

# FORUM 8

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Eighth Judicial Circuit Bar Association, Inc.

November 2020

## President's Message

By Philip N. Kabler, Esq.



*Prefatory remark: This offering is being prepared one month prior to the general election, with its national, state, and local outcomes. I am by no means a 'tea leaves reader,' so I will not predict what will transpire.*

As lawyers we should always remain focused on the following Biblical phrase "*Justice, justice shall you pursue,*" which is a portion of Deuteronomy 16:20. This notion applies to all of us regardless of our respective theological (or non-theological) orientations. It forms the core of our oath, our ethics, our professionalism, and our civility. In addition, it is especially pertinent this month.

By the time you read this piece much of national, statewide, and local significance will have occurred. Foremost, the general election. As discussed in the October issue of *Forum 8*, one of our roles as community builders is to assist and build up the six counties of our circuit and beyond. Some residents will be pleased with the various results, some will be disappointed, and others will question the meaning and implications of those results. How will the new federal, state, and local leadership impact lives? How will Florida Constitution and local ordinance changes affect individuals, families, and businesses? It is our job as servant leaders to help provide meaning to the numbers, and to reinforce those results against the rule-of-law. This is a function we have been trained to do as stewards of the rights of others, and which we can - and must - do fairly, calmly, and reassuringly.

As to the EJCBA itself, we enjoyed a busy October, with several virtual events. (We all look forward to the time when we can soon gather in-person, which we will

do as soon as it is safe to resume.) And November shows every indication of being similarly occupied.

Since we did not have a UF Homecoming weekend this year, our annual and much beloved James C. Adkins, Jr. Cedar Key Dinner has been rescheduled to November 12<sup>th</sup>. Many thanks to Norm Fugate for his efforts to keep this tradition intact. The Cedar Key get-together is one which our members await as a time for informal collegiality among the bench and bar.

On November 20<sup>th</sup> we will welcome Florida Bar President Dori Foster-Morales as the keynote speaker for our monthly meeting. Many of us attended the Virtual Town Hall President Foster-Morales convened in August, when she facilitated a conversation among a panel from our local bench and bar to discuss the challenges confronting and responses implemented in our Circuit as a result of the pandemic. During our November meeting, we will have an opportunity to hear about her goals and initiatives as our Florida Bar leader. Plus, she will participate in our *pro bono* recognition event. For those who have not yet met or heard President Foster-Morales, please take this opportunity. You will be glad you did.

An advance planning note. We will not have a luncheon meeting in December. (That is customary.) Instead, we will have our Holiday Party on Friday December 11<sup>th</sup>. We can only hope this year's party is as fun (to use a simple word which accurately captures the spirit intended) as last year's celebration. Who can forget President-Elect Evan Gardiner's festive attire? Perhaps we can encourage a repeat from him this year.

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## 2020 - 2021 Board Officers

**Philip N. Kabler**  
*President*  
2700 NW 43rd St, Suite C  
Gainesville, FL 32606  
(352) 332-7688  
[pkabler@boginmunns.com](mailto:pkabler@boginmunns.com)

**Robert E. Folsom**  
*President-Elect Designate*  
220 S. Main Street  
Gainesville, FL 32601  
[folsomr@circuit8.org](mailto:folsomr@circuit8.org)

**Dominique Lochridge-Gonzales**  
*Secretary*  
1000 NE 16th Avenue, Bldg 1, Ste B  
Gainesville, FL 32601  
(352) 415-2324  
[dominique.lochridge-gonzales@trls.org](mailto:dominique.lochridge-gonzales@trls.org)

**Evan Minton Gardiner**  
*President-Elect*  
151 SW 2nd Ave  
Gainesville, FL 32601  
(352) 388-7385  
[gardinere@pdo8.org](mailto:gardinere@pdo8.org)

**Sharon T. Sperling**  
*Treasurer*  
P.O. Box 358000  
Gainesville, FL 32635  
[sharon@sharonsperling.com](mailto:sharon@sharonsperling.com)

## 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](mailto:dvallejos-nichols@avera.com).

## Members at Large

**Jan Bendik**  
3600 SW 19th Ave, Apt 13  
Gainesville, FL 32607  
(352) 374-4122  
[prague@mindspring.com](mailto:prague@mindspring.com)

**Mikel Bradley**  
1000 NE 16th Avenue, Building I  
Gainesville, FL 32601  
(352) 415-2304  
[mikel.bradley@trls.org](mailto:mikel.bradley@trls.org)

**Raymond F. Brady**  
2603 NW 13th Street, Box #403  
Gainesville, FL 32609  
(352) 554-5328  
[rbrady1959@gmail.com](mailto:rbrady1959@gmail.com)

**Jodi H. Cason**  
PO Drawer 340  
Starke, FL 32091  
(904) 966-6319  
[Casonj@circuit8.org](mailto:Casonj@circuit8.org)

**Allison Derek Folds**  
527 E. University Ave.  
Gainesville, FL 32601  
(352) 372-1282  
[derek@foldsandwalker.com](mailto:derek@foldsandwalker.com)

