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OCTOBER 2020

FLORIDA SUPREME COURT JUSTICE ALAN LAWSON
Self-evident? Wellness Webinar

Enlightenment through Engagement Series More information on page 21

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ON THE COVER

Florida Supreme Court Justice Alan Lawson will be speaking at our West Broward Webinar about Self-evident? The Surprisingly Deep Connection Between Personal Well-Being and Everything Else. More information about the event and wellness can be found on page 11.

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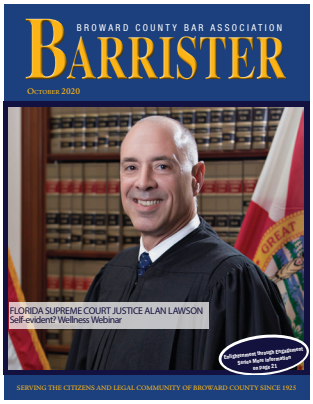

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Robert C.L. Vaughan, Esq.

The Emperor's new suit

Adapted from A fairytale by Hans Christian Andersen (1837)

Once upon a time, there lived an emperor, who thought so much of new clothes that he spent all his money in order to obtain them; his only ambition was to be always well dressed.

His city was great and every day many strangers from all parts of the globe arrived. One day two swindlers came to the city; they made people believe that they were weavers and declared they could manufacture the finest cloth to be imagined. Their colors and patterns were not only exceptionally beautiful, but the clothes made of their material possessed the wonderful quality of being invisible to any man who was unfit for his office or unpardonably stupid.

"That must be wonderful cloth," thought the Emperor. "If I were to be dressed in a suit made of this cloth I should be able to find out who in my empire was unfit for their places, and I could distinguish the clever from the stupid. I must have this cloth woven for me without delay." He gave the swindlers a large advance and set them to work. The swindlers pretended to start weaving and pretended to be hard at work making this wonderful cloth, but in truth, they were doing nothing.

Everybody heard about the remarkable cloth—it was the best cloth EVER! Everyone was anxious to see how bad or stupid their neighbors were, if they couldn't see the cloth.

The Emperor soon decided that he would send his best ministers to preview the cloth – it would also be a test of their intelligence. One after the other, the ministers went in to see this cloth. One after the other, they realized that none of them could see it. Afraid of being thought to be stupid, none of them dared admit that they couldn't see the cloth. Each pretended to see and admire its fine detail.

They all reported to the Emperor that the cloth was MAGNIFICENT!

Everybody in the whole town talked about the precious cloth. At last the Emperor demanded to see it himself, along with his ministers. "Is it not magnificent?" said the ministers. "Your Majesty must admire the colors and the pattern." They each imagined that everyone else but them could see the cloth.

"What is this?" thought the emperor, "I do not see anything at all. That is terrible! Am I stupid? Am I unfit to be Emperor?"

The Emperor decided to wear the new magnificent clothes at a great procession which was soon to take place. "It is magnificent," they said; everybody seemed to be delighted, and the Emperor appointed the two swindlers his "Imperial Court weavers."

On the day of the procession, the swindlers declared that "The Emperor's new suit is ready now." The Emperor and all his ministers arrived to see the suit and the swindlers held their arms up as if they held the suit. The ministers all declared, "The suit is as light as air. It must feel as if one had nothing at all upon the body."

The Emperor undressed, and the swindlers pretended to put the new suit upon him, one piece after another; and the emperor looked at himself in the glass from every side. "How well it looks! How well it fits!" said all his ministers. "What a beautiful pattern! What a magnificent suit of clothes!"

The chamberlains, who were to carry the train, stretched their hands to the ground as if they lifted up the imaginary train; they did not want to admit that they could not see anything.

The Emperor marched in the procession and the people exclaimed: "Indeed, the Emperor's new suit is incomparable! What a long train he has! How well it fits him!" Nobody wished to admit that they saw nothing, for they were too afraid to appear unfit or stupid.

Then finally, a little boy yelled "But he has nothing on at all!" "Good heavens! It's true, he has nothing on at all," the people cried at last. Even the Emperor started to realize they were right, but it was too late, "Now I must bear up to the end" he thought to himself and his chamberlains walked with still greater dignity, as if they carried a magnificent train which did not exist.

As I re-read this story for the umpteenth time, I asked myself, just as I did when I was a little boy reading it for the first time, who do I want to be? Emperor, swindler, minister, chamberlain, the people or the little boy? Who will you be?

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YLS PRESIDENT'S MESSAGE

Omar A. Giraldo, Esq.

Last month, the Young Lawyers Section of the Broward County Bar ("YLS") put together our Veteran Stand Down Event. A huge thank you to President Elect James Heaton for not only bringing this event to Broward but being the driving force organizing the event the last two years. We are eager to be able to host in the courthouse and help more veterans in need, but this year we were contacted by 12 and were able to resolve most their issues and should have them all finalized by our docket scheduled for October 12.

As everyone knows our schools are under tremendous pressure. Our Lawyers for Literacy Broward Reads for the Record will resume on Thursday, October 29th. As part of Jumpstart's national campaign, we will be joining millions of readers across the nation in reading the book Evelyn Del Rey is Moving Away by Meg Medina. The readings will be done virtually on Microsoft Teams and can be handled from the comfort of your home or office.

Finally, I am very excited to announce our yearly golf tournament will be going virtual this year and will be held the whole month of November. We wish we could be in person, but with the current pandemic we want all of our players to be safe. The winner of the virtual tournament will win a free foursome for next years in person tournament. Be on the lookout for information from secretary and golf tournament chair Maria Fischer.

Lastly, if you are interested in joining a committee, partnering with YLS on an event, or have any questions, please feel free to contact me at VG Law Group LLP 954-500-2422 or ogiraldo@vg.law.

by Nazarena Rosales Hauser

Noche Latina (with a Twist!): Covid-19 Style

There are many events throughout Hispanic Heritage month that celebrate our culture, but our traditional Noche Latina event truly encompasses everything fun and exciting about being Hispanic, filled with dancing, paella, cocktails, and dominoes. This year we are adapting the annual event to a new, fun (and safe) way to celebrate our culture. Noche Latina this year will be a two-part series on October 14 and October 15.

