FORUM 8

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President's Message

By Philip N. Kabler, Esq.

As the seasons proceed inexorably, so does the legal community of our six county circuit. During the past several months we have accomplished so much together to benefit the various communities we all serve. Here are some examples (because there were many more…).

We have given – through our traditional Margaret Stack Holiday Gift Project benefiting the Pre-K Exceptional Student Education (ESE) programs in three of our counties (rotating to three more next year) and "The Gloria" golf tournament supporting the Guardian Ad Litem program. In our Ask-A-Lawyer Program. During our Law in the Library events. By our members, who volunteered at election polling venues and at the Champions Club mass vaccination site. Through our annual Leadership/ Diversity/ Inclusivity Forum this past month. And by our collective role in helping to rename the Alachua County Criminal Courthouse in honor of our late Judge Stephan P. Mickle.

We have gathered – mostly online during our monthly and special Members Meetings, and even with the grouping of online events we lovingly called '*UF Town and Gown Month.'* We gathered together with our colleagues at the Alachua County Medical Society during the Medical-Legal Partnership forum. And during this long season of the COVID pandemic, even *once* in-person at "The Gloria." (As lawyers tend to write…*see above*.) One more – for those lucky enough to have 'tuned in,' we were serenaded by new Chief Judge Mark Moseley (as he bid our immediate past Chief Judge James Nilon a happy retirement).

And we have grown – in so many ways. Through our mentoring program with the University Levin College of Law, by the efforts of our Young Lawyers Division, and during our Annual Professionalism Seminar.

One more. *We have partnered* – among ourselves as we developed creative ways to continue (*most*) traditions. (Unfortunately our Cedar Key dinner was deferred, but will hopefully return again in the year to come.) With the local organizations that benefited by our charitable activities. And with the Florida Bar, by the work of Ryan Gilbert, our Young Lawyers Division board member, and Stephanie Marchman, our Board of Governors representative, and by 'visits' with Florida Bar President Dori Foster-Morales and President-Elect Mike Tanner.

These are just a 'smattering' of what has occurred. *And our year is not yet over.*

Please note this article will arrive just in time for May 1 – Law Day, which is actually a significant date on our profession's collective calendar. This year's Law Day theme is "*Advancing the Rule of Law Now.*" As described by the American Bar Association, this year's theme "reminds all of us that we the people share the responsibility to promote the rule of law, defend liberty, and pursue justice." (Because we are lawyers, here is the citation to that reminder of our reason for being lawyers and judges - Law Day (americanbar.org).)

Our programming year will end on May 14 with a capstone speaker, Florida Supreme Court Chief Justice Charles T. Canady. While it has been a challenging time for each of us in our circuit, imagine the responsibilities of steering our entire state's Bench and Bar during this particular past 14 'plus' months. Please be sure to register to participate in this opportunity to hear from and thank the Chief Justice.

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Contribute to Your Newsletter!

From the Editor

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

About this Newsletter

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

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

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Deadline is the 5th of the preceding month

Alternative Dispute Resolution

By Deborah C. Drylie

MEDIATION IN BAD FAITH? NOT SO MUCH…

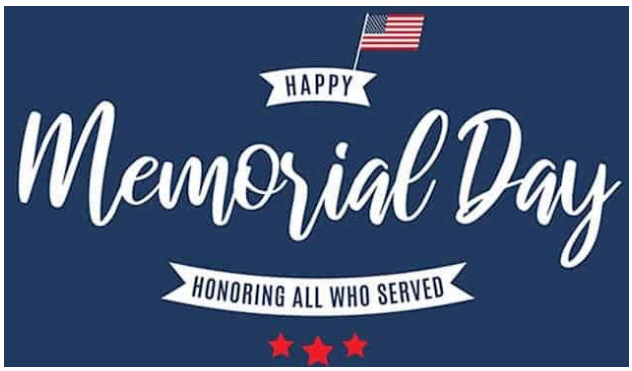
More times than not, one side or the other during the mediation process declares the other side is acting in "bad faith" during the negotiation phase of the proceeding. This statement is typically made when the plaintiff makes a demand far in excess of their pre-suit demand, or any demands communicated prior to the start of mediation. Conversely, a defendant who starts with a lower offer than their previous position is often described as acting in "bad faith." However, with one exception, the concept of bad faith does not play a role in the mediation process. That limited exception is when a party fails to appear and/or participate in the orientation session by the mediator. Believe it or not, that is the only actual requirement for the parties to act in "good faith" in terms of the mediation process. So, why does the statement about bad faith participation occur with such regularity? I believe the unspoken reason is the idea that if the other side does not behave "correctly," that behavior will be relayed to the court in an associated motion for sanctions. However, due to the confidential nature of the mediation, this article addresses why such a motion is an empty threat, is unlikely to be filed and has even less of a chance at success.

Pursuant to F.S. § 44.405, communications which occur during the mediation are confidential. There are limited exceptions when confidentiality will be suspended, such as when the confidential privilege has been waived by all parties, when a statement is made suggesting a crime has been or will be committed, or when professional malpractice is asserted to have occurred during the mediation itself. Even in the malpractice scenario, there are limited forums where this alleged malpractice can be discussed.

