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Supporting Equal Access to Law in Florida

July/August
2013

A Publication of The Friends of the

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On The Cover

“The Mantle at Four Eagle Ranch”

Pastel on sanded paper by Paul Nucci

Do you have original art or photographs that would be suitable for the cover of Friendly Passages? If so, send it to Nora@everlove.net

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On Behalf of the Publisher

By James T. Walker
President, Friends of the
Rupert J. Smith Law Library



“The Greeks embodied law-like mores in poetry to ensure their broad dissemination in an oral culture. If we are committed to having laws that ‘We the People’ can understand, we might do worse than to reinstate that practice.”

-- Kenji Yoshino, from “The Lawyers Know Too Much”

One Robert Brault said, “There is no such thing as gratitude unexpressed. If it is unexpressed, it is plain, old-fashioned ingratitude.” Once again, **Passages** and its readers are the fortunate beneficiaries of wonderful works from our distinguished writers. Their articles and essays enlighten, educate, inform, amuse and challenge. We need these writers and can’t thank them enough. It’s not easy drafting work of publishable quality. The practice pieces, case notes, legal book reviews and scholarly tomes offer immediate payoff to the busy professional who quickly glances through the pages to find a shiny nugget of information and then hurries off to the rest of the day’s schedule. The prose reminds one of the traditional regard given to the piano at a concert, likened by musicians as the queen of all musical instruments.

But the players would remind us that a musical is incomplete without a violin, drum and clarinet. Perhaps I might here make a case for submission of other written forms of knowledge to round out the collection, poetry and its close cousin, prose poetry. Those, too, are legitimate expressions in any publication, like this one, dedicated to exploring the culture of law.

It may have been Robin Williams’ character who said in “Dead Poet’s Society”, “We don’t read and write poetry because it’s cute. We read and write poetry because we are members of the human race. And the human race is filled with passion. And medicine, law, business, engineering, these are noble pursuits and necessary to sustain life. But poetry, beauty, romance, love, these are what we stay alive for.” How can poetry not be an honored presence in the pages of *Friendly Passages*? We simply must have it. You, our discerning reader, will need to come through.

My argument rests on the idea that law and poetry are kin. Percy Byshe Shelley wrote: “Poets are the unacknowledged legislators of the world. As such, poets have been prophets, advocates and touchstones of social change. It is a natural fit to bring such poets and their works into all subjects, especially in the social sciences.” (“In Defense of Poetry” (1821). Law is comprehensive in its embrace of everything that touches on life. So, too, is poetry. Through the power of simile, metaphor, meter, rhyme and imagery, the reader is inspired with the same ideas confronting the lawmaker, lawyer and judge. Anything fit for lawyers is likewise amenable to treatment by the poet. The language may differ, but the ideas and subject are often the same. There is, for example, the “Miranda Warning”, quatrain in form, described by Kenji Yoshino as “the most famous poem in law”. For another, there is Ashley Walker’s submission entitled “The Shooting”, appearing in the May 2012 *Passages*, which addresses the implications of Florida’s Stand Your Ground law. Or, to pick a third, there is “Oaks Tutt”, by Edgar Lee Masters, found reprinted from the public domain in this issue, where the narrator struggles to reconcile ideals with reality.

“Perhaps I might here make a case for submission of other written forms of knowledge to round out the collection, poetry and its close cousin, prose poetry. Those, too, are legitimate expressions in any publication, like this one, dedicated to exploring the culture of law.”

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Oaks Tutt by Edgar Lee Masters

My mother was for woman's rights.
And my father was the rich miller at London Mills.
I dreamed of the wrongs of the world and wanted to
right them.
When my father died, I set out to see peoples and
countries.
In order to learn how to reform the world
I traveled through many lands.
I saw the ruins of Rome.
And the ruins of Athens.
And the ruins of Thebes.
And I sat by moonlight amid the necropolis of Memphis.
There I was caught up by wings of flame,
And a voice from heaven said to me:
"Injustice, Untruth destroyed them. Go forth!
Preach Justice! Preach Truth!"
And I hastened back to Spoon River
To say farewell to my mother before beginning
my work.
They all saw a strange light in my eye.
And by and by, when I talked, they discovered
What had come in my mind.
Then Jonathan Swift Somers challenged to me debate
The subject, (I taking the negative):
"Pontius Pilate, the Greatest Philosopher of the
World."
And he won the debate by saying at last,
"Before you reform the world, Mr. Tutt,
Please answer the question of Pontius Pilate:
'What is Truth?'"

Prose poetry, disguised in form as ordinary prose, is given away by its lyricism. Richard Nordquist claims Lincoln's "Gettysburg Address" as a classic example. Consider another instance, "Detail", by Eamon Grennan: "I was watching a robin fly after a finch – the smaller bird chirping with excitement, the bigger, it's breast blazing, silent in light-winged earnest chase – when out of nowhere flashes a sparrowhawk headlong, a light brown burn scorching the air from which it simply plucks like a ripe fruit the stopped robin, whose two or three cheeps of terminal surprise twinkle in the silence closing over the empty street when the birds have gone about their own business, and I began to understand how a poem can happen: you have your eye on a small elusive detail, pursuing its music, when a terrible truth strikes and your heart cries out, being carried off."

That one, by the way, comes from a little strand that is updated and transmitted weekly to all of the Friends and friends of the Rupert J. Smith Law Library, entitled "Take a Break". The strand includes poetry and other odds and ends, quotes, the occasional letter, and song lyrics. It is a small reward sent out in an effort to express appreciation for their support of the law's ideal of providing equal justice for all, by making the law equally accessible for all. If you, also, might wish to subscribe to such ideal, go to our website, rjlawlibrary.org, and send in the Friends annual membership form you'll find there, along with \$10.00 for individual dues, or \$50.00 for a firm membership. We'll be happy to add you to the list of addressees.

But in the meantime, please consider sending in your best poetic efforts to *Friendly Passages*. Okay?



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Mentoring



By The Honorable Judge
Mark W. Klingensmith

“Successful mentoring can happen almost anywhere: playing a round of golf, attending a baseball game, or strolling through a museum. Being a mentor is not only about giving professional advice -- it includes giving life advice as well.”

The importance to a new attorney of developing a mentoring relationship, either in a law firm or in the legal community, has been widely acknowledged. Much has been written about how important it is for these new lawyers, especially in the first 1-3 years after leaving law school, to have someone available to provide the guidance needed to become a successful and respected attorney. Attorneys given no professional guidance at the outset of their careers often develop bad work habits, as well as poor stress management and coping skills. Mentors can play an indispensable role in helping new attorneys overcome the steep learning curve they face after leaving law school, and bridging the gap between passing the bar and establishing a successful law practice.

Many lawyers believe that mentoring occurs only within law firms. In fact, the mentoring process does not depend on the existence of any employer-employee relationship at all. However, mentoring is more than just instruction or supervision -- it involves a willingness to pass on knowledge, skill, and wisdom. In that sense, the “senior” attorney takes on the role of both advocate and supporter for the “junior” attorney. Mentors can help set goals for career development and help facilitate opportunities for the mentee to further those goals.

Mentors can serve as professional confidantes, to whom no question or concern will be considered silly or inappropriate. They get to know the newer lawyer on a personal level, often dispensing life lessons, helping the young attorney learn to deal with stresses or crises, and providing insight on dealing with the “personalities” on the bench and in the legal community.

It seems there are too few seasoned attorneys willing to undertake such a responsibility, especially compared to the number of new lawyers seeking a mentor. For those with the fortitude to step up and fill that role for someone, there is scant information on what it takes so that everyone gains value from the experience. Lori L. Keating, secretary of the Supreme Court of Ohio’s Commission on Professionalism, administers its Lawyer-to-Lawyer Mentoring Program. In her 2010 article for the ABA’s *GPSolo* newsletter, she provided valuable insight and advice to make the mentoring experience successful for all concerned.¹

Find the right mentee. While it would be important for someone to seek out the right mentor for him or herself, it is just as important that any prospective mentor “audition” their mentee. Do their legal interests match up with yours? Do you feel comfortable advising him or her about their professional goals? Do you value the same goals and ideals? If your mentee’s goals and interests are not the same things that you personally value, perhaps you should consider engaging with someone else.



Mentoring

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Share expectations. Mentors should always have a clear understanding about what they expect to achieve or obtain from their investment of resources and time. Look at yourself critically, and think about the strengths you have that you might teach. Do you feel that you have strength in networking, writing, communicating effectively with clients and others, or in balancing the demands of career and personal life? Share your perceived strengths at the outset with your mentee, and develop a mutual understanding about what is to be gained from the mentoring relationship. You should also be clear about how often you will be able to meet, the preferred method of communication between these meetings, and other time commitments that may impact your ability to timely respond to requests. Expectations are much more likely to be achieved by both sides if they are shared and mutually understood.

Get out of the office. Mentors and mentees who share common interests outside of the professional environment may feel they have a freer exchange of thoughts and feelings with one another. While it may be convenient to meet at someone's office, it is also a good idea to meet after hours on occasion, perhaps over a glass of wine or a meal. Sharing breakfast, lunch, dinner, or even a coffee break is also a great way to bring comfort and connection to your mentoring relationship. If you get to know your mentee as a person, not just as a lawyer, you will have a better idea of how to help them achieve their goals. Successful mentoring can happen almost anywhere: playing a round of golf, attending a baseball game, or strolling through a museum. Being a mentor is not only about giving professional advice -- it includes giving life advice as well.

Don't do all the work yourself. Mentors should make sure their mentee is invested in the relationship too. Although most mentees are eager to have as much contact as possible, many will be initially reluctant to make contact for fear of being perceived as too intrusive, or not wanting to monopolize their mentor's time. While you may need to take the initiative with contacting your mentee, this does not necessarily indicate a lack of interest on their part. Encourage them to contact you, to set up meetings, and to get in touch when needing help. This will help make your mentee more independent and take some pressure off you.

No access, no deal. Again, make sure your expectation about the time commitment is completely understood. To succeed, the relationship has to be a two-way street. Do not undertake the responsibility of mentoring if you do not have the time to invest. Simply stated, *you must be available*. No matter how much insight a mentor can offer, it has no value if the mentor and mentee never meet.

If it is too difficult for a mentee to see their mentor, or to receive a timely reply email or phone call, then there probably is no point continuing the relationship.

Follow up. It is easy to promise your mentee that you will "meet again soon." However, you may realize (perhaps months later) that you have not been able to keep in touch regularly. To prevent this, make it a point immediately after each meeting to mark your calendar with a future date, or at least a reminder to schedule a date and time to get together. Also, when big life events happen to you, let your protégé know, and ask him or her to keep you updated on their life events, too. Taking the time to call or e-mail about special occasions will help keep you and your mentee connected.

The benefits to a young lawyer of being mentored by a more experienced lawyer are obvious. But if asked, a mentor might admit that they probably derived as much benefit from the experience as did the mentee (perhaps more), especially with their own professional growth and career development. In many ways, mentoring can provide an experienced lawyer with a different outlook on life and the profession as a whole. It can serve as an impetus to reflect on one's professional life, to re-examine both personal and professional priorities, and even serve as a challenge to improve both.

