FORUM 8

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President's Message

By Evan M. Gardiner

It's hard for me to believe that were already heading into March. I feel like yesterday it was mid-January and then I blinked and it's already March. It's hard for me to wrap my head around the fact that we're already a few months into 2022. Weather wise, I feel like the winter has been particularly cold in the Eighth Circuit this season. I'm looking forward to some good spring weather and being able to enjoy going outside again!

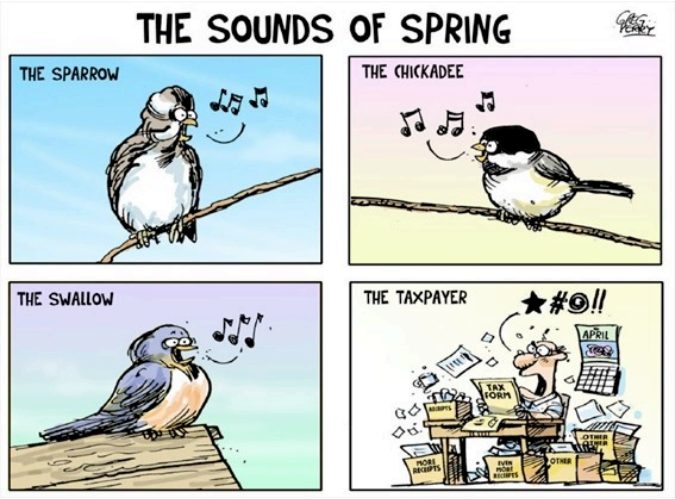
To re-cap February, I sincerely want to thank Lorna Brown-Burton and Scott Westheimer for their participation in our Florida Bar President Candidate Forum. Ballots for the Florida Bar Presidential election should be received by March 1st. They must be returned by March 21st at 11:59 pm. There is also an option to vote online.

I additionally want to thank Mac McCarty and the rest of the Golf Tournament team for putting on another successful charity golf tournament in honor of Gloria Fletcher. I'm always happy to see our legal community come together to enjoy a little fun golfing while also raising funds for such a good cause – the Eighth Circuit's Guardian ad Litem program.

Looking ahead to March and April we have some great events coming up. Florida Bar President Michael Tanner will be joining us in the Eighth Circuit in March to talk about the State of the Florida Bar and his time as President. Going into April, we'll be having our annual EJCBA Professionalism Seminar on the 1st. No, it really is on April 1st, I promise it isn't a joke. The goal is to once again meet in-person, with this year's topic being: "Has Professionalism Evolved (or #Devolved)?" Peg O'Connor is our moderator, and she'll be joined by a panel consisting of Charles "Chic" Holden, Frank Maloney Jr., Aubroncee Martin, and Mary K. Wimsett. If you haven't attended one of our Professionalism Seminars, you're truly missing out. In case you somehow weren't aware, our Professionalism Seminar won the Florida Bar Standing Committee on Professionalism's 2021 Group Professionalism Award. It's an honor that we're all really proud of and reflects the hard work that goes into this seminar each year.

Also keep an eye out for announcements regarding the Spring Fling. We're still working out the final details, but were looking to have a nice outdoor venue where everyone can feel comfortable attending. Hopefully we'll be lucky and get some of that nice spring weather I've been missing.

As always, keep an eye on your emails, and follow our Facebook for up-to-date news. Hope to see y'all soon!



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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

Just Some Thoughts

We have a saying, well, an often repeated saying. To be honest, we have a bunch of often repeated sayings. But the one for today is "we are not the owners of the truth." In other words, we, like everyone, have some thoughts, some suggestions, some observations that may or may not be accurate, much less compelling. But we tend to share those thoughts when they relate to efficacy at mediation.

With the prevalence of mediations via Zoom, a lay party is often provided a Zoom link by their attorney and requested to 'join the Zoom mediation' on a particular day and time. This sometimes, we observe, leads to some problems. The lay party may not have a clue about how to connect to Zoom. We recall how 2 years ago we had to figure it out in order to host Zoom mediations. But some lay parties have not yet figured Zoom out, which leads to glitches. Like they can't connect, they don't answer their cell phone, etc. Please be sure that your client who is asked to join via Zoom is able and comfortable with doing so. Please.