On October 14, we will be offering pick-up of our amazing annual Paella by Chef Dana at the BCBA Conference Center for lunch. Orders can be placed in advance and all registrants can drive through the BCBA to pick up their orders—made on site! All orders will also include our very own Judge Marina Garcia-Wood's famous cheesecake flan! We'll be taking pictures throughout our pick-up lunch event so don't miss it! And it would not be a Noche Latina event without some Latin music, so come with your windows down and join the party! As part of our series, those that place a lunch order will be provided with a raffle ticket for part two of our event.

Part two will take place on October 15, when we will be hosting the Zoom portion of our event. Join us in the evening for a start-to-finish cooking demonstration as we learn how to make some Hispanic dishes (cocktail, appetizer, and dessert)! The list of ingredients will be provided to you before the event so you can join in on making them along with our chefs. Also, make sure to stay until the end as we will be giving out a prize to the winner of the raffle!

We will be sending out details when the time nears. We look forward to seeing everyone!

by Jessica Daley Marra

Returning to Work and Mental Health; Just Keep Going

Winston Churchill once said *"[i]f you are going through hell, keep going."* This year is one history will remember. COVID 19 has rocked our world and flipped us all upside down. The pandemic has affected our physical health, businesses, financial stability, employment, and family relationships. Even those fortunate enough to stay healthy have worried about keeping themselves and their families healthy, keeping their businesses afloat, keeping their jobs, and paying their bills. On top of this, we have missed our families and social gatherings.

Parents have worried about being "good" moms and dads, their children's education, learning to Zoom, making sure assignments are done and actually submitted, ensuring their children don't feel isolated… all while working… from home, so that they can… keep their businesses afloat, keep their jobs, and pay their bills. Wow.

On top of that, many of us in the legal profession have Zoom networking events, mentorship responsibilities, meetings, phone calls; all while trying to make the "new normal" more tolerable. And let us not forget our law school graduates, whose stress has been compounded during the most stressful period of their life because of this pandemic.

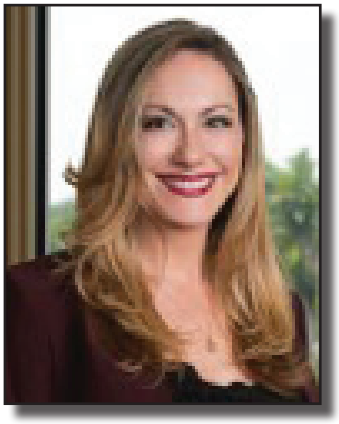
None of this even takes into account anyone that is caring for someone that is ill or someone that is ill themselves, and the immense stress that exists just trying to keep yourself and those whom you love healthy in this uncertain time. Nor does it take into account those who have lost someone, due to COVID or otherwise, and having to deal with such an immense loss without the usual family support, plus all of the other life stressors. *See above.*

To say this is a lot is an understatement. The pandemic has taken its toll on all of us in some respect, especially our mental health. Lawyers were already 3.6 times more likely than other professions to battle depression, and per the CDC, our profession ranked fourth in suicide rates before the pandemic ever began.

So how do we "keep going"? The answer may be this simple; we do not need to do it alone. Florida Supreme Court Justice Alan Lawson will discuss this during his Wellness Webinar on October 22, His topic will be "Self-evident? The Surprisingly Deep Connection Between Personal Well-Being and Everything Else (Ethical Behavior, Professional Performance, Personal Relationships, Health, Longevity and More)". We are all, truly, in this together. Look to your left and look to your right, wherever you are standing… the person beside you is tired, stressed, overwhelmed, and worried about something. In this COVID era, it is too hard not to be. So, first, perhaps give yourself and your neighbor (or even your adversary) a little bit of grace, a little kindness, and certainly an extra dose of professionalism. We all need each other right now and the smallest act of kindness or professional courtesy from you can shape not only that person's day but your own, in a very positive way.

While our profession has historically stigmatized mental health, under the leadership of our Florida Bar this issue in our profession is now, appropriately, of chief concern and openly discussed. Whether talking to a friend, or speaking with a professional, talking helps. The Florida Bar's Mental Health and Wellness Committee has taken wonderful steps in creating the Florida Lawyers Helpline, providing a free (completely confidential) resource for us all. Florida Bar President Dori Foster Morales recently and aptly stated, *"If we solve our own problems, we're going to be better at solving the world's problems."*

Lastly, we must all learn (myself included) to allow ourselves to be imperfect and prioritize to save our sanity. Author Nora Roberts perhaps said it best, that *"[t]he key to juggling is to know that some of the balls you have in the air are made of plastic and some are made of glass."* By prioritizing our responsibilities, and focusing on the glass balls, we can take a deep breath and get through the day. What was plastic today may be glass tomorrow. But for today, it is OK if the plastic balls hit the ground.



Jessica Marra is an Attorney with Kelley Kronenberg in Fort Lauderdale, and serves as a Committee Member of the West Broward Section of the Broward County Bar Association, and Executive Board member of the Broward County Hispanic Bar Association.

by Morgan Weinstein and Sarah T. Weitz

Appellate Mentorship Through Pro Bono

Mentorship makes good attorneys great. It elevates the experience and practice of the newer attorney and provides a way for a more experienced attorney to enhance our profession in a meaningful and personal way. Often, mentor relationships in the field of litigation involve shadowing in court. In the area of appellate practice, mentoring can be both complicated and incredibly simple.

It may seem complicated because appellate work is focused mainly on the writing of briefs: often a solitary practice. There is no uniform motion calendar for which you can help a new attorney prepare. There is no deposition someone can watch you prosecute or defend. None of the live events of trial practice are present in an appeal. However, appellate practice mentorship can be simple for the same reason: since the brief is the focus, and the structure of a brief is predictable, it lends itself well to a mentoring team made up of a newer attorney and a more experience practitioner.

