florida Constitution: https://tinyurl.com/FloridaConstitution

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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

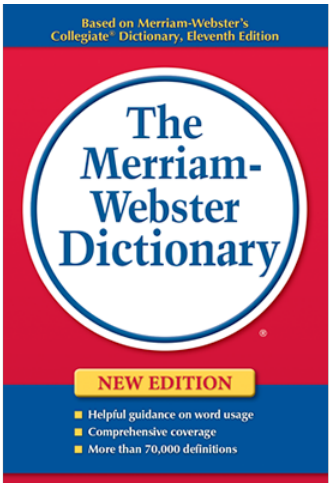
By Chester B. Chance and Charles B. Carter

Words of the Year?

Merriam-Webster's Dictionary always features words of the year. Actually, that particular dictionary has **two** types of "words of the year." One type is based on ***new*** words added to the dictionary. The other type involves how many times a particular word is searched on the internet.

For instance, Merriam-Webster's word of the year for 2020 is "pandemic" based on an analysis of words that have been looked up or searched on-line. The other "words of the year" based on number of searches include in descending order: coronavirus, defund, mamba, kraken, quarantine, antebellum, schadenfreude, and asymptomatic.

None of these words are "new." Coronavirus has been around for a long time. It is just that in 2020 we got smacked in the gob by the coronavirus. It would be like saying the word of the year is "virus." Defund is associated with the movement to defund the police. That's a 2020 concept in that we were confronted with that particular word as being associated with police departments.



Mamba is an African snake. Why was it searched so much in 2020? Well, in January 2020 Kobe Bryant died in a helicopter crash. Kobe Bryant, as a basketball player, was referred to as "The Black Mamba." Obviously, he was not referred to as the other type of that species, i.e., The Green Mamba.

Kraken is not a new word. It was used in Scandinavian countries for over a 1000 years. It was used in English since the 18th century. Why a search for that word in 2020? Seattle's new National Hockey League team is called "Krackens."

Quarantine is a term used since the 14th century and is derived from the Italian word quarantene. It has been used for centuries, but had to be intensely searched in 2020.

Antebellum? The group Lady Antebellum dropped the Antebellum part of its nomenclature. The term obviously refers in the United States to something from prior to the Civil War. In general, antebellum just means "before the war" and our significant war in this country was the Civil War.

Schadenfreude? Now that's an interesting word that gives problems both in pronouncing it and defining it. The word means enjoyment of pain from the troubles of another person. USA Today, the newspaper, used it in a headline discussing President Trump being diagnosed with coronavirus. The authors are just glad they have to define the word in writing in this article and not pronounce it.

Asymptomatic? It was looked up in 2020 on internet searches because news articles talked about people having the coronavirus but being asymptomatic. As lawyers in personal injury cases you constantly hear the term asymptomatic.

Taking a look at this list of words, we are wondering if there is not a dumbing-down of American society that so many of these words would have to be looked up for on-line definitions.

Likewise, the history of similar "words of the year" by Merriam-Webster's Dictionary include some of the following: 2010 – austerity; 2011 – pragmatic; 2012 – socialism/capitalism; 2013 – science. Really? Someone had to look up these words? That's not interesting; that is frightening.

Rather than the common words which were searched so intensely, we would have expected internet searches for unusual terms like monoclonal, antigen, SARS, ARDS, PPE, and Wuhan (which is not an Al Pacino grunt from Scent of a Woman).

A more interesting subject is a list of Merriam-Webster's words that get added as new words to the dictionary each year. What were some of those words for 2020? Well, we think it has something to do with the coronavirus but in a strange way. Three of the new words added to the dictionary were the following:

- Nosocomephobia
- Latrophobia
- Tomophobia

Nosocomephobia is a fear of hospitals; latrophobia is a fear of doctors; and tomophobia is a fear of surgery. One can imagine the anxiety of someone who has a fear of doctors and has to have surgery in a hospital. There is not enough Xanax in the world for such a person.

Other new words added to the dictionary in 2020? How about thirsty? Thirsty was added with a new definition meaning "a strong desire for affection." Another new word added to the dictionary was "truthiness" meaning "someone has a seeming truthful quality that is not supported by facts or evidence."

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City of Ocala's Enforcement of its Open Lodging Ordinance Ruled Unconstitutional for Criminalizing Homelessness

By Nancy Kinnally

Three Ocala residents who are experiencing homelessness and thus had been repeatedly arrested under the city's open lodging ordinance recently won their case challenging the ordinance's constitutionality when U.S. District Court Judge James S. Moody ruled that the ordinance "unlawfully punishes an individual based on their homeless status."