People who have been a mentor to another lawyer report feeling a renewed sense of pride and purpose in their own work. Those who have been truly fortunate have even gained a life-long friend in the process.

Mentors are special people. Do you have what it takes to be one?

(Endnotes)

¹https://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/solo_lawyer_mentor.html

Judge Klingensmith is a Circuit Court judge in the 19th Judicial Circuit, currently assigned to the Family Division in St. Lucie County. He received his B.A. and J.D. degrees from the University of Florida. He now serves on the UF Law School Board of Trustees, as well as the St. Lucie County Children's Services Council, the Executive Roundtable of St. Lucie County, and is the Treasure Coast District Chairman for the Boy Scouts of America Gulf Stream Council. Judge Klingensmith is also Board Certified by the Florida Bar in Civil Trial Law, and a member of the local chapter of the American Board of Trial Advocates and the Major Harding Inns of Court.

This Just In.....

At the end of June, Judge Klingensmith was appointed to the 4th District Court of Appeals. Congratulations, Judge Klingensmith!

FLORIDA ADOPTS NEW LIMITED LIABILITY COMPANY ACT



By Philip B. Schwartz and Andrew E. Schwartz

During the recently completed legislative session, the Florida Legislature unanimously adopted CS/SB 1300, which is a complete re-write of Florida's limited liability company statute. The new limited liability company act (the "New Act"), which will be codified in Chapter 605 of the Florida Statutes, was proposed to the Florida legislature by a task force consisting of members of The Florida Bar Business Law Section, Tax Section and Real Property, Probate and Trust Law Section. The New Act, which was signed into law by Governor Rick Scott on June 14, 2013, will replace Florida's current limited liability company act (the "Existing Act"), which is contained in Chapter 608 of the Florida Statutes.

The New Act does a number of important things. First, the New Act modernizes Florida's limited liability company ("LLC") law, which has not kept pace with developments in the commercial use of LLCs. In that regard, while the New Act (which is called the "Florida Revised Limited Liability Company Act") is largely based on the 2011 version of the Revised Uniform Limited Liability Company Act ("RULLCA") promulgated by the National Conference of Commissioners on Uniform State Laws ("NCCUSL"), which is much improved and a more flexible statutory model on the forefront of development of LLC law, the New Act retains many provisions from the Existing Act that were deemed by the task force to be important to Florida users of LLCs. The New Act also includes desirable provisions taken from the ABA Revised Prototype LLC Act, the Revised Model Business Corporation Act, Florida's partnership acts and the LLC acts of Delaware and other influential commercial states. Second, the New Act corrects significant glitches in the Existing Act, makes it more clear, easier to use for the courts and practitioners, and makes it more consistent with Florida's other business entity statutes. Finally, adoption of the New Act keeps Florida competitive with other leading commercial states, giving Florida the opportunity to retain LLC formations, businesses and jobs that might potentially go to other states.

The New Act will become law on January 1, 2014, but only for LLC's organized on or after that date or for LLCs

organized prior to January 1, 2014 that elect to come under the New Act. However, the New Act will become effective on January 1, 2015 for all LLCs organized in this state, including those organized before January 1, 2014. The one-year extension is intended to give existing LLC's the time to get their house in order before they become subject to the provisions of the New Act.

Limited Liability Companies in Florida

Limited liability companies are useful vehicles to conduct businesses because of the flexibility that is afforded by their use, with pass through taxation, limited liability for the members of an LLC for the debts of the LLC, and the flexibility to contract among members regarding the manner in which the LLC will be operated. According to information posted on the website of the Florida Department of State (the "Department"), as of March 2013 there were approximately 705,000 LLCs organized in Florida, and during 2012 alone, nearly 170,000 LLCs were organized in Florida (compared to approximately 105,000 Florida corporations). This represents continued significant growth in the number of LLCs organized in this state and continues to illustrate that LLCs have become the vehicle of choice for organizing entities in Florida.

Highlights of the New Act

The New Act makes quite a number of changes to the provisions contained in the Existing Act. Some of the key changes include:

- The New Act like all LLC acts, is a "default" statute, meaning it provides rules that apply in the absence of an agreement among the members in an operating agreement, and the New Act, like the Existing Act, sets forth certain provisions that may not be waived by the parties in an operating agreement. However, the New Act expands the list of items that are nonwaivable under Florida law. For example, a limited liability company may not prevent a court from appointing a special litigation committee in connection with a derivative action proceeding. The New Act also provides that an operating agreement may not provide for indemnification for certain kinds of wrongful conduct and under certain circumstances. Further, the New Act's non-waivable provisions contain certain differences when compared to the Existing Act, with relation to which provisions are non-waivable and the extent to which other provisions can be modified or constrained.

Lions, Tigers, and Motions to Disqualify...Oh My!

By Leonard D. Pertnoy



I. Introduction

A survey of the American Bar Association’s Model Rules of Professional Conduct (Model Rules) demonstrates that almost all of the Model Rules that address conduct of litigation have been cited in motions to disqualify counsel for ethical violations.² Although the Model Rules were intended to serve only as a disciplinary tool,³ the courts have repeatedly relied on them in their rulings on such motions, probably because they are as close to a “bright line” as the courts and the practicing bar have in navigating the oftentimes “murky waters” of zealous advocacy.⁴ Many find this trend particularly disturbing, especially considering the ABA’s warnings about the susceptibility of the Model Rules to such misuse:

The purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer’s self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.⁵

Despite the filing of countless motions to disqualify opposing counsel based on the Model Rules, it seems that courts across the country are heeding the ABA’s warnings by viewing disqualification of a party’s chosen counsel as an “extraordinary remedy that should only be resorted to sparingly,”⁶ and that should only be imposed when “absolutely necessary.”⁷ Many courts considering such motions have noted their potential usefulness as litigation tactics. Florida courts have noted that “such motions are often interposed for tactical purposes,”⁸ and the Court of Appeal for the Sixth Judicial District of Florida specifically warned that “the ability to deny one’s opponent the services of capable counsel, is a potent weapon.”⁹

Many courts have noted that motions to disqualify “are often disguised attempts to divest opposing parties of their counsel of choice,”¹⁰ and have refused to disqualify opposing counsel merely because the moving party announced an intention to create a Model Rule violation as a means of removing opposing counsel by calling him as witness.¹¹

No where is this paradigm more striking than in the filing of motions to disqualify opposing counsel pursuant to the Model Rules governing attorney-client conflicts-of-interest that also allege attorney-witness violations as an alternative means of disqualification.¹² Take, for example, a particular motion to disqualify counsel for Defendant that is filed by counsel for Plaintiff under the auspices of the former-client-conflict Model Rule,¹³ which alleges not only that Plaintiff will be calling counsel for Defendant as a witness during trial, anyway (resulting in counsel’s apparently imminent violation of the attorney-as-witness Model Rule),¹⁴ but also that Plaintiff might be adding counsel for Defendant as a co-defendant in the action (resulting in counsel’s possible violation of the current-client conflict Model Rule).¹⁵ By utilizing the model rules as alternative fall-back provisions, motions such as this overtly exercise the Model Rule guidelines as procedural blueprints for disqualifying counsel, one way or another.

Part one (I) of this piece introduced the Model Rules and their susceptibility to tactical misuse. Part two (II) will illustrate the phenomenon mentioned above in detail, using Florida case law, and will provide a context for parts three and four, which will (III) discuss the history and justifications of the Attorney-Witness Rule in particular, and (IV) identify what is at stake from tactical misuse of the Attorney-Witness Rule. Part five (V) will conclude with proposals for courts and bar associations to better guard against tactical misuses of the Attorney-Witness Rule by opposing counsel—namely that courts should employ mandatory “necessity hearings” to determine whether disqualification is required, and that the bar should issue more stringent disciplinary consequences to deter tactical misuse of the Model Rules in general.

II. The Problem of Tactical Maneuvering: Cause-and-Effect

One clearly sees the problems created by tactical misuses of the Model Rules in motions to disqualify opposing counsel by looking at the causes and effects of such motions. Let us revisit our hypothetical motion filed by Plaintiff’s counsel to disqualify Defendant’s counsel, mentioned above.¹⁶

Endnotes for this article may be found on the last two pages of our online edition at: www.rjlawlibrary.org

Interpol:

International Law Enforcement

By Richard Wires

Writers of mystery and crime fiction, including screenplays, often mention Interpol in connection with checking on suspects or gathering further data. While most people know it is an international police organization, with a mystique of sorts, they are not familiar with either its character or operations. Interpol is formally the International Criminal Police Organization (ICPO) and is headquartered in France. It is an unusual law enforcement agency that makes no arrests and keeps no criminals in jail. Instead its mission is “preventing and fighting crime through enhanced international police cooperation.” Thus it functions as a worldwide clearing house for information about crimes and criminals. It maintains a large number of databases so that upon request it can provide documents and reports to the police of member nations, supplying them with information and liaison services otherwise very difficult or impossible to obtain. As a result, the police in Argentina or Tokyo have access to records from Bucharest and Morocco or anywhere else around the globe. Without the organization’s vast records the identities and past activities of suspected criminals and fugitives from justice might never be known.

Interpol was created in response to the increasingly international scope of crime as better transportation and communication systems developed in Europe. Separate and multiple contacts among local and national police agencies or specific personnel were cumbersome and often unproductive. In 1914, representatives from fourteen countries met at an International Criminal Police Congress in Monaco to discuss the best way to achieve closer coordination. However, the outbreak of World War I delayed plans and work. Another International Police Congress held at Vienna in 1923 set up the International Criminal Police Commission. There were fifteen founding members of the ICPC, all in Europe except for Egypt and China, but the United States joined that same year, and Great Britain became a member in 1925. World War II would prove disastrous for the ICPC. German annexation of Austria in 1938 put the ICPC under Nazi control until 1945. Four successive presidents were SS generals, including the notorious Reinhard Heydrich, who was assassinated in 1942, and the brutal Ernst Kaltenbrunner, who was tried for war crimes at Nuremberg and then hanged in 1946. SS control of the ICPC had included moving the organization’s headquarters to Berlin in 1942.

Allied victory in 1945 quickly led to reconstituting the body as the International Criminal Police Organization with its new headquarters located in the Paris suburb of Saint-Cloud.

As Interpol grew, its Paris facilities became inadequate, and in 1989 the headquarters were moved to Lyon in south-central France. For many years, the institution’s address for telegrams had been “Interpol” and in 1956 the already common name also became official for informal use.

The organization deals only with criminal activities. Interpol began developing specialized departments in 1930. At the time currency counterfeiting and passport forgery got particular attention. Many other specific areas of focus now exist. They deal with problems like organized crime, narcotics traffic, maritime piracy, cyber crimes, missing persons, pharmaceutical crimes, money laundering, child pornography, art thefts, and similar matters with an international dimension. To maintain its neutral character, its constitution forbids any involvement in domestic areas such as political, military, religious, or racial issues. Initially, it played no major role in the investigations of Nazi crimes. For instance, the Allies being aware of political realities thus made separate provisions. Now, however, the organization keeps records dealing with war crimes, acts of genocide, terrorists and their groups, weapons smuggling, and other illegal acts that constitute threats to international order. Interpol does not compile or publicize a listing of the “most wanted.” Such a roster would be too subjective and might help glorify those who are named. However, several years ago an informational roster by the organization’s Secretary-General contained names led by Osama bin Laden and included familiar figures about which there was wide consensus: war criminals, terrorists, drug kingpins.