This method of mentorship intersects with pro bono work well. Through the Florida Bar Appellate Practice Section, the Broward County Bar Association Appellate Practice Section, or other entities, pro bono opportunities to work with a mentee abound. In 2017, the Statewide Guardian ad Litem Program partnered with the Florida Bar Appellate Practice Section in a pro bono initiative called the Defending Best Interests Project ("DBI"). [1]The DBI pairs attorneys with the Statewide Guardian ad Litem Program to draft answer briefs in dependency appeals, with a particular focus on representing the best interests of children in appeals of terminations of parental rights.[2] A year into the program, it had generated more than 2,200 hours of attorney time. The Florida Bar Appellate Practice Section also seeks pro bono attorneys for other programs, including appeals related to veterans and to survivors of domestic violence.[4]

The DBI operates through a listserv run by the Florida Bar Appellate Practice Section. The Section regularly emails the listserv a list of appeals in which pro bono assistance is needed. Attorneys on the listserv volunteer, appear as pro bono co-counsel with the Guardian ad Litem Program, and draft an answer brief. In 2019, the Broward County Bar Association's Appellate Practice Section undertook a similar initiative. The Section has been soliciting pro bono appellate opportunities from various legal aid and other pro bono organizations and circulating them to its membership.

These programs, and others like them, present fertile ground for mentorship opportunities. An attorney can agree to take on a mentee, agree to take on an appellate pro bono assignment, assign a portion to the mentee, and review the mentee's work with the mentee before the entire brief is reviewed for filing. The act of working together deepens the mentor-mentee relationship and brings much-needed pro bono help to those who need it.

Through this framework, the authors have contributed hundreds of pro bono hours to the DBI in the past few years. We invite you to join us in expanding the works of these pro bono projects by including a mentee in your work or seeing a mentor to guide you.

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[1] *GAL Project Aims to Help Children, Florida Bar News* (August 15, 2017), https://www.floridabar.org/the-florida-bar-news/gal-project-aims-to-help-children/ (last accessed August 30, 2020).

[2] *See id.*

[3] *Guardian ad Litem Program's Collaboration with the Florida Bar's Pro Bono Appellate Lawyers Wins Taxwatch Prudential Productivity Award, Guardian ad Litem Program* (May 17, 2018) https://guardianadlitem.org/guardian-ad-litem-programs-collaboration-with-the-florida-bars-pro-bono-appellate-lawyers-wins-taxwatch-prudential-productivity-award/#:~:text=The%20Defending%20Best%20Interests%20Project%20is%20a%20first%2Dof%2Dits,have%20donated%20over%202200%20hours. (last accessed August 30, 2020).

[4] Morgan Weinstein, *New Pro Bono Program Aims to Reframe the Way Domestic Violence Injunction Opinions are Written*, Fla. B. J. Vol. 94, No. 4, p. 34 (July/August 2020).

Mr. Weinstein is board certified by the Florida Bar in appellate practice. He is a partner at Twig, Trade, & Tribunal, PLLC, focusing on appellate practice and trial support.

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by Brendan A. Sweeney

Florida Commercial Leases and the Effects of Force Majeure Clauses in the Era of COVID-19

Our country is experiencing one of the most unprecedented events in modern history. Businesses throughout the country and Florida are feeling the economic impacts as governmental regulations, aimed at curbing the spread of COVID-19, have made it difficult to continue normal operations. This economic turmoil has business owners asking one common question: "If my business is not making money, how will I be able to pay rent?" Some of these businesses are exploring solutions that would relieve them of their rent obligations. These businesses may be correct in doing so, but this area of the law can become confusing as there are different approaches depending on the circumstances. These different approaches may be in the form of a force majeure clause within the lease agreement, or based on the common law doctrines of impossibility, impracticability, or frustration of purpose.

Force majeure clauses are common in many types of agreements, especially leases. Force majeure clause seek to protect the contracting parties from events outside of their control that may render continuing obligations under the contract harmful or moot. Before the pandemic, these clauses never attracted much attention because of the limited and very specific events in which they can be invoked. But COVID-19 has made them very relevant.

Force majeure clauses are easy to spot. Most are included as standard language that begins under a section of the agreement titled "Force Majeure." This clause will lie dormant within the lease unless a specified event occurs, often from a list that includes earthquake, hurricane, other acts of God, loss of power, government laws and regulations, war, insurrection, and even pandemic. The remainder or the clause will contain the parties' rights and responsibilities and what performances may be excused. Therefore, a force majeure clause provides a starting point for determining whether a party's non-payment of rent will be excused.

Force majeure clauses are not the only avenue a business may explore in obtaining relief from rent payments that they cannot afford due to the current health crisis. The common law doctrines presented below may also help in providing a lawful basis for the non-payment of rent.

Impossibility. Impossibility is a defense to a breach of contact action that involves the destruction of the subject matter of the agreement. For example, if a leased property burned down, this doctrine may provide the lessee with a basis for not paying rent. *When looking at the language of a contract, it is important to discern whether the purpose of the contract was made impossible during a temporary COVID-19 government closure or from the effects of one.*

Impracticability. Impracticability i a lesser degree of impossibility. Here, while performance under the agreement *is not impossible, the circumstances may mean it is in, either, or both parties' best interests to terminate the agreement. In circumstances during the pandemic, it could be deemed that a party's duty to perform is impractical yet must still fulfill the contract terms when possible. This could result in a party having to perform partially or resume full performance with a reasonable extension of time.*

Frustration of Purpose. With frustration of purpose, performance by either party may not be impossible, but an event occurs that is outside of the parties' control and substantially affects the purpose of the contract, and the other party was aware of this purpose. *Due to the emergency ordered closures of COVID-19, the courts may be willing to expand their opinions of what defines the defenses of impossibility of performance or frustration of purpose within this specific context.*

Force majeure clauses may preclude the availability of these common law doctrines. Further, the clause may even exclude inability to pay rent as an obligation to be suspended during the force majeure event, leaving a party still responsible for rent. Therefore, it is important that these clauses are reviewed carefully to determine the meaning.