Your Internet connection has been lost

And, when a lay party is comfortable with attending via Zoom, it does not mean they have the internet connection/capability to do so. Many of your clients live in rural areas and they have trouble connecting to the internet and they have trouble staying connected. The start of the Zoom conference is not the time to learn about that. Both the ability for the party to technically join Zoom, and the ability to have a stable internet connection during Zoom are things to discuss well before the Zoom mediation conference begins.

When clients attend a mediation via Zoom all kinds of potential interruptions occur. Examples: barking dogs, children requiring attention, lack of confidentiality as all sorts of people wander by the room the Zoom participant is in, unloading of dishwashers during the conference, and worst of all, driving in a car while participating in a conference.

Which leads us to a suggestion that eliminates all of the above concerns. Please consider having your client *in your office* when you and your client are attending a Zoom mediation conference. Such a procedure eliminates a client's lack of proficiency with Zoom technology and eliminates a client's weak internet connection. And, why wouldn't you have your client in your office? The mediation conference, whether via Zoom or in person, is more than just a calendar entry to your client. The client has been anticipating the mediation for a long time in most cases. Maybe they would like to be present with their attorney if the conference is via Zoom. Maybe you can have more productive conversations with your client in your office. If the mediation results in a settlement, having your client present in your office means the agreement can be signed by you and your client immediately. Often, a client has to troop to their lawyer's office anyway to sign the agreement after the mediation is over. Why? Because they do not have the technical skill or technology to do it otherwise. We know: electronic signatures. Electronic signatures will be the subject of a future article.

We assume you are in the same location as your client for your client's deposition. Why not for mediation? Please consider the benefits of doing so.

Oh, and one other thing. Zoom is a two faceted medium: audio and video. Zoom is supposed to substitute as best as possible for in-person meetings. Please consider having all participants turn on their cameras/video for a Zoom mediation. Is it imperative? Well, at a minimum it is courteous. And some firms, persons and organizations say they have a policy against video appearances. Please re-consider your policy.

Again, *we are not the owners of the truth*, but, we have no problem making and discussing some observations from two years of Zoom mediations.

Observations on Professionalism

By Krista L.B. Collins

Professionalism. We hear a lot about it in law school, in CLEs, and in our Inns of Court. We are fortunate here in the Eighth Judicial Circuit to be surrounded by professional colleagues, to have collegial relationships with our opposing counsel, and to have a legal community that fosters growth, development, and good working relationships. We are also fortunate that the EJCBA puts on an annual Professionalism Seminar (coming April 1st). But we have all had experiences where we have been on the receiving end of less-than-professional behavior.

During the course of the pandemic as we have used Zoom for, well, everything, certain aspects of professionalism have changed. (Raise your hand if you go full TV-news anchor when you have a Zoom hearing, wearing your suit jacket with shorts.) I recently attended a cattle-call Zoom hearing for a South Florida court, in which upwards of 50 lawyers patiently waited their turn for their case to be called, the judge to hear a sentence or two from each attorney, and then enter an order before moving to the next case. I was shocked to see several attorneys—men and women—without jackets and a couple of men without ties.

I've had my opposing counsel (no one local, thankfully!) insist on setting a hearing on a motion for which there is no legal support, only to suddenly go radio silent, and not respond to the Court's Judicial Assistant.

Many years ago, in a galaxy far, far away, my opposing counsel, from a foreclosure mill firm, asked to speak with me before a hearing. I went into the hall to talk with him, and he proceeded to stand very close to me, looming over me, insisting that I drop my motion to dismiss the complaint because his client will just refile anyway. Soon afterwards, another foreclosure mill lawyer argued (with a straight face!) that my motion to compel discovery should be denied because a payment history is irrelevant in a foreclosure action.

I have seen attorneys pound the table and wag their finger, insisting that certain actions—actions that are perfectly routine—not be taken, despite the fact that they themselves had already done it. I have seen attorneys interrupt judges or opposing counsel. I have seen attorneys who ignore facts, rather than deal with them.