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Personal Safety, Refuse to Be a Victim!

By Dennis Root



Personal safety is the responsibility of every individual. It is a fact that more times than not the “Bad Guy” is seeking a specific type. He, or sometimes she, is looking for that person who screams like the donkey from Shrek...”I AM A VICTIM! PICK ME! PICK ME!” Many feel that the police or a security officer should keep them safe. However, there is a lot of truth in the saying, “When seconds count, the cops are only minutes away.” Most of the time, the police or security officers are responding to a request for help. It is rare that the officer just happens to be at the right place at the right time. It does happen, but it’s rare.

Your personal safety is your responsibility. You do not want to fight but you have to be prepared to fight. In fact, you may need to fight for your life. Now, I do not want you to become paranoid and think everyone is out to get you. Good gravy that would become stressful! There are many good people in this world, but there are also some very bad people as well. That being said, here are a few simple some simple things you can all do to stay safe:

- 1. BE AWARE!** One of the most important components of personal safety is awareness. Learn to recognize locations to avoid and people to steer clear of. Think about where you park, the lighting in the area, how populated is it, etc. Listen to the intuition God gave you. You know, that feeling that makes the hair on the back of your neck stand up. If there is something that makes you nervous, AVOID IT! It is always best to avoid a situation if you can. Example: Leaving the mall at night is a major concern for many. Especially parents who have children working there until closing. When preparing to exit the mall, look around outside before you exit. Identify people who concern you and avoid them. If something feels wrong, have security or law enforcement escort you out.
- 2. BE PREPARED!** Think about situations you may face and develop a strategy for dealing with them. Perhaps you have decided to arm yourself with some type of personal protection device, such as pepper spray, or a TASER® weapon. Having them in your pocket or purse may make you feel better, but are you truly prepared to use them? I remember asking a woman to show me her car keys. She spent

a great amount of time digging through her purse to find them. If you have to do this for the personal protection device, the encounter will be over before you can implement your safety strategy. If you carry a large purse and are exiting the store at night, have your hand in your purse with the personal protection device in your hand and ready for use. Once you arrive at your vehicle and you are certain there is no immediate threat to your safety, release the item and immediately retrieve your keys to enter the vehicle. (God I pray you wont have to dig for them again.) Once in the car, lock the doors.

- 3. GET TRAINING!** One of the key elements to being aware and prepared is training. In fact, it is one of the most critical elements of your personal safety strategy. You have to receive training to enhance your awareness. Through your training you will become prepared to recognize and avoid dangerous situations. You also become prepared to deal with events you cannot avoid. If you carry the personal protection device, then you should have received training on how and when to use it. Perhaps you decided that your personal protection device will be a firearm. A firearm will not do you any good in the glove compartment of your car when you are exiting the mall. Therefore, it needs to be on your person and that requires specific licensing in most if not all states. You will need to attend a training course on carrying a concealed weapon so that you develop the knowledge about the law regarding firearm’s carry and use. More importantly the course you take should provide you with the opportunity to develop shooting skills that will be required to safely implement that weapon in your personal safety strategy. Physical self-defense skills are also another consideration. Physical contact is a less desirable solution, but one that may be required. If it is required, it will take training to prepare you for what you may be forced to do.

There are many different solutions to any given problem.

You have to consider what you are willing to do as well as what you are capable of doing. Remember, Be Aware, Be Prepared, & Get Training! You can REFUSE TO BE A VICTIM!

Dennis Root is a nationally recognized law enforcement trainer and proven expert witness. He retired from the Martin County Sheriff’s Office after completing 21 years in law enforcement and now serves as a professional investigator and expert witness. Dennis is the founder of Dennis Root & Associates, Inc. and co-founder of Tactical Advantage Solutions, LLC. He is an associate member of the Martin County Bar Association.

Interpol: International Law Enforcement

The increasing use of computers and other technologies in the commission of major crimes has underscored the necessity of maintaining centralized information that is readily available for quick retrieval. Through its vast computerized records, Interpol offers immediate twenty-four hour access and its channels of communication are secure. Each month Interpol's website draws over 2 million hits. Among the databases open to police queries are over 12 million reports consisting of stolen or lost passports and other travel documents, which are frequently used, whether unchanged or altered by criminals, together with ever expanding collections of both fingerprint and DNA records that can be tapped to establish the identities of individuals. The organization's services also provide targeted training, translations or analyses of the materials in its possession, identifying officers or forensic specialists for possible direct contacts, and many other kinds of expert investigative support. Under certain circumstances a field team can be dispatched by Interpol to work closely with national police units on special projects. It is estimated that worldwide, close to a thousand arrests every year result in large part from the organization's data.

"Interpol offers immediate twenty-four hour access and its channels of communication are secure. Each month Interpol's website draws over 2 million hits."

Today, about 190 countries belong to Interpol. Among intergovernmental organizations it is second only to the United Nations in the number of member countries pledging to cooperate. Few nations are not members: North Korea is one, but most others are small island nations in the Pacific. A General Assembly governs Interpol, a President serves, but the Secretary-General supervises day-to-day operations and Interpol's large staff.

In 2000, the appointment went to Ronald Noble, a former Under Secretary of the Treasury for Enforcement, the first American to hold the position. The organization's staff of about 600 people drawn from some eighty member countries helps ensure Interpol's wide range of skills and capabilities. Financing by member nations covers nearly all the organization's budget, reportedly between 60 and 75 million Euros a year, or nearly \$75 to \$100 million at current exchange rates, and additional revenue is derived from certain of its activities. To preserve the institution's integrity France's Cour des Comptes (Office of Accounts) acts as an independent auditor.

More can be learned from the organization's official website and its many public links:

And it was inevitable that the organization's work would inspire electronic games, Interpol and Interpol2, which allow players to investigate criminals and follow their activities around the world.

Richard Wires holds a doctorate in European History and a law degree. He served in the Counter Intelligence Corps in Germany and is Professor Emeritus of History at Ball State University, where he chaired the department and later became Executive Director of the University's London Centre. His research interests include both early spy fiction and actual intelligence operations. His books include "The Cicero Spy Affair: German Access to British Secrets in World War II."

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Fundamentals of the Carmack Amendment

by Daniel W. Raab, Esq.



The Carmack Amendment, 49 U.S.C.A. 14706, is a statute that regulates the liability of domestic carriers that travel across state lines within the United States. This article concentrates on this statute as it applies to commercial motor carriers. Although there are some similar concepts for liability that are similar to ocean carriers, such as the defense of an act of nature, the Carriage of Goods by Sea Act and the Carmack Amendment are two distinct statutes with shorter limitations of liability than what would apply in a standard breach of contract or tort claim.

If you have a claim against an interstate trucker, it is a good idea to obtain a copy of the bill of lading. This is the contract that governs the terms and conditions of the contract. Oddly enough, some of the motor carrier's shipping clients might issue their own bills of lading if they can convince the motor carrier to accept such a bill of lading.

Under the Carmack Amendment, a motor carrier bill of lading can provide that any claim must be made within 9 months. This claim must be in writing if required under the bill of lading and should be specific as to the damages. It is best to assume that you will have to make such a claim within 9 months. I have gone so far as to hire a process server to serve a motor carrier. If you do not do this, you could lose your total claim. I would suggest serving the motor carrier directly with the claim, unless it's insurance carrier or attorney gives you written permission from the motor carrier to serve one of them.

If the claim is declined by the motor carrier, you will have two years and a day from the date of declination in order to file a lawsuit. I would suggest that you do it within two years to be on the safe side. The notice and the contractual provisions are very different from Florida Law which allows 4 years to file on a tort claim and 5 years on a breach of contract claim.

The Carmack Amendment does allow for a motor carrier to have a low limitation of liability. (2-15 Law of Commercial Trucking § 15.08) It is important that you be aware of this if you are going to undertake such a claim. These limitations of liability are usually upheld unless there is an act of fraud, theft, conversion, and intentional destruction of the property. (2-15 Law of Commercial Trucking § 15.08)

It is also important to offer the shipper an opportunity to declare and pay for a higher value. (2-15 Law of Commercial Trucking § 15.08) Frankly, a shipper should carry its own first party insurance.

Motor carrier insurance policies have many exclusions and deductibles. The author has encountered policies that state that they have an unattended vehicle endorsement but it is only applicable if it is unattended in a fenced in area with security.

A carrier's defenses include an act of nature, an act of the public enemy, an act of the shipper (poor packing), inherent vice of the nature of the goods, act of a public authority, and freedom from negligence.

If you have an intermodal shipment, which is where trucking is involved as part of an international ocean shipment and if the bill of lading provides that the entire shipment is governed by the Carriage of Goods by Sea Act, then the Carriage of Goods by Sea Act would most likely supercede the Carmack Amendment under the Supreme Court cases of *Norfolk Southern Ry. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14 (U.S. 2004) and *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 558 U.S. 969 (U.S. 2009). They provide for an extension of contractual liability. An example of this would be if a shipment went by ocean from London to Jacksonville and then by truck to Atlanta. Even if the loss happened while in the truck's possession, the liability could be subject to the Carriage of Goods by Sea Act as opposed to the Carmack Amendment. This becomes important because there is a 1 year statute of limitation under the Carriage of Goods by Sea Act and an issue of the \$500.00 per package limitation.

There is also an entity known as a surface transportation forwarder which usually consolidates cargo and is subject to the Carmack Amendment. It does not actually own and operate motor vehicles but can be sued as a motor carrier under the Transportation Terms and Conditions, Raab, p. 26.

continued on page 15

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LITIGATION HOLDS: WHAT ARE THEY AND HOW DO THEY WORK?

By David Steinfeld, Esq.



Following the September 2012 amendments to our Florida Rules of Civil Procedure that added a mechanism by which parties can obtain electronically stored information (ESI) in civil cases, there has been an explosion of CLEs, articles, and videos on how to prepare for and manage this new area of practice. But, before a party can begin to amass, search, and produce relevant data in e-discovery, they must preserve that data. This is called a “litigation hold”.

WHEN AND WHY TO HOLD

Because ESI is easy to accumulate, delete, or lose, a preservation component has developed in practice to secure and segregate certain potentially relevant data at the outset of a dispute or litigation. Our Florida Rules place the burden on parties when a suit is filed whereas the Federal practice obligates preservation when a dispute reasonably arises. While it may not be required in Florida State Court practice to hold certain data before a suit is served, it is prudent and appropriate to do so for several reasons.

“The Court fined the attorney \$550,000 and he subsequently surrendered his law license. The takeaway here is obvious; preserve, don’t delete.”

First, sanctions can arise from the failure to preserve data, so why expose your client to those by allowing data to be deleted when you know of the likelihood or potential of litigation? Second, preserving data in anticipation of litigation will aid you in your early case assessment and assist you in compiling helpful and relevant ESI for your own case. Third, it is very easy to implement a litigation hold and preserve data.