When faced with a force majeure issue, courts will strictly interpret the clause to best give effect to the parties' intentions. This analysis is fact based and will only provide relief to a party who has carefully and correctly claimed force majeure. In most cases, this means that the circumstances must clearly align with at least one of the events specifically listed in the clause. As such, the common law doctrines of impossibility, impracticability, and frustration of purpose are best utilized as defenses when the agreement is silent on force majeure. If an agreement lacks force majeure language, the common law doctrines act as a default. In any case, there will be a thorough analysis of the facts of the case before a court will decide whether any of these concepts are appropriate as applied to the facts.

Brendan A. Sweeney, Esq., LL.M., Sweeney Law, P.A. a boutique law firm in Fort Lauderdale, Florida, is an AV Preeminent Martindale Rated Attorney, that has been selected as a Florida Super Lawyer and Florida Legal Elite in 2020, and regularly handles construction, real estate, and business litigation matters throughout Florida.

PREMATRIAL ASSETS

by Martyn S. Elberg

What happens to my premarital assets after death? Should I get married or not?

"Well it depends." That is my favorite attorney answer because I can always follow up with several questions that will guide the client to see what is best for his or her situation.

For example, let's say a potential client has the following assets and is considering getting married:

- One million in a 401k
- $30,000 checking/savings account
- One house which is his homestead
- Two cars

After he dies, he wants his future wife to be able to live in the house until she dies or is remarried. Then he wants the house and all contents of the house to go to his two adult children after her death or remarriage.

The house and contents have been transferred to his revocable trust, which gives everything to his children, and he would prefer to keep it that way, and direct his children to allow her to live in the house. The children are also named as beneficiaries on all of his accounts.

The next part is surprising to most people... non-estate attorneys included.

Without getting too technical and detailed, if he were to get married and do nothing with his estate plan, the following scenario could unfold after he dies.

First, because of spousal rights, she would be entitled to up to $20,000 of exempt (from probate) property: household furnishings, personal property and appliances. Also, she could get the two motor vehicles titled in his name, with certain restrictions, if she regularly used them as her personal vehicle.

She may also receive a spousal elective share of his estate. She could open a probate case and elect to have this share awarded to her, since she is not included in the trust or will.

The elective share is equal to 30% of the net value of all his probate assets and non-probate assets, which would include assets owned jointly with others, assets held in a revocable trust, cash value of life insurance policies, pensions, interest in protected homestead, and retirement plans to name a few. So basically, she can have the entire estate plan set aside.

If there are insufficient assets in the estate, beneficiaries of IRA/401k and investment accounts would be required to contribute to the satisfaction of the 30%.

Next, the house would be subject to her marital homestead rights. This means by operation of law she is given a life estate in the house. Or within six months of his death, she could also claim the right to an undivided one-half interest in the homestead, instead of the life estate. Meaning she would own half of the house and your children would own the other half.

Finally, she would be intitled to a family allowance of $18,000 if she petitions the court.

Now that he has all of this information he is wondering if marriage is a good idea or not. Of course, I follow up with "it depends" and go on to explain various ways he could protect his assets and have them go to his children.

He could revise his estate plan to include her and what he wants her to receive, but that probably isn't enough as she can still get everything mentioned above.

The best way is to create a prenuptial or premarital agreement often referred to as a prenup, or even a post-nuptial agreement.

It is the romantic document that ensures a lifetime of trust and love... Well, maybe not, but it can protect your interest in your premarital property.

A properly drafted and executed prenup can spell out as much detail as necessary to keep your client's interest in real estate, retirement accounts and any other assets separate.

He can include the "until death or remarried" clause and have her waive her spousal interest and rights to claim anything against his assets.

After they get married, he would update his estate plan reflecting the marriage and the terms in the prenup. And they live happily ever after and he can die with peace of mind. Unless, of course, she challenges the validity of the prenup after he dies, which is another story.

This has been a simplified version of what could happen to the client's assets if he does nothing. There are more facts to consider and a few more laws to incorporate, so take this as an overview of what to lookout for when you have this situation come up with a client or potential client.

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MEDIATION THEN ARBITRATION

by Peggy Gehl

A New Alternative Resolution

Exploring new alternatives to reduce increasing caseloads, Circuit Judge Carlos Rodriguez took a tip from a lawyer friend that some judges on Florida's West Coast had a possible solution. The attorney furnished Judge Rodriguez with a copy of a uniform Order of Referral to Mediation and Nonbinding Arbitration.

"The first order I received referred the case first to arbitration, then to mediation. I flipped that to mediate first then arbitrate to save additional efforts and fees in the event the case settles at mediation," Judge Rodriguez said. "To expedite the process, the same person acts as the mediator and the arbitrator."

The Judge's edited order was soon put into place in his civil division in late 2019. He realized some early success with this new approach. His division case count of more than 2,500 cases realized a reduction not explained by private settlements, mediated settlements, or completed trials.

Three months later, in the Spring of 2020, the country was near a shutdown with the Covid-19 pandemic, and our courts were no exception. Hearings became Zoom conferences; judges, lawyers, and support staff worked from home; and jury trials became a recent memory. Judges were advised the courthouse would be closed at least through September, and probably through the end of the year.

Now more than ever, Broward Circuit/Civil judges, whose divisions were being assigned an average of 130 new cases per month, sought out the uniform order to help reduce caseloads.

Circuit Judge William Haury obtained a copy of the uniform order, tweaked it with his own language, and began serving it sua sponte. Shortly thereafter, he enters another order continuing the jury trial. All non-jury cases remain on the calendar call docket.