Southern Legal Counsel, the ACLU of Florida, and pro bono attorney Andy Pozzuto represented the plaintiffs, Patrick McArdle, Courtney Ramsey and Anthony Cummings, who had been repeatedly arrested under the city's open lodging ordinance for sleeping outside and experiencing homelessness. Additionally, the city had trespassed all three Plaintiffs from its public parks without providing them the ability to contest their trespass warnings.

"The court's ruling recognized that it is cruel and unusual punishment to arrest and jail individuals for sleeping outside and being homeless when there is no shelter available to them. We are pleased that the court entered an injunction to protect individuals experiencing homelessness from being criminalized for the life-sustaining conduct of sleeping," said Kirsten Anderson, litigation director for Southern Legal Counsel and lead counsel for the plaintiffs.

McArdle alone has spent 219 nights in jail and has been assessed a total of $4,186.00 in fines and court costs imposed for 10 counts of open lodging under the ordinance. The plaintiffs submitted evidence to the Court that 264 individuals were arrested and sentenced to 5,393 nights in jail and assessed more than $300,000 in court costs for open lodging.

Relying heavily on a recent opinion from the Ninth Circuit in *Martin v. City of Boise*, the court found this practice to be cruel and unusual punishment under the Eighth Amendment.

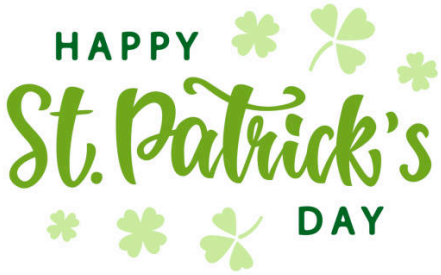
"As long as there are a greater number of homeless individuals than the number of available beds in shelters, cities are prohibited from prosecuting individuals for involuntarily sleeping in public. Courts across the country have recognized this and cities should immediately conform their practices to adhere to these basic constitutional principles," said Jackie Azis, staff attorney at the ACLU of Florida.

The ruling points out that on any given night at least 150 people experiencing homelessness are in Marion County, where only 65 emergency shelter beds are available, and that the ordinance does not require officers to "ascertain whether there is available shelter space prior to arresting an individual" for open lodging.

The court enjoined the city from "arresting, citing, or otherwise enforcing the open lodging ordinance against someone identifying as homeless," before inquiring about the availability of shelter space. As a result of the ruling, the City of Ocala can no longer arrest those experiencing homelessness under the ordinance without first looking into the availability of shelter space.

The lawsuit had also alleged that the plaintiffs' Fourteenth Amendment rights to procedural due process had been violated when they were issued trespass warnings barring them from returning to a public park and downtown square without providing a process to appeal. Relying on *Catron v. City of St. Petersburg*, a decision from a case previously brought by Southern Legal Counsel on behalf of other homeless individuals, the court again sided with the plaintiffs. The court held that the city must rescind the trespass warnings against the plaintiffs and can no longer issue future trespass warnings without due process of law. The Court noted that existing trespass warnings provide no explanation of why they were issued, nor any process for challenging them, nor does the city provide written criteria for law enforcement to follow in issuing them.

Financial support for the suit was provided through a grant by the Impact Fund.
A copy of the order be found here.



It's that time again! The Eighth Judicial Circuit Bar Association Nominations Committee is seeking members for EJCBA Board positions for 2021-2022. Consider giving a little time back to your local bar association. Please complete the online application at https://forms.gle/rs7eHfi7mLHVihq18. The deadline for completed applications is May 3, 2021.

Susan Mikolaitis Receives Pro Bono Service Award for the Eighth Judicial Circuit

By Marcia Green
Pro Bono Director, Three Rivers Legal Services

Congratulations to local attorney Susan Mikolaitis who was awarded the 2021 Florida Bar President's Pro Bono Service Award for the Eighth Judicial Circuit. The January 28th ceremony, usually held at the Florida Supreme Court, was virtual this year due to the pandemic.

Nominated for her work with Three Rivers Legal Services, Mikolaitis began volunteering just over 11 years ago. A strong advocate for the needs of the poor, less advantaged and disenfranchised, she has provided more than 140 volunteer hours during this time period.

With an office in Alachua, Mikolaitis assists many rural clients and in counties where there are limited legal resources. Her cases range from simple wills and estate planning to complicated probates needed for extensive litigation by legal services staff or other pro bono attorneys.

Examples of the pro bono cases handled by Mikolaitis include helping an 86-year-old widow clear title to her home, the probate of a client's husband's estate allowing her to pursue litigation against a mobile home dealer and lender, and representing a disabled man seeking homestead status of his real property when several other heirs were involved. Mikolaitis has always been available to assist with estate planning documents for our clients, including the elderly, single parents and the disabled.