WHAT IS A LITIGATION HOLD

A litigation hold is nothing more than a directive to ESI custodians to maintain specific data. This can be as simple as an e-mail telling specific individuals not to delete their e-mails sent or received about a certain transaction after a specific date. In so doing, you are identifying custodians of data, narrowing the scope of potentially relevant ESI,

and identifying possible key words or terms for your later e-discovery search. Thus, you are protecting your client from possible sanctions and making your later work in e-discovery easier, which translates into a cost savings for your client and provides a better legal service.

In some instances, however, a simple e-mail to custodians may not suffice as there are either too many to manage or you need to manage and track the hold to defend it later. Defensibility is and will remain a critical component in e-discovery. This concept is not limited to defending a search of data, but extends to the initial preservation and accumulation of the data. To accommodate these situations, many vendors have developed software to disseminate legal hold notices to custodians and track their actions in complying with those. This software can be stand-alone or integrated into e-discovery software. Either method works, it just depends on the situation, but as counsel, you need to know the options for your client.

WHEN DO YOU IMPLEMENT THE HOLD

This brings us to the situations in which you need to implement litigation holds. When the hold is triggered is something of a judgment call, but you are not ill advised to adopt a proactive approach to protect your client. I even include a section in my Retainer Agreements advising prospective clients of the new Rules, the obligation to preserve data, and a recommendation that they open a dialogue with me upon execution of the Agreement about this issue. You really can’t go wrong advising and managing an early hold, even in response to a demand letter from an opposing party, but you can expose your client to sanctions if you allow deletion of data and may expose your practice to severe penalties if you ever counsel a client to do so.

In a now infamous Virginia State Court case, a paralegal advised the Firm’s client to remove and delete incriminating photos from the client’s Facebook page. The Court later found that the attorney supervising the paralegal learned of the directive and approved it. The Court fined the attorney \$550,000 and he subsequently surrendered his law license. The takeaway here is obvious; preserve, don’t delete.

Likewise, if you are transmitting a pre-suit demand to the opposite side, nothing prevents you from including a litigation hold statement in that demand. In fact, it may now be prudent practice to do so as it brings the obligation forward in the process and can ensure preservation for your client’s benefit later.

LITIGATION HOLDS:

HOW TO CRAFT A LITIGATION HOLD

So what do you put into a litigation hold to another party? Do you just say hold your data or hold everything? No. That is not helpful to an opposing party and may even be unenforceable later because it is too ambiguous or burdensome. Litigation holds are specific to each situation, thus the appropriate method is to be as specific as you can at that early stage. It will be more beneficial to the process and more helpful to the opposing party if you can narrow a date range and include concepts or even keywords to help in the identification of relevant data.

The drafting committee of Florida's new E-Discovery Rules toyed with the idea of creating a form litigation hold notice for inclusion in the Civil Procedure Rules Forms, but ultimately decided against it because they recognized that these notices were situationally dependent and fact specific. Therefore, you can craft them in any form you wish, but they should convey information that is helpful to the party being asked to implement the hold.

CONCLUSION

In light of the fact that more businesses are utilizing and relying on electronic data, litigation holds will become an increasingly important part of pre-suit practice and early case assessment. Crafting and transmitting holds to an opposing party and initiating and managing holds, whether a formal demand is made on your client or not, will save your client money and help focus your case and your e-discovery efforts. You can do it yourself or you can use vendors and software to assist you as the situation requires, but you must get into the habit of incorporating these holds and educating your clients about them for their protection and benefit. Free videos and articles on e-discovery, data preservation, and litigation holds are at www.davidsteinfeld.com

David Steinfeld, Esq. is Board Certified in Business Litigation Law by the Florida Bar. He practices in Palm Beach Gardens and is rated AV-Preeminent by Martindale-Hubbell. His videos and articles on business litigation, e-discovery, and commercial law can be accessed at and he can be easily reached through www.davidsteinfeld.com.



Fundamentals of the Carmack Amendment

There is a third type of entity involved in interstate transportation which is a surface transportation broker which serves as a booking agent and is excluded from the Carmack Amendment. However a transportation broker acts as a motor carrier on a shipment, it can be sued as a motor carrier and be subject to the Carmack Amendment. This has been the subject of litigation. The author was involved in the case of *Active Media Servs. v. CAC Am. Cargo Corp.*, 2012 U.S. Dist. LEXIS 139785 (D.N.Y. 2012) where the broker was held not to be a motor carrier under the Carmack Amendment.

This article is intended to cover some of the basic issues that you might encounter in a Carmack Amendment case against a motor carrier.

Daniel W. Raab, Esq. is an attorney with offices in Miami Dade County, Florida. He is a graduate of the Johns Hopkins University and the University Of Miami School Of Law. He is the author of Transportation Terms and Conditions, Chapter 47 of the New Appleman Practice Law Guide, Chapter 5 of the Benedict on Admiralty Desk Reference Book, and a Contributing Author to Goods In Transit. He has taught as an Adjunct Professor of Law at the University of Miami School of Law, St. Thomas University School of Law, and the Florida International College of Law.



Last Issue's Cryptoquote Answer

*Hyk'wo yzz ry awovr ibvloc! Rytvh ec hykw tvh!
Hykw sykfrvef ec nverefa,
cy... Aor yf hykw nvh! - Tw. Cokcc*

*You're off to great places! Today is your day! Your
mountain is waiting,
so... Get on your way! - Dr. Seuss*

The Silent Pandemic of Domestic Violence and Legal Considerations

By Art Ciasca



In 2012 the State of Florida experienced an increase of 6.1% in domestic violence (DV) murders (2012 FDLE Uniform Crime Report). The actual numbers for DV murders were 191 in 2012 compared to 180 in 2011. In addition, in Florida there were 11 DV manslaughters last year. Interestingly, the overall number of domestic violence offenses (reported to law enforcement) in 2012 declined by 3.3% (111,681 in 2011 compared to 108,046 in 2012). The statistics indicate we are experiencing a small decline in the number of domestic violence episodes reported to law enforcement, but the cases are more severe. It needs to be stated that many victims of domestic violence do not report the incident to law enforcement for a myriad of reasons. It has been suggested the actual number of episodes are more than double the number reported by the FDLE UCR.

Across our country, almost 4 women die every day in domestic violence episodes at the hands of their intimate partners. Studies have estimated that 1 in every 3 women will be a victim of domestic violence at some point in her life.

Merriam-Webster defines a pandemic as something that is occurring over a wide geographic area and affecting an exceptionally high proportion of the population. I submit that, given the above statistics, domestic violence is a silent pandemic, since most victims do not share their victimization, due to pain, shame, fear of retribution, or other reasons.

One of the challenging components of working in a domestic violence center is balancing the need to create awareness that the center is available to assist victims of domestic violence, and ensuring the confidential nature of the location and the law-protected confidentiality of the persons receiving services. A situation recently occurred on the Treasure Coast where a woman came into our Shelter. She had been controlled by her husband, who is a business leader and well-connected member of the community. Upon her “disappearance” her husband had sought assistance a counselor, a former Board Member of our organization, as the husband feared she had come to us for shelter. We made repeated attempts to educate the counselor on the fact that we cannot confirm or deny her participation with us, and that any adult can “disappear” to any DV center. Most notably, we informed the counselor that the most dangerous time for a victim is when she is talking about leaving, leaving, or just left.

The counselor’s insistence was that his job is to keep people together. We made it clear that our job is safety and support for the victim, and that victims are protected by the law as to their confidentiality, due to the potential lethality involved in domestic violence.

Many victims seek protection through legal assistance. Injunctions are designed to offer the victims a level of safety and comfort, but we are keenly aware that the paper an injunction is printed on does not stop a bullet, as evidenced by the case in downtown Vero Beach at Over the Rainbow Childrens Consignment Shop , to name one instance. 31 year old Kate Kincaid was gunned down by her estranged boyfriend, despite having sought 3 Injunctions against him before she was killed in broad daylight.

Oftentimes victims seek familial help. In Palm City, a man killed his estranged wife’s sister while targeting his wife, who had returned to the house to pick up some belongings. This touched off a gunfight between the assailant and the victim’s brother-in-law, a Martin County firefighter who was there for protection. The fire lieutenant was seriously wounded.

It is apparent that one of the best answers to combat domestic violence would be greater punishment for abusers. The 2012 Florida Statutes provide some responses to this silent pandemic, in hopes of providing relief for the thousands of victims in the state. FS 741.2901 focuses on “the intent of the Legislature that domestic violence be treated as a criminal act rather than a private family matter.” It further states that “criminal prosecution shall be the favored method of enforcing compliance with injunctions for protection of against domestic violence as both length and severity of sentence for those found to have committed the crime of domestic violence can be greater, thus providing greater protection to victims and better accountability of perpetrators.”



The Silent Pandemic of Domestic Violence

Unfortunately, the above-stated statutes are not uniformly enforced throughout Florida and are not enough in protecting the victim and punishing the abuser. It is not uncommon for individuals charged with domestic violence to serve 24 hours in jail, then bond out of jail for \$50. The reality is that domestic violence is caused by an individual exerting power and control over his partner. A brief stay in the local jail can exacerbate the abuser's desire to gain and maintain power and control, and thus utilize more forceful methods in dealing with his partner. If the victim decides to leave the abuser, she is in the window of time that is the most dangerous.

"It is not uncommon for individuals charged with domestic violence to serve 24 hours in jail, then bond out of jail for \$50."

Law enforcement agencies, in locations throughout Florida, have begun to come onboard in this life and death cause. The Florida Coalition Against Domestic Violence (FCADV) which contracts and provides funding for Florida's 42 certified domestic violence centers, has funded InVEST Programs in several cities that have been identified as having a high number of domestic violence fatalities. The partnership between SafeSpace and the Ft. Pierce Police Department is a great example of multiple agencies collaborating in a joint effort. Not only is the SafeSpace InVEST Advocate co-located in the Ft. Pierce Police Department building, but the InVEST team, comprised of the SafeSpace Advocate, Ft. Pierce PD Crime Analyst, Detectives, and DCF staff review all DV cases for signs of high risk for lethality. Aggressive efforts are made by the InVEST Team to work with the victim to keep her safe, but also address and enforce batterer accountability and consequences. In addition, a jointly written Grant has been awarded to the Ft. Pierce Police Department for hiring a detective solely to work on domestic violence cases. This team approach is vital in reducing the number of domestic violence homicides; the city of Ft. Pierce has experienced an 80% reduction in DV deaths over the last 6 years. Strong community-based actions are essential in protecting victims.

A recent case in Martin County that appeared in the media was the story of a woman who was charged with contempt of court for failure to testify against her abuser. The front page story and photo displayed the woman in tears in the courtroom. The article failed to mention the reasons a victim might not want to testify in a courtroom in front of her abuser, which could include shame, pain, and the dreadful fear of retaliation upon his release from jail.

Jill Borowicz, CEO of SafeSpace offered these thoughts on this case: "Many victims refuse to testify.....They are terrified. She (or he) fears for her (or his) life. Batterers know this. They use different tactics to instill fear to gain and maintain aggressive control in the relationship. Other factors add to the victim's reluctance to break away from their attacker, such as economic dependence, lack of shelter, no significant network of support, and even shame and embarrassment about their situation."

