

Nova Law Review

Volume 40, Issue 1

2017

Article 1

Nova Law Review Full Issue



NOVA LAW REVIEW

NOVA SOUTHEASTERN UNIVERSITY

ARTICLES AND SURVEYS

CORRELATION BETWEEN INMATE BRUTALITY AND
LACK OF WHISTLEBLOWER PROTECTION IN FLORIDA

BRITTANY N. HENDERSON
GARY M. FARMER

2015 SURVEY OF JUVENILE LAW

MICHAEL J. DALE

A SURVEY OF FLORIDA BASEBALL CASES

LOUIS H. SCHIFF
ROBERT M. JARVIS

EVIDENCE: 2014 SURVEY OF FLORIDA LAW

MARK M. DOBSON

NOTES AND COMMENTS

JUST SHOOT ME A TEXT: THE FLORIDA BAR'S
REGULATIONS ON ATTORNEY ADVERTISEMENTS
AND MODERN COMMUNICATION

JAZLYN JUDA

THE REAL EMERGENCY: WILL FLORIDA FOLLOW
GEORGIA IN MEDICAL MALPRACTICE REFORM?

MICHELLE DIAZ

NOVA LAW REVIEW

VOLUME 40

FALL 2015

NUMBER I

EXECUTIVE BOARD

KERRY VALDEZ
Editor-in-Chief

STORM A. TROPEA
Executive Editor

SHELBY L. SUMMERS
Lead Articles Editor

ERIC M. YESNER
Managing Technical Editor

ARTICLES EDITORS

AMANDA CARBONE

STEPHANIE CARLTON

KRISTINA A. CORREA

FREDERICK J. PYE III

AKASH SHAH

JASON TOM

ASSOCIATE EDITORS

DYLAN FULOP
Assistant Lead Articles Editor

JENNIFER NOUD
Goodwin Editor

TRICIA-GAYE COTTERELL
Alumni Relations Editor

ASHLEY N. ELLIS
Subscriptions Editor

FACULTY ADVISORS

HEATHER BAXTER
ELENA MARTY-NELSON

SENIOR ASSOCIATES

KATHLEEN DELOACH

JERRY P. SARESKY

NICOLE A. RODOLICO

HANNA YARMOLIK

JUNIOR ASSOCIATES

KRYSTAL ACOSTA

JOSEPH R. KADIS

ALISON BARBIERO

ELYSE MALOUF

KAREN L. BLACK

DOREEN MONK

SAMANTHA E. BOWEN

HENRY E. NORWOOD

MARIO BRITO

JAMES PAUL

DAIRON BUERGO

ANDREÉ QUARESIMA

OLIVIA CHIONG

KHALIL H. QUINAN

NATALIE CIMADEVILLA

RICHARD J. RAFULS

MICHAEL J. COSTELLO II

CHRYSTAL ROBINSON

MARINA DE LARA MUÑOZ

DINA L. ROSENBAUM

ALEX DEFILIPPO

MAXWELL H. SAWYER

KRISTINE DESOIZA

SAMANTHA SCHEFF

MICHELLE DIAZ

TIMOTHY D. SHIELDS

NADIA ENNAJI

CHANELLE VENTURA

MIGUEL A. ESPINOSA III

MARIA D. VERA

LILIAN C. GUZMAN

ALEC J. ZAVELL

JAZLYN JUDA

NOVA SOUTHEASTERN UNIVERSITY SHEPARD BROAD COLLEGE OF LAW

ADMINISTRATION

OFFICE OF THE DEAN

Jon M. Garon, B.A., J.D. *Dean and Professor of Law*

Elena B. Langan, B.A., J.D., *Associate Dean for Academic Affairs & Associate Professor of Law*

Tracey-Ann Spencer Reynolds, *Executive Assistant to Dean Jon M. Garon*

Lynda Harris, *Executive Assistant to Associate Dean for Academic Affairs*

DEANS AND DIRECTORS

Lynn Acosta, B.A., M.S., *Assistant Dean for Student Services*

Catherine Arcabascio, B.A., J.D., *Associate Dean for International Programs & Professor of Law*

Timothy Arcaro, B.S., J.D., *Associate Dean for AAMPLE and Online Programs & Professor of Law*

Olympia R. Duhart, B.A., J.D., *Director of First-Year Lawyering Skills & Values Program & Professor of Law*

Jennifer Gordon, J.D., *Direct of Public Interest Programs*

linda f. harrison, J.D., *Associate Dean, Critical Skills Program & Associate Professor of Law*

Robert Levine, B.S., J.D., *Assistant Dean, Career & Professional Development & Adjunct Professor of Law*

Jennifer McIntyre, B.S., M.S., *Assistant Dean for Online Programs*

Joshua Metz, B.S., B.A., CPA, *Director of Administrative Operations*

Elena Rose Minicucci, B.A., J.D., *Director of Alumni Relations & Adjunct Professor of Law*

Frank A. Orlando, B.S., J.D., *Director of the Center for the Study of Youth Policy and Adjunct Professor*

William D. Perez, *Assistant Dean for Admissions*

Nancy Sanguigni, B.S., M.B.A., *Assistant Dean for Clinical Programs*

Susan Stephan, B.S., J.D., M.A., *Director of Development*

Michele Struffolino, B.A., M.Ed., J.D., *Assistant Dean of Students & Associate Professor of Law*

LAW LIBRARY & TECHNOLOGY CENTER ADMINISTRATION

Eric Young, B.A., M.L.S., J.D., *Assistant Dean for Law Library & Technology Center & Associate Professor of Law*

Karen Rose, *Assistant to the Assistant Dean of the Law Library & Technology Center*

Rebecca A. Rich, A.B., M.S., J.D., *Senior Associate Director, Law Library and Technology Center*

Alison Rosenberg, *Head of Outreach Services*

Rob Beharriell, B.A., J.D., *Outreach & Reference Services Librarian*

Carolyn J. Brown, B.A., M.L.S., J.D., *Outreach & Reference Services Librarian*

Mitchell L. Silverman, B.A., M.S., J.D., *Reference and Patron Services Librarian*

Craig Pharaoh, *Assistant Circulation Manager*

Nikki Williams, *Assistant Circulation Manager*

Mary Paige Smith, B.A., M.L.S., *Associate Director for Technical Services*

John Henderson, *Technical Services Assistant*

Danielle Ranalli, *Technical Services Assistant*

Chad Moulder, *Clinic & Audiovisual Technology Coordinator*

STAFF

Tresha Barracks, *Legal Assistant for Clinical Programs*

Mary Butler, *Coordinator of Advanced Lawyering Skills & Values*

Lakaye Carter, *Admissions Coordinator*

Wendy Clasen, *Administrative Assistant for Clinical Programs*

Natalia Enfort, B.S., *Graduation & Records Advisor for Student Services*

Robert Jacobs, *Secretary for Critical Skills Program*

Jessica Mcfarlane, *Secretary for Critical Skills Program*

Jesse Monteagudo, *Legal Secretary*

Kathleen Perez, *Assitant to the Director of Alumni & Development*

Nicole Rodriguez, *Building Operations Manager*

Catherine Zografos, *Administrative Assistant to the Career & Professional Development Office*

Naomi Scheiner, *Administrative Coordinator for Student Affairs*

Chantelle Spence, *Faculty Assistant*

FACULTY

FULL-TIME FACULTY

Catherine Arcabascio, B.A., J.D., *Associate Dean, International Programs & Professor of Law*

Timothy Arcaro, B.S., J.D., *Associate Dean for AAMPLE and Online Programs & Professor of Law*

Heather Baxter, B.A., J.D., *Assistant Professor of Law*
Brion Blackwelder, B.S., J.D., *Director of Children & Families Clinic & Associate Professor of Law*
Randolph Braccialarghe, B.A., J.D., *Professor of Law*
Ronald B. Brown, B.S.M.E., J.D., LL.M., *Professor of Law*
Timothy A. Canova, B.A., J.D., *Professor of Law and Public Finance*
Kathy Cerminara, B.S., J.D., LL.M., J.S.D., *Professor of Law*
Megan F. Chaney, B.A., J.D., *Professor of Law*
Phyllis G. Coleman, B.S., M.Ed., J.D., *Professor of Law*
Leslie L. Cooney, B.S., J.D., *Professor of Law*
Jane E. Cross, B.A., J.D., *Director of Caribbean Law Program & Associate Professor of Law*
Debra Moss Curtis, B.A., J.D., *Professor of Law*
Michael J. Dale, B.A., J.D., *Professor of Law*
Mark Dobson, A.B., J.D., LL.M., *Professor of Law*
Douglas L. Donoho, B.A., J.D., LL.M., *Professor of Law*
Olympia R. Duhart, B.A., J.D., *Director of First-Year Lawyering Skills & Values Program & Professor of Law*
Michael Flynn, B.A., J.D., *Professor of Law*
Amanda M. Foster, B.A., J.D., *Assistant Professor of Law*
Jon M. Garon, B.A., J.D., *Dean and Professor of Law*
Pearl Goldman, B.C.L., M. Phil., LL.B., J.D., LL.M., *Professor of Law*
Joseph M. Grohman, B.A., M.A., J.D., *Professor of Law*
Richard Grosso, B.S., J.D., *Director, Environment & Land Use Law Clinic & Professor of Law*
Linda F. Harrison, B.A., J.D., *Associate Dean, Critical Skills Program, & Associate Professor of Law*
Joseph Hnylka, B.A., J.D., *Professor of Law*
Areto Imoukhuede, B.A., J.D., *Professor of Law*
Robert M. Jarvis, B.A., J.D., LL.M., *Professor of Law*
Judith R. Karp, B.A., M.L.S., J.D., *Professor of Law*
Shahabudeen Khan, J.D., *Associate Professor of Law*
Ishaq Kundawala, B.A., J.D., *Professor of Law*
P. Camille Lamar, B.A., J.D., *Associate Professor of Law*
Elena Langan, B.A., J.D., *Associate Dean for Academic Affairs & Associate Professor of Law*
James B. Levy, B.A., J.D., *Associate Professor of Law*
Kenneth L. Lewis Jr., M.S., J.D., B.Sc., *Assistant Professor of Law*
Donna Litman, A.B., J.D., *Professor of Law*
Elena Maria Marty-Nelson, B.A., J.D., LL.M., *Professor of Law*
Michael R. Masinter, B.A., J.D., *Professor of Law*
Jani E. Maurer, B.A., J.D., *Professor of Law*

Joel A. Mintz, B.A., J.D., LL.M., J.S.D., *Professor of Law*
Roma Perez, B.A., J.D., *Professor of Law*
Michael L. Richmond, A.B., M.S.L.S., J.D., *Professor of Law*
John Sanchez, B.A., J.D., LL.M., *Professor of Law*
Florence Shu-Acquaye, LL.B., LL.M., J.S.M., J.S.D., *Professor of Law*
Michele Struffolino, B.A., M.Ed., J.D., *Assistant Dean of Students & Associate Professor of Law*
Fran L. Tetunic, B.A., J.D., *Director, Alternative Dispute Resolution Clinic & Professor of Law*
Marilyn Uzdavines, B.A., J.D., *Associate Professor of Law*
Kathryn Webber, B.A., J.D., *Associate Professor of Law*
James D. Wilets, B.A., M.A., J.D., *Professor of Law*
Eric W. Young, B.A., M.L.S., J.D., *Assistant Dean, Law Library & Technology Center & Associate Professor of Law*

EMERITUS FACULTY

John Anderson, J.D., *Professor Emeritus of Law*
Marilyn Cane, B.A., J.D., *Professor Emeritus of Law*
Lynn A. Epstein, B.S., J.D., *Professor Emeritus of Law*
Joseph Harbaugh, B.S., LL.B., LL.M., *Dean Emeritus & Professor Emeritus of Law*
Howard Messing, A.B., J.D., *Professor Emeritus of Law*
Gail Richmond, A.B., M.B.A., J.D., *Professor Emeritus of Law*
Bruce S. Rogow, B.B.A., J.D., *Professor Emeritus of Law*
Marc Rohr, B.A., J.D., *Professor Emeritus of Law*
Michael Rooke-Ley, J.D., *Professor Emeritus of Law*
Joseph Smith, J.D., *Professor Emeritus of Law*
Steven Wisotsky, B.A., J.D., LL.M., *Professor of Law*

CRITICAL SKILLS PROGRAM INSTRUCTORS

Meg Chandelle, *Critical Skills Instructor*
Robert Gregg, B.A., J.D., *Critical Skills Instructor*
Heddy Muransky, B.A., M.Ed., J.D., *Critical Skills Instructor*
Marlene Murphy, *Critical Skills Instructor*
Rodney Rawls, B.S., J.D., LL.M., *Critical Skills Instructor*

ADJUNCT FACULTY

Andrew L. Adler, *Adjunct Professor of Law*
Edward R. Almeyda, *Adjunct Professor of Law*
Antoinette Appel, B.A., M.A., Ph.D., J.D., *Adjunct Professor of Law*
Scott Atherton, *Adjunct Professor in the Master of Science Program*
Ross L. Baer, B.A., J.D., *Adjunct Professor of Law*
Denise L. Baker, *Adjunct Professor in the Master of Science Program*
Steven Ballinger, *Adjunct Professor in the Master of Science Program*
Roshawn Banks, B.S., J.D., *Adjunct Professor of Law*
Courtney Jared Bannan, *Adjunct Professor of Law*
Rob Beharriell, J.D., M.L.I.S., *Outreach and Reference Services Librarian*
Richard H. Bergman, *Adjunct Professor of Law*
Johnny Clark Burris, *Adjunct Professor of Law*
Robert Campbell, *Adjunct Professor in the Master of Science Program*
Laura Cancilla-Miller, *Adjunct Professor of Law*
Marilyn Blumberg Cane, *Adjunct Professor of Law*
Lydia B. Cannizzo, *Adjunct Professor in the Master of Science Program*
Jayme Cassidy, B.S., J.D., *Adjunct Professor of Law*
Meg Chandelle, B.S., M.B.A., J.D., *Critical Skills Instructor*
Michele Chang, *Adjunct Professor in the Master of Science Program*
Tracey L. Cohen, J.D., B.A., *Adjunct Professor of Law*
Jude Cooper, *Adjunct Professor of Law*
Arthur T. Daus III, B.A., J.D., *Adjunct Professor of Law*
Hon. Robert F. Diaz, A.A., B.A., J.D., *Adjunct Professor of Law*
Ken S. Direktor, *Adjunct Professor of Law*
Susan Dubow, *Adjunct Professor of Law*
Cynthia Henry Duval, B.A., J.D., *Associate Director of Career and Professional Development*
Lynn Epstein, *Adjunct Professor of Law*
Rebecca Feinberg, *Adjunct Professor in the Master of Science Program*
Hon. Rex J. Ford, B.S., J.D., *Adjunct Professor of Law*
John A. Frusciante, *Adjunct Professor of Law*
Myrna Galligano-Kozlowski, *Adjunct Professor of Law*
Andrew Garofalo, B.S., J.D., *Adjunct Professor of Law*
Jason A. Glusman, *Adjunct Professor of Law*
Adam Scott Goldberg, B.S., J.D., LL.M., *Adjunct Professor of Law*
Evan J. Goldman, *Adjunct Professor of Law*
Anthony Gonzales, *Adjunct Professor of Law*
Carlos F. Gonzalez, *Adjunct Professor of Law*
Shanika A. Graves, B.A., J.D., *Adjunct Professor of Law*
Arthur Green, *Adjunct Professor in the Master of Science Program*

Robert Gregg, *Critical Skills Instructor*
Tonja Haddad-Coleman, J.D., *Adjunct Professor of Law*
Joseph D. Harbaugh, *Adjunct Professor of Law*
Ross Hartog, B.S., J.D., *Adjunct Professor of Law*
A. Margaret Hesford, B.A., J.D., *Adjunct Professor of Law*
Peter Homer, B.A., J.D., M.B.A., *Adjunct Professor of Law*
Hon. Alfred Horowitz, B.A., J.D., LL.M., *Adjunct Professor of Law*
Julie E. Hough, J.D., *Adjunct Professor of Law*
Jacqueline F. Howe, Esq., *Adjunct Professor of Law*
G. Yasmin Jacob, B.A., J.D., *Adjunct Professor of Law & M.S.Emp.L.
Program*
Nick Jovanovich, *Adjunct Professor of Law*
Kimberly Kanoff Berman, *Adjunct Professor of Law*
Neil Karadbil, *Adjunct Professor of Law*
Jason Katz, B.S., J.D., *Adjunct Professor of Law*
Daniel Kaufman, B.S., J.D., *Adjunct Professor of Law*
Kamran Khurshid, B.A., J.D., *Adjunct Professor*
Warren Kwavnick, *Adjunct Professor of Law*
Allan M. Lerner, B.A., J.D., *Adjunct Professor of Law*
Robert C. Levine, B.S., J.D., *Assistant Dean, Career & Professional
Development & Adjunct Professor of Law*
James Lewis, *Adjunct Professor of Law*
Rochelle Marcus, B.S., M.Ed., J.D., *Adjunct Professor of Law*
Chance Meyer, B.S., J.D., *Adjunct Professor of Law*
Catherine M. Michael, *Adjunct Professor in the Master of Science Program*
Daniel Mielnicki, *Adjunct Professor*
Elena R. Minicucci, B.A., J.D., *Director of Alumni Relations & Adjunct
Professor of Law*
Gerald M. Morris, B.A., J.D., LL.M., *Adjunct Professor of Law*
Charles B. Morton, Jr., B.A., J.D., *Adjunct Professor of Law*
Marlene Murphy, *Critical Skills Instructor*
John Napolitano, *Adjunct Professor of Law*
Robert N. Nicholson, B.A., J.D., *Adjunct Professor of Law*
Michelle M. Parker, Esq., *Adjunct Professor*
Vanessa L. Prieto, Esq., *Adjunct Professor of Law*
Becka Rich, B.A., M.S., J.D., *Senior Associate Director, Law Library &
Technology Center*
Gail L. Richmond, *Professor Emerita of Law*
Michazel J. Rocque, *Adjunct Professor of Law*
Jose A. Rodriguez-Dod, B.S., J.D., *Adjunct Professor of Law*
Bruce Rogow, *Adjunct Professor of Law*
Mac Rohr, *Professor Emeritus of Law*

Morgan Rood, *Adjunct Professor in the Master of Science Program*
Thomas E. Runyan, Esq., B.S., J.D., *Adjunct Professor of Law*
Maria Schneider, B.A., J.D., *Adjunct Professor of Law*
Robert H. Schwartz, *Adjunct Professor of Law*
Stacy Schwartz, B.S., J.D., *Adjunct Professor of Law*
Neal B. Shniderman, B.A., J.D., *Adjunct Professor of Law*
Jodi Siegel, *Adjunct Professor in the Master of Science Program*
Scott Smiley, BSEE, J.D., *Adjunct Professor of Law*
Charlene Smith, *Adjunct Professor of Law*
Mindy F. Solomon, B.S., J.D., *Adjunct Professor of Law*
Athornia Steele, *Adjunct Professor of Law*
Susan Stephan, *Director of Development & Adjunct Professor of Law*
Richard Stone, *Adjunct Professor of Law*
Maxine K. Streeter, B.A., J.D., *Adjunct Professor of Law*
Meah Tell, Esq., B.A., M.B.A., J.D., LL.M., *Adjunct Professor of Law*
Steven Tepler, *Adjunct Professor of Law*
Damian Thomas, J.D., *Adjunct Professor of Law*
Emilie M. Tracy, Esq., *Adjunct Professor of Law*
Dawn Traverso, B.A., J.D., *Adjunct Professor of Law*
Laura Varela, *Adjunct Professor of Law*
Marilyn Vestal, *Adjunct Professor from Coll of Arts, Humanities & Soc Sci (MLAW Temp)*
Ethan Wall, *Adjunct Professor*
Lee Weintraub, B.S., B.A., J.D., *Adjunct Professor of Law*
Steven Wisotsky, *Adjunct Professor of Law*
Camille L. Worsnop, B.S., J.D., LL.M., *Adjunct Professor of Law*

NOVA LAW REVIEW

NON-DISCRIMINATION STATEMENT

It is the policy of *Nova Law Review* to support equality of opportunity. No person shall be denied membership in *Nova Law Review* or participation in any of its activities on the basis of race, color, religion, national or ethnic origin, sex, sexual orientation, age, or disability.

PERMISSION

Nova Law Review hereby grants permission to nonprofit organizations to reproduce and distribute the contents of its journal, in whole or in part, for educational purposes, including distribution to students, provided that the copies are distributed at or below cost and identify the author, *Nova Law Review*, the volume, the number of the first page of the article, the year of publication, and proper notice is affixed to each copy—*unless, a separate copyright notice of an author appears on the article*. **All other rights reserved.** All other inquiries for permission, including articles with a separate copyright notice of an author, should be sent to the attention of the Editor-in-Chief.

MANUSCRIPTS

Nova Law Review invites submissions of unsolicited manuscripts. Articles submitted to *Nova Law Review* should conform to the guidelines set forth in *The Bluebook: A Uniform System of Citation* (20th ed. 2015). Articles may be submitted via mail, or e-mail and must be available on Microsoft Word. E-mail submissions may be sent to the Assistant Lead Articles Editor, accessible at <http://nsulaw.nova.edu/students/orgs/lawreview/>. All articles not chosen for publication are discarded after consideration. *Nova Law Review* does not assume responsibility for the return of any materials.

SUBSCRIPTIONS

The *Nova Law Review* is published three times per year by students of the Shepard Broad Law Center. The current annual subscription rate is \$35.00. Single issues are available for \$12.00. Canadian subscribers should add \$5.00 for postage fees. Foreign subscribers should add \$20.00 for postage fees. Subscriptions are automatically renewed unless notification to the contrary is received by *Nova Law Review*.

Please notify *Nova Law Review* of any changes of address at least 30 days prior to issue release for the change to take effect. The postal service will not forward your copies unless extra postage is provided by the subscriber. Duplicate copies will not be sent free of charge. Subscribers should report non-receipt of copies within 1 month of the expected mailing date. Address any correspondence to:

Nova Law Review
Shepard Broad College of Law
3305 College Avenue
Fort Lauderdale, Florida 33314
Phone: (954) 262-6196

NOVA LAW REVIEW

VOLUME 40

FALL 2015

NUMBER 1

ARTICLES AND SURVEYS

CORRELATION BETWEEN INMATE BRUTALITY AND LACK OF WHISTLEBLOWER PROTECTION IN FLORIDA	BRITTANY N. HENDERSON GARY M. FARMER	1
2015 SURVEY OF JUVENILE LAW	MICHAEL J. DALE	23
A SURVEY OF FLORIDA BASEBALL CASES	LOUIS H. SCHIFF ROBERT M. JARVIS	49
EVIDENCE: 2014 SURVEY OF FLORIDA LAW	MARK M. DOBSON	73

NOTES AND COMMENTS

JUST SHOOT ME A TEXT: THE FLORIDA BAR’S REGULATIONS ON ATTORNEY ADVERTISEMENTS AND MODERN COMMUNICATION	JAZLYN JUDA	153
THE REAL EMERGENCY: WILL FLORIDA FOLLOW GEORGIA IN MEDICAL MALPRACTICE REFORM?	MICHELLE DIAZ	185

CORRELATION BETWEEN INMATE BRUTALITY AND LACK OF WHISTLEBLOWER PROTECTION IN FLORIDA

BRITTANY N. HENDERSON, ESQ.*

GARY M. FARMER, ESQ.**

I.	INTRODUCTION.....	2
II.	INHUMANE TREATMENT OF PRISONERS.....	3
	A. <i>Matthew Walker</i>	3
	B. <i>Darren Rainey</i>	4
III.	ABUSE OF DISABLED PRISONERS	6
	A. <i>Federal System</i>	6
	B. <i>Florida System</i>	6
	1. Elliott “Bud” Yorke	7
	2. Richard Jackson	8
	3. Complaints from Within	8
IV.	REMEDIES FOR PRISONERS	11
	A. <i>Administrative Remedies</i>	11
	B. <i>Civil Remedies</i>	12
	1. Section 768.28 of the Florida Statutes	12
	2. Prison Litigation Reform Act 42 U.S.C. § 1997e..	13
	C. <i>Punitive Damages</i>	14
V.	WHISTLEBLOWER LAWS	15
VI.	INVOCATION OF WHISTLEBLOWER PROTECTION IN FLORIDA	
	PRISONS.....	17

* Brittany N. Henderson, Esq. is an attorney at Farmer, Jaffe, Weissing, Edwards, Fistos & Lehrman, P.L. in Fort Lauderdale, Florida. Brittany concentrates her practice in civil litigation with an emphasis on personal injury, sexual abuse, and class action law. During law school, Brittany developed a passion for civil justice within the Florida prison system, which she now has the opportunity to explore in her professional career. Brittany graduated magna cum laude from Nova Southeastern University College of Law in 2015 after receiving her Bachelor of Arts in Political Science from Auburn University in 2011. Brittany would like to thank the members of the Nova Law Review for their hard work and dedication to this Article.

** Gary M. Farmer, Esq. is a founding partner of Farmer, Jaffe, Weissing, Edwards, Fistos & Lehrman, P.L. in Fort Lauderdale, Florida. Gary has spent almost his entire career fighting for the rights of consumers, fair and just compensation for victims, and the protection of the civil justice system. Gary is now taking that fight to the halls of the Florida Senate as he hopes to personally represent the State of Florida as the next Senator for his life-long constituents in District 34. Gary is a proud alumni and supporter of both Florida State University and the University of Toledo College of Law. He would like to thank the members of the Nova Law Review for their dedication to this Article, and commend them on their commitment to improving the Florida justice system through scholarly writing and education.

A.	<i>Randall Jordan-Aparo</i>	18
B.	<i>Land v. Florida Department of Corrections Complaint</i>	18
VII.	CONCLUSION	20

I. INTRODUCTION

“Inmates are dying in Florida’s prisons, victims of torture and brutality.”¹ As eloquently stated by the Miami Herald, “inmates are being killed by people Floridians pay to keep the peace in a charged, stressful environment.”² Incredibly, Florida has been characterized in recent years as *ground zero* for prison deaths.³ Despite such alarming accusations, formal criminal charges have never been brought against any of the suspected Florida prison employees.⁴ In fact, the situation has become so egregious that former Department of Corrections head, James McDonough, stated in an e-mail, “I am revolted by what I am hearing, just as I am by what I am not hearing. . . . [t]hese cases did not end tragically . . . they ended in horrific and suspicious deaths.”⁵ “With the third largest prison system in the country,” over one hundred thousand inmates are housed in Florida “at a cost of \$2.3 billion per year.”⁶ Recently, in 2014, there are more than five inmates for every ten thousand Florida residents being housed within the seven privately run facilities and forty-eight public state run facilities.⁷ Despite alleged reform attempts within the Florida prison system, former Charlotte Correctional Institute Inmate No. 196374, Joseph Cardenas, described his experience in the facility by saying, “[y]ou have no rights . . . [i]f they beat your ass, [they will] hide you [until] [you are] healed. [That is] their world and you need to accept that.”⁸

In the wake of serious allegations against the State, the Florida Department of Law Enforcement has opened investigations into nine inmate

1. Editorial, *Break the Silence*, MIAMI HERALD (July 10, 2014), <http://www.miamiherald.com/opinion/editorials/article1974845.html>.

2. *Id.*

3. Shaun King, *Record 346 Inmates Die, Dozens of Guards Fired in Florida Prisons*, DAILY KOS (Jan. 14, 2015, 11:20 AM), <http://www.dailykos.com/story/2015/01/14/1357661/-Poisonings-beatings-gassings-Record-346-inmates-die-dozens-of-guards-fired-in-Florida-prisons>.

4. Editorial, *Break the Silence*, *supra* note 1.

5. *Id.*

6. Evan Williams, *Our Inmates, Our Burden*, FLA. WKLY.: FORT MYERS (June 25, 2014), http://fortmyers.floridaweekly.com/news/2014-06-25/Top_News/OUR_INMATES_OUR_BURDEN.html.

7. *Id.*

8. *Id.*

deaths, in addition to the Miami-Dade homicide investigation into the death of Darren Rainey.⁹ Supplementing these investigations, the Florida Department of Corrections introduced an “online database cataloging all inmate deaths over the past [fourteen] years.”¹⁰ This database catalogues the three thousand four hundred inmates who have died in the Florida prison system as well as the roughly one hundred cases that remain under investigation by the Florida Department of Law Enforcement.¹¹

Although a majority of inmate deaths are classified as accidental or natural—like that of Randall Jordan-Aparo—this is often a mistake.¹² In the case of Aparo, his death was ruled an accident until multiple sources at the prison forced the case to be reopened, at which point, it was discovered that he was likely gassed to death by prison guards.¹³ His fate was sealed when prison nurses refused to transport him to the hospital to receive life saving treatment.¹⁴ Conditions have become so outrageous in Florida prisons that convicted murderer, Richard Mair, hung himself in September 2013 leaving behind a suicide note, “accusing guards of sexually abusing inmates and forcing black and white inmates to fight each other for the entertainment of staff.”¹⁵ It has even been reported that if an inmate spoke about filing a complaint, the guards would threaten twenty-four hour cell confinement or issuance of inmate citations for infractions that were not actually committed.¹⁶

II. INHUMANE TREATMENT OF PRISONERS

A. *Matthew Walker*

Matthew Walker was an inmate at the Charlotte Correctional Institution in Punta Gorda, Florida when he was killed on Friday, April 11,

9. Julie K. Brown, *3 More Florida Inmate Deaths Prompt 3 More Investigations*, MIAMI HERALD (July 9, 2014), <http://www.miamiherald.com/news/state/article1974747.html> [hereinafter Brown, *Inmate Deaths Prompt Investigations*].

10. Julie K. Brown, *Florida Prison System, Under Fire, Releases Data on Inmate Deaths*, MIAMI HERALD (Sept. 9, 2014), <http://www.miamiherald.com/news/local/community/miami-dade/article2084652.html>.

11. *Id.*

12. *See id.*

13. *Id.*

14. *See id.*

15. *See* Julie K. Brown, *Staff at a Miami-Dade Prison Tormented, Abused, Mentally Ill Inmates, Former Worker Says*, MIAMI HERALD (May 19, 2014), <http://www.miamiherald.com/news/local/community/miami-dade/article1964709.html> [hereinafter Brown, *Miami-Dade Prison Abused Inmates*].

16. *Id.*

2014.¹⁷ Officers allegedly handcuffed Matthew Walker and beat him to death because he would not put away a magazine and a cup that he had in his cell.¹⁸ Even more appalling, Matthew Walker's brutal murder at the hands of ten prison employees occurred while he was restrained in handcuffs.¹⁹ Officially, nine officers and a lieutenant were placed on leave pending investigation after the officers involved allegedly tried to cover up the crime by blaming Walker's death on his cellmate.²⁰ In light of the incident involving Matthew Walker, former employees of the Charlotte Correctional Institution came forward to reveal the unsafe conditions of the facility.²¹ Incredibly, Joe Facenda—a corrections officer at the facility—stated, “I came home, I [do not] know how many times, dumbfounded at what went on there . . . other officers telling you when, where, and how you can get away with roughing up an inmate.”²²

B. *Darren Rainey*

Darren Rainey was a fifty-year-old mentally ill inmate who “was placed in a small, enclosed, scalding-hot shower by guards and left unattended for more than an hour. He collapsed and died amid the searing heat, suffering severe burns when he fell [with] his face up atop the drain.”²³ Astonishingly, Rainey was placed in the shower “with water temperature exceeding [one hundred and sixty] degrees as punishment for defecating in his cell. He died in that shower with his skin peeling off, while he begged for help”²⁴ An anonymous correctional officer at the Dade Correctional

17. Lucas Seiler, *Inmate at Troubled Prison Killed After Confrontation with Guards*, NBC 2 (Apr. 18, 2014, 4:51 PM), <http://www.nbc-2.com/story/25285565/inmate-charlotte-county-correctional-institution-killed-matthew-walker> [hereinafter Seiler, *Inmate at Troubled Prison Killed After Confrontation with Guards*].

18. Lucas Seiler, *State Question CCI Staff About Prisoner Death*, NBC 2 (Apr. 22, 2014, 6:12 PM), <http://www.nbc-2.com/story/25313044/state-question-cci-staff-about-prisoner-death#.Vd8el7R4FUQ> [hereinafter Seiler, *State Question CCI Staff About Prisoner Death*].

19. *FDLE Investigating Another Inmate Death at CCI*, NBC 2, <http://www.nbc-2.com/story/25590023/fdle-investigating-another-inmate-death-at-charlotte-correctional-institution#.Vd8ckbR4FUQ> (last updated May 22, 2014).

20. Seiler, *Inmate at Troubled Prison Killed After Confrontation with Guards*, *supra* note 17; Seiler, *State Question CCI Staff About Prisoner Death*, *supra* note 18.

21. Seiler, *Inmate at Troubled Prison Killed After Confrontation with Guards*, *supra* note 17.

22. *Id.*

23. Brown, *Miami-Dade Prison Abused Inmates*, *supra* note 15.

24. Nicole Flatow, *Florida Inmate Reportedly Gassed to Death, Another Killed by Scalding Water*, THINK PROGRESS (July 11, 2014, 12:07 PM), <http://www.thinkprogress.org/justice/2014/07/11/3458959/florida-gassed-to-death-killed-by-scalding-hot-water>.