Assistance in the settlement of estates, whether complicated or simple, can help a low income person become eligible for homestead exemption, save a home from foreclosure, and most importantly, establish clear title and the ability to keep a home and property in the family. Clear title is necessary to be eligible for FEMA benefits after a storm and to apply for grants and low-cost loans needed for repairs. The individuals and families seeking assistance from Three Rivers Legal Services do not have much; the estate may just be their aging or mobile home on a small plot of land. Mikolaitis' willingness to accept referrals from Three Rivers Legal Services provides a big service to many in need.

Mikolaitis is also an enthusiastic participant in our Advance Directives Clinics at Senior Centers in rural communities. In addition to providing a valuable service, she brings clarity and laughter to a serious decision-making process and her attitude has always been a treat for our clients, our staff and our other volunteer attorneys. These outreach events have been put on hold for the past year due to the pandemic, but Mikolaitis continues to provide updates and new ideas. She spearheaded a plan for a pro bono Advance Directives project for school personnel who are on the front lines, interacting with students and parents as our schools have reopened. Our plan fell through, however, when we could not get approval and coordination with the schools.

A 2003 graduate of the University of Florida Levin College of Law, Mikolaitis is a member of the Real Property, Probate & Trust Section of the Florida Bar. She earned a Master's of Civil and Geotechnical Engineering from the University of Florida and a Bachelor's in Civil Engineering from the University of Illinois at Urbana Champaign. Her law partner, Marvin Bingham, Jr., received the Florida Bar President's Pro Bono Service award in 1986.

NOMINEES SOUGHT FOR 2021 JAMES L. TOMLINSON PROFESSIONALISM AWARD

Nominees are being sought for the recipient of the 2021 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 30, 2021 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.

A Moment of Consideration for Consideration

By Krista L.B. Collins

When I was in my first semester of law school, my contracts professor decided that he would skip the first few chapters of the contracts textbook and start with consideration rather than offers because he believed consideration was of primary importance. While many of us found this scattered approach less than helpful, he wasn't wrong about the importance of consideration. In practice, however, the issue of consideration is one that is often overlooked. Consideration is often assumed to be present; after all, the parties to the contract had to be agreeing to *something*. However, this does not guarantee that the "something" is proper, legal consideration.

First, the hornbook definition: "'Consideration' may be generally thought of as the thing or promise one party to a contract gives to the other party in return for the thing or promise the other party gives." *Bayshore Royal Co. v. Doran Jason Co. of Tampa, Inc.*, 480 So. 2d 651, 652 (Fla. 2d DCA 1986). The thing need not have monetary value, but can simply be a benefit to the promisor or a detriment to the promisee. *Klein v. Estate of Klein*, 295 So. 3d 793, 800 (Fla. 4th DCA 2020). Examples of consideration other than the payment of money include forbearance from bringing a lawsuit (*Loper v. Weather Shield Mfg., Inc.*, 203 So. 3d 898 (Fla. 1st DCA 2015) and continued employment (*Balasco v. Gulf Auto Holding, Inc.*, 707 So. 2d 858 (Fla. 2d DCA 1998).

Also, the verb tense in the definition matters: the thing must be something that is *going to be* given, performed or paid, not something that has *already* happened. *Gollobith v. Ferrell*, 84 So. 3d 1095 (Fla. 2d DCA 2012). This becomes particularly important when parties seek to modify a contract. Parties cannot simply use the consideration for the original contract as consideration for the modification; the modification requires new consideration. *World-Class Talent Experience, Inc. v. Giordano*, 293 So. 3d 547, 549 (Fla. 4th DCA 2020).

However, as you may remember from law school, the "something" need not be substantial. Lord Coke set forth his "peppercorn theory" in 1628, and the underlying concept hasn't changed in almost 400 years: consideration is sufficient even if only "one graine of wheat, or seed of comyn[1], or one pepper corne…" *Id.* at 656 (quoting from *E. Coke on Littleton* 222 (1628)). In other words: "A promise, no matter how slight, qualifies as consideration if the promisor agrees to do something that he or she is not already obligated to do." *Cintas Corp. No. 2 v. Schwalier*, 901 So. 2d 307, 309 (Fla. 1st DCA 2005). The fact that one party to the contract made a bad deal is not a sufficient ground to throw out the contract. *Klein* at 800. In fact, even a contingent benefit is sufficient consideration to support a contract. *Id.* Inadequacy of consideration simply isn't a basis for rescinding or canceling a contract unless the inadequacy is *so* gross that it shows fraud or weakness of mind. *Id*. (quoting 11 Fla. Jur. 2d *Contracts* §63 (1979)).

However, there are occasions where consideration is illusory. Moral obligation is not sufficient consideration for an executory promise. *Div. of Workers' Comp., Bureau of Crimes Comp. v. Brevda*, 420 So. 2d 887, 892 (Fla. 1st DCA 1982). Also, as stated in *Pick Kwik Food Stores, Inc. v. Tenser*, 407 So. 2d 216, 218 (Fla. 2d DCA 1981):

> A binding contract requires consideration. In a bilateral contract, the promise of one party constitutes the sole consideration for the promise of the other. If one party has the unrestricted right to terminate the contract at any time, that party makes no promise at all and there is not sufficient consideration for the promise of the other.