The reasoning behind these limited occasions for the suspension of confidentiality is a testament to the sanctity of the mediation process itself - that is, mediation at its very core is an opportunity for the parties to exercise their right to self-determination. This method of ADR places power in the hands of the parties to settle their dispute, or not settle their dispute. This empowerment needs to be exercised without the fear or threat of a court being able to second guess or evaluate the behavior of a party simply because a motion for sanctions has been filed. Such a threat removes the concept of 'voluntariness' from the mediation process. In that regard, both sides in a mediation should remember there is no requirement that a party even make an offer to settle at mediation, much less a "satisfactory" offer. See *Avril v. Civilmar*, 605 So. 2d 988 (Fla. 4th DCA 1992). Obviously, if neither side is required to make a demand or offer, there is no requirement that the party start at or improve upon whatever their settlement positions were prior to the start of mediation. There may be practical considerations on why a party should consider their initial starting position in light of prior conversations about settlement, but practical consideration and requirements from an alleged "bad faith" standpoint are very different things.

Another reason to refrain from asserting to either the mediator or the opposing side that the negotiations are being conducted in 'bad faith' has to do with the mediator's role as a neutral. The mediator has ethical as well as express and implied duties to be objective and keep confidences communicated during a mediation session. Neither party should want to place the mediator in the role of a police officer, tasked with making a subjective assessment on behaviors of the parties and then putting them into a position to report said behaviors and subjective assessments to the court. The extent of the mediator's role vis a vis the behavior of participants is to protect the process and decorum of the proceedings.

If you have mediated with me, you will have heard there are rules which are required to be relayed to the participants about the mediation process as well as my own expectations about the process - to treat each other with civility and remember that mediation is still a court-sanctioned event. Despite this, remember that 'bad faith' is a term of art, which should not be freely thrown about. Its occasion is limited to a failure to appear or participate in the orientation session. Using the term to describe unsatisfactory settlement offers not only lacks merit, but the result of such an assertion could have the unintended consequence of undermining the very nature and heart of the mediation process - giving your client an ability to decide their position and legal fate.



More than Six Million Dollars Returned to North Florida Low Income Residents

By Marcia Green
Pro Bono Director, Three Rivers Legal Services

2020 was a year of challenges for all of us, Three Rivers Legal Services and our clients included. The legal community as a whole had to shift from business-as-usual to a new way of practice, brought on by the COVID-19 pandemic. Court and office closures, remote working conditions and limits to technology created challenges that seemed, at various times, insurmountable.

It turns out, however, that 2020 was also a year of great benefit and good outcomes for our clients. We are so grateful to the staff advocates and pro bono volunteers whose work brought resources back into the community. In fact, a review of the TRLS 2020 Annual Report will show that more than six million dollars in value came back to the low-income residents of North Florida!

TRLS clients received more than a million dollars in social security, veterans, reemployment and other public benefits. Family law cases, in which our clients received alimony and child support, brought another million dollars. Relief from federal tax debt amounted to more than $350,000. Maybe an explanation of these benefits is in order.

For example, if TRLS represents a disabled, homeless client in a claim for Supplemental Security Income and wins the claim at hearing before an administrative law judge, the retroactive benefit could be more than $11,000 and a monthly benefit of $783. Our funding sources look at the cumulative amount over the year, so, in our example, that amounts to $9,396 in benefits ($783 x 12) for a year and a total for 2020 of $20,396. The bottom line is that a formerly homeless and disabled individual now has the ability to secure housing as well as health care benefits through Medicaid.

The savings brought about by discharging a debt in bankruptcy or negotiating for taxpayer relief can bring about the ability to recover from an overwhelming burden. When a probate action secures clear title to property, the value of the home, now belonging to the client, becomes a valued asset, and the owner can secure needed repairs, FEMA funding after a disaster, and a homestead exemption.

This is what we mean when TRLS reports that we secured more than six million dollars in benefits for the low-income residents in our service area. In 2019, the cumulative benefit amount for our clients was $3.5 million. The 2020 calculation of nearly $6.5 million shows that our communities continue to benefit from the work of TRLS, regardless of, and in spite of, the pressures and conditions brought about during the past year. This sum represents disability benefits, tax and debt relief, alimony and child support, saved homes, and more.

We cannot calculate all benefits in just financial terms, however. When the household income of a disabled veteran decreased after the death of his wife, he fell behind in his mortgage. His own attempts to negotiate a modification with the mortgage company failed. TRLS stepped in to assist with a Chapter 13 bankruptcy, negotiated with the lender, and encouraged him to rent his empty rooms. With help, he modified the mortgage through bankruptcy and saved his home.

When a young, disabled married father could no longer care for his children while his wife worked, he sought help from TRLS. His 30% disability rating by the Veterans Administration did not provide enough financially to support his family. TRLS assisted by gathering his records and proving that his military-related disability was far greater than initially determined. The VA finally agreed to the extent of his impairments and increased his benefit amount. With the new information, he also secured Social Security disability benefits and the household income increased by 923%. This veteran is now able to support his family and ease his all-consuming stress.