Institution stated that mental health unit guards repeatedly threaten trouble-causing inmates with this *shower treatment*.²⁵

A medical document regarding Rainey's death states that he suffered from a condition referred to as slippage where the skin is so dead that it shrivels away from the body.²⁶ Florida Department of Corrections Secretary Michael Crews fired thirty-two guards in the wake of scrutiny given to inmate deaths across the state of Florida in recent years and specifically to the death of Rainey.²⁷ In regards to situations like Walker and Rainey's, Howard Simon, Executive Director of the American Civil Liberties Union ("ACLU") of Florida stated, "[t]hese revelations that are coming out are not about incompetence. [They are] about guards killing people and public officials working feverishly to cover it up."²⁸ Jerry Cummings, the warden of the prison in which Rainey was held, is on paid administrative leave, while the two correctional officers involved in his suspected murder remain on the job in the facility.²⁹ As of July 9, 2014, Darren Rainey's family had still not been provided with an official cause of death.³⁰

Demanding justice for those unable to obtain justice alone, the Miami Herald has spent more than a year investigating prison abuses within the Florida Department of Corrections.³¹ In particular, the newspaper reported that, "Rainey's death nearly three years ago, along with subsequent stories about rampant inmate abuse as well as a record number of deaths in Florida's prisons, has spawned demands for an overhaul of the Florida Department of Corrections."³² These demands have yet to be met, but hopes remain high as individuals like Inspector General Jeffery Beasley fall under investigation "after four of his subordinates stated under oath this year that he asked them to sideline cases that would give the agency a *black eye*."³³

25. Brown, *Miami-Dade Prison Abused Inmates*, *supra* note 15.

26. Ashley Lopez, *Miami Herald: Allegations of Abuse of Mentally-Ill in Florida Prison*, FLA. CTR. FOR INVESTIGATIVE REPORTING (May 21, 2014), <http://www.fcir.org/2014/05/21/miami-herald-allegations-of-abuse-of-mentally-ill-in-florida-prison>.

27. 32 *Florida Prison Guards Fired Amid Outrage Over Inmate Abuse*, HUFFINGTON POST (Sept. 21, 2014, 1:57 AM), http://www.huffingtonpost.com/2014/09/21/florida-prison-system-fir_n_5856354.html.

28. *Id.*

29. Editorial, *Break the Silence*, *supra* note 1.

30. Brown, *Inmate Deaths Prompt Investigations*, *supra* note 9.

31. Julie K. Brown, *Scalding-Shower Death in Dade Prison Prompts Federal Probe*, MIAMI HERALD (May 19, 2015), <http://www.miamiherald.com/news/special-reports/florida-prisons/article21429693.html>.

32. *Id.*

33. *Id.*

III. ABUSE OF DISABLED PRISONERS

A. *Federal System*

The Department of Justice receives more than sixteen hundred complaints a year from inmates alleging discrimination on the basis of disability.³⁴ The most common allegations include “denial of access or unequal access to the facility’s programs and activities; lack of effective communication for inmates who are deaf or hard of hearing [as well as] those who are blind or have low vision; and denial of access to disability-related medical services and devices.”³⁵ A vast majority of access complaints allege lack of accessible toilets, showers, and cells, along with steep floors that prevent disabled inmates from accessing areas like the dining hall or the library.³⁶ Prisoners are also detrimentally prevented from participating in drug treatment programs required for parole eligibility if they are taking medication to treat mental illness, or they are excluded from obtaining a job, and thus unable to earn credits towards early release.³⁷ Effective communication complaints surround circumstances where prisoners are denied access to sign language interpreters, books on tape, large print, Braille reading materials, or extended length for telephone calls when using special devices to communicate with family.³⁸ Finally, a large number of complaints are received upon denial of mandatory devices or equipment such as eyeglasses, hearing aids, wheelchairs, walkers, necessary medical equipment such as catheters or urine bags, prescribed orthopedic shoes, and necessary medications like insulin or seizure medication.³⁹

B. *Florida System*

The Florida Department of Corrections has systematically generated an environment of fear and hopelessness among disabled prisoners.⁴⁰ “For

34. *Justice Project Improves Conditions for People with Disabilities in Prisons and Jails*, DISABILITY RTS. ONLINE NEWS (Aug. 11, 2008), <http://www.ada.gov/newsltr0208.htm>.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Justice Project Improves Conditions for People with Disabilities in Prisons and Jails*, *supra* note 34.

40. Talila Lewis, Opinion, *Other View: Deaf Inmates Need to be Seen and Heard*, SUN SENTINEL, May 1, 2013, at 10A.

any person who is deaf, prison is a horror.”⁴¹ Unfortunately, “[t]he abuse experienced by deaf prisoners housed in the Florida Department of Corrections *defies imagination*.”⁴² The Helping Educate to Advance the Rights of the Deaf (“HEARD”) organization runs the National Deaf and Deaf-Blind Prisoner Database, and for three years, the organization has been reporting extreme violence and sexual abuse against these vulnerable prisoners to the Governor, the Department of Corrections Secretary, the Office of the Inspector General, and the ADA Coordinator yet to no avail.⁴³ Being that deafness is one of the least understood and most neglected disabilities in prisons, such prisoners are “totally compromised . . . in the dangerous, treacherous environment of rape, abuse, and violence that characterizes most prisons.”⁴⁴

1. Elliott “Bud” Yorke

Elliott “Bud” Yorke is a ninety-year-old deaf and non-verbal inmate at Florida’s Columbia Correctional Institution Annex at Lake City, who was placed in isolation for his own protection after showing signs of being assaulted.⁴⁵ Even in solitary confinement Yorke wrote a letter to a friend stating,

There are no grab and hold bars on [the] wall to help me up and down on [the] toilet. They [will not] let my walker stay in my cell to help, [although] I am [a] solo occupant in this cell while [I am] in this present hell place. At 13:10 [hours] on June 25, 2014, the confinement guard has taken my walker wheels. He rode it out like a *scooter* with one knee on the seat. It was parked outside my cell. It has my jar of topical allergy skin salve under [the] seat, and I [can not] walk without a walker!!⁴⁶

Yorke has served close to thirty years in Florida for a sex offense and has been denied transfer to a prison that teaches American Sign Language.⁴⁷ He has, however, been granted transfer to a facility better suited

41. McCay Vernon, *ADA Routinely Violated by Prisons in the Case of Deaf Prisoners*, PRISON LEGAL NEWS, July 2009, at 14, <http://www.prisonlegalnews.org/media/issues/07pln09.pdf>.

42. Lewis, *supra* note 40 (emphasis added).

43. *Id.*

44. Vernon, *supra* note 41.

45. Adelyn Baxter, *Ninety Years Old, Deaf, and in the Hole in a Florida Prison*, SOLITARY WATCH (July 10, 2014), <http://www.solitarywatch.com/2014/07/10/ninety-years-old-deaf-hole-florida-prison>.

46. *Id.*

47. *Id.*

for his age and disability, but due to limited availability, transferring is a lengthy process.⁴⁸ Incredibly, Yorke will be forced to remain in solitary confinement throughout the remainder of the transfer process despite his vehement objections.⁴⁹

2. Richard Jackson

Richard Jackson, an inmate suffering from partial paralysis of his lower limbs, was denied the use of a wheelchair inside of his cell in Santa Rosa.⁵⁰ In lieu of using his wheelchair, Jackson was forced to *drag himself* between his bed and the toilet using only his hands and arms to assist him in navigating the cell.⁵¹ Even more astonishing, after filing a discrimination lawsuit, Jackson lost thirty pounds in one month from being beaten and having his food withheld as means of retaliation.⁵² Richard Jackson filed his second amended complaint with the United States District Court for the Northern District of Florida in the Pensacola Division on March 26, 2014, naming Michael Crews as the Secretary of the Florida Department of Corrections, Richard Comerford, James White, Dr. Rummel, Marsha Nicols, Officer Locklear, and Does 1-8 as Defendants.⁵³ The Complaint reiterates that when Jackson sought relief from the court, he was transferred to another prison facility where the staff welcomed him by retaliating against him for seeking justice.⁵⁴ Final disposition of this matter is still pending as the Complaint was filed on March 26, 2014.⁵⁵

3. Complaints from Within

George Mallinckrodt was a psychotherapist assigned to the Dade Correctional Institution Psychiatric Unit from 2008 through 2011.⁵⁶ Dr. Mallinckrodt reported that guards “taunted, tormented, abused, beat, and

48. *Id.*

49. *Id.*

50. Kathy M. Foster, *ACLU of Florida and FJI Defend Disabled Man Subjected to Prison Abuse*, FOSTER FOLLY NEWS (Apr. 2, 2014), <http://www.fosterfollynews.com/2014/04/02/aclu-of-florida-and-fji-defend-disabled-man-subjected-to-prison-abuse>.

51. *Id.*

52. *Id.*

53. Second Amended Complaint at 1, Jackson v. Crews, No. 3:13-CV-00174 (N.D. Fla. Mar. 3, 2014).

54. *Id.* at 2.

55. *See id.* at 1.

56. Brown, *Miami-Dade Prison Abused Inmates*, *supra* note 15.

tortured chronically mentally ill inmates on a regular basis.”⁵⁷ Employees allege that guards shockingly “made *sport* of agitating the mentally ill inmates.”⁵⁸ Disability Rights Florida is an organization empowered by federal law to protect the rights of mentally ill individuals in Florida, including those confined by the State at Dade Correctional Institution.⁵⁹ As such, they have filed a complaint for declaratory and injunctive relief against the Florida Department of Corrections and Wexford Health Sources for subjecting mentally ill prisoners to abuse and discrimination by correctional officers.⁶⁰ The lawsuit “alleges systematic and regular abuse and discrimination, including brutality, deprivation of food, and physical and verbal harassment by Dade C[orrectional] I[nstitution] correctional officers against inmates with serious mental illness.”⁶¹

The Dade Correctional Institution has 176 Transitional Care Unit beds and twenty Crisis Stabilization Unit beds, with a majority of inmates residing in solitary confinement conditions.⁶² The complaint alleges that despite actual knowledge of the abuse of inmates in the inpatient mental health unit, correctional officials—including supervisors—have failed to take action to stop the abuse of inmates including the scalding hot shower treatment, physical beatings, deprivation of food, physical harassment, and verbal harassment.⁶³ Notwithstanding numerous verbal and written complaints to prison officials and to the Florida Department of Corrections Inspector General’s office from former treatment staff as well as inmates—including the deaths of two inmates on the Dade Correctional Institution inpatient unit within the past two years—defendant Michael D. Crews failed to rectify the deplorable behavior.⁶⁴ Moreover, Wexford supervisory staff at Dade Correctional Institution not only failed to investigate or report the allegations of abuse, but they did not even attempt to stop the abuse.⁶⁵

Specific allegations include a psychological counselor’s termination in 2011 after he “reported several instances of physical abuse by correctional officers on inmates in the Dade [Correctional Institutions];” all of which

57. *Id.*

58. *Id.*; Lopez, *supra* note 26.

59. Complaint at 1, Disability Rights Fla., Inc. v. Crews, No. 1:14-CV-23323 (S.D. Fla. Sept. 9, 2014).

60. *Id.* at 1–2.

61. Press Release, Disability Rights Fla., Department of Corrections Sued over Inmate Abuse at the Dade Correctional Institute (Sept. 9, 2014), http://www.disabilityrightsflorida.org/newsroom/story/departments_of_corrections_sued_over_inmate_abuse_at_the_dade_correctional_i.

62. Complaint at 5–6, *Disability Rights Fla., Inc.* (No. 1:14-CV-23323).

63. *Id.* at 6–7.

64. *Id.* at 7–8.

65. *Id.* at 8.

were ignored.⁶⁶ The complaint also details the incidents leading up to the death of Darren Rainey, including the horrific detail that he was found dead lying in the shower with burns over ninety percent of his body.⁶⁷ It is further alleged that despite the number of abuse allegations, none of the inmates referenced in the grievances were ever interviewed.⁶⁸ The complaint even identifies two living inmates, D.G. and M.A.—both suffering from serious mental illness and a diagnosis of schizophrenia—who were subjected to the shower treatment, in addition to various other brutal physical attacks.⁶⁹

Richard Mair is additionally listed within the complaint.⁷⁰ Mr. Mair was an inmate at Dade Correctional Institution until he committed suicide on September 11, 2013 after multiple suicide attempts—including ingestion of batteries and razor blades—due to his major depressive disorder.⁷¹ After making several allegations of physical and mental abuse by correctional staff, Mair left a note in his cell indicating that he committed suicide in part because of the continual abuse against him by the correctional staff.⁷² Incredibly, when the Florida Department of Corrections Inspector General's office reopened review of Darren Rainey's death, it was only on whether the shower was functioning properly and did not address the wide spread abuse of mentally ill inmates.⁷³

Counts one and two of the complaint allege violations of 42 U.S.C. § 1983 against Michael D. Crews in his official capacity as the Secretary of the Department of Corrections and Wexford Health Sources, Inc.⁷⁴ The Eighth Amendment of the United States Constitution mandates that reasonable measures be taken to guarantee the safety of inmates by ensuring humane conditions of confinement, preventing use of excessive force against inmates, and ensuring that inmates receive adequate food, clothing, shelter, and medical care.⁷⁵ Finally, count three alleges violations of the Americans with Disabilities Act as well as the Rehabilitation Act.⁷⁶ Specifically, 42 U.S.C. §

66. *Id.*

67. Complaint at 8–9, *Disability Rights Fla., Inc.* (No. 1:14-CV-23323).

68. *Id.* at 10.

69. *Id.* at 11–12.

70. *Id.* at 12.

71. *Id.*

72. Complaint at 12, *Disability Rights Fla., Inc.* (No. 1:14-CV-23323).

73. *Id.* at 13–14.

74. *Id.* at 2–3, 15–16; *see also* 42 U.S.C. § 1983 (2012).

75. Complaint at 15–16, *Disability Rights Fla., Inc.* (No. 1:14-CV-23323); *see also* U.S. CONST. amend. VIII.

76. Complaint at 18, *Disability Rights Fla., Inc.* (No. 1:14-CV-23323); *see also* 42 U.S.C. §§ 12131–12132 (2012); 29 U.S.C. § 794(a)–(b) (2012).

12131 and § 12132 prohibit disability-based discrimination by any public entity.⁷⁷

IV. REMEDIES FOR PRISONERS

A. *Administrative Remedies*

Section 944.331 of the Florida Statutes mandates the creation of an inmate grievance procedure in the state of Florida.⁷⁸ The entirety of the statute states, “[t]he department shall establish by rule an inmate grievance procedure that must conform to the Minimum Standards for Inmate Grievance Procedures as promulgated by the United States Department of Justice pursuant to 42 U.S.C. § 1997(e). The department’s office of general counsel shall oversee the grievance procedures established by the department.”⁷⁹ Florida has developed such a procedure through Florida Administrative Code Rule 33-103.⁸⁰ This procedure is in place to provide inmates with a channel for the administrative settlement of a claim against the facility of incarceration.⁸¹ The Bureau of Policy Management and Inmate Appeals not only address such grievances, but the division is also responsible for developing a standardized grievance plan to be implemented by the Bureau of Staff Development in training employees.⁸²

Importantly, inmates are required to utilize the informal grievance process before initiating a formal grievance, except in the case of an emergency grievance, medical grievance, or grievance alleging violations of the Americans with Disabilities Act.⁸³ Inmates are instructed to place informal grievances in a designated lock box, which will then be distributed to the staff member in charge of the problem area—after it is logged into the system, which is then required to provide a response.⁸⁴ The inmate must indicate that Form DC6-236 is being used as an informal grievance in order to meet the requirement of proper filing necessary prior to the submission of a formal grievance.⁸⁵ Upon completion of the informal grievance process, an inmate can file a formal grievance by completing Form DC1-303 Request for

77. Complaint at 18, *Disability Rights Fla., Inc.* (No. 1:14-CV-23323); 42 U.S.C. §§ 12131–12132.

78. FLA. STAT. § 944.331 (2014).

79. *Id.*

80. FLA. ADMIN. CODE ANN. r. 33-103.001–.019 (2015).

81. *Id.* r. 33-103.001.

82. *Id.* r. 33-103.001, .003.

83. *Id.* r. 33-103.005.

84. *Id.* r. 33-103.005(a)–(b).

85. FLA. ADMIN. CODE ANN. r. 22-103.605(2)(b).

Administrative Remedy or Appeal and submitting it to the warden.⁸⁶ If a formal grievance is found to be an emergency, action to alleviate must be taken and a formal response must be provided to the inmate within fifteen calendar days.⁸⁷ Alternatively, if an emergency is not found, the inmate must be notified of the non-emergent status within seventy-two hours of receipt.⁸⁸ In the event that an inmate is not satisfied with the outcome of the grievance procedure, there is also an appeals process in place that the inmate can utilize.⁸⁹

B. *Civil Remedies*

1. Section 768.28 of the Florida Statutes

Section 768.28 of the Florida Statutes addresses waiver of sovereign immunity in tort actions, stating specifically that, “the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act.”⁹⁰ Importantly,

[t]he state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances, but liability *shall not include punitive damages* or interest for the period before judgment. Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment *by any one person which exceeds the sum of [two hundred thousand dollars]* or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of [three hundred thousand dollars].⁹¹

This limit on the liability of the Department of Corrections as an agency or subdivision of the State of Florida allows prison officials to commit heinous crimes—including brutal murders—against inmates with a two hundred thousand dollar cap on civil liability in state court.⁹² This is utterly outrageous. Heightened financial liability against the Department of Corrections would likely lead to an increase in accountability and a decrease

86. *Id.* r. 33-103.006(1).

87. *Id.* r. 33-103.006(3)(a)(3).

88. *Id.* r. 33-103.006(3)(a)(4).

89. *Id.* r. 33-103.007(1).

90. FLA. STAT. § 768.28(1) (2014).

91. *Id.* § 768.28(5) (emphasis added).

92. *See id.* § 768.28; Seiler, *State Question CCI Staff About Prisoner Death*, *supra* note 18.

in inmate brutality at the hands of prison officials.⁹³ As it stands, it is possible to seek punitive damages in Florida state courts for the wrongful death of an animal—for example, a pet rabbit—yet not possible to do the same in when an inmate is viscerously murdered at the hands of a prison guard.⁹⁴

2. Prison Litigation Reform Act 42 U.S.C. § 1997e

Due to caps placed on recoverability based on state sovereign immunity, civil lawsuits brought against the state or its subdivisions for actions arising out of publically run prison facilities do not yield just results.⁹⁵ As a result of this injustice, civil lawsuits filed on behalf of prisoners against state entities regulating incarceration facilities are often brought under the 42 U.S.C. § 1983 with limitations pursuant to the Prison Litigation Reform Act.⁹⁶ Unfortunately, the Prison Litigation Reform Act makes it seemingly difficult for prisoners to file lawsuits in federal court, primarily by mandating that all administrative remedies be exhausted, which includes taking every single step in the particular facility's grievance process.⁹⁷ Pertinently, this statute provides that, "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other [f]ederal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."⁹⁸ Additionally, the following physical injury requirement must be satisfied for a claim to be ripe under the Prison Litigation Reform Act: "No [f]ederal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody

93. See Barnini Chakraborty, *Florida Prison System Under Fire Amid Allegations of Abuse, Fatal Shower Scalding*, FOX NEWS (Apr. 9, 2015), <http://www.foxnews.com/politics/2015/04/09/florida-prison-system-under-scrutiny-as-lawmakers-fight-to-keep-feds-out-and>.

94. See FLA. STAT. § 768.28(5); Nathan J. Winograd et al., *Damages for Death or Injury of an Animal*, ANIMAL LEGAL DEF. FUND (Feb. 2001), <http://www.aldf.org/resources/when-your-companion-animal-has-been-harmed/damages-for-death-or-injury-of-an-animal>.

95. See Complaint at 17, *Land v. Fla. Dep't of Corr.*, No. 4:14-CV-00347-WS-CAS (N.D. Fla. July 7, 2014); *infra* Section IV.B.

96. 42 U.S.C. § 1997e (2012); see also Complaint at 1–2, *Disability Rights Fla., Inc. v. Crews*, No. 1:14-CV-23323 (S.D. Fla. Sept. 9, 2014) (bringing a suit against the Department of Corrections under 42 U.S.C. § 1983 on behalf of mentally ill inmates that suffered abuse and discrimination).

97. 42 U.S.C. § 1997e(a); *The Prison Litigation Reform Act (PLRA)*, ACLU, http://www.aclu.org/sites/default/files/images/asset_upload_file79_25805.pdf (last updated Nov. 2002).

98. 42 U.S.C. § 1997e(a).

without a prior showing of physical injury or the commission of a sexual act—as defined in [§] 2246 of [T]itle 18.”⁹⁹

Finally, in accord with 28 U.S.C. § 1915, all prisoners must pay the filing fees in full without exception.¹⁰⁰ It is, however, permissible to pay the filing fee over time in monthly increments taken directly from the prisoner’s commissary account.¹⁰¹ Importantly, punitive damages are recoverable under the Prison Litigation Reform Act, which is why—despite the detailed pre-suit requirements—filing suit in federal court is far superior to filing suit in state court, in terms of remedies.¹⁰²

C. *Punitive Damages*

In addition to the availability of punitive damages in federal court under the Prison Litigation Reform Act, the increase in privatization of state prison facilities has opened the possibility of suits against companies like the GEO Group.¹⁰³ Instances of egregious abusive behavior towards Florida inmates can be rectified through punitive damages if an inmate is lucky enough to be housed in a privately operated prison facility.¹⁰⁴ For example, Roy Hyatt was awarded \$1.2 Million as a result of the way he was treated at South Bay Correctional Facility.¹⁰⁵ Hyatt was awarded one million dollars for pain and suffering after being blinded in one eye when another inmate threw boiling water in his face.¹⁰⁶ The incident resulted from private prison company, GEO Group, allowing inmates in the South Bay Correctional Facility unfettered access to microwaves in their cellblocks.¹⁰⁷

99. *Id.* § 1997e(e).

100. 28 U.S.C. § 1915(b)(1) (2012); *The Prison Litigation Reform Act (PLRA)*, *supra* note 97.

101. 28 U.S.C. § 1915(b)(2); *The Prison Litigation Reform Act (PLRA)*, *supra* note 97.

102. *See* 42 U.S.C. § 1997e(a) (allowing inmates to file an action for prison conditions under 42 U.S.C. § 1983, or any other federal law, as long as available administrative remedies are exhausted); FLA. STAT. § 768.28(5) (2014) (establishing that punitive damages shall not be included in the liability of the state and its agencies and subdivision for tort claims).

103. *See* Jane Musgrave, *Injured Inmate Awarded 1.2 Million; Prison Firm Was Wrong to Give Access to Microwave, Jury Says*, PALM BEACH POST, Sept. 14, 2012, at B.1.; *Florida Prisoner Awarded \$1.2 Million for Burn Injuries*, PRISON LEGAL NEWS, June 2014, at 13, <http://www.prisonlegalnews.org/media/issues/06pln14.corrected2.pdf>.

104. *See* Musgrave, *supra* note 103.

105. *Id.*

106. *Id.*

107. *Id.*

On August 28, 2007, Roy Hyatt was watching football on television in the dayroom of his unit at the South Bay Correctional Facility.¹⁰⁸ Following an argument with Hyatt, fellow inmate Rodney Smith used a microwave to boil a container of water, which he then threw on Hyatt causing first and second-degree burns to around thirty percent of Hyatt's body.¹⁰⁹ The incident also resulted in the loss of the use of one of Hyatt's eyes.¹¹⁰ Such negligent behavior—arguably far less negligent than murder committed at the hands of prison employees—warranted a jury finding of over a million dollars to restore justice to Hyatt.¹¹¹

V. WHISTLEBLOWER LAWS

Accountability is maintained in private and public Florida entities alike through whistleblowers that bring fraud, misconduct, and corruption to light.¹¹² In addition to the aforementioned horrors that have been exposed in publicly run incarceration facilities, “[t]ens of thousands of inmates nationwide are housed in privately run prisons.”¹¹³ “The operators of those facilities—Corrections Corporation of America (“CCA”), the GEO Group (“GEO”), and Management and Training Corporation (“MTC”)—are all for-profit entities.”¹¹⁴ Like most for-profit businesses, the private prison industry needs to turn a profit to satisfy investors.¹¹⁵ Studies show that such necessities sometimes lead to cutting corners, over billing, or inadequate staffing.¹¹⁶ “Each of [these] . . . scenarios are ideal for whistleblowers in . . . states that have enacted a false claims law.”¹¹⁷

Florida law relating to whistleblower protection is codified in section 448.102 of the Florida Statutes, which governs private whistleblower

108. *Florida Prisoner Awarded \$1.2 Million for Burn Injuries*, *supra* note 103.

109. *Id.*

110. *Id.*

111. Musgrave, *supra* note 103, *see also* Seiler, *Inmate at Troubled Prison Killed After Confrontation with Guards*, *supra* note 17.

112. Nathan A. Adams IV, *Distinguishing Chicken Little from Bona Fide Whistleblowers*, 83 FLA. B. J. 100, 100 (2009).

113. *Corrections Corp of America Settles Claims — Whistleblower Post*, MAHANY & ERTL (Feb. 17, 2014, 3:02 PM), <http://www.mahanyertl.com/mahanyertl/2014/corrections-corp-america-settles-claims-whistleblower-post>; *see also* Musgrave, *supra* note 103; *Florida Prisoner Awarded \$1.2 Million for Burn Injuries*, *supra* note 103.

114. *Corrections Corp of America Settles Claims — Whistleblower Post*, *supra* note 113.

115. *Id.*

116. *Id.*

117. *Id.*

protection and section 112.3187 of the Florida Statutes, which governs public officers and employees.¹¹⁸

The legislative intent behind section 112.3187 of the Florida Statute is stated within the statute as,

It is the intent of the Legislature to prevent agencies or independent contractors from taking retaliatory action against an employee who reports to an appropriate agency violations of law on the part of a public employer or independent contractor that create a substantial and specific danger to the public's health, safety, or welfare. It is further the intent of the Legislature to prevent agencies or independent contractors from taking retaliatory action against any person who discloses information to an appropriate agency alleging improper use of governmental office, gross waste of funds, or any other abuse or gross neglect of duty on the part of an agency, public officer, or employee.¹¹⁹

“To state a claim under the private Florida Whistleblower Act,” the employee must prove that the employee,

1) disclosed or threatened to disclose to an agency under oath and in writing; 2) an activity, policy, or practice of his or her employer; 3) that was in violation of law, rule, or regulation; 4) that the employer retaliated against his or her because of the disclosure or threat to disclose; and 5) he or she had given written notice to the employer of its activity, policy, or practice; 6) thereby giving the employer reasonable opportunity to correct the activity, policy, or practice.¹²⁰

The most important distinction between the Florida laws regulating public and private entities is that “a public employee may state a claim under the act” so long as they *believe* that the actions of the public employer are illegal, while a private employee must actually “prove [that the] conduct is illegal.”¹²¹ Furthermore, a private employee is required to give notice under oath, while a public employee can give notice in any form “as long as [the notice] is written and signed.”¹²² Based on the publically known instances of horrific inmate abuse within Florida prisons, it is clear that public and

118. Compare FLA. STAT. § 448.102 (2014), with FLA. STAT. § 112.3187 (2014).

119. FLA. STAT. § 112.3187(2).

120. Adams IV, *supra* note 112, at 100 (quoting Taylor v. Mem'l Health Sys., Inc., 770 So. 2d 752, 753–54 (Fla. 5th Dist. Ct. App. 2000)).

121. See *id.*

122. *Id.*

privately operated facilities alike are ripe for whistleblowers with the ability to meet the criteria under either Florida Statute.¹²³

VI. INVOCATION OF WHISTLEBLOWER PROTECTION IN FLORIDA PRISONS

“The [Whistleblower Protection Act] protects federal employees from retaliation after reporting a wrongdoing.”¹²⁴ “Whistleblowers may not be transferred, denied a raise, have their hours reduced, be fired, or be punished in any other way because they have exercised any right afforded to them under the law.”¹²⁵ “[A] whistleblower must have ‘original source’ information of a fraud involving a government-funded project.”¹²⁶ Because of the nature of the relationship between privately operated incarceration facilities and the federal government, “a private prison facility . . . [can] be the subject of a federal whistleblower [investigation].”¹²⁷ Despite the presence of legislation to support, if not encourage, those aware of wrongdoing to come forward, Florida prison employees have nevertheless been retaliated against.¹²⁸ John Pisciotta filed suit in 2011 against the Florida Department of Corrections for “back pay, reinstatement of his job, damages, and attorney fees” under Florida’s whistleblower act.¹²⁹ On May 21, 2008, “[Pisciotta] was one of eight guards involved in the cell extraction of [inmate] Kelly Bradley” that left “Bradley’s eye . . . hanging from its socket.”¹³⁰ Bradley was an inmate at Charlotte Correctional Institution and “Pisciotta was the only prison employee to report that [fellow] guard, William . . . Wilson”, was responsible for the catastrophic injuries sustained by Bradley.¹³¹ Pisciotta was not praised for his strength; rather, the Florida Department of Corrections retaliated against him by falsifying an incident of abuse.¹³²

123. See FLA. STAT. §§ 112.3187(5), 448.102(1–3); Crystal Sheppard, *After Horrific Death in Florida Prison, Investigator is Denied Whistleblower Protection*, CARE2 (July 20, 2014, 11:30 A.M.), <http://www.care2.com/causes/after-horrific-death-in-florida-prison-investigator-is-denied-whistleblower-protection.html>.

124. Sheppard, *supra* note 123.

125. *Id.*

126. *Corrections Corp of America Settles Claims — Whistleblower Post*, *supra* note 113.

127. *Id.*

128. See *Former Florida Prison Guard Sues for Reinstatement Under Whistleblower Act*, PRISON LEGAL NEWS, Oct. 2011, at 34, <http://www.prisonlegalnews.org/media/issues/10pln11.pdf>.

129. *Id.*

130. *Id.*

131. *Id.*

132. See *id.*

A. *Randall Jordan-Aparo*

Randall Jordan-Aparo was a Florida inmate who was “gassed to death in his cell over the course of five hours.”¹³³ “Aparo . . . was serving [eighteen] months . . . at Franklin Correctional Institution in Carabelle, Florida [for check fraud].”¹³⁴ After denying Aparo’s requests for medical treatment, “he threatened to report [the guards] for [medical] neglect,” at which point, “they placed him in solitary confinement.”¹³⁵ He remained in solitary confinement until he subsequently died five days later after guards repeatedly sprayed gas into his cell, which led to his ultimate suffocation.¹³⁶ “In the hours before his death, he pleaded with the guards and . . . prison[] nurses to take him to the hospital because he [could not] breathe.”¹³⁷ “When his body was found, he was coated in yellow residue, his face was pressed up against the bottom of the steel door and a Bible was next to his head.”¹³⁸ While investigating common allegations of prison corruption, Florida Department of Corrections inspector, Aubrey Land, found that Randall Jordan-Aparo “was the victim of force or discipline made either maliciously or sadistically for the purpose of causing harm and for retaliation for threatening to bring a lawsuit.”¹³⁹ Land is of the impression that Aparo “never made it home because they let him [just] lay there and die.”¹⁴⁰

B. *Land v. Florida Department of Corrections Complaint*

Following the death of Randall Jordan-Aparo, Florida Department of Corrections inspector Aubrey Land and other colleagues were denied whistleblower status and faced retaliation as a result of exposing the brutal death.¹⁴¹ Despite thirty-five years of experience in the industry, Aubrey Land was shocked by the events that unfolded involving Aparo.¹⁴² In addition to the denial of whistleblower protection as a means of retaliation, Land and his colleagues were the subject of an internal affairs investigation

133. Flatow, *supra* note 24; see also Brown, *Inmate Deaths Prompt Investigations*, *supra* note 9.

134. Sheppard, *supra* note 123.

135. *Id.*

136. *Id.*

137. Brown, *Inmate Deaths Prompt Investigations*, *supra* note 9.

138. *Id.*

139. Flatow, *supra* note 24.

140. *Id.*

141. Brown, *Inmate Deaths Prompt Investigations*, *supra* note 9; Sheppard, *supra* note 123.

142. Sheppard, *supra* note 123.

based on false and unwarranted allegations.¹⁴³ After being denied whistleblower status, Florida's Chief Inspector General, Melinda Miguel, referred them to the State Commission on Human Relations to file a complaint against their boss, Florida Department of Corrections Inspector General Jeffery Beasley.¹⁴⁴ As a result, Aubrey Land, David Clark, Doug Glisson, and John Ulm filed a complaint in the United States District Court for the Northern District of Florida against the Florida Department of Corrections as well as other defendants in their individual capacities.¹⁴⁵

Aubrey Land, Doug Glisson, and John Ulm were acting within the course and scope of their employment while investigating a variety of prison guard misconduct at Franklin Correctional Institute.¹⁴⁶ During the Cassidy Hill investigation, the Plaintiffs became aware of the aforementioned situation regarding Randall Jordan-Aparo.¹⁴⁷ Throughout their investigation, the investigators obtained "evidence that inmate Aparo died as a result of force or discipline made either maliciously or sadistically for the very purpose of causing harm by the [Florida Department of Corrections] employees in retaliation for Aparo threatening to sue Defendant Florida Department of Corrections for Florida Department of Correction's failure to take Aparo to a hospital for treatment."¹⁴⁸ Such evidence included statements from inmates as well as video and audio footage shot on the date of Aparo's death showing that he was in extreme physical danger in conditions that were not properly documented in the 2010 Aparo Death Investigation; in fact, such conditions were completely falsified within the report.¹⁴⁹ The Complaint additionally alleges "that Lieutenant Austin . . . caused Sergeant James Hamm to sign a Use of Force Report [that] both [officers] knew [was] [blatantly] false."¹⁵⁰

Furthermore, this report failed to mention that Aparo suffered from a rare lung disease that had previously confined him to the infirmary and that the use of chemical agents leading to Aparo's death was cruel and unusual punishment within the confines of the Eighth Amendment.¹⁵¹ In the end, "[A]paro was left to suffocate in his contaminated cell without medical intervention for approximately five hours and his death pose indicated his

143. *Id.*

144. Brown, *Inmate Deaths Prompt Investigations*, *supra* note 9.

145. Complaint at 1, Land v. Fla. Dep't of Corr., No. 4:14-CV-00347-WS-CAS (N.D. Fla. July 7, 2014).

146. *Id.* at 9.