Finally (and interestingly), in certain circumstances it is possible to have too much consideration. If a lender requires that a borrower pay a bonus or other consideration as an inducement to the lender to make the loan, that consideration can be considered interest and could render the loan usurious. *Jersey Palm-Gross, Inc. v. Paper*, 639 So. 2d 664, 667 (Fla. 4th DCA 1994).

In conclusion, consideration is not quite as simple as it is often assumed to be. But I still wish my contracts professor had started with offers!

[1]I Googled so you don't have to: comyn appears to be middle English for cumin. The more you know!

SAVE THE DATE – LEADERSHIP & DIVERSITY ROUNDTABLE SET FOR APRIL 16, 2021

The Eighth Judicial Circuit's Leadership & Diversity Roundtable is scheduled for Friday, April 16th from 11:30-1:30 pm via ZOOM. Because of the format, the program has been shortened but we will still have an interactive portion with break out "Zoom rooms" with the judiciary and local leaders. We hope the Bar will join us for this important event, tentatively titled "Local Leaders on How the Legal Profession Can Help Effectuate Community Change." More information will be available via email blasts and the *Forum 8* as the program develops

Probate Section Report

By Larry E. Ciesla

The Probate Section meets via Zoom on the second Wednesday of each month, beginning at 4:30 p.m.

JANUARY MEETING WAS A RECORD BREAKER

A total of 47 people participated in the January Probate Section Meeting. Although attendance is not taken and no records thereof are maintained, to the best of my memory, which is admittedly far from perfect, this was the largest number of participants to date; special guests included Judge Brasington, Judge Ferrero, Judge Wilson Bullard, Magistrate Floyd and Magistrate Baker.

Judge Brasington gave a brief presentation as to the current state of affairs in the judiciary. She reported that probate and guardianship cases have been moving along very smoothly, primarily via Zoom, during the pandemic. There seemed to be a consensus among the judges that Zoom works really well for non-trial matters and we can expect that the judges will continue to allow and encourage the use of Zoom after the pandemic has run its course and in-person hearings return. As can be imagined, civil jury trials are not being held, creating a large backlog. It has been estimated that by July 1, 2021, there may be as many as one million "extra cases" which will need to be processed on a statewide basis.

Judge Brasington then addressed the outcome of a study initiated by former Chief Judge Nilon regarding allocation of personnel and funding for the Eighth Circuit. The overall result is that there will be a shift in the processing of probate and guardianship cases away from staff attorneys and toward judicial assistants. Although staff attorneys will remain active in reviewing proposed orders and in the case management conference process in Alachua County, it is anticipated that judicial assistants will become the primary point people for these matters in the outlying counties. As I understand it, the main objective is to reduce the amount of communication, after a proposed order has been submitted, between lawyers and the staff attorneys, and to increase the role of judicial assistants, who will be receiving specialized training in this regard.

In order to make things a little bit easier for the judicial assistants, the judges are requesting, on a voluntary basis, that attorneys submit a completed checklist from the Eighth Circuit website (in those situations where one exists) at the time a proposed order is submitted to the probate and guardianship email addresses. The checklist should not be e-filed in the court file.

A discussion was also held regarding the idea of reviewing the existing checklists and possibly making revisions in instances where a checklist does not accurately reflect the legal requirements that may be applicable in a particular situation. Anyone who feels that a particular checklist needs to be revised or that a new checklist should be adopted is requested to contact my office so that I may assemble and present one consolidated list for the judges to consider. Additional information as to the requirements of each particular judge can be found on the specific judge's webpage on the Eighth Judicial Circuit's website (www.circuit8.org).

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Judge Ferrero expressed her thanks and appreciation for all of the lawyers who have appeared before her during the past two years in the probate and guardianship division. Her new assignment is in dependency court. She further advised that Magistrate Bridget Baker is now assisting with guardianship cases in Alachua County. It is my understanding that an order will be entered referring all new Alachua County guardianship filings to Magistrate Baker. Lara Breslow will be the staff attorney assisting with Alachua County probate cases. Judge Wilson Bullard has rotated out of Levy County and is now in charge of Alachua County probate and guardianship cases, assisted by her JA, Kelly Jones. Magistrate Katie Floyd announced that she is now serving as magistrate for Levy County probates as well as guardianships in Levy, Gilchrist and Union Counties.