**Norm D. Fugate**  
P.O. Box 98  
Williston, FL 32696  
(352) 528-0019  
[norm@normdfugatepa.com](mailto:norm@normdfugatepa.com)

**Dean Galigani**  
317 NE 1st Street  
Gainesville, FL 32601  
(352) 375-0812  
[dean@galiganilaw.com](mailto:dean@galiganilaw.com)

**Alexis J. Giannasoli**  
151 SW 2nd Ave  
Gainesville, FL 32601-6229  
(352) 338-7369  
[giannasolia@pdo8.org](mailto:giannasolia@pdo8.org)

**John "Eric" Hope**  
2506 NW 21st Avenue  
Gainesville, FL 32605  
(352) 872-5020  
[ehope@gainesville-lawyer.com](mailto:ehope@gainesville-lawyer.com)

**Abby H. Ivey**  
1524 NW 12th Road  
Gainesville, FL 32605  
(786) 201-8955  
[abbyivey@outlook.com](mailto:abbyivey@outlook.com)

**Frank E. Maloney, Jr. - Historian**  
445 E. Macclenny Ave., Ste. 1  
Macclenny, FL 32063-2217  
(904) 259-3155  
[Frank@FrankMaloney.us](mailto:Frank@FrankMaloney.us)

**James H. McCarty, Jr. (Mac)**  
2630 NW 41st Street, Ste A  
Gainesville, FL 32606-6666  
(352) 538-1486  
[jhmccjr@gmail.com](mailto:jhmccjr@gmail.com)

**George Nelson**  
81 N. 3rd Street  
Macclenny, FL 32063  
(904) 259-4245  
[nelsong@pdo8.org](mailto:nelsong@pdo8.org)

**Peg O'Connor**  
102 NW 2nd Avenue  
Gainesville, FL 32601  
(352) 372-4263  
[peg@toklegal.com](mailto:peg@toklegal.com)

**Lauren N. Richardson**  
3620 NW 43rd Street, Unit B  
Gainesville, FL 32606  
(352) 204-2224  
[lauren@laurenrichardsonlaw.com](mailto:lauren@laurenrichardsonlaw.com)

**Scott Schmidt**  
2957 SW 39th Ave  
Gainesville, FL 32608  
(352) 615-7229  
[scottschmidtesq@gmail.com](mailto:scottschmidtesq@gmail.com)

**Dawn M. Vallejos-Nichols - Editor**  
2814 SW 13th Street  
Gainesville, FL 32608  
(352) 372-9999  
[dvallejos-nichols@avera.com](mailto:dvallejos-nichols@avera.com)

## About this Newsletter

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### \*\*\*NOTE NEW MAILING ADDRESS\*\*\*

Eighth Judicial Circuit Bar Association, Inc.  
P.O. Box 140893  
Gainesville, FL 32614  
Phone: (352) 380-0333  
Fax: (866) 436-5944

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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.

**Judy Padgett**  
*Executive Director*  
P.O. Box 140893  
Gainesville, FL 32614  
Phone: (352) 380-0333  
Fax: (866) 436-5944  
[execdir@8jcba.org](mailto:execdir@8jcba.org)

**Dawn M. Vallejos-Nichols**  
*Editor*  
2814 SW 13th Street  
Gainesville, FL 32608  
(352) 372-9999  
(352) 375-2526  
[dvallejos-nichols@avera.com](mailto:dvallejos-nichols@avera.com)

**Deadline is the 5th of the preceding month**

# Alternative Dispute Resolution

By Chester B. Chance and Charles B. Carter



## CAP: I did not know that

Many cases that are mediated involve the application of § 768.28, *Fla. Stat.*, “Waiver of sovereign immunity in tort actions.” Mediating and negotiating claims under the sovereign immunity statute involve some basic understanding of unique restrictions associated with the statute. We would like to touch upon some of the very basic matters in evaluating and resolving these cases either pre-suit, in litigation or at mediation. Why? Because a lack of knowledge of these BASIC matters in what we call CAP cases can lead to a totally erroneous risk analysis during negotiation of a settlement in a CAP case.

As we discuss some important considerations in CAP cases, please do not email us with scathing and sarcastic accusations of “everybody knows that stuff in your article” or “why did you waste our time telling us about things EVERY attorney knows?”

We assure you, we swear in fact, that everything we discuss in this article has occurred multiple times at mediation either due to attorney or mediator lack of knowledge or forgetfulness. We promise that is true.

Like what? Well, that sovereign immunity cases involve a CAP. In fact, sovereign immunity or CAP cases are the *only* type of case where both the mediator and the lawyer can tell a plaintiff exactly what their best outcome will be: the CAP. We know there is such a thing as a Claims Bill, but Claims Bills are so unique and rare we are going to move them to the side and pretend, for now, they are not an option.

About 10 years ago when the CAP was increased, you would not believe how many attorneys were unaware the CAP had increased. And some lawyers were even unaware for a few years after it increased. Again, we swear. The CAP currently is a \$200,000/\$300,000 CAP (\$200,000 per person and \$300,000 per incident.) And believe it or not, some lawyers are unaware of the per-incident CAP, as in when a wrongful death action is in play. Yes, we swear that happens. Basic? Yes. Forgotten sometimes? Yes. Unknown sometimes? Yes.