Perhaps these attorneys think they are zealously representing their clients. Perhaps they believe that the best way to a good result for their client is to be as tough to get along with as possible.

I am very glad to practice here in our wonderful legal community, where these types of things are not everyday occurrences. Here, professionalism means something more than that. Professionalism means zealously representing your client, of course, but also working with opposing counsel to coordinate events and hearings – and, when appropriate, settlement. It means working together on those points that are not in dispute and where possible, agreeing on certain facts. It means acknowledging that not every fact is good for your case and figuring out the best way to deal with those bad facts, instead of trying to bully your opposing counsel or attempting to mislead the court or jury by pretending bad facts don't exist. It means trying to work out discovery disputes instead of arguing about inane objections.

Finally, it may seem to be a small thing, but dressing properly is a mark of respect for the Court and for the proceeding itself. In other words, professionalism means recognizing that court is court, whether in person or on Zoom, so put on the jacket!

NOMINEES SOUGHT FOR 2022 JAMES L. TOMLINSON PROFESSIONALISM AWARD

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

Criminal Law

By Brian Rodgers;[1] w/input from Brian Kramer

In the recent Netflix original satire "Don't Look Up," a character modeled after a Mark Zuckerberg-style billionaire tech mogul remarks, "[my company] has 40 million data points on every decision [a person] has made since 1994… I know what you are, I know who you are… our algorithms can even predict how [a person will] die to 96.5% accuracy…" Whether one refers to our current world as the "the information age," "the data driven world," or any other term designed to evoke imagery of technological evolution, there is no denying that the most dramatic outcome of this modern era is the nearly incomprehensible amount of data that are collected, analyzed, and retained on all of us – primarily by corporations that thrive on consumer behavior. In many ways this data-centric world is a boon for law enforcement agencies and prosecutors and their ability to conduct effective investigations. However, technological advancements are forcing government actors and courts to consider the implications access to these data has on individual privacy.

Florida law provides substantial and appropriate power to state attorneys to investigate possible criminal conduct. Perhaps the most significant tool available to prosecutors is the power to subpoena witnesses and documents. The type and quantity of data available by subpoena is staggering to say the least. It includes video and, if available, audio surveillance files from inside and outside businesses and public places; social media subscriber details and contact information; dates and times of access to social media and internet sites along with IP addresses from which access was initiated; customer payment data for almost all kinds of business transactions; subscriber information for cellular phones; call and text detail records for every facet of information regarding such communications aside from the contents of the communication; almost all manner of records retained by businesses for any purpose; all manner of medical and banking records (though some of these records require notice to afford the subjects of the records time and opportunity to object should they wish to do so); and on and on. With good reason, a prosecutor's power to subpoena is not checked by the necessity of judicial review or a finding of probable cause. After all, the state attorney is said to be the "one-person grand jury." The state attorney is the investigatory and accusatory arm of our judicial system of government, subject only to those checks imposed by either the law, limited time and labor, political considerations, or genuine concern for the protection of individual rights.

The other major investigative tool available for law enforcement and prosecutors is the search warrant. The materials that require a search warrant to access includes the contents of communications from email, text messages, social media direct messages, wiretaps, etc.; medical records without the requirement that the subject be given time and opportunity to object; DNA samples; blood to be used to analyze the levels of alcohol or other intoxicating substances; infrared camera flyovers of private property; etc. Of course, a search warrant is also needed to conduct nonconsensual searches of a person's home, vehicle, cellular phone, computer, or private business. The major difference between the state's investigative subpoena power and the requirement of seeking a search warrant is that search warrants require that investigators first establish to an independent court that it is more probable than not that a crime has been committed (i.e. probable cause or "PC") and that the materials sought with the warrant or the location to be searched may yield relevant evidence of the alleged crime. Though the process of obtaining search warrants is *ex parte*, the warrants are subject to additional judicial review through the adversarial process by way of a motion to suppress. Indeed, the very court that issues a search warrant also has the power to suppress the fruits of that search if convinced through the adversarial process that there has been a constitutional violation.