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The January meeting continued with a spirited discussion of the issue of the hourly rate for paralegal services being awarded by local judges. During the two years that Judge Ferrero was on the bench, she made it a practice to award a standard rate of $100.00 per hour for paralegals, in the absence of a specially set hearing with expert testimony supporting a higher rate. Apparently, many lawyers, especially out-of-town "big city" lawyers, were requesting much higher rates, and Judge Ferrero felt it was better to have one consistent rate. It was Judge Brasington's feeling that the reasonableness of the rate would depend, in part, on the county in which the case was litigated. A reasonable rate in Baker County might vary widely from that in Alachua County. Some practitioners expressed their belief that a rate higher than $100.00 per hour is appropriate for local cases. It was agreed that the issue could be explored further in the coming months. For the time being, it seems that it is likely that $100.00 per hour will continue to be used as the local standard rate unless expert testimony is presented supporting a higher rate in a specially set hearing.

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Probate Section Report

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The interesting trust case of *Ammeen v Sjogren* (Fla 1st DCA Jan. 11, 2021) involving the issue of the status of a permissible appointee of a power of appointment was discussed. The history of the case is somewhat complicated. Suit was filed in circuit court in Duval County by the guardian father of two minor children against the trustee of a trust established by the children's maternal grandmother for the benefit of the children's now deceased mother. The mother was the holder of a limited power of appointment over trust assets, which was exercisable at the mother's death but only in the mother's will. The power was exercisable among the class of the mother's issue.

The mother died intestate in 2015. Prior to the mother's death, a dispute arose in 2007 regarding various family assets and the administration of the trust. Litigation was instituted in state court in New Jersey in which the mother was a party, but not the children. The dispute was settled at mediation in 2009 and read into the record in open court in New Jersey, which under New Jersey law made the settlement final and enforceable. As part of the settlement, the mother's trust interest was terminated and, in lieu thereof, the mother received certain corporate assets outright.

Further disputes arose in the New Jersey state court in 2014, and the settlement was held to be enforceable, but, since Florida law was possibly involved, the New Jersey court ordered the parties to get an order from a Florida court holding that there was nothing illegal or unenforceable in the New Jersey settlement. In 2015, the Duval County Circuit Court issued an order upholding the New Jersey settlement. The New Jersey court then issued a final judgment approving the settlement in 2016. In 2016, the present case was instituted in Duval County alleging that the trustee breached its fiduciary duty to the children based upon the termination of the mother's trust share. Summary Judgment in favor of the trustee was entered based on the lack of standing of the plaintiffs.

The First DCA affirmed, holding that the children were not "beneficiaries," as that term is defined in Section 736.0103(4), *Florida Statutes*. This provision specifically deals with the rights of a permissible appointee of a trust interest and states, in effect, that a permissible appointee is not considered a beneficiary unless and until the power of appointment has been irrevocably exercised in favor of the permissible appointee.

The holding of the DCA was further premised on the concept of representation, as provided in Sections 736.0301 (actions taken by a person who represents the interests of another are binding on the persons whose interests are represented) and 736.0302 (the holder of a power of appointment may represent and bind permissible appointees). Since the children's mother agreed to the settlement, this is the same as if the children had agreed, even though they were not parties to the litigation.

It is interesting to note that this case may be seen as an example of the old saying, "Pigs get fat and hogs get slaughtered." Here, the mother received certain corporate assets, which were inherited by her children when she died unmarried and intestate. Apparently this was not enough for the children's father (who was divorced from the mother in 2008), who brought the present suit in an attempt to recover an amount equal to the value of the assets in the mother's trust share terminated in 2009.

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The Probate Section meets via Zoom on the second Wednesday of each month at 4:30 p.m., and all interested parties are invited to attend. Please contact Jackie Hall at (352) 378-5603 or jhall@larryciesla-law.com to be included on the e-mail list for notices of future meetings.

ADR

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Now the Oxford Dictionary has some interesting new words including "freegan." It combines the words 'free' and 'vegan.' The Oxford Dictionary says it can be a synonym for 'dumpster diver' in that a freegan is a person who believes it is wrong to throw away food when millions of people around the world are hungry. For this reason, they only eat food they can get for free which usually means it has been thrown out or categorized as waste. Typically, freegans rely on food found in supermarket dumpsters but we assume it does not include food from the meat department. To dumpster dive for meat, perhaps we can use the word freenivore. Let's see if that word catches on in 2021.

Some new words appear to be even less serious. "Sharent" is a parent who frequently uses social media to share photos or details about their child. "Techlash" is a new word meaning a strong negative reaction against the largest technology companies. And of course, how could we overlook the word "zoom." As a *verb* it now means "to communicate with a person or group of people over the internet, typically by video-chatting, using the Zoom application."

And with that we will end the article so we can be on time for our next mediation via Zoom.