What else is forgotten or unknown? How about that the CAP, say \$200,000 for example, applies to damages AND attorney fees and costs. For maybe the last time: we

see that lack of knowledge occur. We see mediators who did not know that the CAP is a CAP on damages, fees, and costs. We promise we see it. Important for a risk analysis? Sure is, since thinking that costs are in excess of the CAP is an awkward post judgment discussion with your client and a big roadblock to settling a case due to a poor risk analysis. If you incur \$25,000 in costs taking a case to trial, your client should know well in advance that the \$200,000 CAP (per person) *includes* costs. As a result, if the case results in a verdict triggering the \$200,000 CAP then every dollar in costs reduces what ultimately goes to the client. Basic? Yes indeed. Overlooked or not considered during negotiation? Again, roger that.



Anything else? Yep. The sovereign immunity statute in its title references a “limitation on attorney fees.” Sure, you say, fees are limited to 25%. Of course, we say. But, some attorneys actually forget that limitation, or are surprised to hear about it at mediation. Unfortunately, true. Does that affect negotiations? Uh, sure does. When your client asks what they will put in their pocket if they settle a CAP case for \$100,000 and you explain you are taking a 40% fee, the case might not resolve. But, when the 25% fee is used, your client’s attorney fees are \$25,000 rather than \$40,000, a \$15,000 savings and more money tumbling into the plaintiff’s pocket. An important and radical difference to the client. We have seen multiple times where attorneys explain a contingency fee above 25% to their clients either out of habit, forgetfulness, or great googly mooglies, lack of basic knowledge. For maybe the last time: we swear it happens. Does it affect risk analysis? Most certainly.

Now, something you experienced attorneys may not know. A proposal for settlement is handled totally differently in a CAP case. Example: the mediator is told “the plaintiff will file a PFS tomorrow for \$50,000 in this sovereign immunity case. We KNOW we will get a judgment for at least \$75,000. When we do, we will get up to the CAP in fees, another \$125,000! Please explain THAT to the government entity!”

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# Criminal Law

By William Cervone



*Yesterday I was clever, so I wanted to change the world. Today I am wise so I have begun to change myself.*

*Stop acting so small. You are the universe in ecstatic motion.*

*Raise your words not voice. It is the rain that grows flowers, not thunder.*

Salal ad-Din Muhammad Rumi, a Persian poet born in 1207, said these things, not me. According to one source, he was a "celebrated but unrealized mystical scholar who evolved into a master of spiritual awareness," and was also known as a jurist. His work is said to have broken barriers and transcended locations, ethnicities, time and languages. He was highly regarded as a teacher in 13th Century Persia, now central Turkey.

I am not a poet or even especially interested in poetry. I don't read it, I don't study it, I don't interpret it and I often don't get it. Instead, I found the first of these quotes in a novel I am reading as I write this (*Apeirogon* by Colum McCann, if you're interested; according to the author, apeirogon means a shape with a countably infinite number of sides). For context, the novel follows two men, one Israeli and one Palestinian. Each of them have lost young daughters to the kind of violence that is so commonplace in current day Israel. The story follows their remarkable journey past the pain and bitterness that such a loss must cause to finding not just peace for themselves, but friendship with each other and a path toward building a better world for their overlapping communities. After reading the first of these lines I easily found the others in researching Rumi. There are, of course, a great many more.

Sometimes it is remarkable to realize how little new there is in a world that changes and advances exponentially and faster than I can keep track of. Some 800 years after his words were written, it is still true to say that the cleverness of youth often, if not always, becomes the wisdom of age. Caution about our own superior understanding or insight into the way things work is probably a good thing, especially when that understanding has yet to be tempered by the realities of the world. Yet we should never think that we, individually or collectively, are small and insignificant for we all matter, each of us being a piece of the whole without which the whole is lesser. And could it be more truly stressed in a world where volume seems to substitute for discourse, accusation for debate, that the rain and not the thunder is what matters?

Perhaps I am at a unique juncture in my life but regardless I am privileged to have the opportunity to offer what might be some perspective. The words of the poet Rumi have substance, thought, and depth. Too often the words we hear now, however, lack anything like that. They are mere buzzwords, designed to appeal to thoughtless reactionaries. Not to disparage them, for they do have value, but words like "reform" and "smart" anything are too easily bandied about as if it is a given that what was is bad and must be thrown away. Words like "crisis" are used so freely that everything has become a crisis and a true crisis is exceedingly difficult to recognize. Worst of all, "Do you still beat your wife?" accusations of racism/sexism/any -ism of your choice as the explanation for everything do a grave disservice to the state of affairs in our country and the decades of work by many dedicated people toward improving those affairs. The sky is indeed falling, except for the one little fact that it actually isn't. And fault is attributed, not because of fault, but because of disagreement. More so, it is loudly attributed because he who can shout the loudest must surely be the one who is right. Not to mention that the whole concept of what's best for everyone as opposed to what's best for me, my rights as opposed to anyone else's, has taken on such disproportionate reality that one who doesn't agree must be evil. At best. Candidly, I'm not interested in buzzwords designed to curry favor or self-aggrandizement or knee jerk criticism. Give me some substance born of reflection and experience.