The legal support for ordering a case to both arbitration and mediation is found in F.R.Civ.P. 1.800:

> A civil action shall be ordered to arbitration or arbitration in conjunction with mediation upon stipulation of the parties. A civil action may be ordered to arbitration or arbitration in conjunction with mediation upon motion of any party or by the court, if the judge determines the action to be of such a nature that arbitration could be of benefit to the litigants or the court.

Getting your case onto this track can originate from a joint stipulation, a motion from either party, or sua sponte from the court.

"Bill and I were two of the judges who seemed to be in trial all the time. You can't try yourself out of a backlog one case at a time," said Judge Rodriguez.

On August 18th, both Judges Rodriguez and Haury presented a webinar to the members of the Broward County Bar Association on this innovative order. The interest from the members was overwhelming. Anxious to settle cases, and worried about the future timeline for getting a case to a jury, most lawyers welcomed an additional layer of alternative resolution after a failed mediation.

"My caseload has been reduced from 2,600-2,700 cases to just above 2,400. I don't know if the cause is the new order, but it's the only administrative change I've made," Judge Haury said.

Florida Rules of Civil Procedure 1.800 to 1.830 address non-binding arbitration, as well as Administrative Order 2017-71-Civ (as corrected), and Chapter 44, Fla. Stat., specifically sec. 44.103, Fla.Stat. Most of the provisions contained in the rules and sec. 44.103, Fla. Stat. are encompassed in the orders of referral.

Arbitrators serve at the pleasure of the Chief Judge, who must approve applicants as "qualified" to serve as arbitrators for Circuit and County Court civil matters in the Seventeenth Judicial Circuit. Those seeking to serve as an arbitrator must complete an application which can be obtained from the Court Mediation and Arbitration Program at the Courthouse. All approved arbitrators are listed on the 17th Judicial Circuit's website.

The Florida Rules for Court-Appointed Arbitrators set forth arbitrator qualifications in Fla.R.Arb. 11.010 and 11.020. All arbitrators must be members of the Florida Bar and must complete a 4-hour course in arbitration approved by the Florida Supreme Court. There are exceptions to both requirements: any non-lawyer arbitrator may serve only on a panel and not as the chief arbitrator; and, former trial judges are usually exempt from the 4-hour arbitration course.

In Circuit matters, arbitrators are paid a per diem fee of $1,500.00 for a permitted one day. If an arbitrator seeks additional fees, the parties must agree. When asked if any appointed mediator/arbitrator had complained about the fee, Judge Rodriguez said no one has complained so far. But, he added, a pro se party had complained because the fee was too costly. If charged on an hourly basis, some arbitrator-attorneys think the fees are too low.

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"One arbitrator-attorney complained the fee was too low for the amount of work involved," said Judge Haury. "I just said, fine, and appointed someone else."

"Another arbitrator spent a day reading and researching voluminous case materials, and another day conducting the arbitration. She submitted an invoice for $3,000.00. The Plaintiff's attorney objected. It was a no-go," added Judge Rodriguez.

And, there are some attorneys who refuse to pay the arbitration fees for a client who refuses to pay. They argue that sec. 44.103(3), Fla.Stat. states the parties shall compensate the arbitrators. Both mediators and arbitrators who don't want to chase parties for payment often send a "letter contract" to the attorneys binding them for the fees.

Not every case is appropriate for arbitration. Pursuant to A.O. 2017-71-Civ, if a party to a civil action has been declared indigent by the Clerk, the case may not be referred to arbitration. Bond estreatures, bond validations, extraordinary writs, and civil and criminal contempt are also excluded.

If the mediated case reaches an impasse, the mediator, the parties, and the attorneys, commence non-binding arbitration. The mediator then becomes the arbitrator. Just as in mediation, the parties attending arbitration must have full authority to settle the case.

"The idea is that arbitration should be conducted informally. The evidence should be kept to a minimum, and information can be presented to the arbitrator through documentation, including affidavits, and arguments of counsel," said Judge Haury. "The goal is to complete the arbitration in a day, not to use five days as in a jury trial."

At mediation, if there has been confidential information exchanged between the parties and the mediator, the burden is on the party seeking to maintain confidentiality to advise the mediator (now arbitrator), before the arbitration begins, that the information is to remain confidential.

The order provides judges an option of determining that a panel of three arbitrators is appropriate for certain types of cases instead of a single arbitrator. Pursuant to Rule 1.810, F.R.Civ.P., in the event a panel is ordered, the court appoints one of the arbitrators to be chief arbitrator. The parties must agree to an arbitrator or a panel of three arbitrators, as designated by the Order of Referral, within fifteen (15) days. Without an agreement, the Court will appoint the arbitrator(s) from the approved list. Some of the court orders give parties only ten (10) days to agree on a mediator/arbitrator(s) before appointing the court's choice.

When asked how arbitrators are chosen by Judges Haury and Rodriguez, both use the Circuit's approved list. In a case where there is need for an arbitrator who has special expertise in certain areas of the law, the judges may match that arbitrator with the specialized case.

Arbitration must be completed within thirty (30) days after the first arbitration hearing, but in no event later than sixty (60) days. Thereafter, the arbitrator's decision must be rendered in writing and served on the parties within (ten) 10 days after the arbitration ends. The decision is kept secret from the Court. The original decision and any transcripts are sealed and filed with the Clerk at the time the parties are served with the decision.

Not happy with the arbitrator's decision? Any party may ask the court for a trial de novo, but the request must be made within 20 days after service of the written decision, pursuant to Rule 1.820(h), F.R.Civ.P. If no timely motion is filed requesting a trial de novo, the court will enter the arbitrator's decision as a judgment.

Non-binding arbitration has been in use in the County Courts for years. To date, there have been no county civil divisions wherein a combination mediation/non-binding arbitration order has been adopted. The same rules and statutes apply to non-binding arbitration in county cases except that arbitrators in county cases are paid $750.00 per diem instead of $1,500.00.