Although the majority of cases handled by TRLS relate to housing and family law, a small percent involve other areas of civil law. Only three percent of our cases involve individual rights but for the individual, the help can be life changing. A pro bono volunteer representing a client in the onerous task of expunging a record helps the individual overcome a barrier to employment and increases their ability to care for themselves.

These services and activities would not be possible without our funding sources and the financial benefits for our local low-income community could not happen without access to the civil legal system. Three Rivers Legal Services, with staff advocates and volunteer attorneys and law students, serve the residents of 17 counties in North Florida. With our grants, awards, partnerships and donations, we are the entry point of access to the justice system for thousands of those who struggle to make it financially.

Outcomes are often visible and calculated; sometimes, however, the unseen results make the difference. The good stories are felt deeply and keep us going and passionate about our work. We know, though, that so much more needs to be done; we are still only able to meet about 20% of the need. Hearing the inspiring work of the advocates and the benefits to our clients and the community is like seeing the sun peeking out from behind a cloudy sky.

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NEW FFCRA EXTENSION AND EXPANSION GOES INTO EFFECT

By Jung Yoon

The mandatory paid leave requirements under the Families First Coronavirus Response Act (FFCRA) expired on December 31, 2020 and was previously extended through March 31, 2021 for those employers who voluntarily chose to provide paid leave benefits to their employees for reasons related to COVID-19. The cost of all qualifying leave was fully reimbursable through the payroll tax credit.

The America Rescue Plan of 2021 (ARPA) recently passed under the Biden Administration extends and expands FFCRA's emergency paid sick leave (EPSL) and expanded family and medical leave (EFMLA). Again, the new leave is not mandated, and employers who choose to participate will be fully reimbursed through the payroll tax credit but there are noteworthy differences. Here is what you need to know:

- **Effective Dates**: April 1, 2021 through September 30, 2021
- **Amount of EPSL Resets**: Effective April 1, 2021, employees are allowed up to 80 hours of EPSL (regardless of any leave taken prior to April 1, 2021).
- **Reasons for EPSL Expanded**: In addition to prior COVID-19 related reasons under the FFCRA, employees can now be paid for (a) getting a COVID-19 vaccine; (b) recovering from adverse reactions to the vaccine; and (c) waiting the results of a COVID diagnosis or test (after exposure to COVID-19 or at the employer's request). Payments are capped at $511 per day for all EPSL reasons.
- **Amount of EFMLA Resets**: Effective April 1, 2021, employees are now allowed up to 12 weeks of paid EFMLA—up from 10 weeks of paid leave previously provided (again, regardless of any leave taken prior to April 1, 2021)
- **Reasons for EFMLA Expanded**: EFMLA is no longer limited to reasons related to a school or childcare closure and may now be used for any of the reasons for which EPSL may be used. The EFMLA rate of pay continues to be two-thirds of the employee's regular rate of pay (up to $200 per day regardless of the reasons for the leave) but the cap has been increased from $10,000 to $12,000.
- **Nondiscrimination mandate**: The new law mandates that employers may not claim the tax credit if certain employees (i.e., highly compensated employees, full-time employees or employees with greater seniority) are treated more favorably than other employees with respect to the paid leave benefits.

As more Americans are vaccinated and employers look for ways to safely bring their workers back to the workplace, many employers may consider voluntarily continuing their compliance with the paid leave requirements, and have the government pay for it. Updates related to the change in law is not yet available but may soon be available on the IRS website at https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs

President's Message

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As noted in prior columns, we will do our very best to hold live events as soon as we can. (Maybe not during this 'program year,' but soon.) And we will work to add more special programs. Be sure to regularly check *Forum 8*, our e-blasts, the www.8jcba.org calendar, and our Facebook page for event updates.

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 (www.8jcba.org) and consider joining our Eighth Judicial Circuit Bar Association Facebook page.

With best wishes for a memorable (in a good way) May,

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

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.

Force Majeure Clauses: Is COVID-19 a Natural Disaster? An Act of God? Both? Neither?

By Krista L.B. Collins

As you might recall, in an article back at the beginning of the COVID-19 pandemic (which somehow feels both like it was a couple of weeks ago and a couple of decades ago), we suggested that one beneficial course of action while quarantining would be to try to anticipate legal issues that will arise over the coming months and years as a result of the pandemic. What issues did you think of?

We have already seen some of those legal issues in the form of lawsuits filed around the country seeking to limit or do away with governmental stay-at-home orders and restrictions on occupancy and mask requirements. The stay of evictions has helped many tenants unable to pay their rent, while placing some landlords in an equally difficult bind with their mortgage holders or leaving them unable to sell their property while a non-paying tenant remains in place.