Notwithstanding the government's broad subpoena powers, investigative authority over certain types of data is evolving more and more in favor of restricted government access and greater individual privacy protections. Consider, for example, access to historical cell site location information ("CSLI"). Cellular phones, especially smart phones, continuously connect to radio antennas called cell sites. Every connection between phone and cell site causes a time-stamped record to generate, which contains near pinpoint geolocation coordinates for the phone. These data are captured, stored, and analyzed by the cell phone provider for its own business purposes, marketing opportunities, and to maximize cellular network efficiencies – in other words to benefit the consumer with potentially better, more individualized cellular service and, primarily, to benefit the provider and its shareholders through greater revenues and profits. CSLI is retained by providers for years and allows for a historical review of a phone's movements and locations. Studies show that most people compulsively carry their phones everywhere they go with the vast majority of smart phone users reporting they are never more than a few feet away from their devices. So while CSLI is technically the location of the phone, it is more …

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

Criminal Law

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appropriately seen as tracking the movements of the person in possession of the phone.

Prior to mid-2018, CSLI was available to law enforcement and agencies conducting criminal investigations through subpoena or a simple court order. However, in *Carpenter v. U.S.*, 138 S. Ct. 2206 (2018), the Supreme Court of the United States held that CSLI may only be accessed by way of a search warrant upon a showing of probable cause. While this may seem that it is a relatively minor change given that access to CSLI still exists for criminal investigative purposes, it was in reality a substantial shift in legal policy. Pre-*Carpenter*, all that was necessary to obtain CSLI was a court order supported by reasonable grounds to believe that the records sought are relevant and material to a criminal investigation. CSLI was also available in many instances through the issuance of an investigative subpoena by the State Attorney's Office, a process that allowed investigators to obtain and review CSLI as part of an investigation without the need for any interaction at all with the court. Post-*Carpenter*, investigators are now required to first establish probable cause that a crime was committed along with a showing of why the CSLI is relevant before it can be accessed. No longer may investigators use CSLI to help to establish probable cause to further the investigation or to help to determine whether there even is any criminality worth pursuing. Additionally, *Carpenter* expanded the philosophical understanding of what materials should be considered so private as to warrant protection under the Fourth Amendment to the United States Constitution.

The Fourth Amendment, of course, protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures…" and arbitrary invasions by the government. Fourth Amendment jurisprudence focused for many years on the principles of property law and private property rights, from the perspective of what constituted a trespass. However, in the second half of the twentieth century appellate courts began to assert that, at its heart, the Fourth Amendment did not protect places, but instead people. Soon thereafter the analysis of what was protected under the Fourth Amendment focused on the expectation of privacy coupled with the question of whether that expectation was one that society was prepared to recognize as reasonable. The Supreme Court has been careful to not draw a bright line of which expectations of privacy are entitled to constitutional protections. Instead, it provides "basic guideposts" for this analysis: the protection of the "privacies of life" against arbitrary power; and the placement of "obstacles in the way of a too permeating police surveillance."

The Supreme Court considered two major principles in determining that CSLI is constitutionally protected. First was whether there is a reasonable expectation of privacy over a person's physical movements and locations. The Court had previously held that the surreptitious placement of a tracker that was then used to assist law enforcement officers in following a vehicle by ground and aerial surveillance to a separate destination did not require a search warrant or a showing of probable cause. The Court reasoned that a person traveling on the public thoroughfares has no reasonable expectation of privacy as such movements were voluntarily conveyed to anyone who wanted to look. However, in a subsequent case, the Court discussed the growing sophistication of surveillance technology available to law enforcement. It held that placement of GPS trackers on a person's vehicle required a showing of probable cause and the issuance of a search warrant. Such trackers provide long-term surveillance of a person's vehicle with the ability to track every movement indefinitely. The Court commented that "longer term GPS monitoring in investigations… impinges on expectation of privacy [regardless of whether those movements were disclosed to the public at large]."