147. *Id.* at 9–10.

148. *Id.* at 10.

149. *Id.* at 10–13.

150. Complaint at 11, Land (No. 4:14-CV-00347-WS-CAS).

151. U.S. CONST. amend VIII; Complaint at 11, Land (No. 4:14-CV-00347-ws-cas).

mouth and nose were lodged in the small gap in the door of his isolation unit, attempting to breathe.”¹⁵²

Based on principles of sovereign immunity granted to the Florida Department of Corrections as well as the Inspector General of the State of Florida, the Plaintiffs in this suit solely sought whistleblower protection including injunctive relief preventing continuance of retaliation in the form of false and unfounded internal affairs complaints.¹⁵³ In terms of the Complaint against Defendants Beasley, Sumpter, Miguel, and Case, the Plaintiffs sought “all compensatory damages allowable pursuant to 42 U.S.C. 1983” for retaliation against the Plaintiffs for disclosing “matters of substantial public concern” in violation of the First Amendment and the Petition Clause.¹⁵⁴

On March 4, 2015, the Northern District Court of Florida granted the Defendants’ Motion to Dismiss the Plaintiffs’ First Amended Complaint—as to Plaintiffs Aubrey Land, David Clark, Doug Glisson, John Ulm, and James Padgett—with prejudice for failure to state a claim under the First Amendment.¹⁵⁵

VII. CONCLUSION

Lack of criminal prosecution of offending employees, limited civil liability for prisoners in state courts, and denial of whistleblower protection serve as the framework for the travesty that is the current Florida prison system.¹⁵⁶

Interestingly, Secretary of the Florida Department of Corrections, Michael D. Crews, issued a Press Release on August 20, 2014, in response to the media coverage of recent inmate deaths in Florida facilities.¹⁵⁷ Secretary Crews specifically announced the expansion of Crisis Intervention Training programs that will teach correctional officers the right and wrong ways to handle inmates suffering from mental illness.¹⁵⁸ Perhaps most importantly, he announced that the Florida Department of Corrections would be “developing a clear and consistent policy that will outline the initiation of disciplinary action up to and including dismissal against any employee

152. *Id.* at 13.

153. *Id.* at 17–18.

154. *Id.* at 18–19; *see also* U.S. CONST. amend. I.

155. Order Granting Defendant’s Motion to Dismiss at 16, *Land v. Fla. Dep’t of Corr.*, No. 4:14-CV-00347-WS-CAS (N.D. Fla. Mar. 4, 2015).

156. *See supra* Section IV.B., Part VI.

157. Press Release, Michael Crews, Sec’y, Fla. Dep’t of Corr., Everything We Do Is Moving Us Down a Path Toward Safer Facilities and a Safer Florida (Aug. 20, 2014), <http://www.dc.state.fl.us/secretary/press/2014/08-20-Crews.html>.

158. *Id.*

whose conduct violates any criminal statute.”¹⁵⁹ Promisingly, a criminal conviction will not be a condition precedent to enforcement of disciplinary action.¹⁶⁰ Finally, the Florida Department of Law Enforcement has been granted full investigative authority on the eighty-two non-natural deaths currently being investigated by FDOC inspectors.¹⁶¹

While it appears that the Florida Department of Corrections has developed good intentions in the wake of the media attack highlighting inmate brutality, planning and implementation are very different concepts.¹⁶² For the Florida prison system to rise up out of the ashes, Florida Department of Corrections insiders must be afforded whistleblower protection.¹⁶³ Denial of whistleblower protection to Aubrey Land, David Clark, Doug Glisson, and John Ulm, in regards to the Randall Jordan-Aparo case, represents the height of the Florida prison problem.¹⁶⁴ In addition to the Plaintiffs listed in the Land Complaint, a Florida Department of Corrections probation officer was also denied protection upon report of suspicious aspects of Aparo’s death before being fired for *absenteeism*.¹⁶⁵ To ensure unfettered access to the statistics and details of inmates who die within prison walls from unnatural causes, the Florida Department of Corrections must do more than issue a press release.¹⁶⁶

As stated by American Civil Liberties Union of Florida spokesperson Baylor Johnson, “[t]he only way to fix the toxic culture in the Department of Corrections is to hold people responsible for their actions—including criminal charges for criminal behavior.”¹⁶⁷ Johnson further warns that any future regulation will only be effective if enforced by “people committed to rigorous oversight and capable of resisting political pressure.”¹⁶⁸ Perhaps most importantly, as eyewitnesses to the interworking of the Florida prison system, public and private corrections employees must be guaranteed protection under the Florida Whistleblower Protection statutes—to the extent that their conduct qualifies—to create a system of

159. *Id.*

160. *Id.*

161. *Id.*

162. Press Release, Michael Crews, *supra* note 157.

163. See Shepard, *supra* note 123; *supra* Part VI.

164. See Complaint at 7–9, Land v. Fla. Dep’t of Corr., No. 4:14-CV-00347-WS-CAS (N.D. Fla. July 7, 2014).

165. Gary Fineout, *Report: Scott’s Top Inspector Told About Cover-Up*, ASSOCIATED PRESS, Sept. 26, 2014.

166. See Press Release, Michael Crews, *supra* note 157.

167. Chakraborty, *supra* note 93.

168. *Id.*

accountability free from appalling abuse and violations of fundamental constitutional rights of Florida inmates.¹⁶⁹

169. See FLA. STAT. §§ 112.3187, 448.102 (2014).

2015 SURVEY OF JUVENILE LAW

MICHAEL J. DALE*

I.	INTRODUCTION.....	23
II.	DEPENDENCY PROCEEDINGS.....	24
III.	TERMINATION OF PARENTAL RIGHTS	27
IV.	JUVENILE DELINQUENCY	32
V.	OTHER MATTERS	39
	A. <i>Due Process Shortcomings in the Dependency Court</i>	39
	B. <i>The Ongoing Failure to Provide Counsel for Children in Child Welfare Cases in Florida and Shortcomings in the GAL Program</i>	40
VI.	CONCLUSION.....	47

I. INTRODUCTION

The Supreme Court of Florida ruled in this survey year on two very important cases arising from the Supreme Court of the United States' 2012 opinion in *Miller v. Alabama*,¹ which held unconstitutional the "sentencing scheme[s] . . . mandat[ing] life in prison without [the] possibility of parole for juvenile offenders."² A series of Florida intermediate appellate court cases followed during this survey year, applying the Florida holdings as to *Miller*.³ The Florida appellate courts continued to rule on a number of issues involving dependency and termination of parental rights ("TPR"), focusing in large part on rudimentary violations of procedural due process by the trial courts.⁴ In the

* Professor of Law, Nova Southeastern University Shepard Broad College of Law. This Survey covers cases decided during the period from July 1, 2014 through June 30, 2015. The author thanks research assistants Michael Costello, Andree Quaresima, and Samantha Scheff and Research and References Services Librarian, Rob Behariell, for their assistance in writing this Survey.

1. 132 S. Ct. 2455 (2012).

2. *Falcon v. State*, 162 So. 3d 954, 960 (Fla. 2015) (quoting *Miller*, 132 S. Ct. at 2469); *Horsley v. State*, 160 So. 3d 393, 394 (Fla. 2015) (quoting *Miller*, 132 S. Ct. at 2469).

3. See *Miller*, 132 S. Ct. at 2469; *Falcon*, 162 So. 3d at 958; *Horsley*, 160 So. 3d at 394, 397.

4. See *Padgett v. Dep't of Health & Rehab. Servs.*, 577 So. 2d 565, 566, 569–70 (Fla. 1991); *Dep't of Children & Families v. T.S.*, 154 So. 3d 1223, 1226 (Fla. 4th Dist. Ct. App. 2015).

delinquency area, restitution is a common dispositional alternative.⁵ There, the appellate courts have on a number of occasions been obligated to reverse trial court decisions for improperly applying the restitution statute.⁶

Finally, and most importantly, the decades long shortcomings in the Florida dependency system—based in significant part on the lack of representation of children by lawyers, and the failure of Florida’s Guardian ad Litem (“GAL”) Program to both adequately and properly carry out its statutory role despite massive funding—have yet again remained a very serious problem during this survey year.⁷

II. DEPENDENCY PROCEEDINGS

In dependency proceedings, there must be competent and substantial evidence to form a basis for a finding of dependency.⁸ Thus, a mother’s homelessness and unemployment, standing alone, are insufficient to support a finding of prospective harm or neglect in a situation where the mother has not previously rejected services offered under Florida law, according to the Fourth District Court of Appeal in *E.R. v. Department of Children & Families*.⁹

In *N.J. v. Department of Children & Families (In re Interest of A.W.J.)*,¹⁰ the Second District Court of Appeal reversed a finding of dependency premised upon a head injury to a child.¹¹ The only individual who testified at the adjudicatory hearing that the child’s head injury was the result of abuse was a medical doctor.¹² However, first, the doctor was not asked whether she could provide her opinion within a reasonable degree of medical probability and, second, the doctor’s opinion of abuse was not substantiated by record evidence but was simply a subjective opinion, which was thus not legally sufficient to support the trial court’s adjudication of dependency.¹³

5. See *L.W. v. State*, 163 So. 3d 598, 599 (Fla. 3d Dist. Ct. App. 2015); *A.D. v. State*, 152 So. 3d 798, 798 (Fla. 4th Dist. Ct. App. 2014); *C.W. v. State*, 150 So. 3d 882, 883 (Fla. 2d Dist. Ct. App. 2014).

6. See FLA. STAT. § 985.437(2) (2014); *L.W.*, 163 So. 3d at 601; *A.D.*, 152 So. 3d at 799; *C.W.*, 150 So. 3d at 883.

7. See Michael J. Dale, *2014 Survey of Juvenile Law*, 39 NOVA L. REV. 37, 62–63 (2014) [hereinafter Dale, *2014 Survey of Juvenile Law*]; Michael J. Dale & Louis M. Reidenberg, *Providing Attorneys for Children in Dependency and Termination of Parental Rights Proceedings in Florida: The Issue Updated*, 35 NOVA L. REV. 305, 310, 329–31 (2011) [hereinafter Dale & Reidenberg, *Providing Attorneys for Children*]; *infra* Section V.B.

8. *J.A.B. v. State*, 148 So. 3d 151, 151–52 (Fla. 5th Dist. Ct. App. 2014).

9. 143 So. 3d 1131, 1133, 1136 (Fla. 4th Dist. Ct. App. 2014). See generally FLA. STAT. ch. 39.

10. 143 So. 3d 1109 (Fla. 2d Dist. Ct. App. 2014).

11. *Id.* at 1110–11.

12. *Id.* at 1111.

13. *Id.* at 1111–12.

In *Department of Children & Families v. T.S.*,¹⁴ the intermediate appellate court reversed on a more fundamental ground.¹⁵ The Department and the child appealed the dismissal of a petition for dependency and arraignment, arguing that the trial court had committed a fundamental error violating a child's due process rights by dismissing the petition without notice or an opportunity to be heard.¹⁶ Recognizing the basic due process violation involving notice and an opportunity to be heard, the appellate court reversed.¹⁷

Case plans are an important part of dependency proceedings resulting, as they do, from the implementation of the federal Child Abuse Protection and Treatment Act, commonly known as CAPTA.¹⁸ In *M.P. v. Department of Children & Families*,¹⁹ the appellate court noted that generic case plans that do not relate to the individual needs and circumstances of the particular family are in violation of section 39.603 of the Florida Statutes.²⁰ In the case at bar, there being no evidence of the father's use of drugs, a case plan that ordered the father to submit to random drug screenings as part of the case plan constituted reversible error.²¹ A similar result occurred in *M.B.W. v. Department of Children & Families (In re Interest of M.W.)*.²² In that dependency case, the Department conceded error in part as tasks were required beyond a parenting class, which had no relationship to the dependency as to the father.²³

The issue of nexus—the tie between a parent's problem and risk of danger to the children—has perplexed the Florida dependency courts for almost twenty-five years since the Supreme Court of Florida decided *Padgett v. Department of Health & Rehabilitative Services*²⁴ in 1991.²⁵ In *E.H. v. Department of Children & Families*,²⁶ the appellate court affirmed the trial court finding that there was sufficient evidence to establish a substantial risk of imminent abuse to a child in a dependency case.²⁷ In *E.H.*, there were incidents of domestic violence, unemployment with an eviction from the home, and a mother with a mental health issue that had gone untreated, which was responsible for her previous child being removed from her care after she heard

14. 154 So. 3d 1223 (Fla. 4th Dist. Ct. App. 2015).

15. *Id.* at 1224.

16. *Id.*

17. *Id.* at 1226.

18. 42 U.S.C. § 622 (2012).

19. 159 So. 3d 341 (Fla. 4th Dist. Ct. App. 2015).

20. *Id.* at 343–44; *see also* FLA. STAT. § 39.603(1)(f) (2014).

21. *M.P.*, 159 So. 3d at 344.

22. 163 So. 3d 1229 (Fla. 2d Dist. Ct. App. 2015).

23. *Id.* at 1229.

24. 577 So. 2d 565 (Fla. 1991).

25. *Id.* at 570–71; Dale, 2014 Survey of Juvenile Law, *supra* note 7, at 60–61.

26. 147 So. 3d 616 (Fla. 4th Dist. Ct. App. 2014).

27. *Id.* at 620–21.

voices encouraging her to shake that child.²⁸ In *E.H.*, the appellate court established that the mother's failure to recognize her mood disorder and her lack of participation in services, along with multiple domestic violence incidents between the mother and the father where the mother continued to engage in the relationship with the father despite the parent-involved nature of their relationship, constituted evidence of a substantial risk of imminent abuse to the child.²⁹

An important technical procedural issue was before the First District Court of Appeal in *W.W. v. Guardian ad Litem Program*.³⁰ The issue was whether an order entered on a post-dependency motion seeking relief fully resolving the issues that were raised in the motion is reviewed by appeal rather than writ.³¹ Applying a recent amendment to Rule 9.130(a)(4) of the Florida Rules of Appellate Procedure,³² the appellate court concluded that orders entered on post-dependency motions seeking relief that fully resolve the issues raised in the motion are to be viewed as final orders under the appellate rule.³³

Cases involving immigrant children are becoming more commonplace in the Florida dependency courts as a result of the influx of such children nationally.³⁴ In *In re Y.V.*,³⁵ a private petition for dependency was filed on behalf of a minor "living in Florida after illegally emigrating alone from Honduras."³⁶ The petition was dismissed by the trial court because the harm relating to the dependency took place outside of Florida, and "the court viewed the petition as an attempt to circumvent federal immigration law[.]"³⁷ The appellate court reversed, finding that there was jurisdiction and that Florida

28. *Id.* at 617.

29. *Id.* at 620–21; *see also* *W.R. v. Dep't of Children & Families*, 137 So. 3d 1078, 1079 (Fla. 4th Dist. Ct. App. 2014) (finding that substantial evidence of harm to one child alone was not sufficient evidence to find substantial risk of imminent abuse to another child); *E.M.A. v. Dep't of Children & Families*, 795 So. 2d 183, 187 (Fla. 1st Dist. Ct. App. 2001) (finding that a substantial risk of harm can be met without past acts of harm where a mental illness is the type that would impact the parent's "judgment and ability to perform basic daily caretaking tasks").

30. 159 So. 3d 999, 1000 (Fla. 1st Dist. Ct. App. 2015).

31. *Id.*

32. *In re* Amendments to the Fla. Rules of Appellate Procedure, 2014 WL 5714099, at *7–8 (Fla. Nov. 6, 2014) (specifying the amendment to Rule 9.130(a)(4)).

33. *Id.*; *W.W.*, 159 So. 3d at 1000–01.

34. *See, e.g.*, WENDI J. ADELSON, SPECIAL IMMIGRANT JUVENILE STATUS IN FLORIDA: A GUIDE FOR JUDGES, LAWYERS, AND CHILD ADVOCATES 5, 7 (2007), <http://media.law.miami.edu/clinics/children-and-youth/pdf/2007/special-immigrant-jvenile-manual-2007.pdf>.

35. 160 So. 3d 576 (Fla. 1st Dist. Ct. App. 2015).

36. *Id.* at 577.

37. *Id.*

dependency law applies.³⁸ Although the appellate court reversed, it did note that “the trial court [was] not alone in its misgivings about the use of the dependency [proceedings] as a conduit to achiev[e] a favorable immigration status.”³⁹ The appellate court also pointed to two provisions in chapter 39 of the Florida Statutes that applied to this child: abandonment, abuse or neglect by the parent and having no parent capable of providing supervision and care.⁴⁰ The appellate court then noted that the only reason the child was not in imminent risk of injury was because there is a responsible adult caring for the child on a voluntary basis.⁴¹

Domestic violence can be the source of dependency court jurisdiction.⁴² Issues of domestic violence can also arise in the context of petitions to protect and against domestic violence pursuant to section 741.30 of the Florida Statutes.⁴³ In *Hair v. Hair*,⁴⁴ the appellate court reversed and remanded the trial court’s decision with instructions to vacate a final judgment of injunction for protection.⁴⁵ The appellate court found that the petitioner did not possess “sufficient evidence that she was a victim of domestic violence or was in imminent danger [to become] a victim” as provided in the Florida Statutes.⁴⁶ Specifically, it found that the daughter did not wish to see or interact with her mother and that was not a basis for the issuance of a domestic violence restraining order.⁴⁷

III. TERMINATION OF PARENTAL RIGHTS

Under Florida law, the petitioner must prove: first, that there are statutory grounds for termination of parental rights; second, that termination is in the “manifest best interest of the child;” and third, that termination is the least restrictive means to protect the child from serious harm.⁴⁸ In *B.K. v. Department of Children & Families*,⁴⁹ the appellate court addressed the application of the three standards in a case in which the father was

38. *Id.* at 581.

39. *Id.* at 579, 581.

40. *In re Y.V.*, 160 So. 3d at 578; *see also* FLA. STAT. § 39.01(15)(a), (e) (2014).

41. *In re Y.V.*, 160 So. 3d at 579.

42. *See* Michael J. Dale, 2007–2008 *Survey of Juvenile Law*, 33 NOVA L. REV. 357, 357 (2009).

43. FLA. STAT. § 741.30.

44. 159 So. 3d 984 (Fla. 4th Dist. Ct. App. 2015).

45. *Id.* at 986.

46. *Id.* at 985; *see also* FLA. STAT. § 741.30.

47. *Hair*, 159 So. 3d at 985.

48. FLA. STAT. §§ 39.806, .810; *Padgett v. Dep’t of Health & Rehab. Servs.*, 577 So. 2d 565, 570–71 (Fla. 1991).

49. 166 So. 3d 866 (Fla. 4th Dist. Ct. App. 2015).

incarcerated.⁵⁰ Under Florida law, the substantive standard regarding incarceration is that the incarceration be for a *significant portion* of the child's life.⁵¹ In *B.K.*, the father was scheduled for release after nearly eight and a half years of the child's life.⁵² Here, the father would be "incarcerated for nearly fifty percent of [the child's] minority" at the point the father is to be released from prison.⁵³ The child had also been in foster care for a period of time, and "at the time of trial, the child was nearly six years old."⁵⁴ On the question of *manifest best interest*, the trial court found no bond with the child, no relative placement and that the child did not know who her father was.⁵⁵ Finally, the trial court found and the appellate court agreed based upon clear and convincing evidence that termination was in the best interest of the child.⁵⁶ Citing that termination was the least restrictive means of protecting the child, the appellate court noted that merely sending letters and cards to a child is not enough because "then it would be difficult indeed to terminate the rights of any parent incarcerated for a lengthy period of time, regardless of the child's lack of a real relationship with her parent. This [would] leave the child without any [parenting] at all, which would not be in her best interest."⁵⁷ The appellate court thus affirmed.⁵⁸

On the other hand, in *D.S. v. Department of Children & Families*,⁵⁹ the court reversed a finding of termination of parental rights arising out of a father's incarceration.⁶⁰ In *D.S.*, "[i]n percentage terms, the father's incarceration amount[ed] to approximately 27[%] to 33[%] of the children's minorit[y]."⁶¹ In doing so, the appellate court cited *B.C. v. Florida Department of Children & Families*,⁶² in which the Supreme Court of Florida held that the percentages in *D.S.* would "not constitute a substantial portion of the children's minorit[y]."⁶³ While terminating the parental rights of the father to one of the three children,

50. *Id.* at 873.

51. *Id.*; see also FLA. STAT. § 39.806(1)(d)(1).

52. *B.K.*, 166 So. 3d at 873.

53. *Id.* at 874.

54. *Id.*

55. *Id.* at 872.

56. *Id.* at 872–73. "[T]he State must show by clear and convincing evidence that reunification with the parent poses a substantial risk of significant harm to the child. . . . [and that] termination of those rights is the least restrictive means of protecting the child from serious harm." *Padgett v. Dep't of Health and Rehab. Servs.*, 577 So. 2d 565, 571 (Fla. 1991).

57. *B.K.*, 166 So. 3d at 877.

58. *Id.*

59. 164 So. 3d 29 (Fla. 4th Dist. Ct. App. 2015).

60. *Id.* at 36.

61. *Id.* at 34.

62. 887 So. 2d 1046 (Fla. 2004).

63. *Id.* at 1054–55; *D.S.*, 164 So. 3d at 34.

the court did not find termination as to the other two.⁶⁴ Those children were in a stable home, not in the custody of the Department, and the father maintained a close relationship, given the father's incarceration, with the children.⁶⁵ Specifically, they knew who their father was and had "regular interaction with him, [which included] regular phone calls, letters, and visits."⁶⁶ At the time of his release, the children would be eleven and six.⁶⁷ Because they were with relatives and still had contact with their father, and there being no evidence of harm to the children, termination was not the least restrictive means to prevent harm, and the appellate court reversed.⁶⁸

Whether termination of parental rights is the least restrictive means of protecting the child from harm, the third question before the trial court in any termination of parental rights case, was on appeal in two separate cases during this reporting cycle.⁶⁹ In *A.H. v. Department of Children & Families*,⁷⁰ a parent appealed termination of her parental rights as to her son on the ground that termination was not the least restrictive means of protecting the child from harm.⁷¹ The State conceded error on this point.⁷² The appellate court reviewed the record in which the trial court created a permanent guardianship for the child.⁷³ However, "there [was] no evidence that the mother's irregular contact[s]" caused harm to the child, although there was evidence "that the child had a strong bond with the permanent guardian and was doing . . . well" there, the child "also enjoyed his visits with [his] mother and his siblings and [wanted] to maintain a relationship with them."⁷⁴ Under those circumstances, termination of parental rights was not the least restrictive means of protecting the child from harm.⁷⁵ Interestingly, the GAL program apparently did not concede error.⁷⁶ The GAL program, although the record does not reflect whether the individual was qualified as an expert, testified that the parents were not "'bonded to [the child] at all. . . . Emotionally and mentally it would be devastating to take him

64. *D.S.*, 164 So. 3d at 34–36.

65. *Id.* at 35.

66. *Id.*

67. *Id.*

68. *Id.* at 36.

69. *See C.D. v. Fla. Dep't of Children & Families*, 164 So. 3d 40, 41 (Fla. 1st Dist. Ct. App. 2015); *A.H. v. Dep't of Children & Families*, 144 So. 3d 662, 664 (Fla. 1st Dist. Ct. App. 2014).

70. 144 So. 3d 662 (Fla. 1st Dist. Ct. App. 2014).

71. *Id.* at 664.

72. *Id.*

73. *Id.* at 664, 666.

74. *Id.* at 666.

75. *A.H.*, 144 So. 3d at 666.

76. *Id.* at 665.

out of his home [with the permanent guardian].”⁷⁷ On the basis of this opinion, “[t]he GAL recommended termination of parental rights [based on] the . . . best interests of the child so [that] he could receive permanency through adoption.”⁷⁸

By reversing, the appellate court rejected this lay opinion.⁷⁹ In fact, contrary to what occurred in this case, the GAL guidelines state that guardians ad litem shall not offer expert opinions.⁸⁰

In *C.D. v. Florida Department of Children & Families*,⁸¹ the appellate court reversed in part on the basis of the trial court’s misinterpretation of *A.H.*⁸²

The appellate court held that first, the trial court ruling was in error because it was at odds with its own factual finding that the children did have a bond with their parents, and second, the trial court misconstrued age, which the “court held that TPR [could be] the least restrictive means of protecting a child from harm despite the fact that there was *little or no bond* between the child and [the parent].”⁸³

Here, again, the appellate court rejected the opinion of the GAL who argued that TPR was the least restrictive means of preventing harm to the children.⁸⁴ The appellate court held that the GAL’s opinion on appeal was “diametrically opposed to the position it took below in which it argued that the children would not be harmed by TPR because their aunt would allow them to have contact with the [m]other.”⁸⁵

The interplay of rights of putative fathers and termination of parental rights based upon abandonment was before the Fourth District in *A.S. v. Department of Children & Families*.⁸⁶ The father, whose paternity was established approximately a year after the child was born, appealed from a termination of parental rights adjudication.⁸⁷ The mother had played a nonexistent role in the child’s life and termination had been entered against her.⁸⁸ The father did not know that he was the parent of the child until a

77. *Id.* (alterations in original).

78. *Id.*

79. *See id.* at 666.

80. *See A.H.*, 144 So. 3d at 664–65; FLA. GUARDIAN AD LITEM PROGRAM, FLORIDA GUARDIAN AD LITEM PROGRAM STANDARDS 9 (2015), http://www.guardianadlitem.org/wp-content/uploads/2014/08/Standards_Final_2015.pdf [hereinafter 2015 FLORIDA GUARDIAN AD LITEM PROGRAM STANDARDS].

81. 164 So. 3d 40 (Fla. 1st Dist. Ct. App. 2015).

82. *Id.* at 43–44; *see also A.H.*, 144 So. 3d at 666.

83. *C.D.*, 164 So. 3d at 43–44.

84. *Id.*

85. *Id.* at 44.

86. 162 So. 3d 335, 336–37 (Fla. 4th Dist. Ct. App. 2015).

87. *Id.* at 337.

88. *Id.* at 336.

paternity test was taken a year after the child was born.⁸⁹ Even then, he did not learn that he was the father for another approximately four months.⁹⁰ Once it was determined that he was the father, he began taking “steps to begin forming a relationship with [the child].”⁹¹ Despite this, the trial court entered an order terminating the father’s parental rights on the ground of abandonment.⁹² The appellate court recognized that the definition of parent “does not include . . . an alleged or prospective parent unless the parental status falls within the terms of [section] 39.503(1) or [section] 63.062(1).”⁹³ Because the Department of Children and Families (“DCF”) failed to utilize the proper provisions of chapter 39 of the Florida Statutes to locate the father and because the court could only consider whether the father abandoned the child once the father’s paternity was established, the trial court erroneously relied upon the failure to take affirmative steps to establish paternity prior to that time.⁹⁴ The appellate court held that the trial court was not presented with clear and convincing evidence of abandonment.⁹⁵ And finally, the appellate court held that the father “was never offered a case plan despite [the fact that there was] no indication in the record that he was unable to comply with [it].”⁹⁶ On these bases, the appellate court reversed.⁹⁷

Periodically, cases appear concerning the proper procedures for appeals in child welfare cases.⁹⁸ *R.W. v. Department of Children & Families*⁹⁹ involved the question of whether “the trial court erred in denying [a] post-judgment motion to set aside the surrender” of parental rights for lack of jurisdiction.¹⁰⁰ In *R.W.*, an expedited petition was filed by DCF to terminate the mother’s parental rights to her child where the mother had executed a sworn consent to surrender those rights.¹⁰¹ However, after receiving the order, the mother filed a motion claiming “that the judgment was inconsistent with the trial court’s oral ruling on the mother’s visitation rights pending adoption of the child. The trial court denied the motion, and the mother thereafter timely filed a notice of

89. *Id.* at 337.

90. *Id.*

91. *A.S.*, 162 So. 3d at 337.

92. *Id.* at 337–38; *see also* FLA. STAT. §§ 39.01(1), 39.503(1), 63.062(1) (2014).

93. *A.S.*, 162 So. 3d at 338 (first alteration in original) (quoting FLA. STAT. § 39.01(49)); *see also* FLA. STAT. §§ 39.503(1), 63.062(1).

94. FLA. STAT. § 39.803(8); *A.S.*, 162 So. 3d at 339.

95. *A.S.*, 162 So. 3d at 339.

96. *Id.* at 340.

97. *Id.*

98. *See, e.g., R.W. v. Dep’t of Children & Families*, 164 So. 3d 15, 17–18 (Fla. 1st Dist. Ct. App. 2015).

99. 164 So. 3d 15 (Fla. 1st Dist. Ct. App. 2015).

100. *Id.* at 16.

101. *Id.*

appeal.”¹⁰² However, “[p]rior to filing her initial brief, the mother filed a motion asking [the appellate] court to ‘relinquish partial jurisdiction [so that] the trial court’” could consider the mother’s motion for reconsideration.¹⁰³ The appellate court viewed the motion as one for relief from judgment and granted the motion, relinquishing jurisdiction.¹⁰⁴ After an evidentiary hearing, “the trial court . . . entered an order denying the motion for reconsideration.”¹⁰⁵ The mother did not file a notice of appeal challenging that order but instead filed a status report to the appellate court.¹⁰⁶ The appellate court entered the filing and instructed the mother to have her initial brief filed.¹⁰⁷ Because “the mother did not file a notice of appeal seeking review of the order denying her motion for reconsideration,” the court on appeal refused to interpret the status report as a notice of appeal.¹⁰⁸ Having “relinquished jurisdiction [for] the trial court to rule on the motion for reconsideration” in the absence of an appeal from the order on the motion for relief in judgment, the appellate court had no preserved issue before it and thus, affirmed the final judgment terminating the mother’s parental rights.¹⁰⁹

IV. JUVENILE DELINQUENCY

On March 19, 2015, the Supreme Court of Florida decided two cases involving application of the Supreme Court of the United States’ opinions in *Graham v. Florida*¹¹⁰ and *Miller*.¹¹¹ In *Graham*, the Supreme Court of the United States ruled that the Eighth Amendment does not allow a juvenile defendant to be sentenced to life in prison without parole for non-homicide crimes.¹¹² In *Miller*, the Supreme Court of the United States held that juveniles are constitutionally different from adults for purposes of sentencing based upon their diminished capacity and greater prospects for reform, and it held that the Eighth Amendment forbids the courts from sentencing juveniles to life in prison without the possibility of parole in capital cases.¹¹³

102. *Id.* at 17.

103. *Id.*

104. *R.W.*, 164 So. 3d at 17–18.

105. *Id.* at 17.

106. *Id.*

107. *Id.*

108. *See id.* at 18.

109. *R.W.*, 164 So. 3d at 18.

110. 560 U.S. 48 (2010).

111. *See id.* at 82; *Miller v. Alabama*, 132 S. Ct. 2455, 2460, 2475 (2012); *Falcon v. State*, 162 So. 3d 954, 956, 959–60, 963–64 (Fla. 2015); *Horsley v. State*, 160 So. 3d 393, 394, 405–06, 409 (Fla. 2015).

112. *Graham*, 560 U.S. at 74, 82; *see also* U.S. CONST. amend. VIII.

113. *Miller*, 132 S. Ct. at 2469, 2474–75; *see also* U.S. CONST. amend. VIII.

Two Supreme Court of Florida cases followed the Supreme Court of the United States' rulings.¹¹⁴ In *Falcon v. State*,¹¹⁵ the Supreme Court of Florida held that *Miller* should be read retroactively.¹¹⁶ In *Horsley v. State*,¹¹⁷ the Supreme Court of Florida held that the remedy in terms of a sentencing option in order to comply with *Miller* does not require revival of the Florida statute regarding life with the possibility of parole after twenty-five years.¹¹⁸

The *Horsley* case involved post-*Miller* and *Graham* convictions of juveniles as adults based upon the Supreme Court of the United States' conclusion that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders."¹¹⁹ The Supreme Court of Florida rejected the doctrine of statutory revival, which had been argued by the State.¹²⁰ The State took the position that the only possible sentencing options to comply with *Miller* were life without parole or the possibility of parole after twenty-five years.¹²¹ The Supreme Court of Florida concluded that the recent change in the Florida Statute was effective on July 1, 2014, and should apply to those juvenile offenders whose sentences were for crimes committed prior to July 1, 2014, but after *Miller* and *Graham*.¹²² The Florida Statute from 2014 governed those who did the killing and those who did not actually kill or attempt to kill.¹²³ The Legislature then added a detailed value process in the same statute.¹²⁴

In *Falcon*, the Supreme Court of Florida undertook an analysis of whether *Miller* should be applied retroactively to juveniles who were convicted of capital offenses prior to the Supreme Court of the United States' decision in that case.¹²⁵ The Supreme Court of Florida ruled that *Miller* should be given retroactive effect based upon its retroactivity test set forth in *Witt v. State*.¹²⁶ The Court relied upon the principle set out in *Witt*, finding that *Miller*

114. See *Falcon*, 162 So. 3d at 955, 959, 964; *Horsley*, 160 So. 3d at 394, 397, 408–09.

115. 162 So. 3d 954 (Fla. 2015).