Another issue that is becoming more prevalent is the applicability of *force majeure* clauses to the COVID-19 pandemic. Could a *force majeure* clause cover delay or cancellation due to the pandemic? Courts are beginning to address this issue and the answer, so far, is yes. In *JN Contemporary Art LLC v. Phillips Auctioneers LLC*, 20CV4370 (DLC), 2020 WL 7405262 (S.D.N.Y. Dec. 16, 2020), the Court held that the term "natural disaster" in a *force majeure* clause included the pandemic. The case stemmed from contracts governing the auction of two works of art, one of which was to occur in New York in May 2020. The contract included a guaranteed minimum of $5,000,000 from the sale of the painting, subject to any applicable withdrawal or termination provision. *Id.* at *2. The termination provision stated:

> In the event that the auction is postponed for circumstances beyond our or your reasonable control, including, without limitation, as a result of natural disaster, fire, flood, general strike, war, armed conflict, terrorist attack or nuclear or chemical contamination, we may terminate this Agreement with immediate effect. In such event, our obligation to make payment of the Guaranteed Minimum shall be null and void…
> *Id.*

On March 14, 2020, as a result of the COVID-19 pandemic, the defendant auctioneer announced it was postponing its auctions until June 2020. *Id.* at *3. On June 1, 2020, however, defendant transmitted a letter to plaintiff stating that it was invoking its right to terminate the contract and asserting that the obligation to make the Guaranteed Payment was null and void. *Id.* at *4. But on July 2, 2020, the defendant held a virtual auction. *Id.*

After taking judicial notice of state and federal official proclamations and actions related to the pandemic, the Court dismissed the plaintiff's claims, holding in relevant part:

> The COVID-19 pandemic and the attendant government-imposed restrictions on business operations permitted Phillips to invoke the Termination Provision. ***The pandemic and the regulations that accompanied it fall squarely under the ambit of Paragraph 12(a)'s force majeure clause.*** That clause is triggered when the auction "is postponed for circumstances beyond our or your reasonable control."
>
> Paragraph 12(a) also provides examples of circumstances beyond the parties' reasonable control. Those circumstances include "without limitation" a "natural disaster." ***It cannot be seriously disputed that the COVID-19 pandemic is a natural disaster.*** One need look no further than the common meaning of the words natural disaster. Black's Law Dictionary defines "natural" as "[b]rought about by nature as opposed to artificial means," and "disaster" as "[a] calamity; a catastrophic emergency." Natural, Disaster, Black's Law Dictionary (11th ed. 2019). The Oxford English Dictionary likewise defines a "natural disaster" as "[a] natural event that causes great damage or loss of life such as a flood, earthquake, or hurricane." By any measure, the COVID-19 pandemic fits those definitions.
> *Id.* at *7. [Emphasis added; footnotes omitted]; *also see Easom v. US Well Services, Inc.*, CV H-20-2995, 2021 WL 520712, at *7 (S.D. Tex. Feb. 10, 2021) ("COVID-19 also qualifies as a "natural" disaster…").

As of this writing, courts in Florida have declined to determine the applicability of a *force majeure* clause to the COVID-19 pandemic on a motion to dismiss, holding that it is a factual question that is inappropriate at that pleading stage. *Palm Springs Mile Associates, Ltd. v. Kirkland's Stores, Inc.,* 20-21724-CIV, 2020 WL 5411353 at *2 (S.D. Fla. Sept. 9, 2020); *Gibson v. Lynn Univ., Inc.*, 20-CIV-81173-RAR, 2020 WL 7024463, at *4 (S.D. Fla. Nov. 29, 2020).

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Probate Section Report

By Cole A. Barnett

The Probate Section meets via Zoom on the second Wednesday of each month, beginning at 4:30 p.m. The following examines the Florida Probate Code's fee statute for the personal representative's attorney.

Overview

A personal representative in a formal probate administration must be represented by counsel (unless there are no other beneficiaries). Fla. Prob. R. 5.030(a). The personal representative's attorney is entitled to a "reasonable" fee and may be paid without court order. Fla. Stat. §§ 733.612(19); 733.6171(1).

Section 733.6171 defines compensation for the personal representative attorneys. The statute provides for a binary approach, involving a determination for "ordinary" fees and a separate determination for "extraordinary" fees. *Compare* § 733.6171(3) *with* § 733.6171 (4).

Section 733.6171 omits any reference to the well-known "lodestar" analysis (i.e., reasonable hourly rate multiplied by the reasonable number of hours expended), as the Florida legislature eliminated lodestar from the Florida Probate Code in 1995. But, as explored below, lodestar is a powerful concept that is not easily eliminated.

Also, Florida's Probate Code allows for an estate to "opt out" of § 733.6171's strictures if (i) the attorney, the personal representative, and the persons bearing the impact of the attorney's compensation agree to a compensation scheme that differs from the statute; or if (ii) the manner to determine the fee "is disclosed to the parties bearing the impact of the compensation and if no objection is made as provided for in the Florida Probate Rules." § 733.6171(2).

The Ordinary Fee

Section 733.6171(3) provides for a presumptively reasonable fee to compensate the attorney for "ordinary" services. The statute is silent on what constitutes an "ordinary" service. But § 733.6171(4) does provide a non-exhaustive list of "extraordinary" services (*see infra*), which may serve as a guidepost to assist in distinguishing "ordinary" services from "extraordinary" services.