"I order mediation-arbitration on my oldest cases first, the 2014 and 2015 cases," said Judge Rodriguez, "then I enter orders for cases coming up on my trial calendar."

"I send out these orders one to two weeks before calendar calls," said Judge Haury. "Then I continue the trial which puts the case back into motion."

The combination order provides attorneys and the court with another alternative to resolution without needing jury determination.

Peggy Gehl has served in the judiciary of the 17th Circuit for more than 30 years. She is a designated Senior Judge, a certified mediator in Circuit/Civil, Family, and County cases, and a qualified Arbitrator.

ENLIGHTENMENT THROUGH ENGAGEMENT

by Kristen L. Palacio

Community Policing and Law Enforcement

The BCBA, in partnership with the "Can We Talk?" series, recently hosted the second discussion in its Enlightenment through Engagement series. The series consists of five panel discussions addressing matters of significant social and community interest. On September 25, 2020, Robert Vaughan and Eugene Pettis co-moderated the second segment of the series—Community Policing and Law Enforcement.

Mr. Vaughan and Mr. Pettis were joined by nine elite panelists: Chief Dexter Williams, Sheriff Gregory Tony, Broward County Mayor Dale Holness, Fort Lauderdale City Manager Chris Lagerbloom, Attorney H.T. Smith, Attorney Michael Dutko, Chief Sonia Quiñones, Captain Delrish Moss, and Jasmen Rogers-Shaw.

As Mr. Vaughan reminded all of our viewers and panelists, each of these segments is a safe space. "A space where we have hard hitting, meaningful conversations, free from partisanship, free from divisive politics. It's a space where facts matter." The panelists were shown poignant videos of true events happening around the nation and answered challenging questions from the moderators.

The central topic was systemic racism and institutional bias. As Mr. Pettis pointed out, so often we want to find a solution, but we cannot work toward a solution until we truthfully acknowledge the problem. Systemic racism and institutional bias mean that there are institutions that produce racially disparate outcomes.

When defining systemic racism, Mr. Smith reminded us that while organizations are trying to remove the "bad cops," there are obstacles because of The Police Officers' Bill of Rights and various collective bargaining agreements. There is no argument that there are good cops. The "bad cops" are often referred to as "bad apples." The debate, however, is often around whether these "bad apples" came to policing that way or whether something changed along the way. Many young officers initially expect to take on a "guardian approach."

Several panelists noted that there seems to be a transition from that idealistic mindset in the academy, to the actual culture of the policing as young officers are exposed to how things are handled on the street from a practical standpoint. That then begins an indoctrination into a brotherhood that has been passed down for decades. Several panelists noted that in order to change the culture, we need to convert young officers from the "warrior" mindset to a "guardian" mindset.

Recent headlines have shown us the negative repercussions that can occur when one officer speaks out against his colleagues who use excessive force. Mr. Lagerbloom shared that officers have to be brave enough not to tolerate the use of excessive force by their colleagues. Several panelists noted that Black officers face unique challenges, often expressing that "in the street I'm not black enough and in the department I'm not blue enough."

Broward Sheriff Tony described creating a diverse command staff to penetrate a culture that has suffered systemic racism for over a hundred years.

Chief Williams suggested connecting the community and law enforcement to address the fact that racial barriers persist. Captain Moss noted that in his experience "what you do as a leader is what is going to permeate throughout that organization."

The panelists discussed possible paths to reform. The ideas included a registry for those with a history of police misconduct, an end to no-knock warrants, an end to qualified immunity and a modification to The Police Officers' Bill of Rights to achieve a more just system.

Of course, a solution won't happen overnight. We must however continue the dialogue—especially with those who may not share the same viewpoint—so that we expand awareness and see the change our community so desperately needs.

Kristen is an attorney at Kim Vaughan Lerner LLP. Kristen is the Past Chair of the BCBA's Hispanic Lawyers' Committee and the President Elect for the Broward County Hispanic Bar Association.

RECENT DEVELOPMENT IN LAW

by Debra P. Klauber

Is it the receipt of the medical malpractice notice of intent (or the mailing of it) that is relevant for the purposes of determining whether the statute of limitations has been tolled?

Where the plaintiff mailed her notice of intent one day before the statute of limitations expired, and the defendant did not receive the notice of intent until three days after the statute of limitations expired, the trial court held that the claim was barred. The Second District affirmed based on precedent, but recognized and certified a conflict with the Fourth and Fifth Districts on this issue and the dissenting judge sided with those districts, noting that the mailing or service of the notice of intent should suffice as the trigger date under the statute of limitations. This is one to watch. *Boyle v. Samotin,* 45 Fla. L. Weekly D1577, 2D18-2932 (Fla. 2d DCA July 1, 2020).

Attorney cannot waive a privilege objection that is held by the client.

In a declaratory judgment action, the appellate court upheld the trial court's decision to allow limited depositions of the insurance company's representatives to address whether the carrier was on notice of the claim. However, the appellate court ruled that the trial court had gone too far in allowing the depositions to include topics such as claims handling and business practices. Even though the carrier's coverage counsel had consented to allow questioning on topics that should have remain protected, the court held that the attorney's communications had not waived the client's privilege objection. *Owners Ins. Co. v. Armour,* 45 Fla. L. Weekly D2105, 2D18-4385 (Fla. 2d DCA Sept. 9, 2020).

Even when a dangerous condition is open and obvious, the occupier of the premises is not excluded from its duties to protect and warn invitees of the unreasonable risk of harm.