Another tool in reducing DV deaths and abuse is awareness. Our goal at SafeSpace is to make sure that every individual in our three county area is aware that SafeSpace is here to assist in creating safety plans, escape plans, and provide shelter if necessary. All services are available on an Outreach basis, meaning victims do not have to move into a Shelter to learn the resources and options available. Studies have shown that 95% of DV homicide victims had no dealings with a DV Center at the time of their death.

In addition, DV Centers like SafeSpace are out in the community gathering the support of good-hearted individuals and businesses who reject violence aimed at females and support the mission of the DV Centers. Men are participating in events like Walk A Mile In Her Shoes, where good men don 4 inch red stiletto high heels to make a bold statement about violence aimed at females. It truly is a heartfelt feeling to see good men wobbling a mile in those shoes, with their young daughters at their side. My belief is that no man would ever want to know his little girl would grow up to be abused and battered by the man she loves.

Domestic violence is occurring all around us. Domestic violence crosses all races, creeds, and socioeconomic groups. The victims often are silent or deny abuse is happening to them. Education, awareness, advocacy, and persistence brings about positive societal change. To quote Albert Einstein: "The world is a dangerous place, not because of those who do evil, but because of those who look on and do nothing."

I respectfully request you give this cause serious thought, get involved, and make a difference.

Prior to serving as the Director of Development at SafeSpace, Art Ciasca worked for New Horizons of the Treasure Coast, Savannas Psychiatric Hospital, and The Wound Healing Center at Indian River Medical Center. He also taught and coached high school baseball and girls volleyball. Art holds a Masters Degree in Health Services Administration and Bachelors Degree in Health and Physical Education. Art Ciasca has resided in Vero Beach since 1986.



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A Children's Book Review: "A Story of Lawyers"

By Jacqueline J. Buyze, Esq.
Illustrated by Klaus Shmidheiser

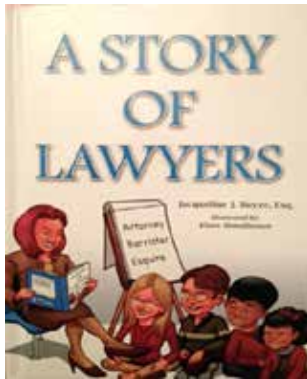


Reviewed by Lucinda Schartner

"As for jobs, there are many that lawyers can do. This book in your hands will discuss just a few."

Utilizing sensical rhyme and colorful illustrations, Jacqueline Buyze, writes a book about the complicated legal profession that both educates and entertains the reader. The book's 38 pages encompass the profession through education requirements, specialties, judgeships, and public service.

The complexity of the information and the length of the book makes this book a nice read aloud for parents and grandparents to share and spend quality time with 4-8 year olds. The reader has the opportunity to discuss the information and illustrations as well as the use of the provided glossary of official terminology. Older children can read and use the book as a reference tool for those, "What I Want To Be..." reports at school.



A Story of Lawyers, should be included in all public, elementary, and middle school libraries. However, I feel the best use is as a read aloud to your children or grandchildren, or better yet, volunteer for The Great American Teach-In and with this book share your profession with a classroom of eager students.

Cindy Schartner is a retired law librarian and reading teacher. She is a graduate of Clarion University with a degree in Library Science. Following graduation, she worked as a research librarian for the Rand Corporation. She worked as a law librarian in the private sector before becoming a Language Arts teacher. She taught in Pinellas and Hillsborough County schools.



Wills for Heroes

By Katie Everlove-Stone



With the recent loss of 19 firefighters in Arizona, it becomes all too clear that our local first responders risk their lives to protect us on a daily basis. For that reason, the Wills for Heroes program seems more important than ever.

The Wills for Heroes program began in Columbia, South Carolina following the September 11th attacks. Attorneys asked what they could do to assist their local first responders, and realized that many of them do not have basic estate planning documents in place. So the attorneys organized an event to provide wills, powers of attorney and health care advance directives to their local police and firefighters. Word of the program spread, and attorneys all over the country have started programs in their local communities.

Right now in Florida we have "Wills for Heroes" programs going in Hillsborough, Manatee and Collier Counties. I run the program in Hillsborough County and would be happy to tell you about it if you are interested in starting a program in your community. I can be reached at Katie@everlovelegal.com.



Katie Everlove-Stone is a graduate of Stetson College of Law with an LL.M. from the University of Miami in estate planning. She is married to Lt. Joshua Stone of the Gulfport (Florida) Police Department.

Please Note:

Florida Rural Legal Services and the Port St. Lucie Bar Association jointly gave a "Wills for Heroes" event on April 25, 2013 reaching out to veterans. Contact your local Bar to see if your community is sponsoring events in the near future. If not, think about creating your own!

FLORIDA ADOPTS NEW LIMITED LIABILITY COMPANY ACT

- The New Act, in a departure from RULLCA but consistent with the Existing Act, recognizes the agency power of members and managers, giving them “statutory apparent authority” to bind the limited liability company. In the absence of a contrary provision in the articles of organization or operating agreement, all Florida limited liability companies are considered to be member-managed, and all members have authority as agents of the limited liability company to bind the limited liability company. Since information regarding whether a particular LLC is member-managed or manager-managed is not required in a publicly filed record, third parties will need to ask for copies of the limited liability company’s operating agreement to determine the authority of a member if it is not set forth in the articles of organization.
- In order to clear up confusion as to who may bind a limited liability company, the New Act allows for the filing of a statement of authority with the Department. Derived from a similar filing authorized under Florida’s partnership statutes, this section creates a safeguard for limited liability companies that want to limit the power of one or more members, managers, or other persons to bind the limited liability company. A statement of denial may also be filed under the New Act in order to deny the grant of authority to a member or manager who had previously been granted authority.
- The New Act modifies provisions addressing a limited liability company’s management structure. Most importantly for existing LLCs, the New Act eliminates the use of the term “managing member,” leaving LLCs to exist as either member-managed or manager-managed going forward. After the New Act takes effect, existing limited liability companies that were previously managed under the auspices of a managing member, will be deemed to be member-managed. The New Act also makes it clear that members, absent an agreement, are not necessarily entitled to compensation for services, except for services related to the winding up of a limited liability company.
- The New Act modifies default management and voting rules for both members and managers. The New Act provides that for manager-managed LLCs, except as otherwise provided in the operating agreement, a majority-in-interest of the members must approve any action outside of the ordinary course of the LLC’s activities and affairs, including an organic transaction (such as a merger or conversion). Conversely, the New Act eliminates provisions from the Existing Act that prohibited amending the articles to provide for a vote of less than a majority of interest and that gave a right to non-voting members to vote on dissolutions and mergers.
- The New Act modifies provisions related to dissociation of members and dissolution of LLCs. Based on RULLCA, the New Act provides that a member may dissociate at any time, rightfully or wrongfully, by withdrawing by “express will”. This is a change from the Existing Act, where unless authorized in the articles of organization or operating agreement, a member could not dissociate at all prior to dissolution or winding up. The New Act also introduces the concept of a “wrongful dissociation,” which is one in violation of the operating agreement or dissociation, through express will or otherwise, prior to winding up. A limited liability company may have the right to damages against a member who wrongfully dissociates. The New Act also modifies language of the Existing Act, maintaining uniformity with RULLCA, in setting forth default events causing dissolution. These events are (i) upon the occurrence of an event described in the operating agreement, (ii) upon the consent of all members, (iii) upon the passage of 90 days without a member, (iv) upon the entry of a decree of judicial dissolution, or (v) upon the filing of a statement of administrative dissolution by the Department.
- The New Act clarifies the grounds for judicial dissolution and the appointment of receivers and custodians. Under the New Act, judicial dissolution is an available remedy in a proceeding brought by a member or a manager if it is established that the company’s activities are illegal or unlawful, or persons in control of the company are acting illegally or fraudulently, if it is not reasonably practicable to carry on the activities of

FLORIDA ADOPTS NEW LIMITED LIABILITY COMPANY ACT

the limited liability company in accordance with its operating agreement, or if the assets are being misappropriated or wasted causing injury to the limited liability company or its members. Further, the New Act continues to allow judicial dissolution in the event of a deadlock between the managers or members where the managers or members cannot break the deadlock and the deadlock is causing or threatening to cause irreparable injury to the limited liability company. However, the New Act contains a “deadlock sale” provision to deal with situations where the operating agreement lays out what is to happen in the event of such a deadlock. Finally, the New Act eliminates the Existing Act’s provision allowing a creditor to bring an action for judicial dissolution if the creditor had an unsatisfied judgment and the limited liability company was insolvent, or where the limited liability company admitted that the creditor’s claim was due and the company was insolvent.

- The New Act adds provisions, taken from RULLCA, for winding up the LLC’s affairs, which are not found in the Existing Act. This includes rules for winding up the limited liability company’s activities and affairs, providing for payment of its debts and the sale of its assets, as well as bringing or defending actions and proceedings, and distributing assets to its members. A member, manager or legal representative may conduct the winding up and may seek judicial supervision of the winding up. A creditor, with good cause and under specified circumstances, may also initiate an action for judicial appointment of a trustee or receiver for winding up.
- The New Act modifies provisions for service of process on LLCs, providing clear guidance on how to serve process on a Florida limited liability company or a foreign limited liability that is authorized to transact business in Florida.
- The New Act modifies the provisions under the Existing Act relating to derivative actions and adds express provisions regarding the appointment of special litigation committees.

- The New Act deals comprehensively with both same-type and cross-type mergers and interest exchanges and with conversions and domestications. The provisions dealing with mergers and conversions are far more comprehensive than the Existing Act and clean up significant ambiguities that were in the merger and conversion provisions of the Existing Act. The New Act also adds provisions that permit interest exchanges and in-bound domestications by non-U.S. entities.
- The New Act modifies the appraisal rights provisions in the Existing Act, including adding additional events that trigger appraisal rights, and provides clarifications to the procedural aspects of appraisal rights provisions, particularly in dealing with organic transactions (such as mergers and conversions) approved by way of written consent.
- The New Act did not adopt “Series LLCs” because of the significant concerns among members of the task force as to how such entities work and their impact on various stakeholders in an LLC. However, there is currently a project ongoing at NCCUSL to draft a Uniform Series LLC Act in conjunction with RULLCA. If this occurs, it can be expected that the task force will be reconstituted to consider adoption of this new uniform act.
- The New Act does not allow “Shelf LLCs,” and, consistent with the Existing Act, an LLC must have a member at the time that it files its articles of organization.

The New Act did not change certain provisions of the Existing Act. For example:

- The New Act did not change rules regarding charging orders, which left the 2011 amendments to Section 608.433, known as the Olmstead Patch, in place.
- The New Act did not change the overall fiduciary duties construct of existing law, with one exception to the duty of care. Particularly, the New Act adopts the RULLCA’s replacement of the “ordinary care/business judgment rule” standard when examining the duty of care, and replaces it with a duty to refrain from engaging in grossly negligent or reckless conduct, willful or intentional misconduct, or knowing violations of law.