The presumptively reasonable fee is based on "the inventory value of the probate estate assets and the income earned by the estate during the administration" and is set by the schedule set forth in § 733.6171(3)(a-h). Thus, a presumptively reasonable fee under § 733.6171 for an estate with $200,000.00 in inventory value and no earned income would be $6,000.00 (3% x $200,000.00).

Increasing or Decreasing the Presumptively Reasonable Fee

After the presumptively reasonable fee for ordinary services is set, it may be increased or decreased: "Upon petition of any interested person, the court may increase or decrease the compensation for ordinary services of the attorney . . . if the facts and circumstances of the particular administration warrant." § 733.6171(5). The statute provides a list of factors that "the court shall consider" and each of which the court shall give weight to "as it determines to be appropriate." The mandatory list includes the promptness and skill with which the estate was handled, the complexity of the estate, the benefit to the estate, and any other relevant factors. § 733.6171(5)(a-i).

Section 733.6171(5)(i)—"Any other relevant factors"—provides a potential (but not mandatory) door for lodestar to enter through. Though lodestar does not appear in the statute, the practitioner may be disinclined to throw out the timesheets in probate matters, especially where a fee challenge is likely or an hourly rate is agreed to by the personal representative. *See Harris v. Estate of Harris*, 307 So. 3d 821, 822–24 (Fla. 3d DCA 2020) (affirming an award of $11,318.50 in attorney's fees where the record reflected that the personal representative of the estate agreed that her attorney "should be paid $325 per hour", the record contained the attorney's "detailed billing records for her services in administering the estate," and there were no allegations of bad faith against the attorney or any showing of inequitable conduct or unreasonable charges by the attorney in her administration of the estate).

The Extraordinary Fee

"In addition to a fee for ordinary services, the attorney for the personal representative *shall* be allowed further reasonable compensation for any extraordinary service." § 733.6171(4) (emphasis added). *See Baumann v. Estate of Blum*, 898 So. 2d 1106, 1108 (Fla. 2d DCA 2005) (reversing the trial court for failure to award fees for extraordinary services where the attorney "presented uncontested expert testimony that supported a claim for extraordinary services fees"). Under the statute, "[w]hat is an extraordinary service may vary depending on many factors, including the size of the estate." § 733.6171(4). So, creative arguments can be made both ways—what may be ordinary for a large estate may be extraordinary for a small estate and vice versa.

The statute provides a non-exclusive list of services that are extraordinary. A review of the list reveals a trend: litigation work (e.g., defending will contests), tax work, real estate work, homestead work, and business or commercial activities work are deemed extraordinary.

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§ 733.6171(4)(a-k). Though the statute is silent on the matter, it seems essential to document "extraordinary" services by keeping contemporaneous timesheets, as most, if not all, extraordinary services are based on an hourly rate.

Challenging a Fee

Who May Challenge

An interested person may bring a fee challenge. *See* § 733.6171(5). The source of funds used to pay the attorney is irrelevant to whether the court has jurisdiction to review the reasonableness of the fees. *Faulkner v. Woodruff*, 159 So. 3d 319, 322 (Fla. 2d DCA 2015) ("The fact that an attorney may be paid from sources separate from the estate does not divest the probate court of its authority to determine whether the fees charged are reasonable."); *Morrison v. Estate of DeMarco*, 833 So.2d 180, 182 (Fla. 4th DCA 2002) (holding that the probate court had jurisdiction to order the attorney to account for money she received from the sale of condominium that was homestead property, a non-probate asset).

Methods of Challenging

Two methods exist to challenge the compensation of the personal representative's attorney.

The first method is to object under Rule 5.401 to the attorney fee represented on the personal representative's final accounting or petition for discharge. Note the requirement to notice hearing within ninety days of filing the objection or the objection is waived. Rule 5.401(d).

The second method is to utilize § 733.6175, in conjunction with declaring the proceeding adversary under Rule 5.025(b). The latter method is likely preferred given the pleadings required (a petition and an answer within twenty days after formal service) and the procedural framework and predictability such pleadings provide.

Indeed, § 733.6175 provides a mechanism with which interested persons may petition the court to determine "the propriety of the employment of any person employed by the personal representative and the reasonableness of any compensation paid to that person." A Rule 5.025 adversary declaration ensures that the proceeding "must be conducted similar to suits of a civil nature, including entry of defaults."

Burden of Proof

Under § 733.6175(3) and Rule 5.355, "the burden of proof of propriety of the employment and the reasonableness of the compensation shall be upon the personal representative and the person employed." *Compare* § 733.6175(3) *and* Rule 5.355 (stating that the attorney and the personal representative carry the burden of proof) *with* Rule 5.410 (failing to address which party carries the burden of proof when the fee is challenged by an objection to a final accounting). Also, the burden of proof likely always remains with the attorney and the personal representative, no matter what burden shifting occurs with respect to the production of evidence. *See* § 90.302. If the personal representative's attorney fails to meet his or her burden of proof, in whole or in part, the attorney may be ordered to make an appropriate refund of the "received excessive compensation." § 733.6175(3).