116. *Id.* at 956, 963–64; see also *Miller*, 132 S. Ct. at 2475.

117. 160 So. 3d 393 (Fla. 2015).

118. *Id.* at 395, 409; see also FLA. STAT. § 775.082(3)(b)(2)(a) (2014); *Miller*, 132 S. Ct. at 2475.

119. *Horsley*, 160 So. 3d at 394 (quoting *Miller*, 132 S. Ct. at 2469); see also U.S. CONST. amend. VIII; *Miller*, 132 S. Ct. at 2469, 2475; *Graham v. Florida*, 560 U.S. 48, 74, 82 (2010).

120. *Horsley*, 160 So. 3d at 395.

121. *Id.*; see also *Miller*, 132 S. Ct. at 2469.

122. See *Horsley*, 160 So. 3d at 394–95, 406, 408–09.

123. FLA. STAT. § 775.082(1)(b)(1); see also *Horsley*, 160 So. 3d at 406.

124. Act effective July 1, 2014, ch. 2014-220, § 7, 2014 Fla. Laws 2869, 2876–77.

125. *Falcon v. State*, 162 So. 3d 954, 955 (Fla. 2015); *Miller*, 132 S. Ct. at 2469.

126. 387 So. 2d 922, 926 (Fla. 1980); *Falcon*, 162 So. 3d at 956; see also *Miller*, 132 S. Ct. at 2475.

constitutes a “*development of fundamental significance* and therefore, must be given retroactive effect.”¹²⁷

The issue of retroactivity under *Miller* initially was to be before the Supreme Court of the United States this term in a pair of cases, *State v. Montgomery*¹²⁸ and *State v. Toca*.¹²⁹ Although the Supreme Court of the United States granted a writ of certiorari in both cases, *Montgomery* was the only case heard due to the procedural issues that resulted in the dismissal of *Toca*.¹³⁰ *Montgomery* had been in prison for nearly fifty years after a *guilty without capital punishment* verdict was returned by the jury.¹³¹ This verdict automatically imposed a life sentence without possibility of parole.¹³² *Montgomery* sought collateral relief from the State of Louisiana for his conviction, arguing that *Miller* should retroactively apply to his sentence because of the automatic life sentence without parole that was attached to his conviction.¹³³ The trial court denied his motion and the Supreme Court of Louisiana denied his writ because the court had previously held that *Miller* did not retroactively apply.¹³⁴ However, the Supreme Court of the United States held in *Montgomery* that *Miller* *does* retroactively apply because the rule established in *Miller* was “a new substantive rule of constitutional law.”¹³⁵ New substantive rules “alter[] the range of conduct or the class of persons that the law punishes” and *must* apply retroactively.¹³⁶ The Court found that although the rule in *Miller* was substantive, an individual affected by it is afforded the procedural opportunity to demonstrate that he or she belongs to the given protected class.¹³⁷ Given the Supreme Court holding in *Montgomery*, the decision in *Falcon*, holding that *Miller* applied retroactively will be upheld.¹³⁸

This Survey has repeatedly discussed restitution as one of a number of dispositional alternatives in delinquency cases in addition to commitment, probation, community service, revocation of driver’s license and attendance at

127. *Falcon*, 162 So. 3d at 956 (quoting *Witt*, 387 So. 2d at 931); *see also Miller*, 132 S. Ct. at 2475.

128. 136 S. Ct. 718 (2016), *rev’g* 141 So. 3d 264 (La. 2014).

129. 141 So. 3d 265 (La. 2014).

130. *Toca v. Louisiana*, 135 S. Ct. 1197 (2015) (dismissing certiorari).

131. *Montgomery*, 136 S. Ct. at 725–26.

132. *Id.* at 726.

133. *Id.* at 726–27.

134. *Id.* at 727.

135. *Id.* at 732–35.

136. *Montgomery*, 136 S. Ct. at 732 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)).

137. *Id.* at 735.

138. *See Montgomery*, slip op. at 14; *Miller*, 132 S. Ct. at 2469; *Falcon v. State*, 162 So. 3d 954, 956 (Fla. 2015).

school.¹³⁹ Despite what would appear to be a statute clear on its face, this past year the appellate courts dealt with seven separate cases involving the restitution provision provided in section 985.437 of the Florida Statutes.¹⁴⁰ In *J.A.B. v. State*,¹⁴¹ the child appealed a \$460 restitution award.¹⁴² “At the restitution hearing, the victim stated that . . . it would cost between \$460 and \$490 to repair the damage to [the] vehicle” while giving no basis for his opinion.¹⁴³ No document was introduced demonstrating the actual repair cost.¹⁴⁴ Thus, as “the award was not supported by competent [and] substantial evidence,” the appellate court reversed.¹⁴⁵

In *K.R. v. State*,¹⁴⁶ a child appealed from a \$479 restitution adjudication arising out of the theft of an automobile.¹⁴⁷ Because the victim simply testified that the amount “was like [\$479] plus like there would be no tax,” and there was no further evidence, the court on appeal reversed based upon the speculative amount testified to by the victim.¹⁴⁸

In *S.M. v. State*,¹⁴⁹ the juvenile had been ordered to pay \$8629 in restitution arising out of the theft of an automobile.¹⁵⁰ The appellate court affirmed on the grounds that the victim of the automobile expressed an opinion as to the value of the automobile basing the opinion on information obtained from a website, such as the *Kelley Blue Book*.¹⁵¹ However, in so ruling, the appellate court held that taking judicial notice of an online *Kelley Blue Book* evaluation, although it did not occur in this case, would not comply with the Florida Rules of Evidence.¹⁵² The appellate court explained that there needed to be evidentiary demonstration that the *Kelley Blue Book* website had the “level

139. FLA. STAT. § 985.455(1)–(2) (2014); Dale, 2014 *Survey of Juvenile Law*, *supra* note 7, at 53.

140. *K.R. v. State*, 155 So. 3d 507, 509 (Fla. 4th Dist. Ct. App. 2015); *L.W. v. State*, 163 So. 3d 598, 599–601 (Fla. 3d Dist. Ct. App. 2015); *S.M. v. State*, 159 So. 3d 966, 967–68 (Fla. 2d Dist. Ct. App. 2015); *A.D. v. State*, 152 So. 3d 798, 798 (Fla. 4th Dist. Ct. App. 2014); *C.W. v. State*, 150 So. 3d 882, 883 (Fla. 2d Dist. Ct. App. 2014); *J.A.B. v. State*, 148 So. 3d 151, 151 (Fla. 5th Dist. Ct. App. 2014); *M.K. v. State*, 143 So. 3d 428, 430 (Fla. 4th Dist. Ct. App. 2014); *see also* FLA. STAT. § 985.437(1)–(2).

141. 148 So. 3d 151 (Fla. 5th Dist. Ct. App. 2014).

142. *Id.* at 151.

143. *Id.*

144. *Id.*

145. *Id.* at 151–52.

146. 155 So. 3d 507 (Fla. 4th Dist. Ct. App. 2015).

147. *Id.* at 508–09.

148. *Id.*

149. 159 So. 3d 966 (Fla. 2d Dist. Ct. App. 2015).

150. *Id.* at 967.

151. *Id.* at 967, 969.

152. *S.M.*, 159 So. 3d at 967, 969; *see also* FLA. STAT. § 90.202(12) (2014).

of accuracy [contradicted] with that of a court-recognized appraiser” or was “relied upon by a high percentage of car traders.”¹⁵³

A case involving both the competence of a victim to testify to the value of stolen goods and the failure of the State to demonstrate that the value of the stolen goods reached the statutory minimum was before the Fourth District in *M.K. v. State*.¹⁵⁴ In this delinquency case, the respondent appealed the order finding him guilty of first-degree petty theft, arguing that there was no competent evidence of the value of the stolen necklace so that the respondent could be charged with third-degree grand theft, which required that the property be “valued at \$300 or more [or] . . . less than \$5,000.”¹⁵⁵ Because the twelve-year-old victim could not provide competent evidence as to the value of the stolen necklace and that the victim was not competent to testify as to the value required, the appellate court reversed.¹⁵⁶ Specifically, “because the necklace was a gift, the victim was unable to testify [as] to [the] . . . purchase price or replacement cost beyond” testifying as to what the victim was told by a parent based upon research on the Internet.¹⁵⁷

Two cases, *C.W. v. State*¹⁵⁸ and *L.W. v. State*,¹⁵⁹ dealt with the question of whether the court could properly enter an order of restitution in a delinquency case where the respondent was not present.¹⁶⁰ In the *C.W.* case, the court ordered \$664 in restitution at the rate of \$25 per month.¹⁶¹ However, the respondent was not present and the court failed to find that the child had the ability to pay.¹⁶² Because the child was not present and there was no showing that the child had waived his presence, the court reversed.¹⁶³ However, in *L.W.*, where the child was ordered to pay \$321.61 in \$30 monthly installments based upon a damaged window, the court found at first the child had waived his right to attend, as the lawyer withdrew his objection based upon the child not being present.¹⁶⁴ However, the trial court failed to make the requisite factual findings of the child’s or the family’s ability to make payments of \$30 per month.¹⁶⁵

153. *S.M.*, 159 So. 3d at 967.

154. 143 So. 3d 428, 430–31 (Fla. 4th Dist. Ct. App. 2014).

155. *Id.* at 430; *see also* FLA. STAT. § 812.014(3)(c)(1).

156. *M.K.*, 143 So. 3d at 431–32.

157. *Id.* at 431.

158. 150 So. 3d 882 (Fla. 2d Dist. Ct. App. 2014).

159. 163 So. 3d 598 (Fla. 3d Dist. Ct. App. 2015).

160. *Id.* at 599; *C.W.*, 150 So. 3d at 883.

161. *C.W.*, 150 So. 3d at 883.

162. *Id.*

163. *Id.*

164. *L.W.*, 163 So. 3d at 599–600.

165. *Id.* at 601.

In *A.D. v. State*,¹⁶⁶ the trial court entered a restitution order regarding a camera even though there was no reference to it “as an item stolen in the grand theft count contained in [the] . . . petition for delinquency.”¹⁶⁷ On that simple basis, the court held that the trial court lacks the authority to require restitution, as the only restitution allowable is that of which arises out of the offense charged as reflected in the information or factual basis for the plea.¹⁶⁸

In a delinquency case, it is not unusual for the State to be unable to serve a respondent—alleged delinquent—with a summons to appear.¹⁶⁹ In *State v. C.W.*,¹⁷⁰ the State appealed a trial court final order entered *sua sponte*, dismissing the petition in a delinquency case for failure to serve.¹⁷¹ The appellate court ruled quite simply that the trial court improperly ruled on an issue that was not before it and that it interfered with the State’s discretion to bring charges against the child.¹⁷² However, oddly, because the State had not preserved the argument for appeal, the appellate court dismissed—albeit, writing to emphasize that where no motion to dismiss had been filed by the child, the trial court was without authority to dismiss the prosecution *sua sponte*.¹⁷³

Discovery is an important matter in delinquency and adult criminal cases often reaching constitutional dimensions.¹⁷⁴ In *M.H. v. State*,¹⁷⁵ a child appealed from an order that withheld “adjudication of delinquency and impos[ed] probation for [the] burglary of an unoccupied dwelling and [petty] theft.”¹⁷⁶ The claim on appeal was a discovery violation in which the State listed the victim of the charged offenses as a Category B witness rather than a Category A witness under Florida law.¹⁷⁷ As a result, the trial court failed to hold a *Richardson Hearing*.¹⁷⁸ Failure to conduct a hearing under the facts of the case constituted reversible error.¹⁷⁹

The question of a proper search and seizure, in the context of a child who was not in school and thus a possible truant, was before the Fourth District

166. 152 So. 3d 798 (Fla. 4th Dist. Ct. App. 2014).

167. *Id.* at 798.

168. *Id.* at 798–99.

169. *See State v. C.W.*, 166 So. 3d 950, 950 (Fla. 4th Dist. Ct. App. 2015).

170. 166 So. 3d 950 (Fla. 4th Dist. Ct. App. 2015).

171. *Id.* at 950.

172. *Id.*

173. *Id.*

174. *See, e.g., Richardson v. State*, 246 So. 2d 771, 773, 777 (Fla. 1971).

175. 151 So. 3d 32 (Fla. 3d Dist. Ct. App. 2014).

176. *Id.* at 33.

177. *Id.*

178. *Id.*; *see also Richardson*, 246 So. 2d at 773–77.

179. *M.H.*, 151 So. 3d at 37.

in *J.R. v. State*.¹⁸⁰ The child was found guilty of possession of marijuana after the trial court denied the child's motion to suppress.¹⁸¹ The police officer had initially observed the child from the officer's patrol car on a school day at about 8:15am.¹⁸² In reversing the denial of the child's motion to suppress, the appellate court held that the officer had begun the stop for truancy without reasonable grounds to believe that the child was absent from school.¹⁸³ Florida's status offense statute does not authorize a police officer to preemptively detain a child who may be plotting to skip school later.¹⁸⁴ The appellate court thus reversed, upholding the motion to suppress.¹⁸⁵

Florida's method for determining whether a juvenile charged with an act of delinquency should be held in secure detention is determined on the basis of something known in Florida as the Risk Assessment Instrument ("RAI").¹⁸⁶ In *A.M. v. State*,¹⁸⁷ a juvenile filed a petition for writ of habeas corpus seeking release from secure detention because his offense was improperly determined to be a violent third-degree felony.¹⁸⁸ The trial court found that a robbery by sudden snatching of a cell phone qualified as a violent third-degree felony, which raised A.M.'s RAI to the level of secure detention.¹⁸⁹ The Third District Court of Appeal reversed the lower court's finding and held that the proper designation of robbery by snatching under the facts of the case was a *non-violent* third degree felony, which would have resulted in a lesser RAI determination.¹⁹⁰ In *D.L. v. State*,¹⁹¹ a juvenile filed a petition for writ of habeas corpus on the basis that the court incorrectly scored the RAI by double scoring possession of a firearm and failing to address whether an unrelated felony charge was concurrently pending against the child.¹⁹² The Fifth District Court of Appeal reversed, finding as it had in other appeals that it is improper to include three additional points for possession of a firearm where the possession is already given the maximum ten points for the third degree felony charge under Florida law.¹⁹³

180. 149 So. 3d 1196, 1196 (Fla. 4th Dist. Ct. App. 2014).

181. *Id.*

182. *Id.*

183. *Id.* at 1197–98.

184. *Id.*; see also FLA. STAT. § 984.13(1)(b) (2014).

185. *J.R.*, 149 So. 3d at 1198.

186. FLA. STAT. § 985.255(3)(a).

187. 147 So. 3d 98 (Fla. 3d Dist. Ct. App. 2014).

188. *Id.* at 99.

189. *Id.* at 99–100.

190. *Id.* at 101–02; FLA. STAT. § 812.131.

191. 147 So. 3d 653 (Fla. 5th Dist. Ct. App. 2014).

192. *Id.* at 654.

193. *Id.* at 655; see also *M.W. v. Dep't of Juvenile Justice*, 15 So. 3d 782, 783–84 (Fla. 1st Dist. Ct. App. 2009).

V. OTHER MATTERS

A. *Due Process Shortcomings in the Dependency Court*

It is clear beyond peradventure that basic due process rights apply in dependency and termination of parental rights cases.¹⁹⁴ Nonetheless, repeated failures to comply with the basic due process constitutional protections arise in the dependency court in Florida and, most recently, cases in Miami demonstrate this shortcoming.¹⁹⁵ First, in *R.C. v. Department of Children & Family Services*,¹⁹⁶ a termination of parental rights case, a parent sought “certiorari relief from a sua sponte order of the trial court [obligating the mother] to submit to a pregnancy test.”¹⁹⁷ The appellate court quashed the trial court order due to the complete failure to accord the mother notice and because there was also no showing of good cause as applied by law.¹⁹⁸ In so doing, after quoting at length from the trial court proceeding and describing it as being “patently obvious from the record in this case that the trial [court] acted for reasons of its own rather than any rule of law,” the appellate court concluded by citing to Alexander Hamilton.¹⁹⁹ “As Alexander Hamilton long ago warned us, ‘it can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature.’”²⁰⁰ The appellate court then added “[t]he principle bears an occasional reiteration, even—and perhaps especially—[with]in our children’s court. There was no pretense made of following any legislative directives or intentions in this case.”²⁰¹

A second Miami case is *R.W. v. Department of Children & Families*.²⁰²

In that case, in a short opinion, the appellate court reversed on the grounds that the same trial court’s termination of parental rights decision was based upon a determination that continued involvement of the father in the family relationship “threaten[ed] the safety or well-being of the child[ren] [regardless] of

194. FLA. STAT. § 984.01(1)(a); Dale, *2014 Survey of Juvenile Law*, *supra* note 7, at 45; *see also* U.S. CONST. amends. V, XIV.

195. *See* U.S. CONST. amends. V, XIV; *A.A. v. Dep’t of Children & Families*, 147 So. 3d 621, 622–23 (Fla. 3d Dist. Ct. App. 2014); *R.C. v. Dep’t of Children & Family Servs.*, 150 So. 3d 1277, 1279–80 (Fla. 3d Dist. Ct. App. 2014); *R.W. v. Dep’t of Children & Families*, 147 So. 3d 631, 632 (Fla. 3d Dist. Ct. App. 2014).

196. 150 So. 3d 1277 (Fla. 3d Dist. Ct. App. 2014).

197. *Id.* at 1277.

198. *Id.* at 1279–80.

199. *Id.*

200. *R.C.*, 150 So. 3d at 1280 (quoting THE FEDERALIST NO. 78, at 452–53 (Alexander Hamilton) (Am. Bar Ass’n ed., 2009)).

201. *Id.*

202. 147 So. 3d 631 (Fla. 3d Dist. Ct. App. 2014).

services.”²⁰³ However, the amended petition did not allege such a statutory basis but pleaded only abandonment, and thus, the appellate court reversed.²⁰⁴

The third Miami case is *A.A. v. Department of Children & Families*.²⁰⁵ Here, the appellate court reversed because the mother was denied due process as a result of the same trial court’s failure to hold an evidentiary hearing before denying her motion for modification.²⁰⁶ In that case, there was a combined failure—first, to hold an evidentiary hearing and then, to make a written factual finding addressing the requisite factors enumerated in the statute.²⁰⁷ Those failures constituted a basic violation of due process rights.²⁰⁸ These cases follow on the heels of earlier appellate court rulings reversing the same trial court in Miami for its failure to comply with basic constitutional principles in *G.W. v. Department of Children & Families*²⁰⁹ and *F.M. v. State Department of Children & Families*.²¹⁰

B. *The Ongoing Failure to Provide Counsel for Children in Child Welfare Cases in Florida and Shortcomings in the GAL Program*

In 1980, the Supreme Court of Florida held in *In re D.B.*²¹¹ that children are not entitled to counsel in termination of parental rights cases.²¹² Until July of 2014, the only way that children received counsel in dependency and termination of parental rights cases in Florida was through volunteer lawyer appointments or in several counties legal aid representation.²¹³ Thus, while all parties to these cases were represented by counsel—DCF, the parents, and the GAL Program—the only unrepresented party was the child unless a volunteer attorney or legal aid lawyer took the child’s case.²¹⁴ The GAL Program’s role,

203. *Id.* at 632.

204. *Id.*

205. 147 So. 3d 621 (Fla. 3d Dist. Ct. App. 2014).

206. *Id.* at 622, 624.

207. *Id.* at 623; *see also* FLA. STAT. § 39.621(10) (2014).

208. *A.A.*, 147 So. 3d at 622–23.

209. 92 So. 3d 307 (Fla. 3d Dist. Ct. App. 2012).

210. 95 So. 3d 378, 381–82 (Fla. 3d Dist. Ct. App. 2012); *G.W.*, 92 So. 3d at 309–10; *see also* Michael J. Dale, 2013 *Survey of Juvenile Law*, 38 NOVA L. REV. 81, 86–87 (2013) [hereinafter Dale, 2013 *Survey of Juvenile Law*]. The same trial court was reversed in *R.L.R. v. State*, a case in which the trial court had held that chapter 39 somehow preempted the Rules Regulating the Florida Bar on the confidentiality of the lawyer child client relationship. 116 So. 3d 570, 572 (Fla. 3d Dist. Ct. App. 2013); *see also* FLA. STAT. ch. 39.

211. 385 So. 2d 83 (Fla. 1980).

212. *Id.* at 91.

213. *Id.* at 92.

214. *Id.* at 87–88, 92–93.

as discussed below, is not to represent the child as a lawyer would do but to represent the child's best interests.²¹⁵

During its 2014 session, the Legislature passed a statute authorizing the expenditure of \$5 million to pay for lawyers to act as attorneys ad litem to represent children before the dependency court in five categories of cases that are based upon the children's special needs.²¹⁶ The serious shortcomings in the statute are detailed in last year's survey article, including the ethical issues relating to the roles of the GAL Program and DCF and their attorneys in requesting the appointment of and choosing the lawyers for the five categories of children.²¹⁷ The problem with the law is exacerbated by the fact that literally hundreds of other children with serious physical, mental, and educational problems do not have the right to counsel because they do not fit within the five categories of the statute as determined by these possibly opposing parties.²¹⁸

In 2014, the General Counsel for the GAL Program prepared a document titled *Children with Certain Special Needs Attorney Registry* that directly illustrates the underlying problems that arise when applying the 2014 amendment to section 39.01305 of the Florida Statutes.²¹⁹ First, the document states that "[t]he appointing court is required to consult with the GAL [Program] in attempting to locate a pro bono attorney. If a pro bono attorney cannot be located or a recommendation is not provided with[in] [fifteen] days, the court is authorized to appoint compensated counsel."²²⁰ A 2011 study demonstrates the inability of the Florida Bar to provide pro bono lawyers to children in dependency proceedings,²²¹ thus making it both futile and time consuming to locate pro bono attorneys and necessitating the use of compensated attorney

215. Dale, *2014 Survey of Juvenile Law*, *supra* note 7, at 63; Michael J. Dale & Louis M. Reidenberg, *The Kids Aren't Alright: Every Child Should Have an Attorney in Child Welfare Proceedings in Florida*, 36 NOVA L. REV. 345, 352–53 (2012) [hereinafter Dale & Reidenberg, *The Kids Aren't Alright*].

216. FLA. STAT. § 39.01305(3)(a)–(e); *see also* Dale, *2014 Survey of Juvenile Law*, *supra* note 7, at 62.

217. Dale, *2014 Survey of Juvenile Law*, *supra* note 7, at 61–63; *see also* Dale & Reidenberg, *Providing Attorneys for Children*, *supra* note 7, at 330; Dale & Reidenberg, *The Kids Aren't Alright*, *supra* note 215, at 353.

218. *See* FLA. STAT. § 39.01305(3)(a)–(e).

219. *See* FLA. STAT. § 39.01305; DENNIS MOORE, GUARDIAN AD LITEM PROGRAM, CHILDREN WITH CERTAIN SPECIAL NEEDS ATTORNEY REGISTRY (2014), *available at* <http://www.slideplayer.com/slide/4327595>.

220. MOORE, *supra* note 219.

221. *See* UNIV. OF FLA. & FLORIDA'S CHILDREN FIRST, LEGAL REPRESENTATION OF DEPENDENT CHILDREN: A 2012 REPORT ON FLORIDA'S PATCHWORK SYSTEM 2–4 (2012), https://www.law.ufl.edu/_pdf/academics/centers-clinics/centers/legal-rep-of-dep-children-12.pdf (demonstrating the Bar's inability to provide a substantial number of pro bono lawyers for children in dependency cases).

representation.²²² Second, according to the document prepared by the GAL General Counsel, it is possible to be registered to represent children for a fee in dependency cases even if the attorney has never actually handled such a case.²²³

The attorney merely needs to demonstrate one of the following prerequisites set out in the document: that the attorney has “observed at least thirty hours of hearings in dependency cases including at least one shelter hearing—one dependency adjudicatory hearing, one judicial review hearing, one hearing pursuant to rule 8.350 [of the Florida Rules of Juvenile Procedure] and one termination of parental rights trial.”²²⁴ Contrary to this prerequisite, attorneys for children “must have the requisite skill and competence to represent children in [these complex] cases that involve, among other matters,” a variety of federal statutory rights as well as myriad, medical, psychological, educational, “cultural, racial, moral, and religious issues.”²²⁵

A review of the application of the 2014 amendment to section 39.01305 of the Florida Statutes in its first year demonstrates additional ongoing problems with the law, leaving aside the issues of the attorney qualifications necessary to handle these cases and the ethical issues of the GAL Program’s role in choosing the lawyers for children as a separate party in the proceeding.²²⁶ First, during the first fifteen months of operation, only 1236 children were appointed counsel with an expenditure of \$900,000 out of a budget of \$5 million, leaving \$4.1 million unspent.²²⁷ Unfortunately, this data does not distinguish between volunteer and paid lawyers.²²⁸ As explained above, the Florida law requires an attempt to find volunteers before hiring a lawyer.²²⁹ Yet, during the initial fifteen-month period, more than twenty-eight thousand children were before the dependency court.²³⁰ Second, the appointment of lawyers for children varied dramatically among the circuits with no correlation to their population.²³¹ In the

222. *See id.*

223. MOORE, *supra* note 219.

224. *Id.*; *see also* FLA. R. JUV. P. 8.350.

225. Dale & Reidenberg, *Providing Attorneys for Children*, *supra* note 7, at 351.

226. *See* FLA. STAT. § 39.01305 (2014).

227. JUSTICE ADMIN. COMM’N, APPOINTMENTS TO CASES PURSUANT TO S. 39.01305, F.S.: COUNT BY CIRCUIT AND CASE DESCRIPTION, APPOINTED JULY 1, 2014–SEPTEMBER 21, 2015 (2015) [hereinafter APPOINTMENTS TO CASES PURSUANT TO S. 39.01305, F.S.] (data on file with author); JUSTICE ADMIN. COMM’N, PAYMENTS ON SPECIAL NEEDS CASES PURSUANT TO S. 39.01305, F.S.: COURT APPOINTED BY CIRCUIT AND APPROPRIATION FISCAL YEAR, JULY 1, 2014–SEPTEMBER 24, 2015 (2015) [hereinafter COSTS PAID FOR SPECIAL NEEDS CASES PURSUANT TO S. 39.01305, F.S.] (data on file with author); Dale, *2014 Survey of Juvenile Law*, *supra* note 7, at 62.

228. *See* APPOINTMENTS TO CASES PURSUANT TO S. 39.01305, F.S., *supra* note 227; COSTS PAID FOR SPECIAL NEEDS CASES PURSUANT TO S. 39.01305, F.S., *supra* note 227.

229. FLA. STAT. § 39.01305(4)(a).

230. FLA. GUARDIAN AD LITEM PROGRAM, GAL REPRESENTATION REPORT: NOVEMBER 2014 (Dec. 2014) [hereinafter GAL REPRESENTATION REPORT: NOVEMBER 2014].

231. *See* APPOINTMENTS TO CASES PURSUANT TO S. 39.01305, F.S., *supra* note 227.

Sixth Circuit—Pasco and Pinellas Counties—with a population of 1.4 million, there were 254 paid appointments of attorneys ad litem at a cost of \$199,000.²³²

In the Seventeenth Circuit—Broward County—with a population of 1.8 million, there were 37 appointments at a cost of \$25,000.²³³ In the Thirteenth Circuit—Hillsborough County—with a population of 1.3 million, there were 138 appointments at a cost of \$106,000.²³⁴ In the Eleventh Circuit—Miami-Dade County—with a population of 2.6 million, 130 lawyers were appointed at a cost of \$57,000.²³⁵ These statistics do not account for the appointment of pro bono lawyers who under the 2014 statute are to be assigned first and found by the GAL Program.²³⁶ Nor does it account for the availability of legal aid lawyers to represent some of these children in some of the circuits.²³⁷ However, the population differences among the circuit courts raises the question of why the process of paid appointments differs so dramatically from circuit to circuit.²³⁸

The historical role of the GAL Program is also problematic for reasons unrelated to the 2014 amendment to section 39.010305 of the Florida Statutes.²³⁹ First, data produced during this survey year as well as recent reports

232. *Id.*; JUSTICE ADMIN. COMM’N, PAYMENTS ON SPECIAL NEEDS CASES PURSUANT TO S. 39.01305, F.S.: COURT APPOINTED BY CIRCUIT AND APPROPRIATION FISCAL YEAR, JULY 1, 2014–SEPTEMBER 24, 2015 (2015) [hereinafter ATTORNEY FEES PAID FOR SPECIAL NEEDS CASES PURSUANT TO S. 39.01305, F.S.] (data on file with author); *State & County Quickfacts: Pasco County, Florida*, CENSUS.GOV, <http://quickfacts.census.gov/qfd/states/12/12101.html> (last revised Dec. 2, 2015); *State & County Quickfacts: Pinellas County, Florida*, CENSUS.GOV, <http://quickfacts.census.gov/qfd/states/12/12103.html> (last revised Dec. 2, 2015).

233. APPOINTMENTS TO CASES PURSUANT TO S. 39.01305, F.S., *supra* note 227; ATTORNEY FEES PAID FOR SPECIAL NEEDS CASES PURSUANT TO S. 39.01305, F.S., *supra* note 232; *State & County Quickfacts: Broward County, Florida*, CENSUS.GOV, <http://quickfacts.census.gov/qfd/states/12/12011.html> (last revised Dec. 2, 2015).

234. APPOINTMENTS TO CASES PURSUANT TO S. 39.01305, F.S., *supra* note 227; ATTORNEY FEES PAID FOR SPECIAL NEEDS CASES PURSUANT TO S. 39.01305, F.S., *supra* note 232; *Total Population in Hillsborough County Zip Codes*, TAMPA HILLSBOROUGH ECON. DEV. CORP., <http://www.tampaedc.com/wp-content/uploads/2015/09/Hillsborough-County-Population-by-ZIP-Code.pdf> (last visited Jan. 30, 2016).

235. APPOINTMENTS TO CASES PURSUANT TO S. 39.01305, F.S., *supra* note 227; ATTORNEY FEES PAID FOR SPECIAL NEEDS CASES PURSUANT TO S. 39.01305, F.S., *supra* note 232; *Miami-Dade County*, SOUTHFLORIDAFINDS.COM, <http://www.southfloridafinds.com/county/miami-dade> (last visited Jan. 30, 2016).

236. *See* FLA. STAT. § 39.01305 (2014); APPOINTMENTS TO CASES PURSUANT TO S. 39.01305, F.S., *supra* note 227.

237. *See* APPOINTMENTS TO CASES PURSUANT TO S. 39.01305, F.S., *supra* note 227; ATTORNEY FEES PAID FOR SPECIAL NEEDS CASES PURSUANT TO S. 39.01305, F.S., *supra* note 232.

238. *See* APPOINTMENTS TO CASES PURSUANT TO S. 39.01305, F.S., *supra* note 227; ATTORNEY FEES PAID FOR SPECIAL NEEDS CASES PURSUANT TO S. 39.01305, F.S., *supra* note 232.

239. *See* FLA. STAT. § 39.01305; Dale & Reidenberg, *Providing Attorneys for Children*, *supra* note 7, at 330.

from the GAL Program demonstrate ongoing serious flaws in the program.²⁴⁰ First, the budget of the GAL Program now exceeds forty-two million dollars not including federal funds and in-kind services.²⁴¹ Yet, the GAL Program was only able to represent approximately 76%²⁴² of the children before the dependency court in 2014, despite employing more than 145 attorneys, including an appeals unit.²⁴³ It is hard to be certain of the accuracy of these figures because the Statewide GAL Program—*Performance Advocacy Snapshot*—only provides percentages.²⁴⁴ Thus, it would appear that as of June 2015, the court appointed the GAL Program to 84.3% of the children in dependency proceedings.²⁴⁵ Of the 84.3%, 77.5% had an Active Certified Volunteer.²⁴⁶ Thus, it would appear that 65.3% of the children before the dependency court last June had an active certified GAL volunteer.²⁴⁷ One cannot tell from the GAL website whether the remaining 34.7% of the children had GAL best interest representation or if they were simply left with nothing.²⁴⁸

A recent announcement from the GAL Program in Palm Beach County seeking donations stated that it could only represent the best interests of about 800 of the 1200—66%—children before the dependency court in that Circuit.²⁴⁹ In

240. See FLA. GUARDIAN AD LITEM PROGRAM, GAL REPRESENTATION REPORT: MAY 2015 (June 2015) [hereinafter GAL REPRESENTATION REPORT: MAY 2015]; GAL REPRESENTATION REPORT: NOVEMBER 2014, *supra* note 230; FLA. GUARDIAN AD LITEM PROGRAM, GAL REPRESENTATION REPORT: MAY 2014 (June 2014) [hereinafter GAL REPRESENTATION REPORT: MAY 2014]. GAL are the lowest paid state attorneys, and the amount of cases they take exceeds the American Bar Association's recommended number, according to a study authorized and paid for by the GAL Program. FLA. GUARDIAN AD LITEM PROGRAM, GUARDIAN AD LITEM ATTORNEY COMPENSATION ANALYSIS 3 (June 30, 2014), <http://www.guardianadlitem.org/wp-content/uploads/2015/01/GAL-Attorney-Compensation-Study-Final-Version.pdf>. One might surmise the study was prepared and paid for to a Florida based company for fundraising purposes. See *id.* Significantly, the lawyers at the Offices of Regional Counsel, albeit without a study to support their problems, are also paid at low salaries with caseloads far exceeding professional norms. See *id.* at 15–16.