The other major principle the Court considered in holding that CSLI is constitutionally protected is the so-called "third-party doctrine." The Court has held that a person has no reasonable expectation of privacy over information that is voluntarily provided to third parties, even if the person believes it is being disclosed for a limited purpose. Most information available by subpoena is not considered constitutionally protected because of this doctrine. By way of example, banking records (including canceled checks, deposit slips, records of transactions, account statements, account numbers, etc.), though likely considered highly confidential by most people, are not records that are subject to constitutional protections. These records are owned and maintained by the bank. These are not confidential communications, but instead are business records that detail commercial transactions and are readily shared with bank employees. Another example implicating the third-party doctrine is the pen register, a device placed on a telephone service that records in real time the incoming and outgoing phone numbers along with date, time, and duration of the calls. Though such data allows a historical review of all the parties with whom a particular person is communicating, along with when and how long they are communicating, this too does not require a search warrant. The Court held that the numbers a person dials is not information over which that person generally has an expectation of privacy and, even if the person did, it is not an expectation that society is prepared to recognize as reasonable.

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Taking the Mystery out of "Trade Secrets"

By Conor Flynn

What even is a "trade secret"… and why the quotes?

For many, the term "trade secret" is mysterious. The term conjures images of professionals in white lab coats, jealously guarding their notes as their discoveries break new ground in medicine, military defense, or surveillance.

It's much simpler than all of that. Thankfully for Florida attorneys, "trade secret" is a term of art defined by statute (hence the quotes):

> "Trade secret" means the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it.

Fla. Stat. § 812.081(f) (2021). The definition of "trade secret" specifically includes:

> any scientific, technical, or commercial information, including financial information, and includes any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof, whether tangible or intangible, and regardless of whether or how it is stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing.

Id. The statute specifies that a "trade secret" is considered to be "(1) secret; (2) of value; (3) for use or in use of business; and (4) of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it, when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes." *Id.* (cleaned up).

But wait – there's more. "Trade secret" is defined in its own jury instruction:

> To prove that Claimant had a trade secret, [Claimant] must prove that:
>
> 1. (Claimant) had (insert description of information) that:
>
>   a. derived actual or potential independent economic value from not being generally known to other persons who could obtain value from its disclosure or use; and
>
>   b. was not readily ascertainable by proper means by other persons.
>
> 2. (Claimant) took reasonable steps, under the circumstances, to maintain the secrecy of (insert description of information).

Fla. Std. Jury Instr. (Cont. & Bus.), 416.41.

We use computers, but we're not a tech company. Why should I care about "trade secrets"?

An increasingly digitized economy and increasingly remote-access labor pool present new challenges for employers. How can employers be sure that their remote-access contractors and employees aren't providing unauthorized access to third parties, including competitors? How can employers be certain that a contractor or employee providing notice hasn't already gotten a case of sticky fingers and taken hard-won customer lists over to the competition?

If you run any kind of company, you may have already been provided with access to sensitive information from your clients. You may have been provided access into financials, business development strategies, client relations materials, and proprietary data that give your company a strategic advantage over the competition. If you woke up tomorrow and all of that sensitive data had been copied and handed over to the competition, your competitive business advantage may be completely eliminated.

Well-drafted employment and independent contractor agreements can provide employers with strong footing should trade secrets turn into a problem. Employers should also have clear data protection and confidentiality policies with signed acknowledgements from independent contractors and employees.

The Unsettled Intersection of Marijuana, Firearms and Deadly Force

By Steven M. Harris

Marijuana use, lawful ownership of firearms (whether kept in the home or carried concealed in public) and claims of self-defense are at all-time highs. Somewhat surprisingly, there is a lack of definitive appellate rulings on the issues when marijuana, firearms and deadly force intersect.

Federal firearms and controlled substances laws are unaffected by state laws permitting possession and use of medical or recreational marijuana. See *Gonzales v. Raich*, 545 U.S. 1 (2005). Marijuana remains a controlled substance under federal law, even when federal authorities choose to exercise investigative or prosecutorial discretion. A recent Congressional Research Service overview (which includes discussion of federal and state law divergence) is available online -- here.