“DUTY TO RETREAT” – DEADLY FORCE WITHOUT “STAND YOUR GROUND”

By Steven M. Harris

I wrote on “Stand Your Ground” (SYG) in the February 2020 *Forum 8* and summarized the limited circumstances when Chapter 776 provisions abrogate the common law “duty to retreat.” The statutes on the use of *deadly* force in defense of person and property contain distinct preconditions for SYG: A user of *deadly* force must not be “engaged in a criminal activity,” and must be in a place where he or she “has a right to be.” See § 776.012(2) and § 776.031(2), *Florida Statutes*. The “home protection” *deadly* force provision requires only that a person be in a residence or dwelling “in which the person has a right to be.” See § 776.013(1)(b), *Florida Statutes.* The precondition phrases are not defined by statute nor adequately explained by caselaw.

The “stand-alone” justified deadly force statute (§ 782.02, *Florida Statutes*) contains no language respecting retreat or SYG. See March 2020 *Forum 8*. *Thompson v. State*, 552 So.2d 264, 266 (Fla. 2d DCA 1989), implies the common law “duty to retreat” exists under that provision. I believe it does not, but there is the related (but unstated) predicate of necessity. See § 782.11, *Florida Statutes*.

There are no SYG preconditions for *nondeadly* force under Chapter 776. See § 776.012(1), § 776.013(1)(a), § 776.031(1), *Florida Statutes*. Those statutes emulate the common law. See, e.g., *Morris v. State*, 715 So.2d 1177 (Fla. 4th DCA 1998); *Redondo v. State*, 380 So.2d 1107 (Fla. 3d DCA 1980).

Of note: The “duty to retreat” has no logical application to the defense of another or prevention of the imminent commission of a forcible felony on another. See *Fletcher v. State*, 273 So.3d 1187 (Fla. 1st DCA 2019); *Craven v. State*, 285 So.3d 992 (Fla. 1st DCA 2019).

“Aggressor” status is relevant to a discussion of the “duty to retreat.” A person who has provoked the use of unlawful force against himself loses the defense of justification *unless* “[i]n good faith, the person withdraws from physical contact with the assailant and indicates clearly to the assailant that he desires to withdraw and terminate the use or threatened use of force, but the assailant continues or resumes the use or threatened use of force” *or* if reasonably believing he is under deadly force threat, first exhausts “every reasonable means to escape such danger other than the use or threatened use” of deadly force. See § 776.041(2), *Florida Statutes*. The latter is similar to the pre-SYG “duty to retreat.”

When SYG is inapplicable, or is lost because a statutory precondition is not satisfied, the *common law* “duty to retreat” applies before *deadly* force can be lawfully employed. There is a common law “Castle” exception - retreat is not required as a precondition to using *deadly* force for self-defense inside one’s *own* residence. See *Hedges v. State*, 172 So.2d 824, 827 (Fla. 1965); *Pell v. State*, 122 So. 110, 116 (Fla. 1929). The privilege of nonretreat was expanded to persons lawfully residing in the residence by *Weiand v. State*, 732 So.2d 1044 (Fla. 1999). Retreat is also not required from the grounds around the residence, one’s own business premises and adjacent grounds, and to a person lawfully engaged at their place of employment. *Danford v. State*, 43 So. 593 (1907); *Redondo v. State*, 380 So.2d 1107 (Fla. 3d DCA 1980); *State v. Smith*, 376 So.2d 261 (Fla. 3d DCA 1979). There may be a “co-worker” place of employment exception to that; see *Frazier v. State*, 681 So.2d 824 (Fla. 2d DCA 1996). Expansion of the nonretreat privilege when under attack in one’s vehicle was rejected in *Baker v. State*, 506 So.2d 1056 (Fla. 2d DCA 1987).

What does it mean when there is a “duty to retreat”? What is expected of the deadly force user? Precedent suggests the “duty to retreat” is not the general avoidance of likely danger; it is narrower, arising when an unlawful “attack” is imminent. The customary formulation is that a person must then use "every reasonable means within his power and consistent with his own safety to avoid the danger” before using deadly defensive force. See, e.g., *Morris v. State*, 715 So.2d 1177 (Fla. 4th DCA 1998); *Linsley v. State*, 101 So. 273 (Fla. 1924). See also *Nagy v. State*, 459 So.2d 1107 (Fla. 4th DCA 1984) (Upchurch, J., dissenting) (retreat must be consistent with one's own safety and weighed against the apprehended danger and steps taken to avoid a confrontation). This could include threatening or using nondeadly force, or threatening deadly force, if leave-taking would be ineffective. Retreat is not rationally demanded when one is opposing an assailant armed with a firearm or multiple assailants, or is physically compromised, in confined space, downed or disabled, or when the only avenue of complete and safe escape is not readily ascertainable.