FLORIDA ADOPTS NEW LIMITED LIABILITY COMPANY ACT

- As described above, the New Act did not change statutory apparent authority of members. LLCs have traditionally been modeled on the general partnership construct of statutory apparent authority; that is, unless there are explicit provisions to the contrary, a member can bind the LLC. The New Act retains the law from the Existing Act on this subject, except that it, in accordance with RULLCA, permits the filing of statements of authority to put parties on notice as to who has the authority to bind the LLC. The New Act, however, retains the default rule that, in the absence of notice to the contrary (such as through a statement of authority or a statement of denial), members of a member-managed LLC are agents of the LLC and thus have the implicit authority to bind the LLC.

Next Steps

The New Act represents a substantial evolution in Florida law, and will make Florida a more desirable location for business owners to use a Florida limited liability company for their business activities. Business owners who expect to start new business entities in the near future, even if before January 1, 2014, should plan their businesses with an eye towards compliance with the New Act. Owners of established limited liability companies, especially those currently operating with “managing members,” should consult with counsel to determine what changes, if any, are needed in their operating agreements or articles of organization to deal with the provisions of the New Act. Further, third parties doing business with Florida limited liability companies should consult with counsel to prepare for any changes that may occur with respect to their contractual or business arrangements with Florida limited liability companies as a result of the adoption of the New Act.

Philip B. Schwartz is a shareholder in the Fort Lauderdale office of Akerman Senterfitt. Mr. Schwartz was a member of the executive committee of the task force that proposed the new LLC act to the Florida legislature. He is a graduate of the University of Miami School of Law and received an LL.M. from NYU School of Law, Taxation.

Andrew E. Schwartz is an associate in Fort Lauderdale office of Akerman Senterfitt. Mr. Schwartz was a member of the task force that proposed the new LLC act to the Florida legislature. He is a graduate of the Syracuse University College of Law and earned his LL.M. in Taxation from Villanova University School of Law.

A Century of Lawmaking For A New Nation

By Robert Brammer and Barbara Bavis

Legislative history research has a way of taking on a life of its own. Both of us have been surprised by how often we receive requests from patrons for congressional documents created during our nation’s first one hundred years. Fortunately, the library offers a free, online database called *A Century of Lawmaking for a New Nation* (found at <http://memory.loc.gov/ammem/amlaw/>), which serves as a helpful resource for those seeking congressional documents and debates from 1774 to 1875.

Even if you are less comfortable with electronic resources than print resources, you will quickly find that this site is intuitive because it can be browsed like a book. To start your search, simply navigate to the site and choose a title from under the headings *Continental Congress and the Constitutional Convention*, *Statutes and Documents*, *Journals of Congress*, or *Debates of Congress*. If you are searching for legislative and executive documents from 1789 to 1838, turn to the *American State Papers*. To find documents and reports created by the House of Representatives or the Senate from the 23rd to the 42nd Congresses, take a look at the *U.S. Serial Set*. Under *Bills and Resolutions*, you can find House bills and resolutions from the 6th to the 64th Congresses, Senate bills and resolutions from the 16th to the 42nd Congresses, and Senate joint resolutions from the 18th to the 42nd Congresses. You can also directly link to the *Statutes at Large* from 1789 to 1875, the congressional debates (whether they are in the *Annals of Congress*, the *Register of Debates*, the *Congressional Globe*, or the *Congressional Record*) from 1789 to 1873, and the *House and Senate Journals* from 1789 to 1873.

The site is a great resource for professional and amateur historians alike. In addition to the resources already mentioned, those with an interest in American history will want to investigate the *Journals of the Continental Congress*, a record of the daily proceedings of the First and Second Continental Congresses. The site also contains *Letters of Delegates to Congress, 1774-1789*, a collection consisting not only of letters written by delegates to the First and Second Continental Congresses, but also of the delegates’ diary entries, public papers, and essays. *Farrand’s Records* contains a comprehensive collection of proceedings from the Federal Convention of 1787, including notes and letters by James Madison and other participants in the Convention. Finally, *Elliot’s Debates* compiles selected debates from state ratification conventions convened to consider the new federal Constitution.

A Century of Lawmaking For A New Nation

Regardless of the section you choose, the navigation structure is similar. After you select a title, look to the left to choose whether you would like to browse that title or perform a search across that title. Certain titles will also include a link to an index. If you choose to browse, many titles will allow you to click on “Page image” to see an image of the page as it would appear in the paper version of the resource. You will then click “PREV IMAGE” or “NEXT IMAGE” to change the images, as though you were turning the pages of a book. This arrangement also allows you to jump to a certain page. If you are working with a title that is indexed, you may obtain a page number from the index and then, in the box that contains the current page number, type your desired page number and click “Turn to image” to jump to that page. If you choose to search the title, you will be presented with a search screen that allows you to narrow your search using drop-down menus. Drop-down menus include the number of Congress, Session, and Chamber. Note that these particular drop-down menus may not apply to every title. Next, select the title you would like to search in the drop-down menu. Note that, for some titles, you are only searching the table of contents or index, not the full text—if this is the case, it will be indicated in the drop-down menu next to the title. Finally, enter your terms and click “SEARCH.”

Do you have questions about this site or a reference question? We are here to help. Call us Monday–Saturday, 8:30 a.m.–5 p.m. at (202) 707-5079. Or, if you prefer, enter <http://www.loc.gov/rr/askalib/ask-law.html> and use our “Ask a Librarian” form to submit a question. You will receive a response within five business days.

Robert Brammer and Barbara Bavis are legal reference librarians at the Law Library of Congress. Their opinions do not necessarily reflect those of the Law Library of Congress.



Come To The Next Friend's Meeting

Please Come Join Your Friends At Upcoming Meetings At the Rupert J. Smith Law Library
at Noon
Thursday, July 11
Thursday, August 8

Mediating e-Discovery Disputes

By David Steinfeld, Esq. and
Edmund J. Sikorski, Jr., J.D.



Discovery of Electronically Stored Information (ESI) is the newest developing area of practice in civil litigation. E-discovery began in complex commercial disputes, but is now appearing in a multitude of cases and will continue to develop and permeate all manner of civil cases.

Mediation is a useful and efficient method to deal with e-discovery issues. It can afford the parties control over the process and reduce their costs. In any mediation, the Worst Alternative to a Negotiated Agreement (WANTNA) is one where a Judge “splits the baby”. This may have a greater impact in e-discovery because it can propel a case on a course that the parties did not intend or desire. In e-discovery mediation, the parties take control over the outcome of the process, what is being requested, how it is produced, and when.

The Committee’s comment to Florida’s new and amended Rule 1.280 provides, “The parties should consider conferring with one another at the earliest practical opportunity to discuss the reasonable scope of preservation and production of electronically stored information. These issues may also be addressed by means of a Rule 1.200 or Rule 1.201 case management conference.” This guidance strongly suggests that parties would be wise to consider mediation in the early stages of the e-discovery process in appropriate cases to avoid unnecessary litigation and use of limited judicial resources.

Unlike ordinary mediation that is geared toward resolving the entire dispute, e-discovery mediation is limited to a singular issue within the dispute that must be resolved before a case can advance to a final mediation or trial. E-discovery mediation is a cost-effective mechanism to manage the situation. The parties’ good faith attempts to resolve the issue may even shield them from the imposition of sanctions.

Some of the advantages of e-discovery mediation are:

- Identification and remedying of miscommunications and misunderstandings

continued from page 23

- Designing workable solutions for issues of ESI sources, presentation, and form of production
- Definition of parameters and confidentiality issues
- Determinations of relevancy
- Development of timelines and sequences for production
- Avoidance of spoliation
- Allocation of costs

The goal of e-discovery mediation is for parties to conclude with an agreed e-discovery plan over which they have and will maintain control. This control, in turn, results in a product that reduces costs and allows for the efficient adjudication of any civil dispute.

From a practitioner's perspective, e-discovery mediation, just like e-discovery itself, may not be necessary or appropriate in every case, however, the costs of e-discovery and ESI experts, whether borne by a plaintiff or defendant, can be substantial and can even rise to the level of precluding a party from having the merits of its claim reached. Thus, where appropriate, e-discovery mediation can be an extremely beneficial mechanism for all the parties to a dispute and can form the foundation necessary for parties to begin the process of working together to ultimately resolve their dispute in a manner and form that is acceptable to them.

David Stienfeld, Esq. is Board Certified in Business Litigation Law by the Florida Bar. He practices in Palm Beach Gardens and is rated AV-Preeminent by Martindale-Hubbell. His videos and articles on business litigation, e-discovery, and commercial law can be accessed at and can be easily reached through

Edmund J. Sikorski, Jr., J.D. is a Florida Supreme Court Certified Circuit Civil and Appellate Mediator. www.treasurecoastmediation.com contains a link to view other authored articles on selected mediation topics and contact information.



The Rupert J. Smith Law Library Celebrates Law Day

By Karen Emerson

On Law Day, May 1, 2013 the annual Law Week Reception and Student Art Contest, sponsored jointly by the Friends of the Rupert J. Smith Law Library and the Trustees of the Rupert J. Smith Law Library, convened for another successful year. 2013 was another banner year for student participation and there were close to 500 student art entries for the art contest. The opportunity for dialogue and creative expression of basic civic values and constitution principals between students and adults expanded this year with the addition of a new essay contest for middle and high school student.

Since Law Day was first proclaimed as a celebration by President Eisenhower in 1958 and later formally proclaimed by Joint Resolution of Congress [U.S. Code, Title 36, Section 164] the annual celebration, with its changing central themes has served as a focus for community discussion the rule of law.

In keeping with the 2013 theme: "Realizing the Dream" St. Lucie County students submitted artistic renderings related to either the Bill of Rights, symbols of justice, or the role of courts, judges and jurors as it related to the theme.

The keynote speaker, St. Lucie County Clerk of Court Joe Smith, was introduced by the Honorable Burton C. Connor, of the Fourth District Court of Appeals. Mr. Smith has honored the Friends on several occasions as keynote speaker for the annual reception.



Dr. Michael Lannon, Superintendent of St. Lucie County Schools and Student Contest Winner.

continued from page 24

The Rupert J. Smith Law Library Celebrates Law Day

This year's Reception honorees were Scott Van Duzer, local businessman, philanthropist and president of the Van Duzer Foundation, introduced by Teri Palumbo, Director of the AIDS Research & Treatment Center of the Treasure Coast, and Art Ciasca, Director of Development for SafeSpace, Inc., introduced by County Commissioner Paula Lewis, also a Law Library Trustee. Both 2013 Law Week honorees embody virtues that make the community a stronger place, mentoring and leading the next generation by example.

Announcement of the Student Art Contest winners and Student Essay Contest winners for 2013, with the distribution of checks and certificates were made by Michael Lannon, Superintendent of St. Lucie County Schools and Kim Cunzo, Esq., Art Contest Chair.

The winner of the \$750 high school prize was 11th grader Abbey Bilicic, of Lincoln Park Academy, 8th grader Diana Balderas of Lincoln Park Academy won the \$200 first place middle school prize, F.K. Sweet fourth grader Animesh Saha won the Elementary grades 3rd-5th \$150 prize, and first grader Bil Nyia Ervin of the James E. Sampson Memorial School won the Elementary K-2nd \$100 prize. An honorable mention prize of \$25 went to Trent Savoia, a 7th grader at Westgate K-8.