241. Justice Administrative Commission: Guardian ad Litem Program, FLA. OFF. PROGRAM POL'Y ANALYSIS & GOV'T ACCOUNTABILITY, <http://www.oppaga.state.fl.us/profiles/1016> (last updated June 11, 2015).

242. GAL REPRESENTATION REPORT: NOVEMBER 2014, *supra* note 230.

243. Dale & Reidenberg, *Providing Attorneys for Children in Dependency Proceedings*, *supra* note 7, at 330.

244. *Statewide Guardian ad Litem Program — Performance Advocacy SnapShot (PASS)*, GUARDIANADLITEM.ORG (June 2015), <http://www.guardianadlitem.org/wp-content/uploads/2014/08/GAL-SnapShot-June-2015.pdf>.

245. *Id.*

246. *Id.*

247. See *id.*

248. See *id.*

249. Michelle Piasecki, *Nonprofit to Help Kids in Need Is Restarted*, PALM BEACH POST, Dec. 4, 2014, at N4.

Broward County, matters appear to be worse.²⁵⁰ A June 2015 report from the GAL Program stated that the GAL Program was appointed for 82.23% of the children before the dependency court, and 56.06% of those children received a volunteer GAL.²⁵¹ Thus, less than half of the children in Broward County had a GAL Program representative.²⁵²

Second, the GAL Program seems to be confused about its proper role or continues to choose to misstate it.²⁵³ The GAL Program in Florida is under the supervision of a state agency in the executive branch that is statutorily authorized to collect and provide information to the court when appointed by the court as to what in certain limited situations it believes is in the best interest of the children.²⁵⁴ It does not represent the child as an attorney does, although its literature at times says it does.²⁵⁵ GAL volunteers and paid staff may not practice law, as is the case with any other non-lawyer.²⁵⁶ Thus, they may not provide legal advice to the child, just as the GAL Program lawyers may not, leaving no confidential relationship between any GAL representative and the child.²⁵⁷

Third, GALs cannot provide expert opinions to the court, although as the case law discussed earlier in this survey demonstrates, they have done so.²⁵⁸

The guidelines for the GAL Program, however, are disingenuous in this regard.²⁵⁹ They state

“[v]olunteers are not being used as experts in a case and will testify as lay people, however this does not take away the fact that they may be credentialed and should be permitted to identify themselves as

250. See GAL REPRESENTATION REPORT: MAY 2015, *supra* note 240.

251. *Id.*

252. See *id.*

253. See Dale & Reidenberg, *Providing Attorneys for Children*, *supra* note 7, at 330.

254. FLA. STAT. § 39.8296 (2014); FLA. GUARDIAN AD LITEM, IMAGINING THE FUTURE: 35TH ANNIVERSARY 1980–2015 7, 15–17 (2015), http://www.issuu.com/liz338/docs/annual_report-web.

255. Dale & Reidenberg, *Providing Attorneys for Children*, *supra* note 7, at 330.

256. FLA. STAT. § 61.403(7); see also *Volunteer FAQ*, FLORIDA GUARDIAN AD LITEM PROGRAM, <http://www.guardianadlitem.org/faq> (last visited Jan. 31, 2016).

257. STATEWIDE GUARDIAN AD LITEM OFFICE, STANDARDS OF OPERATION 15 (2006), <http://www.guardianadlitem.org/wp-content/uploads/2014/12/StandardsOfOperation.pdf> [hereinafter STANDARDS OF OPERATION]; see also 2015 FLORIDA GUARDIAN AD LITEM PROGRAM STANDARDS, *supra* note 80 at 19.

258. See *A.H. v. Dep’t of Children & Families*, 144 So. 3d 662, 665 (Fla. 1st Dist. Ct. App. 2014).

259. See 2015 FLORIDA GUARDIAN AD LITEM PROGRAM STANDARDS, *supra* note 80, at 9.

such [and] . . . [t]he court report should not reiterate their credentials to bolster their credibility.”²⁶⁰

The simple outstanding question—as any lawyer would immediately recognize—is: What is the relevance of the credential, if not to add to the credibility of the witness and thus bolster the witness’ testimony?²⁶¹

Finally, the confusion in the operation of the GAL Program is only exacerbated by its articulation of the role of its lawyers.²⁶² Despite calls by this author in this Article and in other articles for the GAL Program to properly state the role of its lawyers—to represent the GAL Program—it does not do so.²⁶³ It continues to conflate its role with that of the attorney who actually represents the *legal* interest of the child.²⁶⁴ For example, the *Dependency Practice Manual*, apparently written by GAL Program special counsel, in the introduction states that “[i]t is hoped that attorneys will use this manual to ensure that children are the focus of dependency proceedings, that their voices are heard, and that *their legal interests [are] protected through proactive legal advocacy*.”²⁶⁵ That statement defines the role of a child’s lawyer.²⁶⁶ It does not define the role of a GAL lawyer whose sole ethical obligation is to represent his or her client, which is the GAL Program.²⁶⁷ To do otherwise would violate the Florida Rules of Professional Responsibility.²⁶⁸ The GAL guidelines as redrafted this year only makes matters worse. They refer once again to the “Child’s Best Interest Attorney” and describe the role as “the attorney employed by the [department] to protect [the] child’s best interest either in the circuit dependency courts or the appellate courts. There is no attorney-client relationship between the CBI attorney and the child; however, representing the best interest of the child is the sole purpose of their advocacy.”²⁶⁹ This

260. *Id.*

261. *See id.*

262. *See id.*, at 7.

263. *See id.*; Dale & Reidenberg, *Providing Attorneys for Children*, *supra* note 7, at 324.

264. *See* 2015 FLORIDA GUARDIAN AD LITEM PROGRAM STANDARDS, *supra* note 80, at 7; FLA. STATEWIDE GUARDIAN AD LITEM OFFICE, DEPENDENCY PRACTICE MANUAL 2 (2014), http://www.guardianadlitem.org/wp-content/uploads/2014/08/The_Practice_Manual_Final.pdf; Dale & Reidenberg, *Providing Attorneys for Children*, *supra* note 7, at 331.

265. FLA. STATEWIDE GUARDIAN AD LITEM OFFICE, *supra* note 257, at 2 (emphasis added).

266. *See id.*

267. *See id.*; Dale & Reidenberg, *Providing Attorneys for Children*, *supra* note 7, at 331–32.

268. Dale & Reidenberg, *Providing Attorneys for Children*, *supra* note 7, at 331–32; *see also* STANDARDS OF OPERATION, *supra* note 257, at 6, 20.

269. 2015 FLORIDA GUARDIAN AD LITEM PROGRAM STANDARDS, *supra* note 80, at 7.

statement can only be described as legal nonsense.²⁷⁰ The GAL Program lawyer represents the GAL Program, a statutory party in a dependency case.²⁷¹ It is impossible for a lawyer to represent an idea. The GAL Program literature describes a form of legal representation that simply does not exist.²⁷² Attempting to apply these GAL guidelines is inconsistent with the law and defies logic.²⁷³

VI. CONCLUSION

The Supreme Court of Florida decided two major cases this survey year.²⁷⁴ First, it set forth the procedure for applying the Supreme Court of the United States holdings in *Graham* and *Miller* that rendered life without parole unconstitutional as applied to juveniles who committed capital and non-capital offenses.²⁷⁵ Second, it held that *Miller* should apply retroactively.²⁷⁶

The Florida intermediate appellate courts were active in deciding delinquency matters primarily involving proper application of restitution standards.²⁷⁷ The appellate courts were also busy implementing the *Horsley* decision, which set out the test for how to determine the proper sentence for a juvenile previously incarcerated for life without parole.²⁷⁸ In the dependency and TPR areas, the issue of proper application of the nexus problem was once again before the appellate courts.²⁷⁹ Another common issue involved the dependency court rights of immigrant children.²⁸⁰ Also, a pattern of failure to comply with basic due process rights of parents in child welfare cases appears to be developing in the juvenile court in Miami as this survey and surveys over the past two years have illustrated.²⁸¹

270. See *id.*

271. Dale, 2014 *Survey of Juvenile Law*, *supra* note 7, at 63; Dale & Reidenberg, *The Kids Aren't Alright*, *supra* note 215, at 353.

272. See 2015 FLORIDA GUARDIAN AD LITEM PROGRAM STANDARDS, *supra* note 80, at 6–7.

273. See *id.*; FLA. STAT. § 39.01305(b) (2014).

274. See *Falcon v. State*, 162 So. 3d 954, 963–64 (Fla. 2015); *Horsley v. State*, 160 So. 3d 393, 408–09 (Fla. 2015).

275. *Horsley*, 160 So. 3d at 408; see also *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012); *Graham v. Florida*, 560 U.S. 48, 82 (2010).

276. *Horsley*, 160 So. 3d at 408–09; see also *Miller*, 132 S. Ct. at 2460.

277. See *supra* Part IV.

278. See *Horsley*, 160 So. 3d at 408–09; *supra* Part IV.

279. See *supra* Part III.

280. See *In re Y.V.*, 160 So. 3d 576, 577 (Fla. 1st Dist. Ct. App. 2015); *supra* Part II.

281. See Dale, 2014 *Survey of Juvenile Law*, *supra* note 7, at 62; Dale, 2013 *Survey of Juvenile Law*, *supra* note 210, at 86–87; *supra* Section V.A.

Finally, all children in Florida should be entitled to counsel in dependency and TPR proceedings.²⁸² The 2014 amendment to section 39.01305 of the Florida Statutes, giving some children some lawyers in some cases access to counsel, is grossly inadequate.²⁸³ The GAL Program, with a budget in excess of forty-two million dollars, consistently and without restraint, mistakes its role to the detriment of the children.²⁸⁴ The establishment of consistent guidelines across the board is crucial in providing adequate *legal* representation that children not only need, but deserve, in *all* juvenile proceedings, whether dealing with delinquency, TPR, or dependency.²⁸⁵

282. See FLA. STAT. § 39.01305 (2014); *supra* Section V.B.

283. See FLA. STAT. § 39.01305(3); *supra* Section V.B.

284. See *supra* Section V.B.

285. See *supra* Parts II–V.

A SURVEY OF FLORIDA BASEBALL CASES[†]

LOUIS H. SCHIFF^{*}
ROBERT M. JARVIS^{**}

I.	INTRODUCTION.....	50
II.	ANTITRUST LAW	51
III.	BANKRUPTCY LAW	51
IV.	CIVIL RIGHTS LAW	52
V.	CONTRACT LAW.....	52
VI.	CRIMINAL LAW	54
VII.	DISABILITY LAW	56
VIII.	EDUCATION LAW	56
IX.	FAMILY LAW.....	57
X.	GAMBLING LAW.....	58
XI.	GENDER DISCRIMINATION LAW	58
XII.	IMMIGRATION LAW	59
XIII.	INSURANCE LAW.....	59
XIV.	INTELLECTUAL PROPERTY LAW	60
XV.	INTERNATIONAL LAW	61
XVI.	JUDICIAL ETHICS.....	62
XVII.	LABOR AND EMPLOYMENT LAW	62
XVIII.	LIBEL LAW	63
XIX.	MEDICAL MALPRACTICE LAW.....	63
XX.	MUNICIPAL FINANCE LAW.....	63
XXI.	OPEN GOVERNMENT LAW.....	64
XXII.	PERSONAL INJURY LAW	65
XXIII.	REAL PROPERTY LAW	66
XXIV.	TAX LAW.....	67

[†] This Article originated as a paper entitled “Florida’s Judiciary at the Plate: Baseball Cases in the Sunshine State” that was presented in Orlando at the 2015 Annual Summer Education Meeting of the Conference of County Court Judges of Florida. The authors express their appreciation to Judges David L. Denkin (Sarasota County), Maria D. Ortiz (Miami-Dade County), and Judith K. Rubenstein (Miami-Dade County), as well as to Pamela Jordan Anderson and Beverly Brown of the Office of the State Courts Administrator.

^{*} Broward County Court Judge—17th Judicial Circuit (schiff@baseballandthelaw.org). B.S., University of Florida; J.D., Hamline University. Co-author, *BASEBALL AND THE LAW: CASES AND MATERIALS* (Carolina Academic Press, 2016).

^{**} Professor of Law, Nova Southeastern University (jarvisb@nova.edu). B.A., Northwestern University; J.D., University of Pennsylvania; LL.M., New York University. Co-author, *BASEBALL AND THE LAW: CASES AND MATERIALS* (Carolina Academic Press, 2016).

XXV. WORKERS' COMPENSATION LAW	68
XXVI. CONCLUSION	68

I. INTRODUCTION

Florida has long been a hotbed of baseball activity.¹ Today, the state is home to two Major League Baseball (“MLB”) teams, fourteen minor league teams, fifteen spring training sites, both of the schools that train future big league umpires, and numerous amateur and youth teams.² As a result, its case reporters are filled with baseball opinions that stretch back more than a century.³ Collectively, these judgments chronicle the significant role that

1. KEVIN M. MCCARTHY, *BASEBALL IN FLORIDA* 5 (1996) (tracing Florida’s baseball roots back to 1874). Although McCarthy’s text remains definitive, useful examinations of Florida’s baseball history also appear in a number of other works. *See, e.g.*, SCOTT BROWN, *BASEBALL IN PENSACOLA: AMERICA’S PASTIME & THE CITY OF FIVE FLAGS* (2013); A.M. DE QUESADA JR., *BASEBALL IN TAMPA BAY* (2000); ALEJANDRO M. DE QUESADA, *SPRING TRAINING IN CLEARWATER: FENCEBUSTERS AND FASTBALLS FROM THE PHILADELPHIA PHILLIES AND THE CLEARWATER THRESHERS* (2007); RODY JOHNSON, *THE RISE AND FALL OF DODGERTOWN: 60 YEARS OF BASEBALL IN VERO BEACH* (2008); JEFF LAHURD, *SPRING TRAINING IN SARASOTA, 1924–1960: NEW YORK GIANTS AND BOSTON RED SOX* (2006); JOHN PHILLIPS, *A SHORT HISTORY OF MINOR LEAGUE BASEBALL IN MIAMI AND MIAMI BEACH* (1997); WES SINGLETARY, *FLORIDA’S FIRST BIG LEAGUE BASEBALL PLAYERS: A NARRATIVE HISTORY* (2006); RAYMOND SINIBALDI, *SPRING TRAINING IN BRADENTON AND SARASOTA* (2013); Joe Connor, *Baseball History Rich in Sunshine State*, NBC SPORTS (Mar. 27, 2013), <http://www.nbcsports.com/baseball-history-rich-sunshine-state#page=1>.

2. *Batter Up! A Visual History of Baseball in Florida*, FLA. MEMORY, https://www.floridamemory.com/photographiccollection/photo_exhibits/baseball; *see also Amateur & Semi-Pro: Florida*, JOHN SKILTON’S BASEBALL-LINKS.COM, http://www.baseball-links.com/links/Amateur_&_Semi-Pro/Florida; *Florida’s Grapefruit League Is Home to Major League Baseball’s Pre-Season*, FLA. GRAPEFRUIT LEAGUE, <http://www.floridagrapefruitleague.com> (hover over “Teams”); *Team-by-Team Information*, MLB.COM, <http://mlb.mlb.com/team/index.jsp>; *Teams by Geographical Location*, MiLB.COM, <http://www.milb.com/milb/info/geographical.jsp> *Umpire School Information*, MLB.COM, http://mlb.mlb.com/mlb/official_info/umpires/camp/schools.jsp

3. Lawsuits that did not result in a precedential opinion are not included in this survey. *See, e.g.*, *Nix v. Major League Baseball*, No. 3D14–2967, 2015 WL 1930327 (Fla. 3d Dist. Ct. App. Apr. 27, 2015) (unpublished table decision); *Burch v. Little League Baseball, Inc.*, 33 So. 3d 39 (Fla. 2d Dist. Ct. App. 2010) (unpublished table decision); *Young v. City of Dunedin*, 974 So. 2d 1075 (Fla. 2d Dist. Ct. App. 2008) (unpublished table decision); *Bochtler v. Florida Marlins LP*, 961 So. 2d 935 (Fla. 1st Dist. Ct. App. 2007) (unpublished table decision); *Ogletree v. Fitzpatrick*, 935 So. 2d 507 (Fla. 2d Dist. Ct. App. 2006) (unpublished table decision); *Del Valle v. Major League Baseball, Inc.*, 901 So. 2d 131 (Fla. 3d Dist. Ct. App. 2005) (unpublished table decision); *S. Fla. Stadium Corp. v. Klein ex rel. Klein*, 789 So. 2d 1002 (Fla. 4th Dist. Ct. App. 2001) (unpublished table decision); *Toronto Blue Jays, Inc. v. State, Dep’t of Revenue*, 717 So. 2d 1018 (Fla. 2d Dist. Ct. App.

Florida's bench and bar have played in the development of America's national pastime. To make these decisions more accessible, they are briefly summarized below.

II. ANTITRUST LAW

In 1922, the Supreme Court of the United States granted MLB immunity from the nation's antitrust laws.⁴ The Eleventh Circuit has applied this ruling twice—first in a case involving the scheduling of minor league baseball games,⁵ and then in a case investigating the proposed elimination of the Minnesota Twins and Montreal Expos.⁶ In contrast, the Supreme Court of Florida has read the exemption as applying only to player contracts.⁷ Accordingly, the Second District reinstated a lawsuit in which the plaintiffs claimed that numerous parties had conspired to keep them from buying the Minnesota Twins and moving them to Florida.⁸

III. BANKRUPTCY LAW

Two cases from the Middle District have examined baseball through the prism of the country's bankruptcy laws.⁹ In the former, a group of creditors objected to the debtor's proposal to sell his interest in the Fort Wayne Wizards and use the proceeds to pay his attorneys.¹⁰ In affirming the

1998) (unpublished table decision); *Chiamparino v. Florida Marlins Baseball Club*, 668 So. 2d 605 (Fla. 1st Dist. Ct. App. 1996) (unpublished table decision); *Tolar v. Chicago White Sox, Ltd.*, 684 So. 2d 1356 (Fla. 1st Dist. Ct. App. 1996) (unpublished table decision); *Wiggins v. City of Plant City*, 633 So. 2d 1080 (Fla. 2d Dist. Ct. App. 1994) (unpublished table decision); *Leasefirst v. Baseball Cards Unlimited, Inc.*, 550 So. 2d 472 (Fla. 2d Dist. Ct. App. 1990) (unpublished table decision); *Pro Baseball Clubs & Sch., Inc. v. Baseball Enters., Inc.*, 522 So. 2d 390 (Fla. 1st Dist. Ct. App. 1988) (unpublished table decision); *Pinkston v. Little League Baseball, Inc.*, 365 So. 2d 727 (Fla. 3d Dist. Ct. App. 1979) (unpublished table decision).

4. *Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 208–09 (1922).

5. *Prof'l Baseball Sch. & Clubs, Inc. v. Kuhn*, 693 F.2d 1085, 1085 (11th Cir. 1982).

6. *Major League Baseball v. Crist*, 331 F.3d 1177, 1179, 1183 (11th Cir. 2003).

7. *Butterworth v. Nat'l League of Prof'l Baseball Clubs*, 644 So. 2d 1021, 1025 (Fla. 1994).

8. *Morsani v. Major League Baseball*, 739 So. 2d 610, 612 (Fla. 2d Dist. Ct. App. 1999).

9. *Van Buren Indus. Inv'rs v. Henderson (In re Henderson)*, 341 B.R. 783, 786 (M.D. Fla. 2006); *Major Sports Fantasy, Ltd. v. Dowdell (In re Dowdell)*, 406 B.R. 106, 108–09 (Bankr. M.D. Fla. 2009).

10. *In re Henderson*, 341 B.R. at 786–87.

bankruptcy court, the district court found the debtor's plan to be a reasonable one.¹¹

In the latter, the owners of two fantasy baseball camps sold their businesses.¹² Despite a non-competition agreement, they soon opened several new camps.¹³ After the purchasers obtained a \$241,000 judgment from a Texas state court, the sellers filed for bankruptcy in Florida and sought to discharge the judgment.¹⁴ Agreeing with the purchasers, the bankruptcy court held the sellers could only discharge so much of the judgment as was not attributable to their willful misconduct.¹⁵

IV. CIVIL RIGHTS LAW

In a *pro se* complaint, a federal prisoner claimed the Tampa Bay Devil Rays were plotting to kill him when he got out of jail.¹⁶ Finding this allegation to be delusional, the Middle District dismissed the case.¹⁷

V. CONTRACT LAW

In 1949, the City of Miami opened Miami Stadium and hired Florida Sportservice, Inc. ("Sportservice") to run the concession stands.¹⁸ For the next five years, the Miami Sun Sox, a Brooklyn Dodgers farm team, called the field home.¹⁹ In 1954, however, the Sun Sox folded.²⁰ Following two seasons without baseball, Sidney Salomon, Jr., Sportservice's owner, purchased the Syracuse Chiefs and moved the team to Florida, where they became the original Miami Marlins.²¹

After having the Marlins sign a one-sided concession agreement with Sportservice, Salomon sold the club to media mogul George B. Storer.²²

11. *Id.* at 791.

12. *In re Dowdell*, 406 B.R. at 110.

13. *Id.*

14. *Id.* at 112.

15. *Id.* at 115.

16. *Riches v. Schiavo*, No. 8:07-CV-1644-T-30TGW, 2007 WL 2729681, at *1 (M.D. Fla. Sept. 18, 2007).

17. *Id.*

18. *Storer v. Fla. Sportservice, Inc.*, 115 So. 2d 433, 434–35 (Fla. 3d Dist. Ct. App. 1959); SAM ZYGNER, *THE FORGOTTEN MARLINS: A TRIBUTE TO THE 1956–1960 ORIGINAL MIAMI MARLINS* 325 (2013).

19. ZYGNER, *supra* note 18, at 131–32.

20. *Id.* at 132.

21. *Storer*, 115 So. 2d at 435; ZYGNER, *supra* note 18, at 14.

22. *Storer*, 115 So. 2d at 434–35; ZYGNER, *supra* note 18, at 64.

When Storer found out about the sweetheart deal, he moved to set it aside.²³ The trial court dismissed his complaint but the Third District reversed.²⁴

A short time later, the City of Miami informed Sportservice it had decided not to renew its contract.²⁵ Sportservice responded by suing the City, arguing that the absence of baseball from 1954 to 1956 entitled it to a two-year extension.²⁶ The Third District rejected this contention because other events had taken place at Miami Stadium at which Sportservice had been able to sell concessions.²⁷

Several contract cases have involved the current Miami Marlins. When the engineering company building the team's spring training complex was fired, for example, it sued Brevard County to recover the cost of various change orders.²⁸ Because the orders were issued orally rather than in writing, the Supreme Court of Florida found collection on them barred by sovereign immunity.²⁹

In 1997, the Marlins delighted their fans by winning their first World Series; as a result, CFI Sales & Marketing, Ltd. ("CFI") purchased premium stadium seats and advertising for the 1998 season.³⁰ When the club then held a fire sale and wound up finishing in last place, CFI, believing it had been duped, sued for a refund but lost.³¹ On appeal, the Third District affirmed.³²

At a 2008 charity auction, Marlins president David Samson jokingly announced he was putting the team up for bid.³³ The Pomeranz & Landsman Corporation ("P & L") immediately offered \$10 million.³⁴ When the Marlins refused to go through with the "sale," P & L sued.³⁵ After P & L dropped its

-
- 23. *Storer*, 115 So. 2d at 435–36.
 - 24. *Id.* at 434, 438.
 - 25. *Fla. Sportservice, Inc. v. City of Miami*, 121 So. 2d 450, 453 (Fla. 3d Dist. Ct. App. 1960).
 - 26. *Id.* at 452.
 - 27. *Id.*
 - 28. *County of Brevard v. Miorelli Eng'g, Inc.*, 703 So. 2d 1049, 1050 (Fla. 1997).
 - 29. *Id.* at 1051.
 - 30. E-mail from Richard W. Epstein, Esq., attorney for CFI Sales & Marketing, Ltd., to Professor Robert M. Jarvis (Sept. 24, 2014, 6:47 p.m. EDT) (on file with the authors).
 - 31. *CFI Sales & Mktg., Ltd. v. Florida Marlins Baseball, Ltd.*, 837 So. 2d 423, 423 (Fla. 3d Dist. Ct. App. 2002).
 - 32. *Id.*
 - 33. Complaint at 1–2, *Omeranz & Landsman Corp. v. Miami Marlins Baseball Club, L.P.*, 143 So. 3d 1182 (Fla. 4th Dist. Ct. App. 2014) (No. 12-03405).
 - 34. *Id.* at 2.
 - 35. Jeff Sullivan, *Marlins Being Sued by Would-Be Owners*, SB NATION (Feb. 22, 2012), <http://sbnation.com/2012/2/22/2817036/miami-marlins-sued-action>.

lawsuit, the Marlins moved for attorneys' fees.³⁶ In issuing a prohibitory writ, the Fourth District explained the trial court had lost its power to impose sanctions when the case was dismissed.³⁷

In an action involving considerably less drama, the City of Winter Haven filed a three-count complaint against the Cleveland Indians over the team's failure to pay the City for using its Chain-O-Lakes baseball complex.³⁸ Agreeing with the Indians, the Middle District held the first count (breach of contract) necessitated dismissal of the second and third counts (open account and account stated).³⁹

Two contract cases have involved baseball memorabilia.⁴⁰ In one of them, the plaintiff accused an out-of-state defendant of selling him a fake Joe DiMaggio jersey.⁴¹ The defendant moved to dismiss for lack of personal jurisdiction, but the Southern District found the defendant had sufficient contacts with Florida.⁴²

In the other case, the plaintiff claimed the defendants had issued a grossly inflated appraisal for a "Hall of Fame Baseball Montage."⁴³ The trial court dismissed for failure to state a claim, but the Fourth District reversed.⁴⁴

VI. CRIMINAL LAW

Florida's two earliest reported baseball decisions arose from the state's 1905 ban on Sunday baseball.⁴⁵ In the first, the Supreme Court of Florida upheld the newly-enacted law against multiple constitutional attacks.⁴⁶ In the second, it set the defendant free after finding that the complainant, a minister, lacked standing.⁴⁷

36. *Pomeranz & Landsman Corp. v. Miami Marlins Baseball Club, L.P.*, 143 So. 3d 1182, 1182 (Fla. 4th Dist. Ct. App. 2014).

37. *Id.* at 1183.

38. *City of Winter Haven v. Cleveland Indians Baseball Co.*, No. 8:09-CV-00190-T-17EAJ, 2009 WL 1107670, at *1 (M.D. Fla. Apr. 22, 2009).

39. *Id.* at *1-3.

40. *Pathman v. Grey Flannel Auctions, Inc.*, 741 F. Supp. 2d 1318, 1320 (S.D. Fla. 2010); *Blumstein v. Sports Immortals, Inc.*, 67 So. 3d 437, 438 (Fla. 4th Dist. Ct. App. 2011).

41. *Pathman*, 741 F. Supp. 2d at 1320-21.

42. *Id.* at 1321-22, 1324, 1326.

43. *Blumstein*, 67 So. 3d at 439.

44. *Id.* at 438-39.

45. *See* Act of June 5, 1905, 1905 Fla. Laws ch. 5436, § 1. The statute was repealed in 1969. *See* Act effective July 1, 1969, ch. 69-87, 1969 Fla. Laws 322.

46. *West v. State*, 39 So. 412, 415 (Fla. 1905).

47. *Nickelson v. State ex rel. Blich*, 57 So. 194, 196 (Fla. 1911).

In a more typical criminal case, a con man created a fictitious baseball team (the Gainesville All Stars) and convinced a local jeweler to be its sponsor.⁴⁸ A jury convicted him of forgery for cashing the jeweler's check.⁴⁹ On appeal, the Supreme Court of Florida affirmed.⁵⁰

In a somewhat similar scheme, Vincent Antonucci, the owner of a Crystal River souvenir shop called Talkin' Baseball, swindled Ted Williams, the legendary Boston Red Sox left fielder and the business's silent partner.⁵¹ When the State of Florida and Williams both went after Antonucci, the trial judge continued the State's criminal case to allow Williams' civil case to finish first.⁵² On appeal, the Fifth District found this to be error.⁵³

In another case involving a famous major leaguer, former Detroit Tigers pitcher Denny McLain had his federal racketeering conviction overturned by the Eleventh Circuit because the actions of the prosecutor and the trial judge had denied him a fair trial.⁵⁴

More recently, a woman convinced a bank that two World Series baseballs—one signed by the New York Yankees and the other by the Detroit Tigers—were worth \$8 million.⁵⁵ The jury found her guilty of bank fraud, but the Northern District threw out the verdict for lack of evidence.⁵⁶ On appeal, the Eleventh Circuit ordered it reinstated.⁵⁷

In two separate incidents, a New York Mets minor league player and a little league coach were convicted of sexual misconduct.⁵⁸ The Fourth District upheld the player's conviction,⁵⁹ but the First District reversed the coach's conviction because the prosecutors had relied on an improper theory.⁶⁰

48. Green v. State, 76 So. 2d 645, 646 (Fla. 1954).

49. *Id.*

50. *Id.* at 648.

51. State v. Antonucci, 590 So. 2d 998, 999 (Fla. 5th Dist. Ct. App. 1991); BEN BRADLEE, JR., *THE KID: THE IMMORTAL LIFE OF TED WILLIAMS* 624 (2013).

52. *Antonucci*, 590 So. 2d at 999.

53. *Id.* at 1000.

54. United States v. McLain, 823 F.2d 1457, 1459, 1462, 1468 (11th Cir. 1987).

55. United States v. Williams, 390 F.3d 1319, 1321 n.3 (11th Cir. 2004).

56. *Id.* at 1320.

57. *Id.* at 1326.

58. Palmer v. State, 838 So. 2d 579, 579–80 (Fla. 1st Dist. Ct. App. 2002); Gonzalez v. State, 745 So. 2d 542, 543 (Fla. 4th Dist. Ct. App. 1999).

59. *Gonzalez*, 745 So. 2d at 543.

60. *Palmer*, 838 So. 2d at 579.

In yet another case, an off-duty police officer at a St. Lucie Mets game had too much to drink.⁶¹ When he was asked to leave, he became hostile and was taken into custody.⁶² Following his release, he sued for false arrest and false imprisonment, but the Southern District dismissed his complaint.⁶³

VII. DISABILITY LAW

There are two reported cases involving disabled baseball fans.⁶⁴ In the first, the plaintiff sought to force the Florida Marlins to make Pro Player Stadium more accessible.⁶⁵ The Southern District dismissed because the plaintiff's proposed modifications were not readily achievable.⁶⁶

In the second, involving similar claims against the St. Lucie Mets at Tradition Field, the Southern District put off ruling on the team's motions to dismiss for lack of standing and mootness until a full record could be developed.⁶⁷

VIII. EDUCATION LAW

The baseball coach at Coconut Creek High School was disciplined for failing to prevent hazing during a team trip to Orlando.⁶⁸ On appeal, the Fourth District reversed the Broward County School Board's decision because the coach had been unaware of the players' activities.⁶⁹

In four cases, high school baseball players challenged decisions of the Florida High School Athletic Association.⁷⁰ In the first, a Hialeah Miami Lakes High School player who had used up his eligibility and had been

61. *Magielski v. Sheriff of St. Lucie Cty.*, No. 2:11-CV-14235-KMM, 2012 WL 292285, at *1 (S.D. Fla. Jan. 27, 2012).

62. *Id.*

63. *Id.* at *2, *4.

64. *Wein v. St. Lucie Cty.*, 461 F. Supp. 2d 1261, 1262 (S.D. Fla. 2006); *Access Now, Inc. v. S. Fla. Stadium Corp.*, 161 F. Supp. 2d 1357, 1360 (S.D. Fla. 2001).

65. *Access Now, Inc.*, 161 F. Supp. 2d at 1361.

66. *Id.* at 1371.

67. *Wein*, 461 F. Supp. 2d at 1262, 1265.

68. *McMillan v. Broward Cty. Sch. Bd.*, 834 So. 2d 903, 904 (Fla. 4th Dist. Ct. App. 2003).

69. *Id.*

70. *Fla. High Sch. Athletic Ass'n v. Marazzito*, 891 So. 2d 653, 654 (Fla. 2d Dist. Ct. App. 2005); *Lee v. Fla. High Sch. Activities Ass'n, Inc.*, 291 So. 2d 636, 638–39 (Fla. 3d Dist. Ct. App. 1974); *Coletti v. Fla. High Sch. Athletic Ass'n, Inc.*, 23 Fla. L. Weekly Supp. 38 (Fla. 17th Cir. Ct. May 11, 2015); *White v. Fla. High Sch. Activities Ass'n*, 9 Fla. L. Weekly Supp. 536 (Fla. 2d Cir. Ct. May 8, 2002).

denied a hardship waiver had his case dismissed by the trial court.⁷¹ On appeal, the Third District reversed and held he was entitled to a hearing.⁷²

In the second, four home-schooled players sued after school officials declared them ineligible to play for the Chattahoochee High Magnet School baseball team.⁷³ Finding that no rules had been broken, the trial court ordered them reinstated.⁷⁴

In the third, a catcher at All Saints Academy in Winter Haven petitioned for an extra year of eligibility.⁷⁵ The trial court granted his request, but the Second District reversed after concluding the record did not support such an extraordinary remedy.⁷⁶

In the fourth, a Nova High School player argued that his team's regional semi-final game against St. Thomas High School should not have been called due to rain.⁷⁷ The trial court dismissed the lawsuit for lack of standing, failure to exhaust administrative remedies, and failure to state a cause of action.⁷⁸ It also found that the umpires had been right to give the victory to St. Thomas.⁷⁹

IX. FAMILY LAW

Just before going on a team trip, Boston Red Sox pitching coach Dennis Rasmussen signed a note leaving all of his property to his wife Jan "in the event of death or separation."⁸⁰ The couple later divorced.⁸¹ Relying on the note, the trial court ruled that Rasmussen's individual retirement account and MLB pension were marital assets.⁸² The Second District reversed because the note, being conditional, failed to create a valid gift.⁸³

71. *Lee*, 291 So. 2d at 638.