In this premises liability claim, the trial court granted summary judgment in favor of the defendant based on a finding that a depression in the pavement was open and obvious. The appellate court reversed on several grounds. First, based on the testimony, a jury could have reasonably concluded that the hole in the pavement was not open and obvious. Second, given the novel architecture of the ice cream shop and the patrons' need to watch for other vehicles in the parking lot, a jury also could have concluded that an invitee negotiating the parking lot might not see the impending danger. *Greene v. Twistee Treat, USA, LLC,* 45 Fla. L Weekly D2101, 2D18-4064 (Fla. 2d DCA Sept. 4, 2020). *See also*, *Echevarria v. Lennar Homes, LLC,* 45 Fla. L. Weekly D1567, 3D19-1422 (Fla. 3d DCA July 1, 2020)(finding factual issue as to whether defendant's uncommon design or mode of construction created a hidden danger).

What happens on appeal if there is no transcript?

The appellant has the burden of demonstrating that there was an error by the trial court and, without a transcript of the proceedings, the appellate court is unable to resolve factual issues and the trial court gets the benefit of the doubt. The appellate rules allow for a statement of evidence to be filed with the appellate court. However, it is critical to note that the statement, and any objections or proposed amendments from the opposing party, are to be filed with the trial court for its approval before it can be considered a proper substitute for a transcript. *Waites v. Middleton,* 45 Fla. L. Weekly D2130, 1D19-414 (Fla. 1st DCA Sept. 10, 2020).

Appellate court suggests reconsideration of the effect of a bankruptcy stay during the pendency of an appeal by the debtor.

Under Florida law, an automatic stay is imposed on litigation when bankruptcy is filed. However, under the existing case law, that automatic stay provision does not apply in appellate court where it is the debtor who is seeking bankruptcy protection is the appellant. The rationale behind this policy is that the bankruptcy stay "acts as a shield" to protect the debtor who has already lost and should not continue to benefit from the stay. Recognizing that this earlier decision has created confusion and "mischief," the appellate panel suggested that the court should reconsider and recede from that holding. *Nat'l Medical Imaging, LLC v. Lyon Financial Servs., Inc.,* 45 Fla. L. Weekly D2071 3D20-730 (Fla. 3d DCA Sept. 2, 2020).

Where there is no showing of criminal intent, it is reversible error for trial court to deny a defendant's motion for attorneys' fees for defending a civil theft claim.

This litigation arose after a dispute over the distribution of funds collected during a brief joint venture. The plaintiff was eventually successful on the breach of contract claim, but the trial court granted a directed verdict on the civil theft claim, finding no evidence of criminal intent. Thereafter, the court denied the defendants' motion for attorneys' fees in defending the civil theft claim. The appellate court reversed, holding that when the trial court determined that there was no evidence presented in support of an essential element of the civil theft claim, that was tantamount to a determination that the claim was without any factual or evidentiary support, warranting an award of the fees expended on the civil theft claim. *Island Travel & Tours, Ltd. v. Hauf,* 45 Fla. L. Weekly D2071, 3D16-2085 (Fla. 3d DCA Sept. 2, 2020).

Debra P. Klauber, Esq., a partner with Haliczer Pettis & Schwamm, oversees the firm's trial support and appellate practice and provides guidance to litigators throughout Florida. Debbie can be reached at: 954-523-9922 or dklauber@hpslegal.com

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By Charles Eiss and Tiexin Yang

Updates on FFCRA – Work-Availability Requirement

In response to the COVID-19 pandemic, Congress passed the Families First Coronavirus Response Act ("FFCRA"), which would remain effective from April 1, 2020 through December 31, 2020. The Department of Labor ("DOL") was charged with administering the statute and a Final Rule implementing the law's provisions was soon published. The FFCRA includes two major provisions: the Emergency Family and Medical Leave Expansion Act ("EFMLEA") and the Emergency Paid Sick Leave Act ("EPSLA").

The EPSLA requires covered employers to provide paid sick leave to employees who are "unable to work (or telework) **due to** a need for leave because of any of six qualifying COVID-19-related conditions, where the employee:

(1) "is subject to a Federal, State, or local quarantine or isolation order related to COVID-19";

(2) "has been advised by a health care provider to self-quarantine due to concerns related to COVID-19";

(3) "is experiencing symptoms of COVID-19 and seeking a medical diagnosis";

(4) "is caring for an individual subject" to a quarantine or isolation order by the government or a healthcare provider;

(5) is caring for a child whose school or place of care is closed, or whose childcare provider is unavailable, because of COVID-19; or

(6) "is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor."

DOL's Final Rule implementing EPSLA excluded from these benefits employees whose employers "do not have work" for them, which is the work-availability requirement, one of the issues in *State of New York v. U.S. Department of Labor, et al.,* No. 1:20-cv-03020 (S.D. N.Y. Aug. 3, 2020). In the Order issued on August 3, 2020, Judge Paul Oetken of the Southern District of New York concluded that the work-availability requirement exceeded DOL's authority under the statute because the requirement failed the *Chevron* two-step framework. Judge Oetken acknowledged that the traditional meaning of "because" and "due to" implies a but-for causal relationship. However, as applied in the context of EPSLA, Judge Oetken cannot conclude that the terms "because" or "due to" unambiguously foreclose an interpretation entitling employees whose inability to work has multiple sufficient causes – some qualifying and some not – to paid leave. Judge Oetken therefore concludes that EPSLA's text is ambiguous as to whether it requires but-for causation in all circumstances, or whether some other causal relationship – specifically, multiple sufficient causation – satisfies its eligibility criteria. Judge Oetken then moves to step-two of *Chevron* and concludes that the Final Rule's differential treatment of the six qualifying conditions, imposing the work-availability requirement to only three of the six qualifying conditions, is entirely unreasoned. The Final Rule has offered no explanation why the work-availability requirement only applies to three qualifying conditions when the six qualifying conditions share a single statutory umbrella provision containing the same causal language. The requirement would considerably narrow EPSLA's potential scope but the only justification for the work-availability requirement provided in the Final Rule is "because the employee would be unable to work even if he or she" did not have a qualifying condition. Judge Oetken considers this reasoning a terse and circular regurgitation of the requirement, which does not pass *Chevron's* minimum requirement of reasoned decision-making.