Dr. Michael Lannon, Superintendent of St. Lucie County Schools and Student Contest Winner.

The \$750 1st place high school prize for the 2013 essay contest, named in honor of the late Norm Paxton, former Treasurer of the Friends of the Rupert J. Smith Law Library, Inc., went to Joseph Sabbagh of Port St. Lucie High, the \$500 Gordon & Donner award went to Conner Lookabill of Barnabas Christian Academy, and the \$200

middle school 1st place went to Robert Hennis of St. Anastasia.

All of the student artwork was left on display to the public on the walls of the St Lucie County Courthouse in the main hallway outside the original jury room on the first floor for viewing after the reception.



Judge Burton Conner, Scott Van Duzer, & St. Lucie County School Artists

The student contest and reception has continued to be a special event every year and is a tradition that the Friends are proud of. We look forward to continuing participation of St. Lucie County students in exploring the rule of law in creative ways. The essay contest will be continued in 2014.



Art Ciasca, and Chief of Police, R. Sean Baldwin.



What's New at the Law Library

By Nora J. Everlove, Law Librarian

Completing our second year: This issue of "Friendly Passages" closes our second year of publication. Our first issue, in September 2011, was sixteen pages in black & white with single color highlights and it circulated to only 2200 people. Now we mail to most members of the Florida Bar as well as print five hundred to one thousand copies for local distribution. It is almost twice as many pages with a striking color cover and full-color on inside pages. We hope to continue showing that big things can happen in small counties through volunteerism and community support.

Mortgage Foreclosure Seminars: Florida Rural Legal Services continues their Mortgage Foreclosure seminars at the library. Please come to the "Ask A Lawyer" program with your questions. Call the library for times and dates. 772-462-2370

New Westlaw databases: We have just signed a new Westlaw contract with even more databases. Please see the content listed to the right. Also, the staff librarians have access to additional databases and are happy to assist you in searching these materials. These are not available through our larger contract because they are just too expensive. Our public access contract allows four simultaneous users (plus the librarians' access) in Fort Pierce and we have identical coverage at the library computer in St. Lucie West.

Successful Website: I hope all of you have visited our website: <http://www.rjsslawlibrary.org>. You can find a complete listing of Local Rules and Administrative Orders at the webpage. The current, as well as archived, copies of "Friendly Passages" are stored there. You can find the latest library announcements including our live CLE presentations and a list of free CLE disks that you can borrow at your convenience. The library hours are posted for the convenience of the general public. Bar members can have access 24/7 through a security swipe card. Please call us if you would like information on this. So far this year, we have averaged over 95,000 "hits" per month. To put it in perspective that is almost as much activity as we had in all of 2011. The most frequently visited pages are from "Friendly Passages," and we are convinced this is driving our statistics. So, thank you, readers!

Updating the Florida Jurisprudence in South County: We should be receiving a new copy of Fla Jur 2d before this is published.

Westlaw Coverage:

Our public access covers tens of thousands of volumes of law books. And, we have equal coverage in both the main library and the SLW branch:

All state and federal primary law
All American Law Reports (ALR)
All American Jurisprudence titles
Federal Analytical Library
Analytical Florida materials including
Fla Jur and the treatise series
Florida Litigation documents including
Civil Pleadings, Motions & Memorandums
Appellate Court Briefs
State Civil Trial Court Orders
Personal Injury Damages Analytical & Library
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Construction Practitioner Core – Florida
Couch on Insurance
Real Property materials
Fletcher Cyclopedic of Corporations w/ forms
Form Finder Advantage
Immigration Practitioner
Municipal Law Practitioner Core

Latest Florida Bar CLE Programs:

We have recently purchased the following CLE programs:

Title	Credits	Ethics
Bankruptcy Law & Practice: View From the Bench 2012	4.0	0
New Frontiers in Post Conviction Litigation: A Practical Guide	4.5	3
ELULS Annual Update	16.5	1
Case Law Update 2012: Stay Up to Date...Family Law	2.5	0.5
Guardians and Attorneys Ad Litem: Voicing A Child's Best Interest	2.5	0
An Introduction to E-Filing and E-Discovery	2	0
Annual Ethics Update: Ethics Technology & Trust Accounting	5	5
Practice Management Track 6th Annual Solo & Small Firm Conference - The Extraordinary Lawyer: Minding Your Own Business	9	2
32nd Annual RPPTL Legislative & Case Law Update	8	1
Nuts and Bolts of Workers' Compensation Appeals	1.5	
Basic Bankruptcy, Collections and Foreclosures	8	1
Deposing the Expert Witness	2	
Hot Topics In Appellate Practice 2013	8	1
36th Annual Local Government in Florida	12	2
Building Business in a Down Economy	2.5	1
Probate Law 2013	7.5	1
Till Divorce Do Us Part..The New Beneficiary Designation	1	0
Basic Criminal Practice	7.5	2
Sunshine Law, Public Records & Ethics	9	6
Topics in Evidence 2013	7.5	2
Masters of DUI 2013	8	1.5

Patrons can borrow the programs for one week and renew them for a second week. If you are not in Fort Pierce, you may find it more convenient if we mail them to you. You are responsible for mailing them back within a two week period. There is no charge to borrow disks but there is an overdue fine of \$1 per day to encourage prompt return. Our aim is to circulate the programs as many times as possible. You can also call and reserve the disks.

Lions, Tigers, and Motions to Disqualify...Oh My!

Endnotes for this article may be found on the last two pages of our online edition at: www.rjlawlibrary.org

The circumstances surrounding this motion are based on a case from the Circuit Court of the Eleventh Judicial Circuit of Florida for judicial dissolution of a corporation, filed in July of 2011.¹⁷

Plaintiff in the aforementioned action had employed attorney [hereinafter “Attorney Smith” for the purposes of this article] to represent his interests in the company at issue [hereinafter “Company”] in 2001, and a series of incorporations, purchases, investments, transactions, and negotiations for the next ten years. Subsequently, in April of 2011, Smith was enlisted by certain of Company’s principal shareholders, the Defendants, to represent them. On learning this, Plaintiff’s counsel sent Smith a letter, also in April of 2011, indicating his belief that Smith should withdraw from representing the Defendants because he had formerly represented the Plaintiff in matters related to Company, as well as other personal matters. In August of 2011, after Smith declined to withdrawal as Defendants’ counsel, Plaintiff filed a motion to disqualify Smith.

Plaintiff’s motion to disqualify was based primarily on the allegation that Smith’s former representations of Plaintiff created a conflict of interest, pursuant to Florida Rule 4-1.9, to which Plaintiff was not willing to consent.¹⁸ Defendants highly contested Plaintiff’s argument that Smith’s former representation of Plaintiff was a disqualifying conflict. In their memorandum of law in opposition of the motion, filed in February of 2012, Defendants immediately alerted the court to the rule’s susceptibility to tactical misuse as a procedural weapon to disrupt opposing parties.¹⁹ Under State Farm’s two-prong test,²⁰ Defendants argued that all prior legal services performed by Smith for Plaintiff were either published to third parties, performed for the company at issue, rather than Plaintiff personally, or performed for unrelated third parties/entities, and that those services had no substantial relation to the matters alleged in Plaintiff’s present judicial dissolution action against the company.²¹ Defendants took the position that a lawyer should not be precluded from defending a claim against a former client on the grounds of a “substantial relationship” (as opposed to representation) with that client.²² Matters are “substantially related” in terms of representation “if they involve the same transaction or legal dispute, or if the current matter would involve the lawyer attacking work that the lawyer performed for the former client.”²³

Defendants argued that the line between relationship and representation must be proven by the moving party, upon a showing of evidence illustrating particular conflicting subject matters, issues, and causes of action performed in the former representation.

As a seeming afterthought, Plaintiff alternatively argued that its intention to call Smith to testify against Defendants created a disqualifying conflict of interest, pursuant to Florida Rule 4-3.7.²⁴ It is interesting here to note that any advocate expected to act as a necessary witness adversely to his or her own client, unless falling into one of the three exceptions delineated by the rule, should disqualify himself or herself, even if he or she has no other potential conflicts. Yet, an advocate whom would be permitted to serve as an advocate-witness under the exceptions to the Attorney-Witness Rule might be precluded from doing so by Model Rule 1.9, “duties to former clients,” and consequently, Plaintiff’s first alleged grounds for Smith’s disqualification. The Florida Fourth District Court of Appeal posited that “the rule requiring a lawyer to withdraw when he expects to be a witness in a case was not designed to permit a lawyer to call opposing counsel as a witness and thereby disqualify him as counsel.”²⁵ The court warned that lawyers should avoid calling opposing counsel to the stand, and that courts should not permit attorneys to call opposing counsel as witnesses in order to disqualify him or her.²⁶ Yet, one may infer by Plaintiff’s double binding of the Model Rules’ guidelines on former clients and attorney-witnesses, this is precisely what Plaintiff’s counsel was planning to do to ensure Smith’s disqualification.

Nevertheless, relying on the court’s decision in *Alto Const. Co., Inc.*,²⁷ Plaintiff claimed Smith should be disqualified because his testimony would be “sufficiently adverse to the factual assertions or accounts offered on behalf of the client.”²⁸ Defendants refuted Plaintiff’s reliance on the Attorney-Witness Rule because it only requires disqualification of attorneys who would provide “necessary”²⁹ testimony. Additionally, Defendants argued that the Attorney-Witness Rule is intended to protect the lawyer’s own client(s), not the adversary.³⁰ In a similar case, the Court of Appeal for the Fifth Judicial District of Florida quashed the trial court’s order granting a defendant’s motion to disqualify counsel for plaintiff because the defendant failed to demonstrate the likelihood that prejudice would or might result from his testimony.³¹

Defendants also highlighted that the Attorney-Witness Rule disqualifies attorneys only if their testimony would be adverse to their own clients’ factual assertions of factual events of the case.³² In this regard, the Florida Fourth District Court of Appeal denied a plaintiff’s motion to disqualify counsel for defendant because the plaintiff had “alleged, at most, only a possibility that disqualification might be necessary.”³³

Lions, Tigers, and Motions to Disqualify...Oh My!

Additionally, Defendants noted that the rule would disqualify Smith from advocating at trial only, therefore permitting him to stay actively involved in all pre-trial and post-trial proceedings, even if he were proven to be a material and necessary witness.³⁴

Adding to Plaintiff's overt attempts to disqualify Smith is an allegation that there was a "strong possibility" that Smith may be added as a defendant in the case following his deposition, placed discretely in a footnote accompanying Plaintiff's attorney-witness argument. Although Plaintiff elaborated on this point no further, this would create a possibly disqualifying current conflict of interest with Defendants.³⁵ The comments to the Model Rule on current conflicts-of-interest indicate that a client may consent to representation, notwithstanding a conflict.³⁶ But if "a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances," and it is nevertheless obtained, the court is likely to find the consent "deficient" for inadequate disclosure of the "potential conflicts of interest which are at stake."³⁷ Thus, Plaintiff seemingly built a procedural trap door into its motion to disqualify Smith around the Model Rules' guidelines concerning attorney-client conflicts of interest, albeit a purely conjectural one.