72. *Id.* at 638–39.

73. *White*, 23 Fla. L. Weekly Supp. 536.

74. *Id.*

75. *Marazzito*, 891 So. 2d at 654.

76. *Id.*

77. *Coletti*, 23 Fla. L. Weekly Supp. 38.

78. *Id.*

79. *Id.*

80. *Rasmussen v. Rasmussen*, 909 So. 2d 969, 970 (Fla. 2d Dist. Ct. App. 2005).

81. *Id.*

82. *Id.*

83. *Id.* at 970–71.

X. GAMBLING LAW

Three cases have involved prosecutions for wagering on baseball.⁸⁴ In the first, the Southern District ordered cash seized from a bookmaker who had taken bets on baseball to be returned.⁸⁵ On appeal, the Fifth Circuit ordered a new trial.⁸⁶

In the second, the defendants “were found guilty of maintaining a gambling room.”⁸⁷ On appeal, the Third District reversed because the evidence—a bet on one baseball game—was insufficient to support the charges.⁸⁸

In the third, the defendants were convicted by the Southern District of taking bets on baseball games.⁸⁹ Finding no error, the Fifth Circuit affirmed their sentences.⁹⁰

XI. GENDER DISCRIMINATION LAW

Claiming she had been denied a promotion because of her gender, a woman baseball umpire sued multiple defendants.⁹¹ When she failed to make timely service, two of the defendants moved for dismissal, which the Middle District granted.⁹²

In two different lawsuits against the Brevard County School Board, the Middle District found that the disparities between the boys’ baseball and girls’ softball programs at various local high schools were so substantial they violated federal and state law.⁹³

84. United States v. Sklaroff, 552 F.2d 1156, 1157 (5th Cir. 1977); United States v. Frank, 265 F.2d 529, 529–30 (5th Cir. 1959); Cohen v. State, 189 So. 2d 498, 498–99 (Fla. 3d Dist. Ct. App. 1966).

85. Frank, 265 F.2d at 529–30.

86. Id. at 531.

87. Cohen, 189 So. 2d at 498.

88. Id. at 499.

89. Sklaroff, 552 F.2d at 1157, 1162.

90. Id. at 1162.

91. Cox v. Ariz. League of Prof’l Baseball Clubs, Inc., 151 F.R.D. 436, 437 (M.D. Fla. 1993).

92. Id. at 439.

93. Landow *ex rel.* Landow v. Sch. Bd. of Brevard Cty., 132 F. Supp. 2d 958, 958–59 (M.D. Fla. 2000); Daniels v. Sch. Bd. of Brevard Cty., 985 F. Supp. 1458, 1459 (M.D. Fla. 1997).

XII. IMMIGRATION LAW

After successfully smuggling Cuban infielder Yuniesky Betancourt into the United States and obtaining a \$2.8 million contract for him with the Seattle Mariners, sports agent Gustavo Dominguez decided to try his luck again with five more Cuban players.⁹⁴ This time the plan blew up and Dominguez was convicted by the Southern District of smuggling, concealing, and transporting unlawful aliens.⁹⁵ On appeal, the Eleventh Circuit affirmed the smuggling conviction but reversed the other charges for lack of evidence.⁹⁶

XIII. INSURANCE LAW

Following the closure of a baseball card store, one of its investors agreed to keep its inventory in his home.⁹⁷ A short time later, the home was broken into, and the cards were stolen.⁹⁸ The investor sued his insurer and was awarded \$25,000.⁹⁹ Considering this amount to be too little, the investor filed a new action against his agent for failing to provide him with the proper coverage.¹⁰⁰

In the trial court and at the Fourth District, the agent successfully defended on the ground that the investor's suit was time-barred.¹⁰¹ On appeal, the Supreme Court of Florida rejected this contention.¹⁰² Nevertheless, it ordered the complaint dismissed due to the investor's bad faith in suing the agent.¹⁰³

A little league coach injured during a game sued both the league and the City of South Daytona.¹⁰⁴ Nutmeg, the City's insurer, tendered the case to Continental, the league's insurer, but it denied liability.¹⁰⁵ After the coach's claim was dismissed, the City filed a declaratory judgment action against Continental for attorneys' fees.¹⁰⁶ The trial court ordered Continental

94. United States v. Dominguez, 661 F.3d 1051, 1057 (11th Cir. 2011).

95. *Id.* at 1056–57.

96. *Id.* at 1056.

97. Blumberg v. USAA Cas. Ins. Co., 790 So. 2d 1061, 1062 (Fla. 2001).

98. *Id.* at 1063.

99. *Id.*

100. *Id.*

101. *Id.*

102. Blumberg, 790 So. 2d at 1065–66.

103. *Id.* at 1066–68.

104. Cont'l Cas. Co. v. City of South Daytona, 807 So. 2d 91, 92 (Fla. 5th Dist. Ct. App. 2002).

105. *Id.*

106. *Id.*

to reimburse the City for both actions.¹⁰⁷ On appeal, the Fifth District held the City was entitled to attorneys' fees only in the coach's action.¹⁰⁸

When pitcher Alex Fernandez re-injured his shoulder, the Florida Marlins sought reimbursement from its insurer Lloyd's of London.¹⁰⁹ Having paid out on a previous claim, Lloyd's denied coverage.¹¹⁰ During discovery, it sought to learn what the Marlins had been told by a Missouri lawyer named Michael Whittle.¹¹¹ The Marlins objected, claiming that Whittle's advice was protected by attorney-client privilege.¹¹² The trial court rejected this contention because Whittle was not admitted in Florida, but the Third District reversed.¹¹³

After prospect Matthew White tore his rotator cuff while pitching for the 2000 U.S. Olympic team, the Tampa Bay Devil Rays submitted a claim to the Standard Security Life Insurance Company.¹¹⁴ It refused to pay because White was able to pitch sporadically during the 2001 season for the Durham Bulls.¹¹⁵ Finding that numerous unresolved fact issues existed, the Middle District denied Standard's summary judgment motion and referred the Devil Rays' summary judgment motion to a magistrate judge.¹¹⁶

XIV. INTELLECTUAL PROPERTY LAW

In two different actions, Little League Baseball, Inc. sued parties who were using its trademarks.¹¹⁷ In the first, the Middle District ordered the defendant to stop using the marks.¹¹⁸ In the second, the Southern District refused to let the defendant depose the league's president after finding he had

107. *Id.*

108. *Id.* at 93.

109. Andrew Cave, *Lloyd's Whacks \$7.7M Claim by Baseball Team*, DAILY TELEGRAPH (London), July 5, 2004, at 25.

110. *Id.*

111. Florida Marlins Baseball Club, LLC v. Certain Underwriters at Lloyd's London Subscribing to Policy No. 893/HC/97/9096, 900 So. 2d 720, 721 (Fla. 3d Dist. Ct. App. 2005).

112. *Id.*

113. *Id.*

114. Tampa Bay Devil Rays, LED v. Standard Sec. Life Ins. Co. of N.Y., No. 8:04-CV-1330-T-17MAP, 2006 WL 1119207, at *4 (M.D. Fla. Apr. 26, 2006).

115. *Id.* at *4.

116. *Id.* at *4-5.

117. Little League Baseball, Inc. v. Kaplan, No. 08-60554-CIV, 2009 WL 426277, at *1 (S.D. Fla. Feb. 20, 2009); Little League Baseball, Inc. v. Daytona Beach Little League, Inc., No. 76-108, 1977 WL 22777, at *1 (M.D. Fla. Mar. 17, 1977).

118. *Daytona Beach Little League, Inc.*, 1977 WL 22777, at *1.

no pertinent knowledge and the defendant already had deposed four other league officials.¹¹⁹

In another case, a songwriter who wrote a ballad about the Fort Myers Miracle sued the team for playing it at its home games.¹²⁰ When the Miracle produced proof it had twice obtained permission to do so, the Middle District granted the team summary judgment.¹²¹ On appeal, the Eleventh Circuit affirmed.¹²²

In a different action, a developer accused various parties of stealing his idea of having a baseball stadium anchor a mixed-used development project in Jupiter.¹²³ Finding the concept to be an obvious one, the trial court dismissed,¹²⁴ and the Fourth District affirmed.¹²⁵

In two cases, former MLB players sued others for using their names.¹²⁶ In the first, the Southern District dismissed for lack of personal jurisdiction a lawsuit filed by the estate of Joe DiMaggio against various San Francisco officials who had named a park in his honor.¹²⁷ In the second, the Fourth District decided the jury hearing Cecil Fielder's lawsuit against an interior decorating company had been unduly influenced by Fielder's fame.¹²⁸

XV. INTERNATIONAL LAW

After escaping Cuba and signing a \$30 million contract with the Cincinnati Reds, pitcher Aroldis Chapman found himself sued by four individuals who claimed they had been tortured by the Cuban government after Chapman gave false testimony against them to avoid losing his spot on the Cuban national baseball team.¹²⁹ Citing the Act of State and political question doctrines, Chapman moved to dismiss the suit, but the Southern District found neither defense to be a bar.¹³⁰

119. *Kaplan*, 2009 WL 426277, at *1.

120. *Jacob Maxwell, Inc. v. Veeck*, 110 F.3d 749, 751 (11th Cir. 1997).

121. *Id.* at 751–53.

122. *Id.* at 754.

123. *Alevizos v. John D. & Catherine T. MacArthur Found.*, 764 So. 2d 8, 10–11 (Fla. 4th Dist. Ct. App. 1999).

124. *Id.* at 11, 13.

125. *Id.* at 13.

126. *DiMaggio, LLC v. City & County of San Francisco*, 187 F. Supp. 2d 1359, 1361 (S.D. Fla. 2000); *Weinstein Design Grp., Inc. v. Fielder*, 884 So. 2d 990, 993 (Fla. 4th Dist. Ct. App. 2004).

127. *DiMaggio*, 187 F. Supp. 2d at 1362.

128. *Weinstein Design Grp., Inc.*, 884 So. 2d at 995.

129. *Garcia v. Chapman*, 911 F. Supp. 2d 1222, 1229, 1231 (S.D. Fla. 2012).

130. *Id.* at 1240–42.

XVI. JUDICIAL ETHICS

Broward Circuit Judge John T. Luzzo accepted Florida Marlins tickets from lawyers who regularly appeared in front of him.¹³¹ For this lapse in judgment, the Judicial Qualifications Commission recommended a public reprimand, which the Supreme Court of Florida imposed.¹³²

XVII. LABOR AND EMPLOYMENT LAW

When he was denied overtime, a Sarasota White Sox groundskeeper sued the team.¹³³ Based on the Fair Labor Standards Act's "recreational operator" exemption,¹³⁴ the Middle District dismissed.¹³⁵ On appeal, the Eleventh Circuit affirmed.¹³⁶

In another FLSA case, workers who had helped build the Miami Marlins' new stadium sued for wages they claimed they had not received.¹³⁷ The Southern District dismissed for lack of subject matter jurisdiction,¹³⁸ but the Eleventh Circuit reversed.¹³⁹

After officiating a game together at Spoto High School in Riverview, one umpire filed a report accusing the other umpire of inappropriate conduct.¹⁴⁰ The Umpires Association refused to give the second umpire a copy of the report but remained willing to hire him for future games.¹⁴¹ Indignant, the second umpire refused to accept any new assignments and sued the association for embarrassment and loss of income.¹⁴² Finding the plaintiff's claims to be meritless, the Hillsborough Circuit Court dismissed them.¹⁴³

In an action arising out of the Biogenesis steroids scandal, MLB Commissioner Bud Selig sought testimony from Yuri Sucart, Alex

131. *In re Luzzo*, 756 So. 2d 76, 77 (Fla. 2000).

132. *Id.* at 79.

133. *Jeffery v. Sarasota White Sox, Inc.*, 64 F.3d 590, 592 (11th Cir. 1995).

134. 29 U.S.C. § 213(a)(3).

135. *Jeffrey*, 64 F.3d at 597.

136. *Id.* at 592.

137. *Calderon v. Baker Concrete Constr., Inc.*, 771 F.3d 807, 808–09 (11th Cir. 2014).

138. *Id.* at 809.

139. *Id.* at 811.

140. *Sousa v. W. Cent. Fla. Umpires Inc.*, No. 09CA08550, 2010 WL 9606079, at *1 (Fla. 13th Cir. Ct. Apr. 29, 2010).

141. *Id.* at *2.

142. *Id.* at *1–2.

143. *Id.* at *2.

Rodriguez's cousin, and a second man.¹⁴⁴ When they moved to quash their subpoenas, the trial court dismissed for lack of standing.¹⁴⁵ On appeal, the Third District denied for the alternate reason that the petitioners had failed to prove that the lawsuit was preempted by federal labor law.¹⁴⁶

XVIII. LIBEL LAW

In an interview in the *Ladies Home Journal*, Kelly Ripken, the wife of Baltimore Orioles shortstop Cal Ripken, implied that a particular woman was a baseball groupie who wanted to sleep with her husband.¹⁴⁷ Taking offense, the woman sued, but the trial court dismissed.¹⁴⁸ On appeal, the Fourth District affirmed because the comment was "pure opinion."¹⁴⁹

XIX. MEDICAL MALPRACTICE LAW

A student at Braulio Alonso High School in Tampa died from cardiac arrest during a pre-season baseball workout.¹⁵⁰ The jury found that the doctor who had signed the student's medical release form was 20% liable.¹⁵¹ On appeal, the Second District reversed because the student's estate failed to establish that the doctor's actions were a proximate cause of death.¹⁵²

XX. MUNICIPAL FINANCE LAW

In 1966, the Supreme Court of Florida ruled the City of Deerfield Beach could not build a spring training facility for the Pittsburgh Pirates.¹⁵³ Thirty-five years later, with public sentiment regarding such projects having

144. *Sucart v. Office of the Comm'r*, 129 So. 3d 1112, 1113 (Fla. 3d Dist. Ct. App. 2013).

145. *Id.* at 1114.

146. *Id.* at 1113–14.

147. *Morse v. Ripken*, 707 So. 2d 921, 921–22 (Fla. 4th Dist. Ct. App. 1998).

148. *Id.* at 921.

149. *Id.* at 921, 923.

150. *Shartz v. Miulli*, 127 So. 3d 613, 614 (Fla. 2d Dist. Ct. App. 2013), *review denied*, 148 So. 3d 771 (Fla. 2014).

151. *Id.* at 616, 618.

152. *Id.* at 618–19, 621. Prior to trial, the family's lawsuit against various school officials was dismissed for failing to state a cause of action. *Miulli v. Fla. High Sch. Athletic Ass'n*, 998 So. 2d 1155, 1157 (Fla. 2d Dist. Ct. App. 2008).

153. *Brandes v. City of Deerfield Beach*, 186 So. 2d 6, 7–8, 12 (Fla. 1966).

shifted, it held the City of Clearwater could build a spring training facility for the Philadelphia Phillies.¹⁵⁴

When it appeared that Orlando might get an MLB expansion team, Orange County pledged to build a new stadium using a 1% tourist tax.¹⁵⁵ In response, a group of hotels filed a lawsuit.¹⁵⁶ The trial court dismissed their action as premature, but the Fifth District reversed.¹⁵⁷ The matter became moot after the franchise was awarded to Tampa Bay.¹⁵⁸

A decade later, the City of Miami agreed to build a new stadium for the Florida Marlins.¹⁵⁹ Two taxpayers sought but were denied a temporary injunction prohibiting the City from selling the bonds needed to pay for the project.¹⁶⁰ In dismissing their appeal as moot, the Third District pointed out that their failure to request an emergency stay had resulted in the bonds being issued.¹⁶¹

XXI. OPEN GOVERNMENT LAW

In a case involving St. Petersburg's failure to land the Chicago White Sox as a tenant for its new stadium, the Second District ordered the City to share its records with the public.¹⁶² But in a subsequent case involving the relocation of the Baltimore Orioles' spring training home from Fort Lauderdale to Sarasota, the Supreme Court of Florida decided that Sarasota had not violated any laws by conducting negotiations in private.¹⁶³

154. Roper v. City of Clearwater, 796 So. 2d 1159, 1159–60, 1164 (Fla. 2001).
 155. Tamar 7600, Inc. v. Orange Cty., 686 So. 2d 790, 790 (Fla. 5th Dist. Ct. App. 1997).

156. *Id.* at 791.

157. *Id.* at 791, 793.

158. *Id.* at 790, 793; DE QUESADA JR., *supra* note 1, at 128.

159. Solares v. City of Miami, 23 So. 3d 227, 227–28 (Fla. 3d Dist. Ct. App. 2009).

160. *Id.* at 228.

161. *Id.* This decision followed the earlier dismissal of a similar lawsuit championed by automobile magnate Norman Braman. *See* Braman v. Miami-Dade Cty., 18 So. 3d 1259, 1259 (Fla. 3d Dist. Ct. App. 2009).

162. Times Publ'g Co. v. City of St. Petersburg, 558 So. 2d 487, 490–91, 495 (Fla. 2d Dist. Ct. App. 1990). *See generally* BOB ANDELMAN, STADIUM FOR RENT: TAMPA BAY'S QUEST FOR MAJOR LEAGUE BASEBALL (1993).

163. Sarasota Citizens for Responsible Gov't v. City of Sarasota, 48 So. 3d 755, 758, 766 (Fla. 2010).

XXII. PERSONAL INJURY LAW

In an early case, a Pensacola boy chasing a baseball was seriously injured when he ran into the street and was hit by a car.¹⁶⁴ The jury found for the youngster, but the Supreme Court of Florida reversed due to his contributory negligence.¹⁶⁵ In a much more recent case, the Middle District held that a van carrying a baseball team was not responsible for a bicyclist's injuries.¹⁶⁶

In most of Florida's personal injury baseball cases, the plaintiff either has been a spectator or a bystander.¹⁶⁷ Sometimes, however, the plaintiff has been a player. For example, when a batter was injured because the helmet he was wearing failed to protect him, he sued its out-of-state manufacturer.¹⁶⁸ Although the trial court twice found the defendant amenable to suit in Florida, the First District reversed both times.¹⁶⁹

164. *Magee v. Friedrichsen*, 109 So. 197, 197 (Fla. 1926) (en banc).

165. *Id.*

166. *Donaldson v. United States*, No. 6:09-CV-1049-ORL-28GJK, 2011 WL 1988803, at *4 (M.D. Fla. Mar. 16, 2011).

167. *See, e.g., Baker v. Major League Baseball Props., Inc.*, No. 3:08CV114/MCR, 2009 WL 1098482, at *1, *4 (N.D. Fla. Apr. 22, 2009) (Florida fan injured at World Baseball Classic in San Diego had to sue in California); *Woodford v. City of St. Petersburg*, 84 So. 2d 25, 26–27 (Fla. 1955) (homeowner could sue City for failing to protect him from baseball-chasing crowd); *City of Coral Springs v. Rippe*, 743 So. 2d 61, 62, 65 (Fla. 4th Dist. Ct. App. 1999) (jury's finding that City knew its fences were too short to protect spectators was reasonable); *Collazos v. City of West Miami*, 683 So. 2d 1161, 1162 (Fla. 3d Dist. Ct. App. 1996) (judgment notwithstanding the verdict should not have been entered in case involving four-year-old struck by baseball bat); *City of Jacksonville v. Raulerson*, 415 So. 2d 1303, 1304, 1306 (Fla. 1st Dist. Ct. App. 1982) (whether injured youngster appreciated dangers posed by baseball chalking machine was a question for the jury); *Jackson v. Atlanta Braves, Inc.*, 227 So. 2d 63, 63–64 (Fla. 4th Dist. Ct. App. 1969) (summary judgment entered against fan hit by baseball reversed for further fact-finding); *City of Bradenton v. Finley*, 208 So. 2d 675, 676 (Fla. 3d Dist. Ct. App. 1968) (City named as third-party defendant in accident arising from its alleged failure to maintain spring training facility had to be sued in county in which it was located); *Buck v. McLean*, 115 So. 2d 764, 765, 768 (Fla. 1st Dist. Ct. App. 1959) (spectator's suit dismissed because of sovereign immunity); *Nielsen v. City of Sarasota*, 110 So. 2d 417, 417, 420 (Fla. 2d Dist. Ct. App. 1959) (summary judgment for defendants appropriate where fan who fell through open space in baseball stadium's grandstand could not explain how accident happened); *Giordano v. Babe Ruth League, Inc.*, No. 11CA1352, 2013 WL 6911496, at *1 (Fla. 7th Cir. Ct. July 10, 2013) (summary judgment granted to defendants in suit brought by spectator hit in the head by errant warm-up throw).

168. *Am. Baseball Cap, Inc. v. Duzinski*, 359 So. 2d 483, 485 (Fla. 1st Dist. Ct. App. 1978).

169. *Id.* at 485, 489.

Three player cases have involved pitching machines.¹⁷⁰ In the first, two friends were sharing a batting cage.¹⁷¹ While taking a swing at a pitch, one of the friends accidentally hit the other with his bat.¹⁷² The injured friend later sued the facility's operator, claiming he should have warned patrons that it was dangerous for two players to be in the cage at the same time.¹⁷³ The trial court agreed, but the Second District reversed.¹⁷⁴

In the second, a child was injured when a pitching machine's arm unexpectedly struck him.¹⁷⁵ After his parents sued the machine's manufacturer and its distributors, they were counter-sued for contribution.¹⁷⁶ Finding that the child had released his parents from liability, the Third District affirmed the dismissal of the counter-suit.¹⁷⁷

In the third, a batter was injured when a pitching machine malfunctioned.¹⁷⁸ After jury selection, one of the defendants settled the case for \$1.1 million.¹⁷⁹ It then sought contribution from the other defendants.¹⁸⁰ Two of the co-defendants refused to pay and claimed they had defenses that would have shielded them from any judgment.¹⁸¹ The trial court agreed with the co-defendants, but the First District reversed.¹⁸²

XXIII. REAL PROPERTY LAW

As part of its plan to build a new power station, the City of Jacksonville filed an eminent domain lawsuit to acquire thirty-six acres of privately-held land.¹⁸³ Contending that it did not need the entire parcel, the property's owner, as well as a baseball team with a subordinate interest,

170. Home Ins. Co. v. Advance Mach. Co., 500 So. 2d 664, 665 (Fla. 1st Dist. Ct. App. 1986); Dudley Sports Co. v. Berry, 407 So. 2d 335, 336 (Fla. 3d Dist. Ct. App. 1981); Chambers v. Cline, 161 So. 2d 224, 224–25 (Fla. 2d Dist. Ct. App. 1964).

171. Chambers, 161 So. 2d at 225.

172. Id.

173. Id.

174. Id.

175. Dudley Sports Co., 407 So. 2d at 336.

176. Id.

177. Id. at 337.

178. Home Ins. Co. v. Advance Mach. Co., 500 So. 2d 664, 665 (Fla. 1st Dist. Ct. App. 1986).

179. Id. at 666.

180. Id.

181. Id.

182. Id. at 665–66, 668–69 (rejecting manufacturer's statute of repose defense).

183. Inland Waterway Dev. Co. v. City of Jacksonville, 38 So. 2d 676, 676–77 (Fla. 1948).

objected but lost at trial.¹⁸⁴ On appeal, the Supreme Court of Florida affirmed.¹⁸⁵

In a different action to stop the City of Gulfport from leasing a portion of Tomlinson Park to a baseball league, the Second District found the proposed arrangement to be a valid public use.¹⁸⁶

When a law transferring Al Lopez Field—the spring training home of the Cincinnati Reds—from the City of Tampa to the Tampa Sports Authority was challenged, the Supreme Court of Florida upheld the statute as a proper exercise of the Florida Legislature’s municipal oversight powers.¹⁸⁷

In a similar action, a taxpayer sued the City of Fort Myers for failing to give proper notice of its plan to transfer City of Palms Park—the spring training home of the Boston Red Sox—to Lee County.¹⁸⁸ Finding that the plaintiff did not have standing, the Second District dismissed.¹⁸⁹

In yet another case, a group of North Bay Village homeowners sought to prevent the construction of a baseball field at Treasure Island Elementary School, claiming it would create a nuisance.¹⁹⁰ The Third District dismissed the complaint on sovereign immunity grounds.¹⁹¹

XXIV. TAX LAW

In 1948, a husband and wife won a car during a raffle at a Tampa Smokers baseball game.¹⁹² The IRS assessed income taxes, which the couple paid under protest.¹⁹³ In court, they argued that a sign at Plant Field had informed fans that a car would be given away, thereby making the vehicle a gift.¹⁹⁴ Agreeing with this contention, the Southern District ordered the government to issue a refund.¹⁹⁵

184. *Id.* at 677.

185. *Id.* at 679.

186. Fla. Little Major League Ass’n v. Gulfport Lion’s Little League, Inc., 127 So. 2d 707, 708, 711 (Fla. 2d Dist. Ct. App. 1961).

187. State v. Tampa Sports Auth., 188 So. 2d 795, 798 (Fla. 1966).

188. Smith v. City of Fort Myers, 944 So. 2d 1092, 1093 (Fla. 2d Dist. Ct. App. 2006).

189. *Id.* at 1093, 1096.

190. Paredes v. City of North Bay Village, 693 So. 2d 1153, 1153 (Fla. 3d Dist. Ct. App. 1997).

191. *Id.* at 1153–54.

192. Fernandez v. Fahs, 144 F. Supp. 630, 630–31 (S.D. Fla. 1956).

193. *Id.* at 630.

194. *Id.* at 632.

195. *Id.* at 631–32. By the time the court ruled, the Smokers had folded. See DE QUESADA JR., *supra* note 1, at 8 (explaining that the team’s last year was 1954).

When the Hillsborough County Value Adjustment Board granted a tax break to the New York Yankees' spring training facility in Tampa, the Hillsborough County property appraiser challenged the decision.¹⁹⁶ The trial court dismissed the complaint for lack of standing.¹⁹⁷ On appeal, the Second District affirmed.¹⁹⁸ In later proceedings, the Supreme Court of Florida affirmed the Second District.¹⁹⁹

Because of a back-loaded contract, the New York Mets owed deferred compensation to outfielder Darryl Strawberry.²⁰⁰ When the team sought to make the first payment, both the IRS and Strawberry's former wife stepped forward.²⁰¹ Agreeing with the magistrate judge's recommendation, the Northern District found for the IRS as the first-in-time creditor.²⁰²

XXV. WORKERS' COMPENSATION LAW

Generally speaking, professional athletes are entitled to receive workers' compensation.²⁰³ Two Florida cases have authorized such benefits,²⁰⁴ and two others have rejected procedural attempts to block such claims.²⁰⁵

XXVI. CONCLUSION

As the foregoing makes clear, Florida's courts have been in the middle of almost every conceivable type of baseball-related dispute. What sorts of cases will they handle in the future? Although prognostications always are fraught with risk, it seems likely that actions involving injured

196. *Turner v. Hillsborough Cty. Aviation Auth.*, 739 So. 2d 175, 176 (Fla. 2d Dist. Ct. App. 1999).

197. *Id.* at 177.

198. *Id.* at 179–80.

199. *Fuchs v. Robbins*, 818 So. 2d 460, 464 (Fla. 2002).

200. *Colon v. Strawberry*, No. 4:12-CV-101 MCR/CAS, 2013 WL 7023169, at *1–2 (N.D. Fla. July 26, 2013).

201. *Id.* at *3.

202. *Id.* at *4.

203. WALTER T. CHAMPION, JR., *SPORTS LAW IN A NUTSHELL* 256 (4th ed. 2011).

204. *Miles v. Montreal Baseball Club*, 379 So. 2d 1325, 1325–26 (Fla. 1st Dist. Ct. App. 1980) (infielder injured at a team press party); *Sielicki v. New York Yankees*, 388 So. 2d 25, 25–26 (Fla. 1st Dist. Ct. App. 1980) (pitcher forced into early retirement due to arm strain).

205. *Hartzog v. New York Yankees*, 847 So. 2d 1115, 1115 (Fla. 1st Dist. Ct. App. 2003) (statute of limitations); *Detroit Tigers v. Castillo*, 843 So. 2d 1026, 1026 (Fla. 1st Dist. Ct. App. 2003) (venue).

fans will continue to be brought, especially if the nascent movement to jettison the venerable “Baseball Rule”—which protects stadium operators from liability for balls that leave the field and hit spectators—takes root in Florida.²⁰⁶

A number of lawsuits will arise if the Tampa Bay Rays decide to exercise their new-found right to depart Tropicana Field early.²⁰⁷ Indeed, it almost is a certainty that a group of wary taxpayers will challenge whatever funding mechanism is used to finance the project. Moreover, if the negotiations are not transparent, an open government lawsuit is practically a given. And, of course, at least some residents will seek to force the club to fully honor its existing lease.²⁰⁸

The minimum wage litigation taking place in California between minor league players and MLB has enormous potential ramifications for Florida. The players contend they are being grossly underpaid in violation of federal law.²⁰⁹ If they prevail, the continued financial viability of one or more of Florida’s minor league teams could be in jeopardy.

Just before the start of the 2015 season, MLB punished Miami Marlins pitcher Jarred Cosart after rumors spread that he had bet on baseball.²¹⁰ Nevertheless, MLB and the country’s three other major sports leagues are getting closer to dropping their longstanding opposition to sports gambling.²¹¹ This will have significant implications for Florida’s casinos,

206. The Baseball Rule was announced in *Crane v. Kansas City Baseball & Exhibition Co.* and quickly gained widespread acceptance. 153 S.W. 1076, 1077–78 (Mo. Ct. App. 1913). Four recent cases, however, have called it into question. See *Coomer v. Kansas City Royals Baseball Corp.*, 437 S.W.3d 184, 197–98 (Mo. 2014) (en banc); *S. Shore Baseball, LLC v. DeJesus*, 11 N.E.3d 903, 907–09 (Ind. 2014); *Rountree v. Boise Baseball, L.L.C.*, 296 P.3d 373, 376 (Idaho 2013); *Atlanta Nat’l League Baseball Club, Inc. v. F.F.*, 761 S.E.2d 613, 616 (Ga. Ct. App. 2014). Somewhat surprisingly, the Supreme Court of Florida has not had to construe the Baseball Rule.

207. Charlie Frago, *City, Rays Break Logjam on Stadium*, TAMPA BAY TIMES, Jan. 15, 2016, at 1 (explaining that after nearly a decade of negotiations, the City of St. Petersburg has authorized the Rays to leave Tropicana Field before their lease ends in 2027).

208. For on-going coverage of the Rays’ efforts to find a new home, see Noah Pransky, *Shadow of the Stadium*, <http://shadowofthestadium.blogspot.com>.

209. *Senne v. Kansas City Royals Baseball Corp.*, 105 F. Supp. 3d 981, 991–92 (N.D. Cal. 2015).

210. Craig Davis, *MLB Fines Cosart but Finds No Baseball Bets*, SUN-SENTINEL, Apr. 4, 2015, at 5C. Concluding he had gambled on other sports but not baseball, MLB fined Cosart an undisclosed amount of money. *Id.*

211. Barry Svrluga, *Unafraid of Change, Rob Manfred Steps to Plate, Faces Pitches on Pace of Play, Gambling*, WASH. POST (Feb. 5, 2015), <http://www.washingtonpost.com/news/sports/wp/2015/02/05/unafraid-of-change-rob-manfred-steps-to-plate-faces-pitches-on-pace-of-play-gambling> (“Adam Silver, who has been the

which undoubtedly will lobby state legislators for permission to operate sports books.²¹²

President Obama's decision at the end of 2014 to normalize relations with Cuba will have important consequences for baseball in general and Florida in particular. Already, there is talk of holding spring training games in Cuba.²¹³ Many baseball fans—especially those in South Florida—will travel to such games, and it is not difficult to imagine some of these road trips ending in lawsuits if something goes wrong.

Lastly, baseball is seemingly a topic of conversation every time Florida's lawmakers meet. During its 2015 regular session, for example, the Florida Legislature helped advance construction of a joint-use facility for the Houston Astros and Washington Nationals in West Palm Beach by approving needed zoning changes.²¹⁴ It also considered bills relaxing the transfer rules for high school athletes,²¹⁵ imposing new restrictions on ticket resellers,²¹⁶ punishing disruptive youth sports coaches,²¹⁷ and requiring the state to regularly assess its efforts to retain MLB spring training sites.²¹⁸ Additionally, to mark the sixtieth anniversary of Roberto Clemente's big league debut, the Florida Senate passed a resolution honoring the Pittsburgh Pirates' Hall of Fame right fielder.²¹⁹

NBA's commissioner just more than a year, has embraced the idea of legalizing sports gambling, and he has discussed that with his counterparts in baseball, football and hockey.”).

212. Of course, even if MLB greenlights gambling on its games, Florida's casinos will not be able to operate sports books until the Professional and Amateur Sports Protection Act of 1992, 28 U.S.C. §§ 3701-3704, either is repealed by Congress or struck down by the courts. A challenge to the statute currently is pending before the full Third Circuit in Philadelphia. See Joe Drape, *Court Will Reconsider Its Ban on Sports Betting in New Jersey*, N.Y. Times, Oct. 15, 2015, at B17.