In addition to the work-availability requirement provision, Judge Oetken's Order also vacated nationwide the provision requiring an employee to obtain his or her employer's approval before taking FFCRA leave intermittently, the provision defining "health care provider" for purposes of employees whose employer may exclude them from FFCRA leave, and the provision requiring documentation of a need for leave prior to taking leave. Judge Oetken's analysis throughout the ruling strongly indicates that the main purpose of the FFCRA is to provide relief to American workers and the statute therefore should be construed broadly in favor of American workers[1].

[1]Effective September 16, 2020, the DOL issued revised regulations in response to Judge Oetken's opinion in *State of New York v. U.S. Department of Labor, et al.,*. While in some instances the updated guidance is consistent with the Court's ruling, the DOL effectively "doubled down" on the work availability issue thereby placing the DOL at potential odds with the Court. It remains to be seen what the future will hold on these constantly evolving interpretations of the FFCRA and it is strongly recommended that employers and employees alike seek the advice of legal counsel when addressing any FFCRA matter.

Chuck Eiss is the managing partner of the Law Offices of Charles Eiss, P.L., a boutique employment law firm representing both employers and employees.

Tiexin Yang is an associate attorney at the Law Offices of Charles Eiss, P.L., a boutique employment law firm representing both employers and employees.

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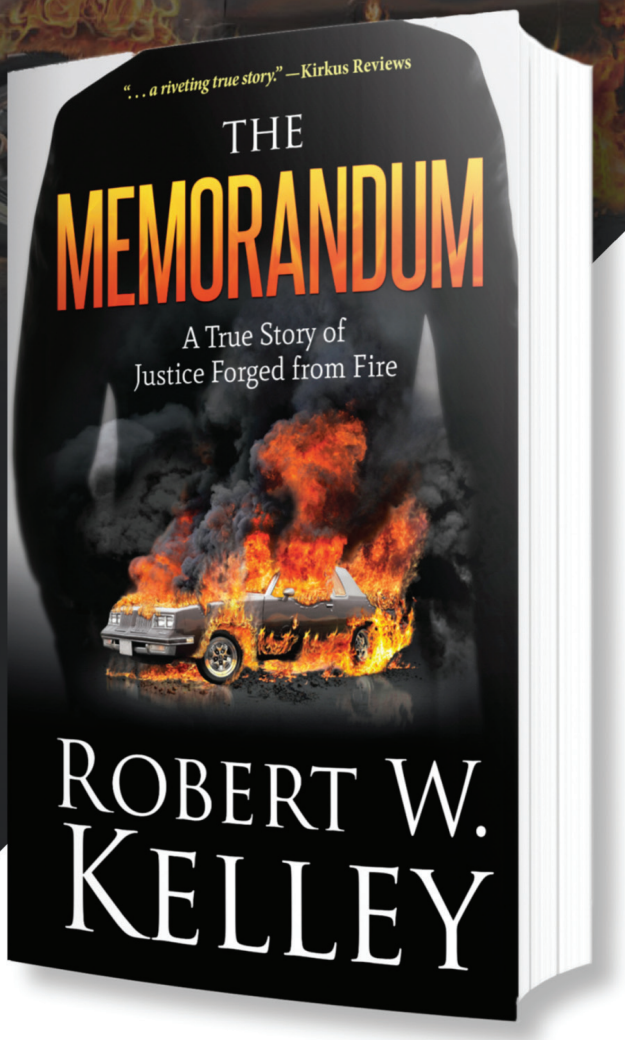

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October 6
Professionalism Webinar: Zoom Views from the Bench
Time: 12:00 p.m. – 1:00 p.m.
Cost: $15 BCBA Member; $25 Non-Member

October 7
Webinar: Ethical Challenges in Personal Injury Cases
Sponsored by Law Offices of Anidjar & Levine, Dolan Dobrinsky Rosenblum Bluestein LLP, Frankl Kominsky P.A., and Prestige Reporting Services
Time: 12:00 p.m. – 1:00 p.m.
Cost: $15 BCBA Member; $25 Non-Member

October 8
Webinar: How to Avoid and Resolve Probate and Trust Related Title Issues
Time: 12:00 p.m. – 1:00 p.m.
Cost: $15 BCBA Member; $25 Non-Member

October 8
Law Firm Management: Programs that can take your firm to the next level Webinar
Time: 1:00 p.m. – 2:00 p.m.
Cost: $15 BCBA Member; $25 Non-Member

October 9
Probate Judges Roundtable Webinar
Time: 12:00 p.m. – 1:00 p.m.
Cost: $15 BCBA Member; $30 Non-Member

October 14
Noche Latina Primera Parte (Part 1) - Lunch Pick-Up
***orders MUST be placed by 10/8**
Time: 12:00 p.m. – 1:00 p.m.
Venue: Broward County Bar Association
Cost: $15 BCBA Member; $30 Non-Member

October 14
Noche Latina Segunda Parte (Part 2) Zoom Event - Cooking Demos!
Time: 5:30 p.m. – 6:30 p.m.

October 15
Criminal Law Update with Judges Coleman & Fein
Time: 12:00 p.m. – 1:00 p.m.
Cost: $15 BCBA Member; $30 Non-Member

October 20
CFLPSF October General Meeting
The impact of divorce on child & adolescent development
Time: 6:00 p.m. – 7:15 p.m.
Venue: Zoom
Cost: Free

October 21
ASFMA CLE/CME: Judge Carol-Lisa Phillips
Time: 12:00 p.m. – 1:00 p.m.
Cost: $15 ASFMA/BCBA Member; $35 Non-Member

October 22
Florida Supreme Court Justice Alan Lawson: WELLNESS Webinar
Time: 12:00 p.m. – 1:30 p.m.
Cost: $10

October 29
Trial Strategy in a Virtual World
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Time: 12:00 p.m. – 1:30 p.m.
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October 30
Enlightenment through Engagement: Criminal Justice Reform
Time: 12:00 p.m. – 2:00 p.m.

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