Noteworthy, too, is Plaintiff's concluding assertion that the court's interest in ensuring ethical attorney conduct should outweigh the litigant's right to freely choose his or her own counsel.³⁸ Defendants responded to these concerns throughout their memorandum in opposition to Plaintiff's motion by highlighting the importance of the client's "associational right"³⁹ to counsel of choice, and insisting that due regard must first be given to the potential effect of disqualification on the lawyer's client.⁴⁰ Accordingly, Defendants urged the court to hold Plaintiff to the heightened burden of proof required to disqualify opposing counsel in order to protect that interest.⁴¹

Ultimately, though, despite Defendants' ardent efforts to retain Smith and oppose Plaintiff's motion to disqualify their counsel of choice, Smith agreed to withdraw at the hearing on the motion. Smith's decision was due largely to concern that any of the three Model Rule grounds asserted by Plaintiff in its motion would become the basis of bar complaints filed against him, should he proceed. Unfortunately, such motions to disqualify opposing counsel are common, and decisions to withdraw, which are placed upon attorneys like Smith by opposing counsel, apparently to gain tactical advantage at trial, are filed every day as procedural tactics.⁴²

Leonard D. Pertnoy is a Professor of Law at St. Thomas University School of Law in Florida Practice, Professional Responsibility, and Real Estate Transactions. A.B., 1964, University of Vienna, Austria; J.D., 1969, University of Miami, B.A., 1966, University of Louisville. He would like to extend special thanks to his research assistant Erin Pogue for her excellent work in preparing this article.

The next installment of this article will appear in the next edition of Friendly Passages.

Endnotes for this article may be found on the last two pages of our online edition at: www.rjlawlibrary.org



CLE Luncheons

Common Estate Planning Mistakes and How to Avoid Them
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Endnotes for,

Lions, Tigers, and Motions to Disqualify...Oh My!

¹See ABA Model Rules of Professional Conduct, 1.6 - 1.7, 1.9 - 1.13, 3.4, 3.6 - 3.7, 4.1 - 4.3, and 8.4; *See also* Mark J. Fucile, *Disqualification Motions and the RPC's: Recent Decisions Using Ethics Rules As the Basis for Disqualification*, 1999 PROF. LAW. 9, 10 (1999).

²See ABA Model Rs. Prof. Cond., Scope (2009) (“The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.”).

³Mark J. Fucile, *Disqualification Motions and the RPC's: Recent Decisions Using Ethics Rules As the Basis for Disqualification*, 1999 PROF. LAW. 9, 22 (1999).

⁴ABA Model Rs. Prof. Cond., Scope (2009) (emphasis added); *See also* Fla. R. of Prof. Cond., Scope.

⁵*Singer Island Ltd. v. Budget Constr. Co., Inc.*, 714 So. 2d 651, 652 (Fla. 4th DCA 2004) (citing *Manning v. Waring*, 849 F. 2d 222, 224 (6th Cir. 1988) (“the ability to deny one’s opponent the services of capable counsel, is a potent weapon”); *Vick v. Bailey*, 777 So.2d 1005, 1007 (Fla. 2d DCA 2000).

⁶*Weeks v. Samsung Heavy Industries Co.*, 909 F. Supp. 582, 583 (N.D. Ill. 1996).

⁷*Alexander v. Tandem Staffing Solutions, Inc.*, 881 So. 2d 607, 608-09 (Fla. 4th DCA 2004); *Concur Evans v. Artek Sys. Corp.*, 715 F.2d 788, 791-92 (2d Cir.1983); *See also Cannon Airways Inc. v. Franklin Holdings Corp.*, 669 F. Supp. 96, 100 (D. Del. 1987) (“[M]otions to disqualify are often disguised attempts to divest opposing parties of their counsel of choice.”).

⁸*Manning v. Waring*, 849 F.2d 222, 224 (Fla. 6th Cir. 1988) (emphasis added).

⁹*E.g.*, *Kalmanovitz v. G. Heileman Brewing Co.*, 610 F. Supp. 1319 (D. Del. 1985); *accord Klupt v. Krongard*, 728 A.2d 727 (Md. 1999) (explaining that courts “will take a hard look” at disqualification motions out of concern that movant will use motion as tactical ploy);

¹⁰*See Devins v. Peitzer*, 622 So. 2d 558 (Fla. 3d DCA 1993) (calling opposing counsel as an adverse witness on moving party’s behalf), *accord In re Guidry*, 316 S.W.3d 729 (Tex. App. Houston 2010) (finding allegations of unethical conduct alone or evidence showing only a remote possibility of a violation of the disciplinary rules is not sufficient to require disqualification).

¹¹ABA Model Rules of Professional Conduct (2009), Rules 1.7-1.9, and 3.4, respectively.

¹²ABA Model Rules of Professional Conduct (2009), Rule 1.9.

¹³ABA Model Rules of Professional Conduct (2009), Rule 3.4.

¹⁴*See* ABA Model Rules of Professional Conduct (2009), Rule 1.7(a)(2).

¹⁵*See* Section I, *supra*

¹⁶*Janjua v. Av-Core Aviation*, No. 11-21477CA22 (11th Cir. Fla. 2011)

¹⁷4-1.9 Fla. R. Prof. Cond. (2006). Florida Rule 4-1.9 suggests:

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client consents after consultation; or

(b) use information relating to the representation to the disadvantage of the former client except as rule 4-1.6 would permit with respect to a client or when the information has become generally known. For purposes of this rule, “generally known” shall mean information of the type that a reasonably prudent lawyer would obtain from public records or through authorized processes for discovery of evidence. *Id.*

¹⁸“Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation.” Comment [14] to Florida Rule 4-1.7. “Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment.” *Id.*

¹⁹The moving party has the burden of establishing, first, an attorney client relationship existed between the moving party and attorney. *State Farm Mut. Auto. Ins. Co. v. K.A.W.*, 575 So. 2d 630 (Fla. 1991). If this is proven, an irrefutable presumption arises that confidences were disclosed during the relationship. *Id.* And second, of establishing that the matter in which the attorney subsequently represented the interest adverse to the moving party was the same or substantially related to the matter in which he represented the former client. *Id.*

²⁰*See id.*

²¹*See* 2006 Comment to Fla. R. Prof. Cond. 4-1.9, and *Royal Caribbean Cruises Line, Ltd. v. Buenaqua*, 685 So. 2d 8 (Fla 3d DCA 1996) (explaining that the underlying question of “substantially related” is whether the lawyer is so involved in the same transaction or legal dispute that the subsequent legal representation is regarded as “changing sides” in the matter in question).

Endnotes for,

Lions, Tigers, and Motions to Disqualify...Oh My!

²² 2006 Comment to Fla. R. Prof. Cond. 4-1.9.

²³ 4-3.7 Fla. R. Prof. Cond. (2006). Florida Rule 4-3.7 suggests:

(a) When Lawyer May Testify. A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness on behalf of the client unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;

(3) the testimony relates to the nature and value of legal services rendered in the case; or

(4) disqualification of the lawyer would work substantial hardship on the client.

(b) Other Members of Law Firm as Witnesses. A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by rule 4-1.7 or 4-1.9. *Id.*

²⁴ *Arcara v. Warren*, 574 So.2d 325, 326 (Fla. 4th DCA 1991) (quashing a trial court's disqualification of opposing counsel).

²⁵ *Id.*

²⁶ *Alto. Const. Co., Inc. v. Flagler Const. Equip., LLC.*, 22 So. 3d 726 (Fla. 2d DCA 2009).

²⁷ *Id.* Plaintiff alleged that he would be asking Smith questions concerning documents he prepared, meetings he attended, advice he gave, and transactions that occurred while Smith was representing Plaintiff.

²⁸ See generally Richmond, *Lawyers as Witnesses*, 36 N.M. L. REV. 47, 52 (2006) (“[I]f the lawyer’s intended testimony is irrelevant, immaterial, cumulative, or can be obtained from other sources, the lawyer is not a necessary witness.”). The “Necessity Test” will be discussed more thoroughly in section IV and V, *infra*.

²⁹ See *Purtle v. McAdams*, 879 S.W.2d 401 (Ark. 1994) (finding that Model Rule 3.7 applies only to situations where lawyer is to be witness on behalf of client, and not when called by opposing party); *but see* *Fleitman v. Virginia McPherson*, 691 So. 2d 37 (Fla. 1st DCA 1997) (finding that the adversary is protected in so far as to shield him from the “bolstering” effect of a lawyer calling himself to the stand to testify for the benefit of his client).

³⁰ *Cazares v. Church of Scient. of California, Inc.*, 429 So.2d 348, 349-50 (Fla. 5th DCA 1983).

³¹ *Alto. Const. Co., Inc. v. Flagler Const. Equip., LLC*, 22 So. 3d 726 (Fla. 2d DCA 2009) (finding disqualification unnecessary where attorney was a material witness, but would not be testifying sufficiently adversely to his client’s factual assertions or account of effects).

³² *Singer Island v. Budget Constr. Co.*, 714 So.2d 651, 652 (Fla. 4th DCA 1998).

³³ See *Columbo v. Puig*, 745 So. 2d 1106 (Fla. 3d DCA 1999); see also ABA Informal Ethics Op. 89-1529 (1989) (finding that a lawyer who expects to testify on contested issue at trial may represent client in pretrial proceedings, provided that client consents after consultation and lawyer reasonably believes that representation will not be adversely affected by client’s interest in expected testimony).

³⁴ 4-3.7(a)(2) Fla. R. Prof. Cond. (2006). Florida Rule 4-3.7(a)(2) suggests:

Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (2) there is a significant risk that the representation of one or more clients will be materially limited by...a personal interest of the lawyer. *Id.*

³⁵ See *In re Captran Creditors Trust v. North Am. Title Ins. Agency, Inc.*, 104 B.R. 442, 445 (M.D. Fla. 1989). “A further reading of the Comments to Rule 4-3.7 . . . indicates that a lawyer should not properly ask for a consent from a client where such situation exists where a disinterested lawyer would conclude that a client should not agree to the representation under the circumstances.” *Id.*

³⁶ *Id.* at 445.

³⁷ Plaintiff argued that allowing Smith to continue as counsel for Defendants would “embarrass the bar as a whole of having an attorney testify against his own client.” Pl.’s Mot. Disq. 9-10. The court’s interest in maintaining the administration of justice will be discussed in detail at section IV, *infra*.

³⁸ *Kusch v. Ballard*, 645 So. 2d 1035 (Fla. 4th DCA 1994).

³⁹ Comment to Florida Rule 4-3.7.

⁴⁰ *Alexander v. Tandem Staffing Solutions, Inc.*, 881 So. 2d 607, 609 (Fla. 4th DCA 2004).

⁴¹ *E.g.*, *May v. Crofts*, 868 S.W. 2d 397 (Tex. 6th DCA 1993) (expressing disapproval of a will contestant’s tactical use of the Model Rules in her motion to disqualify the will proponents’ counsel on conflict of interest, and alternatively lawyer-as-witness grounds).