Under 18 U.S.C. § 922(g)(3) and § 924(a)(2), a person who is an *unlawful user* of or *addicted to* any controlled substance, including state permitted medical or recreational marijuana, may not possess firearms or ammunition. See *United States v. Bowens*, 938 F.3d 790 (6th Cir. 2019); *Wilson v. Lynch*, 835 F.3d 1083 (9th Cir. 2016). Nor may a firearm be sold to such person, see 18 U.S.C. § 922(d). Thus, a person required to admit being a marijuana user (on ATF Form 4473) will be denied the purchase of a firearm by a federal firearms licensee. The ATF recently distributed an "open letter" to licensees reminding them of the supremacy of federal law.

Like federal law, Florida statutes apply when possession or use of a firearm intersects with possession or use of a controlled substance, including state legal medical marijuana. Despite what any state official, medical marijuana supplier or lobbyist group declares, or the nonprosecution practice of local police and State Attorney. A lawful carded user of medical marijuana may be denied a "must issue" Florida concealed weapons license. See § 790.06(2)(f) (chronic and habitual use to impairment) and § 790.06(2)(n) (when prohibited from purchasing or possessing a firearm by any provision of Florida or federal law), *Fla. Stat*.

It is a second degree misdemeanor to discharge a firearm or to have a firearm "readily accessible for immediate discharge" (loaded and in hand) when under the influence of marijuana, if "affected to the extent that… normal faculties are impaired." See §§ 790.151(3), (4), *Fla. Stat*., and *Brinegar v. State*, - So.3d - (Fla.1st DCA October 13, 2021). There is an exception for the exercise of "lawful self-defense or defense of one's property." That exception should correlate with justification for using or threatening deadly force under § 776.012(2), § 776.013(1)(b) and § 776.031(2), *Fla. Stat*. I wrote on firearm display and gunpointing in the April 2020 Forum 8.

One prerequisite for the privilege of deadly force nonretreat ("Stand Your Ground") under § 776.012(2) or § 776.031(2), *Fla. Stat*., is that one must not be "engaged in a criminal activity." That term is not defined in Chapter 776. *Cf*. § 772.102(1), *Fla. Stat*. The prerequisite is not imposed on otherwise justified deadly force in the home or occupied vehicle under § 776.013(1)(b), *Fla. Stat*., but it is imposed on the "home protection" evidentiary presumption, § 776.013(2), *Fla. Stat*. See § 776.013(3)(c), Fla. Stat. (requiring one not be engaged in a criminal activity and not be using the dwelling, residence or occupied vehicle to further criminal activity), and *Derossett v. State*, 294 So.3d 984 (Fla. 5th DCA 2020). Duty to retreat (or privilege not to) and being "engaged in a criminal activity" do not burden the use of deadly force otherwise justified under § 782.02, *Fla. Stat*.

In *State v. Chavers*, 230 So.3d 35 (Fla. 4th DCA 2017), the court held that a person engaged in criminal activity is not entitled to pre-trial immunity under § 776.032(1), *Fla. Stat*. There is a statement in *Bolduc v. State*, 279 So.3d 768 (Fla. 2d DCA 2019) that one "engaged in a criminal activity" is not entitled to assert the defense of justification. In the January 2020 Forum 8 I suggested those cases misstate the law. See § 776.041(1), *Fla. Stat*., and *Peruchi v. State*, 317 So.3d 1262 (Fla. 2d DCA 2021), for the actual circumstance when the defense of justification is unavailable as a matter of law. Language correctly imposing only the duty to retreat can be found in other opinions, e.g., *Bouie v. State*, 292 So.3d 471 (Fla. 2d DCA 2020); *Garcia v. State*, 286 So.3d 348 (Fla. 2d DCA 2019); *Fletcher v. State*, 273 So.3d 1187 (Fla. 1st DCA 2019); *Pierce v. State*, 198 So.3d 1051 (Fla. 4th DCA 2016); *Little v. State*, 111 So.3d 214 (Fla. 2d DCA 2013); *Roberts v. State*, 168 So.3d 252 (Fla. 1st DCA 2015).

Marijuana possession at the time deadly force is used seems comparable to the unlawful possession or carriage of a firearm. Thus, the intersection should result in an "engaged in a criminal activity" finding invoking the duty to retreat, possibly application of the prior common law. See *Dorsey v. State*, 74 So.3d 521 (Fla. 4th DCA 2011), and my article in the March 2021 Forum 8.