Thanksgiving as we celebrate it in the United States is not conceptually unique, or at least it shouldn't be, although the specific circumstances of our holiday may be. Many cultures and countries have their own day of reflection and appreciation for who and what they are. We might be unique, however, in how much we have to be grateful for. Even for the worst off of us, we live in times of unprecedented abundance and comfort. Please, especially this year, can we have a little less histrionics and a little more sincerity and unity along with our thanks?

## SAVE THE DATE!

There will be a joint Zoom meeting of the EJCBA and the Alachua County Medical Society on Tuesday, February 16, 2021 from 6:00 p.m. – 7:15 p.m. This meeting will include a panel discussion of "General Legal Insights for Practicing Physicians." For questions or additional information, contact Ray Brady at [rbrady1959@gmail.com](mailto:rbrady1959@gmail.com); watch EJCBA emails and future issues of *Forum 8* for event registration information.

# Three Rivers Legal Services? Do You Know Us?

By Marcia Green

Pro Bono Director, Three Rivers Legal Services



While preparing a presentation about the history of Three Rivers for our Annual Retreat (this year via Zoom), I had the pleasure of walking down memory lane. Just a few years ago, Three Rivers celebrated our 40<sup>th</sup> Anniversary. Sometimes, though, I wonder if the attorneys in our community really know who we are and what we do!

Three Rivers Legal Services is a local non-profit providing civil legal assistance to the poor, abused, disabled and elderly in North Florida. We also focus on providing preventative legal education with a variety of outreach activities.

We receive grant funding from the Legal Services Corporation (LSC), the US Department of Justice, USDA, IRS, The Florida Bar Foundation, Florida Attorney General, United Way, Elder Options, Elder Affairs and the Florida Coalition Against Domestic Violence. We also receive funding through filing fees from many of the counties we serve, Meridian Behavioral Healthcare and Volunteers of America for veterans and a few other grants and local projects. Each grant, regardless of its size, has specific requirements and eligibility guidelines.

Three Rivers Legal Services began in the late 70s as a merger of Storefront Legal Aid in Gainesville and the legal aid division of the Suwannee River Economic Council in Live Oak. Initially we provided services in just seven counties in the Eighth and Third Judicial Circuits and then added an additional five counties. Our board consisted of such Gainesville dignitaries as retired US District Court Judge Stephan Mickle, retired Circuit Judge Larry Turner, attorneys Marvin Bingham and Bill Salmon, and the late attorneys Ken Davis and Barbara Burkett. Original staff attorneys included Judy Collins, who recently came out of retirement to work part-time on our Legal Helpline.

Many of our former staff attorneys are now well-known in the Gainesville community. EJCBA newsletter editor Dawn Vallejos-Nichols was a staff attorney and is now on our Board. Circuit Judge Gloria Walker started her Three Rivers career while in law school and spent the majority of her career as a staff attorney, managing attorney and litigation director. Recently retired Senior Legal Skills Professor and Director of the Virgil Hawkins Civil Clinics, Jeff Grater, started his career as a Three Rivers staff attorney as did his former law school co-workers, Iris Burke and Peggy Schreiber. Retired Circuit Judges Chuck Chance and Rick Smith were volunteers.

In 2004, we opened a small office in Jacksonville to serve the northeast part of the State with LSC funds. We currently have just over 50 employees spread out between our three offices (Gainesville, Lake City and Jacksonville) and we provide services in 17 counties in North Florida. With a diverse set of staff attorneys, including those with years of experience and those who are relatively new law school graduates, the impact in the community is great.

At our recent staff retreat, some of our advocates told stories of the work done on behalf of a few of our clients. A couple of stories brought me to tears, including one about the victim of domestic violence whose spouse was finally convicted of attempted murder. The client's strength and the dedication and diligence of our staff attorney brought about the positive in a very frightening situation. Other stories, not quite as horrific but equally impactful, included securing clear title to heirs property, obtaining needed educational supports for a disabled child, enforcing the provision of prescribed medical and other care through Medicaid, and obtaining Social Security and Veterans benefits to homeless individuals.

Additional stories included preventing foreclosures, for example, helping a disabled veteran whose income decreased after the death of his wife. He was able to save his home with representation in the foreclosure and assistance in the modification of his mortgage. Another example is that of a couple who faced foreclosure after falling behind in the payments on their Agreement to Purchase. Through representation and negotiation, they saved their home from foreclosure and repaid the remaining debt.

Many of you represent clients every day in your private practices who have similar stories. Many of you take on representation of clients who have limited ability to pay for your services or work out agreements to assist them on a payment basis. The majority of those people who live at or below the federal poverty level, however, would have no ability to secure legal help without Three Rivers Legal Services.