The Evidence

The presumptively reasonable fee under § 733.6171(3) is designed to facilitate the judge's ability to determine the appropriate amount of compensation. As such, it is a presumption affecting the burden of producing evidence and it is rebuttable. § 90.302(1); § 90.303.

The Probate Code is silent on how to determine a reasonable fee for the attorney of the personal representative who resigns or is removed. This "hole" in the statute places the attorney for the resigned or removed personal representative in a bind. It would be difficult for such an attorney to rely on the ordinary services presumption, as that presumption assumes that the ordinary estate administration has been completed to finality (i.e., the presumptively reasonable fee is only for complete administrations).

Put differently, the attorney for the removed or resigned personal representative has not, by definition, completed all of the ordinary services. Without the presumption to rely on, what evidence can the attorney present upon a challenge to his or her compensation? Lodestar and expert testimony come to mind.

Expert Testimony

Under § 733.6175(4), expert testimony is not required. *See Brake v. Swan*, 767 So. 2d 500, 502 (Fla. 3d DCA 2000), *order clarified* (July 19, 2000) (rejecting the argument that the award of fees requires expert testimony). If such testimony is to be offered, notice is required and "a reasonable expert witness fee shall be awarded by the court and paid from the assets of the estate." The court determines from what part of the estate the expert fee will be paid. § 733.6175(4).

Fees on Fees

An attorney for the personal representative defending his or her fees is entitled to the fees incurred in such a defense, but not if the compensation at issue is found to be "substantially unreasonable." § 733.6175(2). The statute leaves the term "substantially unreasonable" undefined and current appellate case law examining the term is thin at best. *See e.g.*, *Venis v. Greenspan*, 833 So. 2d 208, 210 (Fla. 4th DCA 2002) (declining to address the trial court's finding that fees for extraordinary services were "substantially unreasonable" where that finding was not appealed).

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“Self-Defense Immunity” (What It Is and Isn’t)

By Steven M. Harris

News media reporting on a defensive use of force event will usually take note if the force user asserted lawful self-defense to responding police when interviewed at the incident scene, but was not arrested. Condemnation of the lack of arrest often follows, including from sworn law enforcement and/or members of the Bar. Notwithstanding that an arrest in such circumstances might violate Florida law, which unmistakably disfavors such arrests.

A person who “uses or threatens to use force as permitted” by *Fla. Stat*. § 776.012, § 776.013, or § 776.031, is *immune* from being arrested, detained in custody, charged, or prosecuted, and from *civil* action (by the person, personal representative, or heirs of the person against whom the force was used or threatened). See § 776.032(1), *Fla. Stat*. There is an exception for unlawful force directed at a law enforcement officer. The statute provides for “true immunity,” not an affirmative defense. *Peterson v. State*, 983 So.2d 27 (Fla. 1st DCA 2008). An *agency* probable cause determination is a necessary prerequisite to arrest. See § 776.032(2), *Fla. Stat*. When *civil* immunity is granted, there is a mandatory award to a defendant of “reasonable attorney’s fees, court costs, compensation for loss of income, and all expenses incurred.” See § 776.032(3), *Fla. Stat*. Immunity and the “duty to retreat” (or its elimination, commonly referred to as “Stand Your Ground”) are two wholly distinct legal concepts based on different legislative undertakings.

A *pre-trial hearing* to determine immunity is available in a criminal case. Under the present legislative iteration, the state has the burden to overcome a defendant’s claimed immunity by *clear and convincing* evidence. See *Love v. State,* 286 So. 3d 177 (Fla. 2019). That quantum of proof might be described as evidence that compels a firm belief or conviction, without any hesitation. It is considerably more than a mere preponderance. Immunity may not be denied because the hearing record reflects disputed material facts; the judge must adjudicate such facts and make a substantive decision applying the law. *Dennis v. State*, 51 So. 3d 456 (Fla. 2010); *Hair v. State*, 17 So.3d 804 (Fla. 1st DCA 2009).

The defendant has no evidentiary burden in a pre-trial immunity hearing. Allegations sufficient to establish justification under Chapter 776 need only be “raised” in a Rule 3.190(b) motion to fulfill the statute’s “prima facie claim” threshold. *State v Cassady*, - So.3d – (Fla. DCA 4th, March 10, 2021) (noting opinions of other DCAs to same effect). Thus, a defendant need not testify or introduce any evidence to support the motion. The state may only be able to attack a defendant’s credibility indirectly in the pre-trial hearing, just as it would in an actual trial (where it has the burden to disprove justification beyond a reasonable doubt and the defendant cannot be compelled to testify). See *Jefferson v. State*, 264 So.3d 1019 (Fla. 2d DCA 2018).

It is common for the pre-trial immunity hearing to be mistakenly referred to as a “Stand Your Ground hearing.” That is an inaccurate reference, whether or not the availability of immunity turns on an unmet “duty to retreat.” See *Mency v. State*, 292 So.3d 1 (Mem) (Fla. 1st DCA 2019) (Roberts, J., concurring).