A medical marijuana possessor or user must be in strict compliance (as to manufacture, possession, sale, purchase, delivery, distribution, and dispensing) with § 381.986, *Fla. Stat*., in order to be deemed not …

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Criminal Law

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In determining that CSLI is something deserving of constitutional protection, the Court recognized that the chronicling of a person's past movements is akin to the GPS trackers that require a search warrant before placement. Though a person with a cell phone continuously reveals location information to the third-party cell phone provider, the Court rejected the notion that the third-party doctrine removed CSLI from under the umbrella of the Fourth Amendment. The Court held that a person does not "surrender all Fourth Amendment protection by venturing into the public sphere." The Court noted that it is theoretically conceivable that a law enforcement officer could track and pursue an individual for an indefinite period of time, the reality is such pursuit may only be maintained for the short term due to the expense of time and labor. Society has a reasonable expectation that law enforcement neither would or could "monitor and catalogue every single movement of [an individual] for a very long period." Accordingly, the ability to retroactively monitor every movement a person makes after obtaining that person's CSLI from their cell phone provider is something over which society demands constitutional protection through a requirement that the government obtain a search warrant upon a showing of probable cause before the data may be obtained. After all, "whether the Government employs its own surveillance technology… or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI."

Given the ubiquity of cell phones in today's world and the inarguable fact that such devices have essentially become an appendage of their carriers' body, CSLI offers a major key to unlocking the privacies of the cell phone user's life. A cell phone follows its owner everywhere – throughout the public sphere and into "private residences, doctor's offices, political headquarters, and other potentially revealing locales." It is only reasonable, and hopefully provides a modicum of solace to citizens, that such information is shielded from arbitrary intrusion by the government. The depth, breadth, comprehensive reach, and deeply revealing nature of CSLI coupled with the fact that CSLI is inescapably and automatically collected makes it worthy of Fourth Amendment protection. That the Supreme Court reaches this conclusion more readily with the advancement of technology provides law enforcement officers and prosecutors with a telling warning as to the boundaries of investigative resources. It should also serve to hearten society that the privacies of life are, in fact, highly respected and being carefully safeguarded.

The Unsettled Intersection

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"engaged in a criminal activity" under Florida law. However, *federal* criminal law also applies when examining the Chapter 776 privilege of nonretreat. Thus, a person in possession of medical marijuana would be "engaged in a criminal activity." An armed user not then in possession of marijuana would be so engaged if under federal law (see above) they may not lawfully possess a firearm.

Ownership of a medical marijuana card and evidence of purchases would be admissible to assess a defendant's status under federal law. An ATF regulation, 27 C.F.R. § 478.11, explains the terms "unlawful user" and "addicted." Of note: Recent or use contemporaneous with firearm possession, use on a particular day, or within a matter of days or weeks, is not required. The regulation states that an inference of current use may be drawn from "evidence of a recent use or possession," or a "pattern of use or possession that reasonably covers the present time."

Probate Section Report: Literary Executors and the Florida Universal Directed Trust Act

By Blake Moore, Guest Columnist

A literary executor is a person entrusted with a deceased writer's written works, both published and unpublished. Literary executors have been used for centuries by authors as a part of their estate plan. For example, James Merrill, a Pulitzer Prize winning poet who died in 1995, stated in his last will and testament that his literary executors had "full power and authority to edit . . . my literary papers . . . and to make proper arrangements for publication . . . as they may consider wise or expedient." *Artistic Control After Death*, 92 Washington Law Review 253, 266 (2017).

Literary executors are typically not also named as personal representative; rather, the role of literary executor is one dedicated only to management of the literary works of the decedent. Thus, when these "executors" attempt to act independently on behalf of the deceased's estate, they are often met with problems. In the New York case of *Woodhouse v. Cohen*, a literary executor attempted to bring suit, but the complaint was dismissed when the court ruled that there was "no such entity in the law." 101 N.Y.S.2d 675 (N.Y. Sup. Ct. 1950). Similarly, in *Sundeman v. Seajay Society, Inc.*, a federal court noted that a literary executor in Florida was not a fiduciary or recognized in any manner by the probate court. 142 F.3d 194 (4th Cir. 1998). Thus, literary executors have historically not been formally recognized by courts and have acted in an advisory capacity only.