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# “SELF-DEFENSE” - APPELLATE UPDATE

By Steven M. Harris



In the [January Forum 8](#), I questioned Fourth (*Chavers*) and Fifth (*Kirkland*) DCA opinions for confusing the availability of pretrial immunity or the defense of justification with the duty to retreat when a defendant was engaged in criminal activity or in a place unlawfully. [Cf. *Garcia v. State*, 286 So.3d 348 (Fla. 2d DCA 2019) (recognizing duty to retreat)]. In [Rich v. State](#) (2d DCA, June 10, 2020), an appeal by writ of prohibition was taken after the trial court indicated it would follow *Kirkland*. The DCA observed the issue was not “inconsequential,” but determined a premature advisory opinion was being sought since the trial court did not rule and enter a written order. It held the writ could not be used for that, and denied the petition without reaching the merits.

Harming or killing an innocent person is not a criminal act when it occurs by misfortune in the “proper and prudent exercise of self-defense.” The principle also applies when defending others. [David v. State](#) (3d DCA, June 10, 2020). In *David*, the defendant wounded innocent bystanders when defending his wife. The jury instructions were intended to but did not expressly explain this aspect of the law. Instead, the jury heard a mix of instructions focusing on *self-defense*. The DCA labeled this a “strawman defense” and observed: “No other instruction informed the jury that a volitional act in furtherance of the defense of another shielded culpability imposed by transferred intent. Given the unique circumstances presented in this case, we cannot conclude the error was vitiated by the ancillary instructions.” The court reversed the conviction, stating: “... the error here denied David the ‘ability to transfer his defense to the unintended’ victims...”

In the [April Forum 8](#) I cited unvarying case law holding that firearm display and gunpointing constitute the *use of nondeadly force as a matter of law*. See also [Lopez v. State](#) (3d DCA, Sept. 6, 2020); [Copeland v. State](#), 277 So.3d 1137 (Fla. 5th DCA 2019). However, I observed that gunpointing could be considered as *threatening deadly force*. See §§ 776.012(2), 776.013(1) (b), and 776.031(2), *Fla. Stat.* A DCA has now spoken to that. In [Little v. State](#) (4th DCA, Aug. 19, 2020), the defendant brandished a firearm, gunpointed a suspected burglar, and ordered him to the ground pending arrival of the police. The DCA rejected the *use of nondeadly force* gunpoint case law with these statements:

- “Pointing a firearm at another individual without discharging it is not “use of” deadly force, and that was the pertinent issue in an asserted defense of

property case prior to the effective date of the 2014 amendments to Florida’s self-defense/SYG statutes. Defendant’s actions at issue in this case occurred after the effective date, and therefore our inquiry turns to the added language, focusing on whether Defendant’s actions constitute justifiable “threatened use of” deadly force.”

- “Thus, threatening to discharge one’s firearm is a threat of deadly force regardless of an intent to actually cause death or great bodily harm of the recipient of the threat.”
- “When a person points a loaded firearm at another person and issues a command to do something, this is generally an implied declaration that the failure to abide by the command will result in the discharge of the firearm, i.e., deadly force.” (Citations omitted.)

The DCA did not address the legislature’s evident bungling in amending Chapter 776. The ostensible intent was to treat a “warning” shot as the *use of nondeadly force* (like gunpointing), and to clarify that the defense of justification was available when force was threatened, but not actually used. (Avoiding what happened in Kansas; see <http://volokh.com/2010/02/12/if-you-brandish-a-gun-in-self-defense-in-kansas-you-d-best-shoot-it/>). The amendments were not intended to overrule case law and transform gunpointing into deadly force. (Some states have enacted statutes which expressly make gunpointing nondeadly force. See, e.g., [Iowa Code § 704.2](#)). It is rather easy to appreciate (and judges have so noted) that gunpointing or a “warning shot” is preferable to shooting a person.

The holding in *Little* is impractical. Gunpointing accompanied by verbal command would only be justifiable when a deadly force predicate exists. See [May Forum 8](#). It is very common for a police officer to unholster or draw to gunpoint and issue commands (although not effecting an arrest) when the officer does not intend to (or may not lawfully) *use* deadly force in response to noncompliance. Left for future determination is gunpointing or firearm display without verbal command, mere verbal command while armed (e.g., “I have a gun...”), and display with verbal command (e.g., “go away now”) but without gunpointing. Of note: When *use of deadly force* is justified under § 782.02, *Fla. Stat.* (see [March Forum 8](#)), threatening deadly force should be justified as well, even though that venerable statute is silent on threats.

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# GOOD NEWS FOR BUSINESSES ON TRACKING TELEWORK TIME

By Jung Yoon



Millions of Americans continue to telework (or otherwise work remotely away from the worksite) during the COVID-19 pandemic. And telework is likely here to stay for many businesses and their workers post-pandemic. The nature of telework where workers can work anytime (outside traditional or scheduled hours of work) and without direct oversight, can result in a heightened risk of wage and hour litigation for employers.

In response, the Department of Labor (DOL) recently issued guidance on how employers should track compensable work—including unscheduled work—performed by teleworking employees under the Fair Labor Standards Act (FLSA). A policy prohibiting unscheduled work does not in itself relieve employers of their obligations under the FLSA. An employer is required to pay for all hours that it knows or has reason to believe were worked.