Appellate review of pre-trial immunity (by writ of prohibition) has been likened to the review of a motion to suppress. See *Mobley v. State*, 132 So.3d 1160 (Fla. 3d DCA 2014). A trial court's factual findings are presumed correct and can be reversed only if they are not supported by competent substantial evidence. Legal conclusions are of course reviewed *de novo*. See, e.g., *Bouie v. State*, 292 So.3d 471 (Fla. 2d DCA 2020); *Craven v. State*, 285 So.3d 992 (Fla. 3d DCA 2019); *Arauz v. State*, 171 So. 3d 160, 161-62 (Fla. 3d DCA 2015). A defendant who is denied immunity after hearing in the trial court or after appellate review is not barred from asserting a justification defense under Chapter 776 (or § 782.02, *Fla. Stat*., which alone does not entitle the defendant to a pre-trial immunity hearing). Of note: There are DCA opinions containing language that conflates the availability of immunity with the duty to retreat. (See articles I authored in the ***Forum 8***, January 2020, and the ***Forum 8*** (November 2020)).

A defendant’s immunity hearing testimony is admissible at trial in the state’s case-in-chief. See *State v. Hester*, - So.3d – (Fla. 3d DCA, March 24, 2021). A grant of immunity from criminal prosecution does not confer immunity in a later civil suit. *Kumar v. Patel*, 227 So.3d 557 (Fla. 2017). The pre-trial immunity process is fully available to a law enforcement officer, whether on or off duty, and irrespective of whether the officer is making an arrest. *State v. Peraza*, 259 So.3d 728 (Fla. 2018).

A defendant must admit to essence of the charged conduct and assert Chapter 776 justification in order to claim immunity. Thus, a defendant who denies threatening or using force is not entitled to pre-trial adjudication of his or her immunity. See *Marrero v State*, 299 So.3d 489 (Fla. 3d DCA 2020).

Criminal Law

By Brian Kramer

Marijuana, probable cause, and social justice: The 2021 update

There has been much debate over the future of marijuana in the State of Florida. The Florida Legislature seemingly threw the legal world into flux when it legalized low-THC cannabis, or as it is better known, hemp. Much has been said and debated over the consequences to police practices with this change in the law. At the time of this change my office issued advice to law enforcement that has become colloquially known as the "smell plus" test. Essentially taking the position that officers should have something beyond the odor of burnt marijuana to establish probable cause to search a vehicle or person without a warrant. There have been several cases over the past few years that seemed to address this issue or parts of this issue. Most of these cases concluded that the odor of burnt cannabis remains probable cause to search, but many have declined to address the hemp or medicinal marijuana issue directly. Recently the 2nd DCA addressed this issue head on.

In *Owens v. State*, 2021 WL 1200326, filed March 31, 2021, the 2nd DCA held "[W]e conclude that the recent legalization of hemp, and under certain circumstances marijuana [referencing medical marijuana], does not serve as a sea change undoing existing precedent, and we hold that regardless of whether the smell of marijuana is indistinguishable from that of hemp, the smell of marijuana emanating from a vehicle continues to provide probable cause for a warrantless search of the vehicle." In this case, the defendant challenged the search of his vehicle based on the odor of burnt marijuana. The trial court upheld the search. The Circuit Court in the Twentieth Judicial Circuit had previously ruled that such a search, without more, was insufficient. (*State v. Nord*, Td, 28 Fla. L. Weekly Supp. 511 (Fla. 20th Cir. Ct. Aug. 8, 2020). The Ninth Circuit Court found the opposite. The 2nd DCA disapproved *Nord* and approved *State v. Ruise*, 28 Fla. L. Weekly Supp. 122 (Fla. 9th Cir. Ct. Mar. 20, 2020) (holding that an officer who smelled the odor of marijuana during a traffic stop had probable cause for a warrantless search of the vehicle, even though the odor of cannabis was found to be indistinguishable from the odor of now legal hemp). The 2nd DCA gives a compelling legal analysis of DUI law that essentially concludes that even if marijuana becomes completely legal, the smell of burnt marijuana or hemp will continue to provide probable cause for a search of a vehicle. Further, in addressing the issue of lawful possession of hemp, CBD or medical marijuana, the Court stated, "we can think of no circumstance where an affirmative defense might lie where the impetus for the search arose from the smell of burnt marijuana in a vehicle." *Id*. *Owens*.

Considering *Owens* and its predecessors, where does that leave the legal and law enforcement community? *Owens* is decisively clear: the smell of burnt cannabis coming from a vehicle is probable cause to search. My prosecutors often must balance the "can we?" with the "should we?" On this issue, the advice from my office remains the same that "smell plus" is our preference. It is law enforcement best practices to observe and contemporaneously document all facts and circumstances that contribute to probable cause. If the only indicator of probable cause is the odor of burnt cannabis, officers should continue the investigation before deciding to execute a warrantless search. Does this mean that the State of Florida will not precede in a case where there is nothing more than the odor of cannabis as the probable cause for a search? No, but every case is reviewed on its merits for sufficiency of the evidence. The strength of probable cause for a search is and will remain an important factor in both filing and resolution of criminal cases.