The above discussion strongly suggests that precise special jury instructions and/or interrogatories are desirable for the various iterations of SYG, increased statutory requirements, or common law “duty to retreat.” The defendant’s ability to effect and availability of a completely safe avenue of “retreat” is part of the burden on the state to prove beyond a reasonable doubt that a

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Criminal Law

By Brian Kramer

Bill Cervone left me an incredible gift. The Office of the State Attorney is one of the best run, most progressive, fiscally responsible, ethical, and effective state attorney's offices in Florida. The work that Bill and Jeanne did has made my first month in office a pleasure. The State Attorney's Office continues with business as usual. I intend to use my first six months in office to continue learning to do the job of State Attorney. To be sure, changes will come, but the changes I make will be with notice and plenty of opportunity for input of all involved.

There are a few changes that I can report already. I have selected Assistant State Attorney Heather Jones to be the Chief Assistant State Attorney. Heather has been a leader in the office for the past 18 years. She has proven herself as an outstanding leader of young lawyers. I have selected Assistant State Attorney Stephanie Klugh to be the next County Court Division Chief. She will assume the position previously held by Assistant State Attorney Heather Jones. The office will not hire externally to replace Stephanie, but we will rearrange internally to fill the vacancy in the felony division.

Due to fiscal constraints, the office will not have an executive director for the foreseeable future. The economic impact of COVID-19 on the office's current and next fiscal years' budget is yet to be finalized. Caution is required.

We often say that our staff is paid to do two things: communicate and make decisions. Looking forward, we will be rolling out a new social media presence: "Update with the Eighth" will now be on Facebook. This social media platform will allow the office to quickly and effectively inform the community about current issues that involve the State Attorney's Office. "Update with the Eighth" will also serve as a clearinghouse for the media. The media will be able to source matters of high interest such as videos and documents directly from the site. In the next phase of development, I intend to complete a comprehensive study of the office's overall communication strategy and implement the most modern communications possible with all of the stakeholders we serve.

One of the greatest and most complex challenges we face is how to improve decision-making. I will be looking at issues brought to the forefront of the national consciousness by the social justice movement. Such as, how do we as an office address implicit bias, confirmation bias, racial injustice, socioeconomic injustice, and others? These are difficult, complex issues that cannot be solved quickly; however, I believe there are systemic issues to be addressed and improvements that we can make on our own.

I look forward to reporting back to you on them in coming months. Thank you for letting me serve as your State Attorney.

"Duty to Retreat"

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defendant did not act in self-defense. See *State v. Bobbitt*, 389 So.2d 1094 (Fla. 1st DCA 1980); *Thompson v. State*, 552 So.2d 264 (Fla. 2d DCA 1989); *Brown v. State*, 454 So.2d 596 (Fla. 5th DCA 1984).

New EEOC Guidance on Mandatory Vaccinations in the Workplace

By Cole Barnett

The Equal Employment Opportunity Commission has issued updated COVID-19 guidance on mandatory vaccinations in the workplace. As of December 16, 2020, the agency advised that employers may mandate COVID-19 vaccinations in the workplace. The guidance acknowledged that such action may implicate anti-discrimination laws including the *Americans with Disabilities Act of* 1990, *Title VII of the Civil Rights Act of 1964*, and *Title II of the Genetic Information Nondiscrimination Act*, but underscored that such laws do not prevent employers from following public health directives from the Centers for Disease Control and Prevention and other public health agencies. The guidance contains three main takeaways.

First, anti-discrimination laws do not prohibit a mandatory vaccination policy, so long as employees may seek an exemption for a medical condition or disability that prevents the employee from safely receiving the vaccine or a sincerely held religious belief, practice, or observance that would prevent the employee from receiving the vaccine. In evaluating a request for accommodation, the EEOC advises that the employer should make an individualized determination of whether the unvaccinated employee will "expose others to the virus at the worksite" and thereby pose a direct threat to the health and safety of individuals in the workplace. In doing so, the employer should consider: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm.

Second, even where a determination is made that the unvaccinated employee constitutes a direct threat to the workplace, "the employer cannot exclude the employee from the workplace—or take any other action—unless there is no way to provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce this risk, so the unvaccinated employee does not pose a direct threat." "If there is a direct threat that cannot be reduced to an acceptable level, the employer can exclude the employee from physically entering the workplace, but this does not mean the employer may automatically terminate the worker." In other words, the employer and employee must continue to engage in the interactive process to see if any other reasonable accommodation can be made (e.g., remote work, isolated work, and leave under employer's existing leave policy).

And third, the guidance reiterated that vaccinations are not medical exams under the ADA. However, an employer's pre-screening questions must be "job-related and consistent with business necessity" which requires "a reasonable belief, based on objective evidence, that an employee who does not answer the questions and, therefore, does not receive a vaccination, will pose a direct threat to the health or safety of her or himself or others." In assessing who needs to be vaccinated, employers may ask whether employees have received a COVID-19 vaccine. But if the answer is "no," employers should not ask why, as "[p]re-screening vaccination questions may implicate the ADA's provision on disability-related inquiries, which are inquiries likely to elicit information about a disability." Similarly, prescreening questions should not ask employees about genetic information or family members' medical histories.