DOL makes it clear employers can minimize exposure to FLSA liability by providing a reasonable reporting procedure for non-scheduled time and then compensating employees for all reported hours of work. Employers should not prevent or discourage workers from accurately reporting hours worked.

If an employee fails to report unscheduled hours worked through the reporting procedure, “the employer is not required to undergo impractical efforts to investigate further to uncover unreported hours of work and provide compensation for those hours,” says the DOL.

While its focus is on telework, the DOL guidance applies to all unscheduled or off-the-clock work performed by nonexempt employees. Having an effective timekeeping policy and reporting procedure will be critical in showing that the employer exercised reasonable diligence to track all hours worked by its workers and any hours of work not reported under such procedure are not compensable.

The guidance, in the form of a field assistance bulletin, can be found at [https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab\\_2020\\_5.pdf](https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab_2020_5.pdf).

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## President’s Message

*Continued from page 1*

Now, those who know me personally are aware that Thanksgiving is one of my favorite events each year. I begin collecting recipes months in advance (with a nod to *Southern Living* magazine and the *Tasty, Delish*, and *Food Insider* Facebook pages, among others). I compose a detailed, *written* agenda for the day. (I can almost hear the chuckle from people who spend time with me. I am indeed prone to use checklists.) We start with breakfast (*which I call porridge, but is usually cinnamon buns*) over the “Macy’s Thanksgiving Day Parade.” Then much of the cooking begins during the “National Dog Show” (*our family dog wins every year*) - with accompanying snacks - and continues until whenever the dinner is ready. (We have also volunteered during this hiatus, which requires advance cooking to be done.) Then, of course, the dinner itself. Followed by football, games and movies. With desserts and more snacks. And then leftovers. *And the treadmill...*

I recently read an interesting and timely idea. When doing holiday shopping, instead of buying gifts from a non-local online source, perhaps gift certificates can be purchased from local stores trying their best to stay in business. It seems well worth considering to help support our area’s business community, and there is no downside to trying.

Our communal and personal traditions are significant. As lawyers we are accustomed to a world of precedents, which we naturally tend to carry-over beyond our professional work. What are your Thanksgiving traditions? Toward that end, you can be sure there will be an invitation to swap recipes and related ideas on our Facebook page. Let us add some fun together to our seasonal *stare decisis*.

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

Wishing you and yours an enjoyable and meaningful Thanksgiving.

*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>

# Settlements Involving Minors

By Krista L.B. Collins



Who else is tired of everything revolving around the pandemic? I know we have all talked about it a lot here—and with good reason—but I'm ready to talk about regular non-Covid legal questions and issues. Here we go!

Many of us who practice civil litigation are used to having clients who are decision-makers; people who can decide that the best course of action is to settle their claims rather than going to trial. For instance, presidents of corporations or managers of LLCs can make the smart business decision to resolve a case; people seeking to enforce payment under a contract can choose to accept a lesser sum; adult children dealing with the fallout of their parents' estate plan (or lack thereof) can reach an agreement with their siblings. But what happens when a client can't legally make that decision? What happens when the person with a claim is a child?

Sometimes the parent(s) can make the decision for their child. If the gross settlement in the case is less than \$15,000, under §744.3025(1)(a), *Fla. Stat.*, the parent can decide. But if the gross settlement in the case is between \$15,000 and \$50,000 and the court believes a guardian ad litem is necessary to protect the child's interest, then the court may appoint a guardian ad litem. *Id.* If the gross settlement exceeds \$50,000, then the court *shall* appoint a guardian ad litem to represent the minor's interest before approving the settlement. Sec. 744.3025(1)(b), *Fla. Stat.* For instance, if the total proposed settlement is \$500,000, with \$490,000 allocated to the parent and \$10,000 to the child, a guardian ad litem must be appointed to represent the child's interest.<sup>1</sup>

In practice, this requires a multi-step process. The first step is a motion and order appointing the guardian ad litem on behalf of the child. Second, the guardian ad litem must review the facts of the case and the proposed settlement, and prepare a report indicating the guardian ad litem's determination regarding whether the proposed settlement will be in the best interest of the minor. Finally, upon petition for approval of the settlement, the court must approve the settlement and how it is apportioned. The requirements and procedures are set out in §744.3025, *Fla. Stat.*, and Rule 5.636, *Fla. Prob. R.*

As to step one, "the appointment of the guardian ad litem must be without the necessity of bond or notice." Sec. 744.3025(1)(c), *Fla. Stat.* Furthermore, the court *shall* award reasonable fees and costs to the guardian ad litem, to be paid from the gross proceeds of the settlement. Once the guardian ad litem has been appointed, she must file and serve a report, no later than five days before the hearing on the petition to approve the

settlement, indicating her determination of whether the proposed settlement will be in the best interest of the minor. The report must include:

- a statement of the facts of the minor's claim and the terms of the proposed settlement, including any benefits to any persons or parties with related claims;
- list of the persons interviewed and documents reviewed by the guardian ad litem in evaluating the minor's claim and proposed settlement; and
- the guardian ad litem's analysis of whether the proposed settlement will be in the best interest of the minor.