213. *Manfred Foresees Teams Visiting Cuba*, SUN-SENTINEL, Mar. 11, 2015, at 1C.

214. Joe Capozzi, *Scott's Pen Clears Way for Stadium*, PALM BEACH POST, June 11, 2015, at 1B.

215. Dan Sweeney, *Bill Gives Young Athletes Options on Where to Play: Possibility of Creating 'Powerhouse' High Schools a Fear*, SUN-SENTINEL, Mar. 29, 2015, at 1A.

216. Dan Sweeney, *Lawmakers Want to Ban Bots for Ticket Resellers*, ORLANDO SENTINEL, Apr. 14, 2015, at 8A.

217. Sean Rossman, *Bill Boots Unruly Coaches*, TALLAHASSEE DEMOCRAT (Apr. 1, 2015), <http://www.tallahassee.com/story/news/politics/2015/03/31/bill-boots-unruly-coaches/70732638>.

218. H.B. 7067, 2015 Leg., Reg. Sess. (Fla. 2015); S.B. 1214, 2015 Leg., Reg. Sess. (Fla. 2015) (amending FLA. STAT. § 288.0001 to require triennial reports by the Office of Economic and Demographic Research and the Office of Program Policy Analysis and Government Accountability).

219. S. Res. 1666, 2015 Leg., Reg. Sess. (Fla. 2015).

Farther afield, the Florida House of Representatives voted to let private adoption agencies refuse to place children with same-sex couples.²²⁰ This much-criticized step came just weeks after the Tampa Bay Rays urged the Supreme Court of the United States to recognize gay marriages,²²¹ and MLB, in response to Indiana's new religious restoration statute, which many observers viewed as an attack on LGBT rights, issued a press release condemning discrimination in any form.²²²

220. Gray Rohrer, *House Bill Has Tax Cuts, Gay-Adoption Controversy*, ORLANDO SENTINEL, Apr. 10, 2015, at 1B.

221. Roger Mooney, *Rays Backing Gay Marriage in Supreme Court Cases*, TAMPA TRIB. (Mar. 6, 2015), <http://www.tbo.com/news/crime/rays-backing-gay-marriage-in-supreme-court-cases-20150306>.

222. Lucy McCalmont, *MLB Responds to Indiana's 'Religious Freedom' Law*, HUFFINGTON POST (Apr. 1, 2015), http://www.huffingtonpost.com/2015/04/01/mlb-indiana-law_n_6987220.html.

EVIDENCE: 2014 SURVEY OF FLORIDA LAW

MARK M. DOBSON*

I.	INTRODUCTION.....	74
II.	RELEVANCY AND ITS GENERAL CONSIDERATIONS	78
III.	SPECIAL RELEVANCY CONCERNS	85
	A. <i>Statements in Plea Negotiations</i>	85
	B. <i>Compromises and Offers to Compromise</i>	87
	C. <i>Character Evidence</i>	90
	D. <i>Williams Rule Issues—Other Crimes, Wrongs, or Acts</i>	94
	1. To Prove Matters Independent of Section 404(2)..	95
	a. <i>Inextricably Intertwined Evidence</i>	95
	b. <i>To Legally Establish an Element of the Charged Offense</i>	99
	2. To Prove Traditional <i>Williams</i> Rule Issues.....	100
	3. To Prove Child Molestation Charges.....	102
IV.	WITNESS EXAMINATION ISSUES	106
	A. <i>Refreshing Recollection</i>	107
	B. <i>Impeachment with Prior Convictions</i>	109
	C. <i>Inappropriate Witness Dress in Criminal Cases</i>	112
	D. <i>Impeaching a Hearsay Declarant</i>	115
V.	ATTORNEY-CLIENT PRIVILEGE.....	118
	A. <i>Scope and Waiver of the Attorney-Client Privilege</i>	119
	B. <i>Crime-Fraud Exception</i>	124
VI.	PSYCHOTHERAPIST-PATIENT PRIVILEGE	126
	A. <i>The Privilege in General</i>	126
	2. Confidential Communications and Third Party Presence	129
VII.	HEARSAY.....	132
	A. <i>Excited Utterances</i>	135
	1. In General	135
	2. <i>The First Complaint Exception</i>	138
	B. <i>Market Reports and Commercial Publications</i>	141
	C. <i>Business Records in Foreclosure Cases</i>	143
VIII.	BEST EVIDENCE RULE.....	147
	A. <i>Videotape Evidence</i>	147
	B. <i>Promissory Notes</i>	150
IX.	CONCLUSION.....	152

I. INTRODUCTION

This Survey discusses major Florida evidentiary case law developments during the 2014 calendar year.¹ As in most years since the Florida Evidence Code's ("the Code") passage, few significant statutory changes occurred in 2014.² Florida attorneys must continue to look to the state's appellate courts for guidance on the Code and other evidentiary related issues.* As with most survey years, not every recent decision merits discussion.* Cases have been selected for discussion in this Survey on the basis of three criteria: (1) the case represents a new or relatively new evidentiary development, (2) the case provides a good example of fundamental principles in a certain area, or (3) evidentiary issues in a particular area arose so commonly, that they are important for discussion to both practitioners and the courts.³ As a service to readers, the author notes that the following evidentiary areas, not discussed in the Survey's main text, generated opinions during 2014:⁴ judicial notice,⁵ accident report privilege,⁶

* J.D., 1973, Catholic University; L.L.M., 1977, Temple University. M. Dobson is a member of the Florida Bar and is also admitted to practice in Kansas. He is a professor of law at Nova Southeastern University.

1. See *infra* Parts II–VII.

2. In 2014, the Florida Legislature made four changes to the Code. See Act effective Oct. 1, 2014, ch. 2014-160, § 15, 2014 Fla. Laws 2157, 2190–91; Act effective Oct. 1, 2014, ch. 2014-200, § 1, 2014 Fla. Laws 2632, 2633; Act effective May 12, 2014, ch. 2014-19, § 30, 2014 Fla. Laws 299, 325; Act effective May 12, 2014, ch. 2014-35, § 2, 2014 Fla. Laws 676, 678. Three of these were extremely minor. Chapter 2014-160, Florida Laws, amended section 90.404 of the Florida Statutes, by changing statutory references in subsections (2)(b)(2) and (c)(2). See FLA. STAT. § 90.404 (2014). Chapter 2014-19, Florida Laws, deleted obsolete provisions to the psychotherapist-patient privilege in section 90.503 of the Florida Statutes. See FLA. STAT. § 90.503. Finally, chapter 2014-200, Florida Laws, made minor changes and deletions to the hearsay exception for statements of elderly persons or disabled adults in section 90.803(24) of the Florida Statutes. See FLA. STAT. § 90.803. The only significant statutory change was made in section 90.204 of the Florida Statutes concerning the propriety and nature of taking judicial notice. See FLA. STAT. § 90.204. Chapter 2014-35, Florida Laws, added a fourth subsection to this rule, providing for the emergency taking of judicial notice in family law cases. See *id.* § 90.204(4).

3. See *infra* Parts II–VII.

4. See *infra* Parts II–VII. The author does not claim this footnoted list is a complete catalogue of all evidentiary issues discussed in the 2014 decisions. For example, neither the Survey's main text nor this list includes cases discussing expert testimony.

5. See FLA. STAT. §§ 90.201–.204. When judicial notice is taken of information not offered in open court, fairness requires the parties to be given a chance to challenge it and to offer contradictory proof. *Id.* In *Glaister v. Glaister*, the court found a general master in a domestic relations case erred sua sponte by taking judicial notice of an IRS tax guide without affording a challenge opportunity as required by section 90.204(3) of the Florida Statutes. *Glaister v. Glaister*, 137 So. 3d 513, 516–17 (Fla. 4th Dist. Ct. App. 2014); see also FLA. STAT. § 90.204(3).

informer privilege,⁷ litigation privilege,⁸ trade secrets,⁹ impeachment on collateral matters,¹⁰ impeachment by showing potential bias,¹¹ impeachment

As mentioned above in note 1, the 2014 Florida Legislature added a fourth subsection to section 90.204 of the Florida Statutes, providing for the emergency taking of judicial notice in family law cases when imminent danger to persons or property exists. Ch. 2014-35, § 2, 2014 Fla. Laws at 678 (codified at FLA. STAT. § 90.204(4)); *see also supra* note 1 and accompanying text.

6. *See* FLA. STAT. § 316.066(4). In *Wetherington v. State*, the defendant's felony driving under the influence conviction was reversed because the trial court erroneously allowed the investigating police officer to testify to statements Wetherington made identifying himself as the driver of a crashed vehicle in a one car accident. *Wetherington v. State*, 135 So. 3d 584, 585, 587 (Fla. 1st Dist. Ct. App. 2014). These statements were made before either the defendant waived his Miranda rights or otherwise waived his privilege against self-incrimination. *Id.* at 586 n.1. This violated the accident report privilege. *Id.* at 586; *see also* FLA. STAT. § 316.066.

7. *See* *State v. Powell*, 140 So. 3d 1126, 1127, 1130 (Fla. 5th Dist. Ct. App. 2014) (arising from the State's petition for a writ of certiorari requesting reversal of a trial court's order to disclose the identity of confidential informants who provided police information used in an application for a wiretap). The State's general privilege in withholding a confidential informant's identity can only be overcome if either the informant will be a witness at trial or if disclosing the informant's identity is essential to a fair determination of the case. *Id.* As the only purpose of disclosure was to provide information to contest probable cause for issuance of the wiretap application, identity disclosure was not constitutionally required. *Id.* at 1132.

For a recent short article discussing the informer's privilege, *see* Stephen A. Saltzburg, *Trial Tactics: Informant Privilege*, CRIM. JUST., Summer 2015, at 60.

8. *See* *Pomfret v. Atkinson*, 137 So. 3d 1161, 1162–64 (Fla. 4th Dist. Ct. App. 2014). Although there is no absolute privilege for an attorney's alleged defamatory statements during ex-parte, out-of-court statements to a potential, non-party witness, such statements may be protected by a qualified privilege. *Id.* When the statements have some relation to an underlying lawsuit, the party alleging defamation must show express malice. *Id.* at 1164. Express malice means that the statements were made with a desire to harm the person allegedly defamed. *Id.*; *R.H. Ciccone Props., Inc. v. JP Morgan Chase Bank, N.A.*, 141 So. 3d 590, 591–92 (Fla. 4th Dist. Ct. App. 2014) (specifying that the litigation privilege did not support the trial court's order dismissing appellant's quiet title action against a bank after the bank voluntarily dismissed its foreclosure action against the appellant).

9. *See* FLA. STAT. § 90.506 (generally protecting trade secrets as privileged, as long as recognizing the "privilege will not conceal fraud or otherwise work injustice"). This section does not define what is a trade secret, leaving this instead to section 688.002 of the Florida Statutes. FLA. STAT. § 688.002(4). When information is claimed to be a trade secret, the court must first decide if it qualifies as such, and then hold a hearing on its disclosure, and on how it is necessary to determine the underlying issues in the litigation. *See* *Bright House Networks, LLC v. Cassidy*, 129 So. 3d 501, 505–06 (Fla. 2d Dist. Ct. App. 2014) (finding that customer lists not publicly available can be trade secrets, thus requiring an in camera review to determine such, and to also determine the opposing party's need to access them for the litigation).

For another recent case involving disclosure of trade secrets, *see* *Laser Spring Inst., LLC v. Greer*, 144 So. 3d 633, 633–34 (Fla. 1st Dist. Ct. App. 2014), finding that billing and

with prior inconsistent statements,¹² the rape shield statute,¹³ the Sixth Amendment's Confrontation Clause,¹⁴ authentication of photographs taken

collection documents which admittedly were trade secrets could not be ordered disclosed without a hearing making particularized findings for their need.

10. See FLA. STAT. § 90.608(5) (permitting "[p]roof by other witnesses that material facts are not as testified to by [a] witness"). This language forbids impeachment by offering contradictory proof on purely collateral matters, introduced only to contradict the witness's testimony on a minor point. See *id.* What is collateral or not must necessarily be determined on a case-by-case basis. See *Anderson v. State*, 133 So. 3d 646, 647–48 (Fla. 1st Dist. Ct. App. 2014), *cert. denied*, 135 S. Ct. 1006 (2015) (finding that whether a sexual battery victim wore jogging clothes or pajamas at the time of the alleged attack was collateral, even if the victim's characterization of her dress as jogging clothes was false); *Cokely v. State*, 138 So. 3d 1204, 1208–09 (Fla. 4th Dist. Ct. App. 2014) (finding that the witness's proffered testimony would not have been collateral, as it would have contradicted the victim's direct examination testimony related to the material contested issue of whether the victim had been trespassing on the defendant's property before the defendant allegedly attacked the victim).

One area where the Florida courts have held as a matter of law that proof will never be considered collateral is where it demonstrates potential bias. *Id.*

11. See *Brown v. Mittelman*, 152 So. 3d 602, 604–05 (Fla. 4th Dist. Ct. App. 2014) (finding that the financial relationship between a treating doctor and a referring plaintiff's law firm is discoverable as potential bias evidence in a negligence case).

12. See *Wilcox v. State*, 143 So. 3d 359, 377–79 (Fla. 2014), *cert. denied*, 135 S. Ct. 1406 (2015) (finding that the trial court only harmlessly erred in sustaining objection to the attempted impeachment of a witness by using another person's statement).

13. FLA. STAT. § 794.022. This section, commonly known as the Rape Shield Statute, although not part of the Code, is clearly meant to regulate proof in some criminal cases. See *id.*; *Cooper v. State*, 137 So. 3d 530, 531 (Fla. 4th Dist. Ct. App. 2014). While the section forbids the introduction of a victim's prior sexual acts with persons other than the defendant, by its explicit terms, it does so only in sexual battery prosecution cases under section 794.011 of the Florida Statutes. FLA. STAT. § 794.022(2). Thus, when such acts are asked about in cases not being brought under this chapter, section 794.022 of the Florida Statutes does not forbid the inquiry, despite a charge's sexually related nature. *Id.* § 794.022; see also *Cooper*, 137 So. 3d at 531 (arguing that where the state confessed on appeal that section 794.022 of the Florida Statutes should not have prohibited cross-examination of a victim about her prior sexual experiences in a lewd and lascivious molestation and battery case). Despite this confession of error, the Fourth District Court of Appeal declined to reverse because the defense had not argued the section's inapplicability at trial when the State objected to the defense's inquiry. *Cooper*, 137 So. 3d at 531–32. Furthermore, the defense had not proffered what the defense's questions would have revealed. *Id.* at 531 n.1. The Fourth District summarily rejected the argument that excluding the potential testimony was fundamental error. *Id.* at 531.

The result in *Cooper* illustrates the requirements that are ignored all too often by trial counsel. See *id.* The contemporaneous objection rule requires that counsel object promptly, precisely, and correctly when seeking to exclude evidence. FLA. STAT. § 90.104. On the other side, when an objection is made, the attorney wishing to introduce certain information must correctly explain to the trial court why the objection should be overruled. See *id.* If the objection is sustained, the proponent of the information must make an adequate offer of proof to preserve the issue for appeal. See *id.* Failure to satisfy any of these

from videotapes,¹⁵ sequestration of witnesses,¹⁶ lay opinion testimony,¹⁷ and various hearsay rule issues.¹⁸

requirements will almost always lead to an appellate court declining to address an evidentiary issue. *E.g.*, *McGee v. State*, 19 So. 3d 1074, 1078–79 (Fla. 4th Dist. Ct. App. 2009). As *Cooper* also shows, fundamental error arguments are often given short shrift and rarely lead to reversals. *See* 137 So. 3d at 531–32. Furthermore, the defense had not proffered what its questions would have revealed. *See id.* at 531 n.1.

14. U.S. CONST. amend. VI (applied to the states in *Pointer v. Texas*, 380 U.S. 400 (1965)). The Sixth Amendment to the U.S. Constitution guarantees an accused the right “to be confronted with the witnesses against him.” *Id.*

Several cases during this Survey period briefly discussed the scope of this clause’s protection. *E.g.*, *McKenzie v. State*, 153 So. 3d 867, 879 (Fla. 2014). Although the clause protects the accused against the admission of testimonial hearsay in a criminal trial, it does not protect against the State using all non-cross-examined hearsay. *Id.* at 882. Particularly, when the defendant’s own statement constitutes the hearsay, the Confrontation Clause will not bar its use by the prosecution. *Id.* (finding no evidentiary error in the State using a self-represented defendant’s opening statement at trial against him as evidence of guilt); *Peterson v. State*, 129 So. 3d 451, 453 (Fla. 2d Dist. Ct. App. 2014) (finding that an automobile’s computer-generated air bag control system report was non-testimonial, as it was non-accusatory and did not describe any specific wrongdoing). Although the court did not reject the defendant’s argument on this basis, the author believes a better ground is that the report was not hearsay to begin with, as it did not constitute an assertion by any person. *See* FLA. STAT. § 90.801(1)(a); *Peterson*, 129 So. 3d at 453. Thus, there was no statement under the definition of the hearsay rule. *Peterson*, 129 So. 3d at 453 (defining statement); *see also* FLA. STAT. § 90.801(1)(a).

The right to confrontation does not protect an accused against the introduction of physical evidence or testimony about unavailable physical evidence. *See Yero v. State*, 138 So. 3d 1179, 1184 (Fla. 3d Dist. Ct. App. 2014) (finding no Confrontation Clause violation when the State introduced testimony from several witnesses who described how a theft defendant had appeared on subsequently destroyed video evidence). The video had been overwritten before the State was able to secure it for trial. *Id.* at 1183. However, Yero’s confrontation rights were satisfied by his ability to cross-examine at trial the witness who testified about the tape’s contents. *Id.* at 1184.

15. *See Lerner v. Halegua*, 154 So. 3d 445, 447 (Fla. 3d Dist. Ct. App. 2014) (finding that to admit still photographs taken of frames from a video surveillance tape, someone who knew about the operation and storage procedures for the tape was necessary to authenticate them to show their reliability).

16. FLA. STAT. § 90.616(1). Although this rule provides for the sequestration of witnesses upon a party request or a court order, it does not specify what remedies there are for violation of a sequestration order. *Id.*

In *Cokely v. State*, a proposed defense witness violated the trial court’s sequestration order by being present at a pre-trial stand-your-ground defense hearing and hearing an alleged battery victim testify. *Cokely v. State*, 138 So. 3d 1204, 1205–07 (Fla. 4th Dist. Ct. App. 2014). At trial, the court, as a matter of law, excluded this witness’s testimony for violating its order without holding any hearing into the violation’s circumstances. *Id.* at 1207 n.4. The Fourth District reversed the defendant’s subsequent conviction. *Id.* at 1209.

In this situation, trial courts need to balance the defendant’s Sixth Amendment right to present a defense against violation of the court’s sequestration order. *See* U.S. CONST. amend. VI; *Cokely*, 138 So. 3d at 1208. This requires the trial court to determine first,

II. RELEVANCY AND ITS GENERAL CONSIDERATIONS

Section 90.401 of the Code states that information that tends “to prove or disprove a material fact” is relevant.¹⁹ Beyond this brief statement, relevancy cannot be defined by any code or set of rules. Relevancy contains two sub-categories: materiality and probative value.²⁰ Materiality is usually a function of either the underlying claims and defenses in a particular lawsuit or of matters properly affecting witnesses’ credibility.²¹ Whether information tends to *prove or disprove*²² a material fact, and thus, is probative, depends upon the strength or weakness of the logical connection between the information and what it is offered to prove.²³

Since relevancy is mainly a function of logical deduction and substantive law, altering facts even slightly can affect information’s potential relevancy greatly.²⁴ Thus, cases discussing relevancy in general under

whether the defendant or defense counsel had been involved in causing the violation, and second, even if there was active defense involvement, the violation’s effect on the witness’s proposed testimony. *Id.* If the witness’s testimony would not have been substantially affected by hearing what the witness should not have heard, complete witness’s exclusion is too harsh a remedy. *See id.* Since the trial court never held any hearing on these issues, its virtually automatic exclusion of the witness was erroneous. *See id.* at 1209.

17. FLA. STAT. § 90.701 (permitting lay opinion testimony if doing so is necessary to convey the witness’s testimony and the opinions “do not require a special knowledge, skill, experience, or training”). Two cases during this Survey discussed this rule. *See Alvarez v. State*, 147 So. 3d 537, 542 (Fla. 4th Dist. Ct. App. 2014); *Herring v. State*, 132 So. 3d 342, 346 (Fla. 4th Dist. Ct. App. 2014). In *Herring*, the court found that witnesses who knew and had seen the defendant around the time he had killed his father should have been allowed to give their opinion as to his sanity. *See* 132 So. 3d at 344–46. The witnesses were the defendant’s mother and a police officer, who apparently came to the victim’s home shortly after the killing while the defendant was still there. *Id.* at 344. However, the error was found harmless. *Id.* at 346.

However, in *Alvarez*, the same district court of appeal found reversible error in letting a police officer, testifying as a lay witness, give his opinion as to the skin color and race of a robbery and murder perpetrator who was captured on surveillance tape during the crime. 147 So. 3d at 538–39, 544. The tape was admitted into evidence; thus the jurors could view it just as well as the officer and come to their own conclusions as to what it showed. *See id.* at 539, 542. The officer’s opinion was thus unnecessary, and any opinion as to identity should have been let to the jurors. *See id.* at 542.

18. *See infra* Part VII.

19. FLA. STAT. § 90.401.

20. *Id.*

21. 1 CHARLES W. EHRHARDT, EHRHARDT’S FLORIDA EVIDENCE § 401.1 (2014 ed.).

22. *Id.*

23. *Id.*

24. *See id.* There is a common assertion that no item of information is inherently relevant. *See id.* As a general proposition, this saying is correct. *See* 1 EHRHARDT, *supra* note 21, at § 401.1.

section 90.401 of the Florida Statutes seldom have much precedential value as they are so fact specific. During this Survey period, no case discussing general relevancy alone under section 90.401 of the Florida Statutes was unusual enough to merit extended discussion.

However, general relevancy is not the end of the story for admissibility under the Code. Once logical relevancy requirements have been satisfied, the Code expresses a preference that “[a]ll relevant evidence [be] admi[tted] except as provided by law.”²⁵ This language encompasses reasons extending from evidence being excluded because of its substantive nature, such as hearsay or privilege, to evidence being excluded because of procedurally related problems, such as a question being asked outside the scope of cross-examination or evidence being offered to bolster a witness’s character for truthfulness before the witness’s credibility has been attacked. The substantive reason for excluding evidence that would otherwise be admissible under section 90.401 of the Florida Statutes may also stem from the information’s inherently prejudicial nature or the potential the evidence has for being confusing.²⁶ In certain specific situations, the Code expressly provides for the exclusion of otherwise probative information.²⁷

No statutory scheme or evidence code can possibly specify every factual instance where evidence should be excluded because of its prejudicial or confusing nature. The Code generally follows the Federal Rules of Evidence by providing for exclusion of otherwise relevant evidence when “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.”²⁸

There are two important points which should be remembered about this language. First, only *unfairly* prejudicial types of evidence merit exclusion.²⁹ Evidence that *fairly* hurts the other side’s case or *fairly* advances the case of the proponent should not be excluded. Second, even

25. FLA. STAT. § 90.402 (2014).

26. *Id.* § 90.401.

27. *See id.* § 90.407 (excluding evidence of subsequent remedial measures when offered “to prove negligence, the existence of a product defect, or culpable conduct in connection with [an] event” causing injury or harm). During this Survey period, no reported cases discussed this exclusionary rule. *See id.* § 90.401; *supra* Part I.

28. FLA. STAT. § 90.403. Unlike the Code, Federal Rule of Evidence 403 also includes undue delay and wasting time as other reasons for exclusions. FED. R. EVID. 403. *But see* FLA. STAT. § 90.403. Section 90.403 of the Florida Statutes includes an additional sentence that Federal Rule of Evidence 403 does not. *Compare* FLA. STAT. § 90.403, *with* FED. R. EVID. 403. The section expressly provides that it “shall not be construed to mean that evidence of the existence of available third-party benefits is inadmissible.” FLA. STAT. § 90.403.

29. *See id.*

unfairly prejudicial evidence will not be excluded unless its unfair prejudice *substantially* outweighs any probative value the information has.³⁰

There is a preference for admission when the balance between relevancy and prejudice, or other section 90.403 of the Florida Statutes concerns, is close or even. Only a fairly gross disproportion of section 90.403's general concerns merits excluding any relevant evidence. As with cases discussing logical relevancy, cases discussing section 90.403 are likely to be so *fact bound* that their precedential value is questionable. However, one decision during 2014, refusing to reverse a death sentence for admission of potentially unfair prejudicial evidence, merits discussion.³¹

Unfair prejudice exists when certain evidence is likely to arouse the jurors' emotion in a way that would lead them to decide a matter on an improper basis.³² *Poole v. State (Poole II)*³³ certainly has to potentially be considered such a situation, if one ever existed.³⁴ Poole was convicted of first-degree murder, attempted first-degree murder, armed burglary, armed robbery, and sexual battery.³⁵ The two victims, Loretta White and Noah Scott who lived together,³⁶ went to sleep late one night after playing video games at their mobile home.³⁷ Later that night, White woke up with Mark Poole on top of her pushing a pillow down on her face.³⁸ He started to sexually assault her, and White begged him to stop and physically resisted.³⁹

30. *Id.* The words *any probative value* are purposefully used here to illustrate a very simple but often overlooked point with regard to arguments on admissibility. *See id.* When arguing relevancy issues, attorneys should be careful to do so in a logical order. If an attorney first argues that information should be excluded because its probative value is outweighed because of section 90.403 concerns, the attorney has implicitly conceded the information's relevancy. *See id.* § 90.403. To then next argue the same information should be excluded under section 90.401 makes no sense. *See* FLA. STAT. § 90.401. If information has no relevancy under section 90.401, the considerations in section 90.403 do not matter. *Id.* §§ 90.401, .403. The information should be excluded for lack of helpfulness to begin with. *See id.* § 90.401.

31. *Poole v. State (Poole II)*, 151 So. 3d 402, 414–19 (Fla. 2014), *cert. denied*, 135 S. Ct. 2052 (2015).

32. *Id.* at 414. For example, deciding a case on the basis of a party's sexual orientation, race, or religion. *Id.* at 409; *see also* FLA. CONST. art. I, § 23.

33. 151 So. 3d 402 (Fla. 2014), *cert. denied*, 135 S. Ct. 2052 (2015).

34. *See id.* at 414–16.

35. *Id.* at 405.

36. *Poole v. State (Poole I)*, 997 So. 2d 382, 387 (Fla. 2008). The two victims obviously had different last names. *Id.* Whether they were married to each other is not stated in either opinion discussing the case. *Poole II*, 151 So. 3d at 406; *Poole I*, 997 So. 2d at 387. This fact is however completely irrelevant to the charges against the defendant. *Poole II*, 151 So. 3d at 406; *Poole I*, 997 So. 2d at 387.

37. *Poole II*, 151 So. 3d at 406.

38. *Id.*

39. *Id.*

Poole then struck her several times with a tire iron, severing one finger and part of another finger from her hand.⁴⁰ Scott woke up, attempted to help White, and in turn he was beaten by Poole with the tire iron.⁴¹ Scott died from the blunt force head trauma suffered in this beating.⁴² Poole finally left, and White passed out from his attacks.⁴³ She recovered early the next morning and called the police who came and found Scott dead.⁴⁴ Besides losing the fingers, White suffered multiple face and head wounds plus a concussion.⁴⁵ The evidence against Poole was extremely strong⁴⁶—so strong that at trial his defense counsel in closing argument conceded his guilt on the sexual battery, robbery, and burglary charges.⁴⁷ However, defense counsel argued he was not the person who inflicted the other injuries on the two victims.⁴⁸ Not surprisingly, a jury convicted Poole of all charges and after a sentencing hearing, recommended death by a twelve to zero vote.⁴⁹ The trial judge agreed with the jury and imposed a death sentence.⁵⁰

On direct appeal in *Poole v. State (Poole I)*,⁵¹ the Supreme Court of Florida affirmed the defendant's conviction but vacated the sentence and remanded for another hearing.⁵² Although Poole argued numerous errors had affected the fairness of the guilt phase of his trial, the court found that defense counsel's failure to make contemporaneous objections waived many of these points for appeal.⁵³ On the one point, defense counsel had promptly objected to an erroneous comment on the defendant's silence at trial in closing argument, the Supreme Court of Florida found the trial court had not abused its discretion by refusing to declare a mistrial.⁵⁴ But when it came to the claimed errors in the sentencing hearing, the Supreme Court of Florida

40. *Id.*

41. *Id.*

42. *Poole II*, 151 So. 3d at 406.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* Witnesses placed Poole near the trial the night of the attack. *Poole II*, 151 So. 3d at 406. He was found with several items stolen from the trailer and was found to have sold several others. *Id.* at 407. DNA evidence from a vaginal swab matched him to White's attack, and other scientific evidence, such as fingerprints and blood stains, connected him to the crimes. *Id.*

47. *Poole I*, 997 So. 2d 382, 390 (Fla. 2008).

48. *Id.*

49. *Poole II*, 151 So. 3d at 407.

50. *Id.*

51. 997 So. 2d 382 (Fla. 2008).

52. *Id.* at 397.

53. *Id.* at 390–91. Many of these claims of error involved the prosecutor's statements in the closing argument, commenting on Poole's silence after arrest and on his failure to testify at trial. *Id.* at 391.

54. *Id.* at 389.

reached a different result.⁵⁵ Here, the court found that the defense counsel's objections to improper cross-examination of the defense witness, about Poole's prior convictions that were not statutory aggravating factors and about the content of a tattoo on Poole's stomach that said *Thug Life*, required reversal for a new sentencing proceeding.⁵⁶

A new sentencing hearing was held, after which the jury voted eleven to one for death, and the trial court again sentenced Poole accordingly.⁵⁷ On appeal from this second sentence, the Supreme Court of Florida affirmed the sentence.⁵⁸ Again, defense counsel failed to preserve certain issues for appeal, either by not making prompt contemporaneous objections⁵⁹ or by not making certain legal arguments at the trial court level.⁶⁰ However, one preserved issue brought up the issue of the evidence's probative value versus potentially unfair prejudicial effect in a starkly dramatic fashion.

At the new sentencing, the State introduced a jar of formalin liquid containing White's severed fingertip.⁶¹ The defense apparently objected to this as unfairly prejudicial.⁶² What exactly was the prosecutor's response to the objection at trial is unfortunately not clear from the Supreme Court of Florida's opinion. In the Court's words, "the prosecutor offered no credible reason as to why the severed fingertip was relevant to any issue in the penalty phase, much less any issue in dispute."⁶³ This language can be read in two ways. One, when the defense objected at trial, the prosecutor could not credibly articulate why the fingertip was relevant. Two, the prosecutor did specify a reason for admitting the fingertip at trial, but the defense just did not agree it was a credible one. If the Court meant the first interpretation, the remainder of its opinion is incredibly disturbing. If the prosecutor could indeed articulate no credible reason for admission at trial, then any reason

55. See *Poole I*, 997 So. 2d at 391.

56. *Id.* at 393.

57. *Poole II*, 151 So. 3d 402, 408 (Fla. 2014), *cert. denied*, 135 S. Ct. 2052 (2015).

58. *Id.* at 405.

59. See *id.* at 413. These missed objections were the failure to make contemporaneous objections to the prosecutor's comments in the closing, disparaging the testimony of the defendant's family members as *all that crap*, to the prosecution's potential mischaracterizing intoxication evidence, and to the prosecution's legally erroneous comments about merger of the aggravating circumstances. *Id.* at 415–17.

60. *Id.* at 413. Defense counsel's failure to make legal arguments at trial that the State's impermissible disparate questioning of prospective jurors had led to a racially impermissible use of preemptory challenges and waived this issue for appeal. *Poole II*, 151 So. 3d at 413–14.

61. *Id.* at 414.

62. *Id.*

63. *Poole II*, 151 So. 3d at 414.

given then and any reason the State came up with on appeal is arguably disingenuous. A more favorable reading is the alternative, that the State had a reason but the defense just did not find it a credible one.⁶⁴

Regardless of which alternative reading one chooses, the remainder of the Court's opinion on this issue merits close inspection and criticism. The Court began by instructively laying out the process trial judges should follow when ruling on section 90.403 of the Florida Statutes objections.⁶⁵ This process involves two steps.⁶⁶ "[T]he trial judge must first determine that the evidence is relevant for a specific purpose."⁶⁷ Then, the Court "must weigh the importance of the evidence to the specific purpose, against the possibility that the evidence will unfairly prejudice" the other side.⁶⁸ In *Poole II*, the defense objected to the fingertip being unfairly prejudicial in general and specifically objected to admitting the natural fingernails with the skin attached.⁶⁹ The trial court rejected this, saying the fingertip was not difficult to look at, not unpleasant, and had no blood on it.⁷⁰ Nowhere in the opinion is there any *specific purpose* that the trial court determined the tip was relevant for, nor does the Supreme Court of Florida mention any explicit weighing process the trial court went through.

Despite this, the Supreme Court of Florida's opinion articulates its own basis for admission.⁷¹ As the fingertip "was severed during the same criminal episode at issue in this penalty phase,"⁷² and it was "relevant to the amount of force used during the attempted . . . murder,"⁷³ it was relevant.⁷⁴ Thus, the Supreme Court of Florida supplied its own specific purpose for relevancy, despite the State's potential inability to do so, and the trial judge's apparent failure to do likewise. Even if the State had articulated these two purposes, the two-step process still requires the weighing contemplated by step two. Amazingly, the Supreme Court of Florida totally ignores this step and merely finds the fingertip's admission was not an abuse of discretion. Thus, the Supreme Court of Florida's opinion ignores the very two-step process it had articulated should be done only paragraphs earlier!