March 2021 Calendar

3 EJCBA Board of Directors Meeting via ZOOM, 5:30 p.m.
5 Deadline for submission to April Forum 8
5 EJCBA Golf Tournament, "The Gloria," Mark Bostick Golf Course, 11:30-5
10 Probate Section Meeting, 4:30 p.m. via ZOOM
12 EJCBA Monthly Luncheon Meeting, UF President Kent Fuchs, 11:45 a.m. via ZOOM

April 2021 Calendar

1 Amaze-Inn Race
2 Good Friday – County Courthouses closed
5 Deadline for submission of articles for May Forum 8
7 EJCBA Board of Directors Meeting via ZOOM, 5:30 p.m.
14 Probate Section Meeting, 4:30 p.m. via ZOOM
16 EJCBA Leadership Roundtable and Monthly Meeting via Zoom, 11:30 a.m. -1:30 p.m.
30 Deadline to deliver nominations for 2021 James L. Tomlinson Professionalism Award

EIGHTH JUDICIAL CIRCUIT BAR ASSOCIATION CHARITY GOLF TOURNAMENT

"THE GLORIA"

In Memoriam of Gloria Fletcher

Benefiting the Guardian ad Litem Foundation

Format: Four-Person Scramble

Mark Bostick Golf Course Friday, March 5, 2021

$130/golfer ($115/golfer early registration)

2800 SW 2nd Avenue
Gainesville, FL 32607
Phone: 352-375-4866

Cost: $130 per golfer
$115 Early Registration

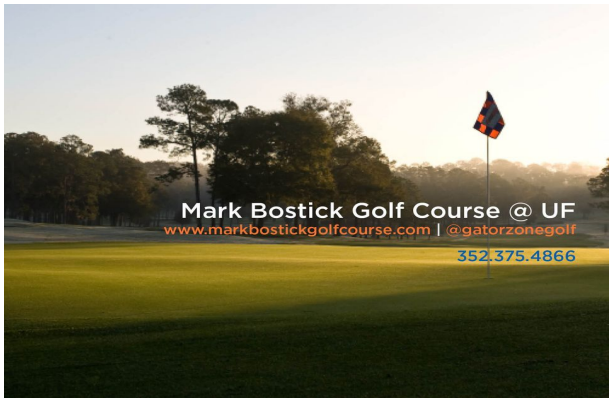
Registration and Outdoor Lunch: 11:30 AM
Tee Time: 12:30 PM
Outdoor Reception following the round.
Masks required inside clubhouse.

To register online please go to: www.guardian8foundation.org/2021-ejcba-charity-golf-tournament-registration/

OR, please return this form with payment to:

The Guardian Foundation, Inc.
3919 W. Newberry Rd, Ste 3
Gainesville, FL 32607

SIGN –UP DEADLINE FOR EARLY DISCOUNT FEBRUARY 26, 2021



The cost of this event is **$130 per golfer with an early registration discount of $115 per golfer** for those who register and pay by February 26, 2021. This price includes 18 holes of golf, riding cart, lunch, reception, and various awards and/or prizes. All net proceeds of this charity tournament benefit the Guardian ad Litem Program of the 8th Judicial Circuit through the Guardian Foundation, Inc.

The EJCBA Charity Golf Tournament benefiting The Guardian Foundation, Inc. has been named in honor of the late Gloria Fletcher. While the names of major golf tournaments, such as "The Masters," are synonymous with the best in the field, Gloria Fletcher's name, and her legacy, represent the pinnacle for children's advocacy. Gloria was a dedicated champion for vulnerable children in the 8th Circuit and across Florida. The EJCBA tournament bears Gloria's name to ensure her example, passion, and work on behalf of abused, neglected, and abandoned children will continue.

To register, please see the link above or return this form with payment. All checks must be made payable to the Guardian Foundation, Inc. We strongly encourage online registration and payment! However if you prefer, please fill out the corresponding number of spaces below. Don't worry if you don't have a full foursome--we'll find you some playing partners (even maybe a ringer)! Also, per course rules, no metal spikes are allowed.

Entry Fee: $130 per golfer ($115 if registered & paid by February 26, 2021)

Name (Golfer 1) _____

Email _____

Phone _____ Consent to 2 in cart: Yes or No

Name (Golfer 2) _____

Email _____

Phone _____ Consent to 2 in care: Yes or No

Name (Golfer 3) _____

Email _____

Phone _____ Consent to 2 in cart: Yes or No

Name (Golfer 4) _____

Email _____

Phone _____ Consent to 2 in cart: Yes or No