Rule 5.636(f), *Fla. Prob. R.*

Rule 5.636(b) even sets forth precisely what information must be included in the petition for approval of the settlement:

- the initials, residence address, and the year of birth of the minor;
- the name and address of any guardian appointed for the minor;
- the name and residence address of the natural guardians or other persons having legal custody of the minor;
- A statement disclosing the interests of any natural or court-appointed guardian whose interest may be in conflict with that of the minor;
- a description of the cause of action in which the minor's interest arises;
- a summary of the terms of the proposed settlement; and
- copies of all agreements, releases, or other documents to be executed on behalf of the minor.

Rule 5.636(b), *Fla. Prob. R.*

In many cases, confidentiality is one of the settlement terms. Although the statute and rule do not specifically provide for it, many judges allow the guardian ad litem's report and the specific terms of the proposed settlement to be provided *in camera* in order to preserve confidentiality. Although there are precise requirements and steps that must be taken, obtaining approval of a settlement involving a minor child is still a fairly straightforward process.

Now, back to our irregularly scheduled programming: Wear your mask! Practice social distancing!

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<sup>1</sup>While it makes sense not to force parties to incur the additional expense of a guardian ad litem if the monetary settlement is small, it does leave open the possibility that a minor's claim could be settled for far less than it should be with no court oversight.

# ADR

Continued from page 3

Well, mediators don't explain it to the government entity unless the mediator does not know that a triggered PFS is treated differently in cases subject to §768.28 Fla. Stat. Way differently. In our example, the MOST the successful plaintiff attorney could recover is 25% of the judgment, or, \$18,750. We bet many of you did not know that. Read the last two paragraphs again. What, you say? "That is not true. That is not right. That is not fair!" Well here is a string cite of cases that say exactly that:

*City of Live Oak v. Harris*, 702 So. 2d 276 (Fla, 1<sup>st</sup> DCA 1997)  
*Pinellas County v. Bettis*, 659 So. 2d 1365 (Fla, 2<sup>d</sup> DCA 1995)  
*North Broward Hospital District v. Johnson*, 538 So. 2d 876 (Fla, 4<sup>th</sup> DCA 1989)  
*Hellman v. City of Orlando*, 634 So. 2d 245 (Fla, 5<sup>th</sup> DCA 245)  
*UCF Athletics Assoc. Inc. v. Plancher*, 121 So. 3d 616 (Fla, 5<sup>th</sup> DCA 2013)

Please read these cases; you may be disappointed, you may think it is unfair, but we did not make this stuff up. Again, we promise you many lawyers and mediators do not know this about a PFS in a CAP case. That leads to a completely new risk evaluation when it is discovered, hopefully, not after a trial when a big smile turns to a big frown and several unprintable utterances.

OK. You do not believe any of the things we mentioned are unknown to any member of the Florida Bar. Last time: We swear we are not making this up. And seriously: can you imagine how any one of the things we discussed would lead to a totally false risk analysis and possibly a totally awkward meeting with your client? Seriously.

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## Three Rivers Legal Services

Continued from page 5

I know many of you are already familiar with our program; many are volunteers or served as student interns and volunteers while in law school. Some of you are my former co-workers and I enjoy seeing you at bar events and around the community. Those who are less familiar with Three Rivers, please check out our website at <https://www.trls.org/> and become familiar with our program -- become a volunteer, refer your clients, learn about the need in our community and find informative information. We always have a need for volunteers and sometimes have open staff attorney positions. I am always happy to tell you about the work we do and truly enjoy singing the praises of the amazing folks with whom I have the privilege to work.

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## “SELF-DEFENSE” - APPELLATE UPDATE

Continued from page 6

**My take:** Gunpointing and “warning” shots are not force likely to cause death or great bodily harm. Thus, those acts should require only a nondeadly force predicate. If the status of a firearm discharge as a “warning” shot is disputed, the nondeadly or deadly force instruction would be given, after the jury answers a special interrogatory.

## Professionalism Seminar – SAVE THE DATE Inexpensive & Enlightening CLE Credits

By Ray Brady

Mark your calendars now for the annual Professionalism Seminar. This year the seminar will be held on Friday, February 26, 2021, from 9:00 a.m. (registration begins at 8:30 a.m.) until Noon at the Trinity United Methodist Church on NW 53<sup>rd</sup> Avenue or via Webcast if necessary. Our keynote speaker will be The Honorable Karen K. Specie, Chief United States Bankruptcy Judge for the Northern District of Florida, speaking on “COVID: 19 Professionalism Lessons for Lawyers.”

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

Watch your email and the *Forum 8* newsletter for reservation information in December. Questions may be directed to the EJCBA Professionalism Committee chairman, Ray Brady, Esq., at 373-4141.

# INVITATION TO RENEW / JOIN THE 2020-21 EJCBA

The Eighth Judicial Circuit Bar Association (EJCBA) cordially invites you to either renew your membership or join the EJCBA as a new member.

To join, please visit: [www.8jcba.org](http://www.8jcba.org) to pay online or return the below application, along with payment, to the EJCBA at PO Box 140893, Gainesville, FL 32614. The EJCBA is a voluntary association open to any Florida Bar member who lives in or regularly practices in Alachua, Baker, Bradford, Gilchrist, Levy or Union counties.