The use of the odor of marijuana to search a citizen's vehicle is a vexing social justice issue. Law enforcement has used the odor of marijuana to locate guns, drugs, and other evidence of crime for time eternal. As we learn more about the impact of police practices on people of color, these law enforcement practices should be weighed against the potential damage to race relationships. We are learning that both today and historically, many police practices disproportionately affect communities of color. I have no easy answer to how we balance these issues. What I do know is that we are fortunate to have excellent sheriffs, deputy sheriffs, chiefs of police, police officers, and other members of law enforcement in the Eighth Judicial Circuit. Further, I do trust our local law enforcement leaders to provide the proper training and guidance to the men and women of their agencies on these sensitive issues.

My charge as State Attorney is to enforce the law in a manner that is, to every extent possible, fair, balanced, and unbiased towards any group regardless of race, religion, sex, or gender identity. Recognizing the potential sources of disproportionate treatment is only a start in meeting this goal.

TRLS

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TRLS is grateful for the financial support received from donors and the services provided by our volunteers. These commitments allow us to continue our mission of providing quality legal assistance to low-income and vulnerable residents of North Florida. Check out our website https://www.trls.org/; review our 2020 Annual Report and contact us if you want to volunteer, donate or ask any questions.

Force Majeure Clauses

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However, this does not mean that the issue has not been addressed at all. In *IN RE: CINEMEX USA REAL ESTATE HOLDINGS, INC, et al., Debtors. Additional Party Names: CB Theater Experience LLC, Cinemex Holdings USA, Inc., Cobb Lakeside, LLC, Lessee & Cobb Lakeside, LLC*, 20-14695-BKC-LMI, 2021 WL 564486, at *5 (Bankr. S.D. Fla. Jan. 27, 2021), the Court found after final hearing that a movie theater was excused from paying rent until pandemic restrictions were lifted and it was allowed to reopen based upon the *force majeure* clause of the lease.

Although the general trend seems to be that *force majeure* provisions can be applicable to the pandemic, that is by no means a guarantee it will apply to every contract that is breached during the pandemic. Questions that will remain to be answered include: Does the subject matter of the contract make a difference – an art auction is certainly non-essential, as noted by the Court. What about the construction of a building? Does it matter if the construction is indoors (where transmission of the virus is riskier) or outdoors (where the risk is smaller)? What about the delivery of goods? Would it make a difference if the goods being delivered are N-95 masks or Halloween masks? What if the state government has lifted restrictions but the costs for the business to operate safely remain prohibitive? What other legal issues will arise as a result of the pandemic? We should all keep thinking!

Probate Section Report

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The Estate Assets that Fees are Paid From

Under § 733.106(4), the court may direct what part of the estate fees are paid from. In exercising its discretion, the court may consider the attorney's impact on the estate, whether the attorney prevailed on the fee challenge, and any other relevant facts. § 733.106(4)(c)(1-8). "The court may assess a person's part of the estate without finding that the person engaged in bad faith, wrongdoing, or frivolousness." § 733.106(4)(d).

The Probate Code does not provide for the imposition of fees against the personal representative in his or her personal capacity. *Lopez v. Hernandez*, 291 So. 3d 1007, 1009 (Fla. 5th DCA 2020). The award of a charging lien against an estate is not appropriate. *Id.*; *Correa v. Christensen*, 780 So. 2d 220, 220-21 (Fla. 5th DCA 2001).

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.

May 2021 Calendar

5 Deadline for submission of articles for June Forum 8
5 EJCBA Board of Directors Meeting via ZOOM, 5:30 p.m.
12 Probate Section Meeting, 4:30 p.m. via ZOOM
14 EJCBA Monthly Meeting via Zoom with Florida Supreme Court Chief Justice Charles T. Canady, 11:45 a.m.
31 Memorial Day, County & Federal Courthouses closed

June 2021 Calendar

9 Probate Section Meeting, 4:30 p.m. via ZOOM
9-12 2021 Annual Florida Bar Convention, Hilton Bonnet Creek, Orlando (mixture of in- person and ZOOM events)

Gerald T. Bennett American Inn of Court

The Gerald T. Bennett American Inn of Court is accepting applications for its 2021-2022 session. Applications can be submitted online at bennettinn.com.

The Bennett Inn of Court was established in 2011 to foster a cooperative learning environment between law students, attorneys, and judges, with a strong emphasis on exploring cutting-edge legal issues, mentoring, and interactive learning. The Inn is part of the American Inns of Court, America's oldest, largest and fastest-growing legal mentoring organization. For over twenty years, American Inns of Court have provided judges, lawyers, and law students an opportunity to participate actively in developing a deeper sense of professionalism, achieving higher levels of excellence and furthering the practice of law with dignity and integrity.

Meetings are held monthly from September to April at Blue Gill Quality Foods, with dinner provided. Continuing legal education credits are available for participation in each meeting. Scholarships are available for public interest attorneys and attorneys employed by the State of Florida.

For additional information, please visit www.bennettinn.com or contact the Membership Chair, Magistrate Katherine L. Floyd at floydk@circuit8.org.