This could all change with the recent passage of the Florida Universal Directed Trust Act (FUDTA). The FUDTA allows for the creation of a Trust Director as a role separate from the trustee. A Trust Director is "a person who is granted a power of direction by the terms of a trust to the extent the power is exercisable while the person is not serving as a trustee." Fla. Stat. § 736.0103(25). Trust Directors have whatever powers are granted to them by the trust document. Fla. Stat. § 736.1406(2). Like a trustee, a trust director generally has a fiduciary duty. Fla. Stat. § 736.1408(1). And trustees must generally submit to trust directors when directed on a matter within the scope of the trust director's authority. Fla. Stat. § 736.1409(1). Interestingly, a person may still be a trust director even when a trust does not use that term to describe the role. Fla. Stat. § 736.0103(25).

To understand why this matters so much to literary executors, imagine that a Florida resident named Mary creates a living revocable trust for her estate plan. In the trust, she names her friend Timmy as trustee and Fiona as literary executor. The trust states that Fiona has "full power and authority to edit, manage, publish, store, or destroy all my literary papers." Mary then dies. In this example, Mary has unknowingly created a trust director. Because the terms of the trust grant Fiona an exercisable power separate from any trustee, the actions of both Fiona and the trustee are subject to the FUDTA on all matters relating to Mary's literary works. This means that if Fiona accepts the job of literary executor, she will owe a fiduciary duty to the trust beneficiaries. This is true even if the trust was drafted before the FUDTA was signed into law. Fla. Stat. § 736.1403(1)(a).

Estate planners can also intentionally take advantage of the new law to create literary executors. By naming a literary executor for an author, you relieve a trustee of the burden of dealing with copyrights, publishers, unpublished works, and family members of the decedent with strong opinions on how to handle the literary estate. With a properly-appointed trust director acting as literary executor, the trustee may ignore those problems and get on with managing the rest of the probate estate, safe in the knowledge that he is not legally liable for the decisions of a trust director. In the meantime, the literary executor can focus all of her attention on the written works of the author, just as literary executors have done for centuries. And now with the aid of the FUDTA, the literary executor can act with authority and make decisions without the need for someone else's approval.

Professionalism Seminar – REGISTER NOW
Inexpensive & Enlightening CLE Credits

By Ray Brady

Mark your calendars and register 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 Peg O'Connor, 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.

Register online at https://8jcba.org/event-4631807 ; the registration deadline is March 25, 2022 in order to set up breakout rooms for the group discussions. Questions may be directed to the EJCBA Professionalism Committee chairman, Ray Brady, Esq., at (352) 554-5328.

March 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 of articles to April Forum 8
4 EJCBA Monthly Luncheon Meeting, Speaker TBA, The Wooly, 11:45 a.m., (or via ZOOM)
9 Probate Section Meeting, 4:30 p.m. via ZOOM
18 EJCBA 2d Monthly Luncheon Meeting, Florida Bar President Michael G. Tanner, The Wooly, 11:45 a.m., (or via ZOOM)

April 2022 Calendar

1 EJCBA Annual Professionalism Seminar, Trinity United Methodist Church, 4000 NW 53rd Ave., 9-12 noon (registration begins at 8:30)
5 Deadline for submission of articles for May Forum 8
6 EJCBA Board of Directors Meeting, Office of the Public Defender, 151 SW 2dAve., (or via ZOOM), 5:30 p.m.
8 EJCBA Monthly Luncheon Meeting, Speaker TBA, The Wooly, 11:45 a.m., (or via ZOOM)
13 Probate Section Meeting, 4:30 p.m. via ZOOM
15 Good Friday – County Courthouses closed
22 EJCBA Leadership & Diversity Roundtable and Meeting, Larry D. Smith, Esq., The Wooly, 11:45a.m. - 3:00 p.m.
29 Deadline to deliver nominations for 2022 James L. Tomlinson Professionalism Award

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.