Remember, only current EJCBA members can access a printable version of the complete member directory, edit their own information online, post photos and a website link, and be listed on results for searches by areas of practice. Additionally, our Forum 8 Newsletter, event invitations, and updates are all sent electronically, so please ensure we have your current email address on file and add [execdir@8jcba.org](mailto:execdir@8jcba.org) to your email address book and/or safe senders list.

## EJCBA Membership Dues:

**Free** - If, as of July 1, 2020, you are an attorney in your first year licensed to practice law following law school graduation.

**\$70.00** - If, as of July 1, 2020, you are an attorney licensed to practice law for five (5) years or less following graduation from law school; or

- If, as of July 1, 2020, you are a public service attorney licensed to practice law for less than ten (10) years following graduation from law school. A "public service attorney" is defined as an attorney employed as an Assistant State Attorney, or an Assistant Public Defender, or a full-time staff attorney with a legal aid or community legal services organization; or
- you are a Retired Member of the Florida Bar pursuant to Florida Bar Rule 1-3.5 (or any successor Rule), who resides within the Eighth Judicial Circuit.

**\$90.00** - All other attorneys and judiciary.

## Optional – YLD Membership Dues (*in addition to your EJCBA dues above*):

**\$35.00** - EJCBA Young Lawyers Division (eligible if, as of July 1, 2020, you are an attorney under age 36 or a new Florida Bar member licensed to practice law for five (5) years or less)

\* EJCBA voting membership is limited to Florida Bar members in good standing who reside or regularly practice law within the Eighth Judicial Circuit of Florida. EJCBA non-voting membership is limited to active and inactive members in good standing of the bar of any state or country who resides in the Eighth Judicial Circuit of Florida, and to UF College of Law faculty.

## EJCBA Renewal/Application for Membership

**Membership Year: 2020 - 2021**

Check one: Renewal  New Membership

First Name: \_\_\_\_\_ MI: \_\_\_\_\_

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Bar Number: \_\_\_\_\_

List two (2) Areas of Practice:

\_\_\_\_\_

\_\_\_\_\_

Number of years in practice: \_\_\_\_\_

Are you interested in working on an EJCBA

Committee?

Yes

No

# ANNUAL EJCBA JIMMY G. ADKINS, JR Cedar Key Dinner

**THURSDAY, NOVEMBER 12, 2020**

**6PM at Steamer's 420 DOCK STREET,  
CEDAR KEY, FL**

**\$40\***

### Bring a Dessert to Share

Please feel free to bring a dessert to share at the event. Your colleagues will thank you!

**NOTE:** Attendance is limited to current members of the EJCBA and attorneys who are members' guests, but only if the guest attorney(s) would not otherwise be eligible for membership in the EJCBA. You may join/renew your EJCBA membership online at <http://www.8jcba.org/join-us/>

**REGISTER:** <https://8jcba.org/event-4013884>

**PLEASE REGISTER ON OR BEFORE  
THURSDAY, NOVEMBER 5, 2020**

\*\$45.00 at the door for attendees not having made prior reservations. If you are reserving at the last minute, or need to change your reservation, email Judy Padgett at [execdir@8jcba.org](mailto:execdir@8jcba.org) or call (352) 380-0333. Note, however, that after the deadline, EJCBA is obligated to pay for your reserved meal and we make the same obligation of you. Thank you for your support.

**Masks are required unless  
sitting at the table eating  
and social distancing is  
strongly encouraged.**

**The Fund**

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## November 2020 Calendar

- 4 EJCBA Board of Directors Meeting, Gainesville Chamber of Commerce, 300 E. University Avenue (or via ZOOM), 5:30 p.m.
- 5 Deadline for submission to December Forum 8
- 7 UF Football v. Georgia, Jacksonville, 3:30 p.m.
- 11 Veteran's Day Holiday – County & Federal Courthouses closed
- 11 Probate Section Meeting, 4:30 p.m. via ZOOM
- 12 Annual James C. Adkins, Jr. Cedar Key Dinner, Steamers, sunset
- 14 UF Football v. Arkansas, TBA
- 20 EJCBA Monthly Meeting with Dori Foster-Morales, Florida Bar President (includes pro bono recognition), 11:45 a.m. via ZOOM
- 21 UF Football at Vanderbilt, TBA
- 26 Thanksgiving Day – County & Federal Courthouses closed
- 27 Friday after Thanksgiving Holiday – County Courthouses closed
- 28 UF Football v. Kentucky, TBA

## December 2020 Calendar

- 2 EJCBA Board of Directors Meeting, Gainesville Chamber of Commerce, 300 E. University Avenue (or via ZOOM), 5:30 p.m.
- 4 Deadline for submission to January Forum 8
- 5 UF Football at Tennessee, TBA
- 9 Probate Section Meeting, 4:30 p.m. via ZOOM
- 11 EJCBA Holiday Event, TBA
- 19 SEC Football Championship, Atlanta, GA – TBA
- 24 Christmas Eve Holiday, County Courthouses closed
- 25 Christmas Day, County & Federal Courthouses closed