Since the Supreme Court of Florida did not do the second step of the weighing process, it is appropriate to discuss what might have been the result

64. *See id.*

65. *Id.* at 414; *see also* FLA. STAT. § 90.403 (2014).

66. *Poole II*, 151 So. 3d at 414.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *See Poole II*, 151 So. 3d at 414–15.

72. *Id.* at 414.

73. *Id.*

74. *Id.*

had it done so. Assuming the fingertip had some relevancy, how necessary was its introduction to the State's case? Put another way, would refusing to admit the severed fingertip as an exhibit have deprived the State of its fair opportunity to argue about the amount of force Poole used in committing his crimes? The State still could have produced testimony about the fingertip being severed and arguably would have had to do so to authenticate the exhibit. Thus, admission of the actual fingertip was to some extent cumulative to the voice testimony. Furthermore, assuming the victim, White, testified at the hearing,⁷⁵ she might have been able to hold up her hand to show the jurors where her fingers had been severed,⁷⁶ or there might have been photographs of her hand available. What is the potential unfair prejudicial effect? Obviously, the jury might become irrationally inflamed by seeing the fingertip, both during the admission of evidence and during its deliberations where they would have it available as an exhibit.

By not following the very process its own opinion sets forth, the Court never addresses the balancing question of relevancy versus unfair prejudice. Even more, by rendering the decision on this point that the court did, it arguably promotes bad lawyering. The prosecution had already been reversed once because of the errors it created.⁷⁷ One would think it would have been extra careful to not do so again, but reading this opinion's description of what the prosecution did gives a different impression. Finally, by rendering its decision on the basis it does, the Supreme Court of Florida also may send a message to trial judges that they will be protected from bad decisions. In fairness to the *Poole II* opinion, it did conclude this matter by finding that any error would have been harmless anyways.⁷⁸

Precedents and decisions send messages beyond just *this is what the law is*. *Poole II* could easily send the message that such potentially excessive lawyering will not only be excused by finding it harmless error in some cases, but also encouraged, by not finding it error to begin with. One hopes that this is not the standard type of lawyering a court would want to promote.

75. *Id.* If she did not, then how did the State authenticate the exhibit? *Poole II*, 151 So. 3d at 414–15.

76. *See id.* The crimes took place the evening of October 12 through 13 of 2001. *Id.* at 406. I say might here because White could have had cosmetic surgery done on her hand, so just displaying it would not accurately show the force. *Id.* at 414–15. Still, her testimony about this would have been available. *See id.*

77. *See Poole II*, 151 So. 3d at 408.

78. *See id.* at 418–19.

III. SPECIAL RELEVANCY CONCERNS

A. *Statements in Plea Negotiations*

Section 90.410 of the Florida Statutes protects offers to plead guilty, pleas of nolo contendere, and withdrawn guilty pleas from admission in any civil cases and most criminal cases.⁷⁹ It also protects against admission of statements made in connection with negotiations for these pleas.⁸⁰ The purpose behind this protection is to encourage the state and defense to engage in plea discussions and to resolve more charges without full-blown trials whenever possible.⁸¹ Promoting free discussion in negotiations without having the fear one's words will come back to haunt a party is thought to further these two goals.⁸²

However, section 90.410 of the Florida Statutes does not define what should be considered plea negotiations—or to use the statute's words, “statements made in connection with any of the [covered] pleas or offers.”⁸³

Thus, parties may still, on occasion, unwittingly make careless statements about possible plea offers that come back to haunt them. As most criminal defense lawyers also know, sometimes accused parties can become some of their own worst enemies. Both these principles were recently illustrated by a decision briefly discussing section 90.410 of the Florida Statutes. In *Bass v. State*,⁸⁴ the State charged the defendant with second-degree murder and armed robbery.⁸⁵ Sometime before trial, Bass had been incarcerated, and defense counsel received a potential twenty-year plea offer from the State.⁸⁶ Counsel transmitted this potential plea offer to Bass, who decided he wanted to first talk to his mother about it.⁸⁷ The facts do not indicate whether defense counsel knew of Bass's desire to do this. Bass talked to his mother about the offer the day after defense counsel told Bass

79. FLA. STAT. § 90.410 (2014). It does not, however, protect against admission of guilty pleas that have not been withdrawn. *See id.* Federal Rule of Evidence 410—the federal counterpart—covers the same types of pleas and statements made in plea negotiations, but it does not offer as broad a protection against admission in all cases. *Compare* FED. R. EVID. 410, *with* FLA. STAT. § 90.410.

80. FLA. STAT. § 90.410.

81. *See* FED. R. EVID. 410; FLA. STAT. § 90.410; *United States v. Herman*, 544 F.2d 791, 796 (5th Cir. 1977).

82. *See Herman*, 544 F.2d at 796.

83. FLA. STAT. § 90.410.

84. 147 So. 3d 1033 (Fla. 1st Dist. Ct. App. 2014), *review denied*, 163 So. 3d 507 (Fla. 2015).

85. *Id.* at 1034.

86. *Id.*

87. *Id.*

about it.⁸⁸ Unfortunately for Bass, the State recorded his phone discussion⁸⁹ with his mother and later offered it at his trial and again, in the State's closing argument⁹⁰ to show Bass's consciousness of his own guilt.⁹¹

Defense counsel, during a hearing on the State's motion in limine to use the conversation, argued it should be protected since a plea had been made and Bass was talking with his mother in connection with this offer.⁹² The trial court disagreed, and the appellate affirmed this decision.⁹³ The First District Court of Appeal said that to decide if statements were made in connection with plea offers and thus protected under section 90.410 of the Florida Statutes, the first step was looking at the plain meaning of the rule.⁹⁴ If the answer was not clear from the rule's plain meaning, then a totality of circumstances approach should be taken.⁹⁵ This totality included two factors: "[W]hether the defendant had a subjective expectation of engaging in plea negotiations when the statements were made, and, if so, whether the expectation was . . . reasonable."⁹⁶ Under either step, the district court found against Bass.⁹⁷ First, the State's offer was not definite, only a pending one.⁹⁸ Second, Bass's statements about not taking twenty years but willing to accept less only came up in response to his mother's question about the potential length of his sentence.⁹⁹ Nothing Bass said about being willing or unwilling to take a certain length of time had yet, or later was, communicated to the State in response to the pending offer.¹⁰⁰ Additionally, what Bass was really telling his mother was merely what his attorney had told him, not the traditional give and take one expects in plea discussions.¹⁰¹ His rejection of the State's offer the next day after the conversation further indicated Bass did

88. *Id.* at 1034–35.

89. *Bass*, 147 So. 3d at 1034–35. The State did not allow Bass to call his mother the day defense counsel relayed the plea offer but permitted Bass to do so the next day. *Id.*

90. *Id.* In the conversation, Bass told his mother he expected to have to serve some prison time, but told her he would not accept the twenty-year offer and would instead accept one of fifteen or sixteen years. *Id.* at 1034.

91. *Id.*

92. *Bass*, 147 So. 3d at 1034–35.

93. *Id.*

94. *Id.* at 1035; *see also* FLA. STAT. § 90.410 (2014).

95. *Bass*, 147 So. 3d at 1035; *see also* FLA. STAT. § 90.410; *United States v. Robertson*, 582 F.2d 1356, 1366 (5th Cir. 1978).

96. *Bass*, 147 So. 3d at 1035 (citing *Robertson*, 582 F.2d at 1366).

97. *Id.*

98. *Bass*, 147 So. 3d at 1035.

99. *Id.*

100. *Id.*

101. *Id.* at 1036.

not have a subjective expectation that he was engaging in plea discussions when talking with his mother.¹⁰²

The court's opinion illustrates that there is a difference between actually engaging in plea discussions and talking about plea discussions in general—especially when the person the discussions are being talked about with is not one's own attorney or an agent of the state. The decision also illustrates another important point that defense counsel should strictly follow. Never let your client talk about his case with anyone outside your presence, and especially, never let your client talk about his case with anyone else but counsel—even family members—during a phone call from a jail or correctional facility as these conversations are regularly recorded. Defense counsel, at their initial contact with clients, should remember to automatically warn them about this. *Bass* illustrates that warning family members about this is also a good idea.¹⁰³

B. *Compromises and Offers to Compromise*

Similar to its provision on pleas and plea negotiations in criminal cases, the Code seeks to promote settlement negotiations as a favored way of resolving disputes between private parties.¹⁰⁴ Section 90.408 of the Florida Statutes protects compromises, offers to compromise, and statements or conduct made during bona fide settlement negotiations conducted in good faith efforts to achieve resolutions before trial.¹⁰⁵ A recent case demonstrates that Florida law is strict on this point, even stricter than its federal rule counterpart.¹⁰⁶ *Panama City-Bay County Airport & Industrial District v. Kellogg Brown & Root Services, Inc.*,¹⁰⁷ arose from litigation following the building of a new airport in Panama City.¹⁰⁸ When the airport opened in 2010, a storm water retention pond had to be rebuilt to comply with Florida Department of Environmental Protection regulations.¹⁰⁹ Four main parties had been involved in the planning and construction of the airport and pond: the Panama City Airport District (“the Airport”), a plans and specification designer (“Atkins North America” or “Atkins”), a construction and program

102. *Id.*

103. *See Bass*, 147 So. 3d at 1034–36.

104. *See* FLA. STAT. § 90.408 (2014).

105. *Id.*

106. *See* FED. R. EVID. 408; FLA. STAT. § 90.408; *Pan. City-Bay Cty. Airport & Indus. Dist. v. Kellogg Brown & Root Servs., Inc.*, 140 So. 3d 1112, 1116–17 (Fla. 1st Dist. Ct. App. 2014), *review denied*, 163 So. 3d 510 (Fla. 2015).

107. 140 So. 3d 1112 (Fla. 1st Dist. Ct. App. 2014), *review denied*, 163 So. 3d 510 (Fla. 2015).

108. *Id.* at 1113.

109. *Id.* at 1113–14.

management overseer (“Kellog Brown” or “KBR”), and a prime construction contractor (“Phoenix Construction Services” or “Phoenix”).¹¹⁰ After the pond had to be rebuilt, numerous claims, counterclaims, cross-claims, and third-party claims were filed among the four main parties.¹¹¹

By trial, only claims between the Airport and KBR remained.¹¹² The rest had been disposed of by various settlements.¹¹³ One settlement was between the Airport and Phoenix.¹¹⁴ In that settlement, the Airport admitted liability to Phoenix.¹¹⁵ Phoenix accepted liquidated damages from the Airport in return for a share of any recovery in the lawsuit remaining between the Airport, KBR, and at that time, Atkins.¹¹⁶ Under the agreement, the Airport and Phoenix would cooperate in this remaining litigation by using the airport’s general counsel and common counsel paid for by Phoenix.¹¹⁷ The agreement also provided that both Phoenix and the Airport retained control of their own claims and could settle them independently.¹¹⁸ Both the Airport and Phoenix settled before trial with Atkins, and neither Atkins nor Phoenix remained a party when the case went to trial.¹¹⁹

Before trial, the Airport’s counsel moved in limine to exclude any evidence of Phoenix’s settlement offer or of the Airport-Phoenix settlement agreement itself.¹²⁰ The trial court excluded terms of any offer but permitted the agreement to be disclosed.¹²¹ KBR disclosed the agreement at trial, using it to impeach some of the Airport’s witnesses and to advance KBR’s counterclaims.¹²² After a jury verdict for KBR and denial of a new trial, the Airport appealed.¹²³

In a short but important opinion, the First District reversed.¹²⁴ The district court’s opinion focused on both section 90.408 and section 46.015(3) of the Florida Statutes, which the court found required this result.¹²⁵ Both statutory sections prohibited the admission of completed settlement

110. *Id.*

111. *Id.* at 1114.

112. *Pan. City-Bay Cty. Airport & Indus. Dist.*, 140 So. 3d at 1114.

113. *See id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Pan. City-Bay Cty. Airport & Indus. Dist.*, 140 So. 3d at 1114.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 1114–15.

122. *Pan. City-Bay Cty. Airport & Indus. Dist.*, 140 So. 3d at 1115.

123. *Id.*

124. *Id.* at 1117.

125. *Id.* at 1115–16; *see also* FLA. STAT. §§ 46.015(3), 90.408 (2014).

agreements, and section 46.015(3) additionally prohibited telling the jury a party has been dismissed from a lawsuit because of such.¹²⁶

KBR made two arguments why the apparently complete statutory bans in the two provisions should not be followed.¹²⁷ KBR claimed the settlement between the Airport and Phoenix amounted to a *Mary-Carter style* agreement that Florida case law had found outside the statutory bans.¹²⁸ Mary-Carter agreements exist when one of multiple parties to litigation enters into a secret agreement with another party to reduce the first party's exposure in the lawsuit and to have the second party remain in the lawsuit so that the two can secretly work against some or all of the remaining non-parties to the agreement.¹²⁹ These agreements were found to undermine the openness and integrity of the trial process by creating sham adversary relationships between name parties.¹³⁰ Thus, when such agreements are made, a non-party to them can inform the jury of their existence.¹³¹ However, here, the settlement arrangement was considered different.¹³² Phoenix did not remain a party to the litigation after the agreement with the Airport.¹³³ Second, even though the Airport and Phoenix agreed to use common counsel, each retained control of its remaining claims and each did settle its remaining claims with some of the parties.¹³⁴ Thus, the subterfuge and prospects of subterfuge existing in a Mary-Carter Agreement situation were not present.¹³⁵

Finally, any argument that the settlement's existence should be admissible to show possible bias was rejected.¹³⁶ As the court said, these two statutory sections contain neither explicit nor implicit exceptions for impeachment.¹³⁷ Thus, Florida evidence law, unlike the federal rule

126. *Pan. City-Bay Cty. Airport & Indus. Dist.*, 140 So. 3d at 1115–16; *see also* FLA. STAT. §§ 46.015(3), 90.408.

127. *Pan. City-Bay Cty. Airport & Indus. Dist.*, 140 So. 3d at 1115–17.

128. *Id.* at 1116.

129. *Id.*; *Saleeby v. Rocky Elson Constr., Inc.*, 3 So. 3d 1078, 1083 n.3 (Fla. 2009) (defining Mary-Carter Agreement); *Dosdourian v. Carsten*, 624 So. 2d 241, 243 (Fla. 1993).

130. *Saleeby*, 3 So. 3d at 1083; *Dosdourian*, 624 So. 2d at 246; *Pan. City-Bay Cty. Airport & Indus. Dist.*, 140 So. 3d at 1116.

131. *Pan. City-Bay Cty. Airport & Indus. Dist.*, 140 So. 3d at 1116; *see also* *Dosdourian*, 624 So. 2d at 243.

132. *Pan. City-Bay Cty. Airport & Indus. Dist.*, 140 So. 3d at 1117.

133. *Id.* at 1116.

134. *Id.* at 1114.

135. *Id.* at 1116.

136. *Id.* at 1115–17.

137. *Pan. City-Bay Cty. Airport & Indus. Dist.*, 140 So. 3d at 1115–16; *see also* FLA. STAT. §§ 46.015(3), 90.408 (2014).

regarding settlements and offers,¹³⁸ has made the policy choice in favor of broad exclusion of this type of evidence.¹³⁹

C. *Character Evidence*

Character is one area of evidence law which seems to present many problems. As a general rule, evidence is usually forbidden in any case, criminal or civil, to prove that a person has a certain general character or type of character trait, and acted consistently with this on a particular occasion.¹⁴⁰ This is commonly called the propensity rule.¹⁴¹ Evidence is not admissible to show someone has a propensity to act a certain way and followed this propensity at a particular time.¹⁴² Character evidence can be shown by one of three methods: testimony as to one's reputation in the community, testimony about a witness's personal opinion of someone else's character, or testimony about past specific acts of conduct of the person whose character is to be proven.¹⁴³

Despite the general prohibition, not every use of character evidence to show propensity is forbidden.¹⁴⁴ Similarly, not every use of one of the three methods of proving character even involves character evidence at all.¹⁴⁵ A recent case during this Survey period demonstrates both an exception to the ban on character evidence to show action in conformity therewith and also how proof of someone's reputation may not necessarily involve character evidence at all.¹⁴⁶

*Antoine v. State*¹⁴⁷ involved charges against the accused of first-degree murder and of attempted first-degree murder, both by use of a

138. FED. R. EVID. 408. Federal Rule of Evidence 408 explicitly contains an impeachment exception to the rule's broad provisions on exclusion to show validity or invalidity of claim. *Id.* Federal Rule of Evidence 408 by its explicit terms does not allow statements made in settlement negotiations to be used to impeach by inconsistent statements. *Id.*

139. *Pan. City-Bay Cty. Airport & Indus. Dist.*, 140 So. 3d at 1117; see also FLA. STAT. § 90.408.

140. Fed. R. Evid. 404.

141. *See id.*; *Antoine v. State*, 138 So. 3d 1064, 1075 (Fla. 4th Dist. Ct. App. 2014).

142. *See* FED. R. EVID. 404(a)(1). This prohibition is embodied in the introductory language to section 90.404(1) of the Florida Statutes: "Evidence of a person's character or a trait of character is inadmissible to prove action in conformity with it on a particular occasion" FLA. STAT. § 90.404(1).

143. FED. R. EVID. 405(a)–(b).

144. *See id.* 404(a)(2)(A)–(C).

145. *See id.* 405(a)–(b).

146. *See Antoine*, 138 So. 3d at 1075–76.

147. 138 So. 3d 1064 (Fla. 4th Dist. Ct. App. 2014).

firearm.¹⁴⁸ The jury could not reach a verdict on the first charge but convicted Antoine on the second one.¹⁴⁹ Both charges arose from the same unfortunate incident at a Palm Beach nightclub late one evening.¹⁵⁰ The two victims, Brandon Hammond and Jeffrey Thompson, had been ejected from the nightclub twice that evening for their rowdy behavior.¹⁵¹ They returned a third time and managed to get themselves thrown out again.¹⁵² After their third ejection, Hammond and Thompson had a confrontation outside the nightclub with some men who were leaving.¹⁵³ The defendant, Narcisse Antoine, tried to intervene and make peace.¹⁵⁴ The two victims turned their attention to Antoine both with racial statements and threats of violence.¹⁵⁵

The club's bouncer, Tyrone Slade, was also present when this occurred.¹⁵⁶ Slade testified that Thompson gave him "the impression . . . he was about to sneak up and attack."¹⁵⁷ Hammond then hit Antoine in the jaw, splitting his lip.¹⁵⁸ Antoine gave Slade the drink he was holding and pulled out a handgun.¹⁵⁹ Slade later testified about the subsequent events.¹⁶⁰ Even then, Antoine did not immediately fire on either man.¹⁶¹ Hammond began "reaching in his pants as if he had a gun"¹⁶² while racially cursing Antoine.¹⁶³ Slade, the bouncer, heard Antoine asking Hammond if he was armed and if he planned to shoot Antoine.¹⁶⁴ Slade also asked Hammond what he was reaching for and told him to stop.¹⁶⁵ The defendant shot Hammond multiple times, killing him, and shooting Thompson.¹⁶⁶ Thompson survived this shooting but was in a coma for some days afterward.¹⁶⁷ At trial, he was unable to remember the events surrounding the

148. *Id.* at 1068.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Antoine*, 138 So. 3d at 1067.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 1068.

157. *Antoine*, 138 So. 3d at 1068.

158. *Id.* at 1068.

159. *Id.* at 1069.

160. *Id.*

161. *Id.*

162. *Antoine*, 138 So. 3d at 1069.

163. *Id.*

164. *Id.*

165. *Id.* Slade supposedly told Hammond, "[Do not] do this Brandon." *Id.*

166. *Antoine*, 138 So. 3d at 1069, 1071.

167. *Id.* at 1071.

shootings.¹⁶⁸ A security guard at a nearby parking lot corroborated Slade's testimony.¹⁶⁹

Antoine testified at trial, claiming self-defense for both shootings.¹⁷⁰ He said that earlier that evening, he had intervened inside the nightclub to prevent a fight between Hammond, Thompson, and three other men.¹⁷¹ Then, when Antoine left, he saw Hammond and Thompson trying to provoke another fight outside.¹⁷² Hammond had punched him and then threatened him with physical harm, including a threat to kill.¹⁷³ Antoine said that when Hammond reached inside his own shirt, he was convinced Hammond was going to kill him first.¹⁷⁴ Antoine then shot Hammond and shot Thompson whom Antoine claimed appeared to be reaching for a gun and coming towards Antoine.¹⁷⁵ Antoine drove off, talked to an attorney early the next morning and was arrested later on.¹⁷⁶

Slade knew Hammond's family and also knew Hammond's reputation for violence and being a drunk.¹⁷⁷ A second bouncer at the nightclub also gave reputation testimony about Hammond's reputation for violence.¹⁷⁸ The trial court used Florida Jury Instruction—Criminal 3.6(f)—on the significance of the reputation evidence to the self-defense claim.¹⁷⁹ This instruction required that not only must a victim have a reputation for violence, but that a defendant must also know of this reputation before a jury could consider it.¹⁸⁰ The defense objected to requiring Antoine to know of Hammond's reputation and requested an additional instruction that the jury could independently consider the victim's reputation for violence when determining who was the first aggressor. The judge denied the request and kept the instructions' original wording.

168. *Id.*

169. *Id.* at 1069.

170. *Id.* at 1067.

171. *Antoine*, 138 So. 3d at 1070.

172. *Id.*

173. *Id.*

174. *Id.* (alteration in original).

175. *Id.* at 1070–71.

176. *Antoine*, 138 So. 3d at 1071.

177. *Id.* at 1072.

178. *Id.*

179. *Id.*

180. *Id.* The exact instruction the trial court gave was as follows:

If you find that Brandon C. Hammond had a reputation of being a violent and dangerous person, and that their [sic] reputation was known to the defendant, you may consider the fact in determining whether the actions of the defendant were those of a reasonable person in dealing with an individual of that reputation.

Antoine, 138 So. 3d at 1072.

The Fourth District Court of Appeal reversed and remanded for a new trial due to error in this instruction. Section 90.404 of the Florida Statutes establishes one of the statutory exceptions to the ban on circumstantial use of character evidence. This exception explicitly provides that “evidence of a pertinent trait of character trait of the victim of the [alleged] crime” is admissible when offered by the accused to prove the victim acted in conformity therewith.¹⁸¹ Furthermore, when the character evidence is so offered, reputation testimony is the appropriate method of doing so.¹⁸² Thus, the trial court’s instructions were erroneous for two reasons: First, they conditioned the jury’s consideration of Hammond’s reputation for violence on Antoine’s knowledge of this fact.¹⁸³ Second, they did not tell the jury that if it found Hammond had such a reputation, the jury could use this in considering whether he acted in conformity therewith before the shooting, namely engaged in violent acts or threatening violent acts that caused Antoine to react in self-defense. Why is the defendant’s actual knowledge of the victim’s reputation for violence required? As the district court said, “because the evidence is offered to show the conduct of the victim, rather than the defendant’s state of mind.”¹⁸⁴ If Antoine’s self-defense claim had been predicated on previous violent acts of Hammond towards others, Antoine would have had to know about them for them to be relevant as they would have gone to his state of mind, not the victim’s conduct. Indeed, under Florida evidence law, previous acts of someone are usually not allowed to prove that person’s subsequent action in conformity therewith.¹⁸⁵

Would Antoine’s knowledge of Hammond’s reputation have been helpful to his self-defense claim? Yes, in that case Antoine would have been able to use the reputation evidence two ways, instead of one: First, to show Hammond’s action in conformity therewith as the first aggressor;¹⁸⁶ second, to show the reasonableness of Antoine’s claim that he feared he would be shot and so fired first.¹⁸⁷ But just because the second way was foreclosed due to the defendant not actually knowing Hammond’s reputation, this should not legally prevent him from using it the other way.¹⁸⁸

181. FLA. STAT. §90.405(1) (2014).

182. *Id.* Unlike the Federal Rules of Evidence, Florida does not allow proof of circumstantial character by personal opinion.

183. *Id.* at 1075.

184. *Id.* (quoting *Dwyer v. State*, 743 So. 2d 46, 48 (Fla. 5th Dist. Ct. App. 1999)).

185. FLA. STAT. § 90.404.

186. *See Antoine*, 138 So. 3d at 1076.; FLA. STAT. § 90.404(1).

187. *See Antoine*, 138 So. 3d at 1076.

188. *See id.* at 1075–76. The jury had deadlocked on the murder charge involving Hammond’s death but convicted on the attempted murder charge for shooting

D. Williams Rule Issues—Other Crimes, Wrongs, or Acts

As noted above, when character evidence is used to prove the defendant has a certain character trait to further prove the defendant has a tendency to act in accord with this trait, the propensity rule is violated.¹⁸⁹ This violation occurs however the character trait would be proven—whether by reputation, opinion, or specific acts of past conduct.¹⁹⁰ Evidence law recognizes that a person's past *bad acts* can be relevant for legitimate non-propensity purposes.¹⁹¹ In Florida, this use of collateral crimes evidence is called *Williams Rule* evidence.¹⁹²

The Code has codified the *Williams Rule*.¹⁹³ Section 90.404(2)(a) of the Florida Statutes states that “[s]imilar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue . . . but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.”¹⁹⁴ What might these material facts be? The section lists them as “including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”¹⁹⁵

While the *Williams Rule* has a similar counterpart in the Federal Rules of Evidence,¹⁹⁶ there are several differences between the two that are actually more favorable to defendants in Florida. First, in Florida, the state must give the defense notice of its intent to use such evidence and a description of it ten days before trial.¹⁹⁷ In a federal court, the prosecution must only provide *reasonable notice* of such.¹⁹⁸ Second, under the federal rules, the existence of the accused's other crimes must only be shown by a preponderance of the evidence.¹⁹⁹ In Florida, it must be established by clear

Thompson. *Id.* at 1068. However, since both charges stemmed from the same series of events, if the jury had found Antoine's actions in shooting Hammond reasonable, it might have also done so in connection with the immediate shooting of Thompson afterwards. *See id.* at 1075–76. Thus, reversal was needed. *See id.* at 1078.

189. *See* FED. R. EVID. 404(a)(1).

190. *See id.* 404(a)(1), 405.

191. *Williams v. State*, 110 So. 2d 654, 659, 661 (Fla. 1959).

192. *Id.* at 659.

193. *Id.*; *see also* FLA. STAT. § 90.404 (2014).

194. FLA. STAT. § 90.404 (2)(a).

195. *Id.*

196. *See* FED. R. EVID. 404(b).

197. FLA. STAT. § 90.404(d)(1).

198. FED. R. EVID. 404(b)(2)(A).

199. *See Huddleston v. United States*, 485 U.S. 681, 684 (1988).

and convincing evidence.²⁰⁰ Third, in Florida the evidence cannot be so focused upon that it becomes a *feature of the trial*.²⁰¹

More reported cases discussed this section of the relevancy rules than any other.²⁰² Cases discussing section 90.404(2)(a) of the Florida Statutes generated a fair number of reversals.²⁰³

1. To Prove Matters Independent of Section 404(2)

a. *Inextricably Intertwined Evidence*

Sometimes to tell a coherent story, the State must introduce other acts evidence that is not directly related to the crimes charged.²⁰⁴ When this happens, the other crimes evidence is admissible.²⁰⁵ Some jurisdictions call this evidence of the *res gestae*.²⁰⁶ In Florida, this type of other crimes evidence is referred to as *inextricably intertwined* evidence.²⁰⁷ Technically speaking, it is not *Williams* Rule evidence because its purpose is not to prove or disprove an element of the case.²⁰⁸ Rather its purpose is to prevent the story of the case from becoming confused, broken, or disjointed.²⁰⁹ Thus, some courts then do not require the State to follow section 90.404(2) of the Florida Statutes' usual notification provisions.²¹⁰

200. See *McLean v. State*, 934 So. 2d 1248, 1256 (Fla. 2006).

201. *Id.*; see also *Barnett v. State*, 151 So. 3d 61, 63 (Fla. 4th Dist. Ct. App. 2014) (during this Survey period rejecting the argument that the *Williams* Rule evidence had improperly become a feature of the trial).

202. *McLean*, 934 So. 2d at 1251; *Carlisle v. State*, 137 So. 3d 479, 486 (Fla. 4th Dist. Ct. App. 2014); *Barnett*, 151 So. 3d at 63.

203. See FLA. STAT. § 90.404(2)(a) (2014). There was reversal in six cases where the state introduced evidence of other crimes, wrongs, or acts, and reversal in one case where the defense was denied the right to introduce Reverse *Williams* Rule evidence. See *Moore v. State*, 143 So. 3d 468, 469 (Fla. 5th Dist. Ct. App. 2014); *Parker v. State*, 142 So. 3d 960, 965 (Fla. 4th Dist. Ct. App. 2014); *Kyne v. State* 141 So. 3d 759, 764 (Fla. 2d Dist. Ct. App. 2014); *Jackson v. State*, 140 So. 3d 1067, 1073 (Fla. 1st Dist. Ct. App. 2014); *Carlisle*, 137 So. 3d at 487. The one Reverse *Williams* Rule case was *Carlisle*, where the court found the defense should have been allowed to cross-examine an alleged sexual battery victim about her earlier recantation of other sexual claims against the defendant. *Carlisle*, 137 So. 3d at 483–84, 487. The questioning would have been admissible to show a motive to falsify on the victim's part. *Id.* at 484.

204. *Kyne v. State*, 141 So. 3d 759, 762 (Fla. 2d Dist. Ct. App. 2014).

205. *Id.*

206. *State v. Jano*, 524 So. 2d 660, 661 (Fla. 1988).

207. *Kyne*, 141 So. 3d at 762.

208. See *Williams v. State*, 621 So. 2d 413, 414–15 (Fla. 1993); *Kyne*, 141 So. 3d at 762.

209. *Kyne*, 141 So. 3d at 762.

210. See FLA. STAT. § 90.404(2) (2014). *Kyne v. State*, where the State argued no notice was due because the defense as evidence of prior threats between the defendant and

When other crimes or acts evidence is offered under the *inextricably intertwined* rationale, courts must be especially careful to make sure the evidence is necessary or else risk a high chance of reversal.²¹¹ This is especially true because the other acts evidence is often potentially inflammatory in nature.²¹² During this Survey period, four cases where the State introduced evidence under the *inextricably intertwined* rationale resulted in conviction reversals.²¹³ Three of the four shared a common characteristic.²¹⁴ They all involved evidence of possession of handguns or other firearms as the alleged *inextricably intertwined* acts.²¹⁵

*Parker v. State*²¹⁶ provides the most overall instructive discussion of the three. Parker's vehicle was pulled over for a traffic routine stop, during which an officer saw a gun partially sticking out between the vehicle's seats.²¹⁷ The officer had Parker exit the vehicle and arrested him when it was discovered Parker was a convicted felon.²¹⁸ Later, during an inventory search, officers discovered illegal narcotics inside the vehicle.²¹⁹ Parker was charged with multiple drug possession offenses as well as being a felon in possession of a firearm.²²⁰ The State severed the firearm possession charge

his step-father weeks before the defendant allegedly strangled his mother, was *inextricably intertwined* with the killing. *Kyne v. State*, 141 So. 3d at 760–61. The district court of appeal rejected this argument and also held that while the evidence might have been otherwise admissible as *Williams* Rule evidence, this could not be considered on appeal due to the state's failure to supply the notice required under section 90.404(2)(d)(1) of the Florida Statutes. *Id.* at 763; *see also* FLA. STAT. § 90.404(2)(d)(1).

Kyne sends an important message to the state. If other acts are allegedly admissible as both *inextricably intertwined* with charged offenses' facts and also separately admissible as *Williams* Rule evidence, careful prosecutors will always provide notice of intent to use such. *Kyne*, 141 So. 3d at 763. Thus, if an appellate court later rejects the *inextricably intertwined* grounds, the state can preserve its ability to argue *Williams* Rule evidence as a fall back position. *Id.*

211. *Id.*

212. *See Williams*, 621 So. 2d at 415.

213. *Parker v. State* 142 So. 3d 960, 963 (Fla. 4th Dist. Ct. App. 2014); *see also Kyne*, 141 So. 3d at 761; *Tolbert v. State*, 154 So. 3d 1141, 1142–43 (Fla. 2d Dist. Ct. App. 2014); *Francois v. State*, 132 So. 3d 1206, 1207 (Fla. 3d Dist. Ct. App. 2014).

214. *Parker*, 142 So. 3d at 963; *Tolbert*, 154 So. 3d at 1142; *Francois*, 132 So. 3d at 1207–08. *Kyne* is the fourth and only non-weapons case where admission of other bad acts evidence caused reversal as not being *inextricably intertwined* with events surrounding the charges and not otherwise admissible under the *Williams* Rule. *Kyne*, 141 So. 3d at 763.

215. *See Parker*, 142 So. 3d at 963; *Tolbert*, 154 So. 3d at 1142; *Francois*, 132 So. 3d at 1207–08.

216. 142 So. 3d 960 (Fla. 4th Dist. Ct. App. 2014).

217. *Id.* at 962.

218. *Id.*

219. *Id.*

220. *Id.*

before trial.²²¹ The defense moved to exclude any evidence relating to the gun found in car as unnecessary to prove the remaining drug charges.²²² The State claimed that testimony about finding the gun was needed to explain why the vehicle was searched and the drugs subsequently found.²²³ The trial court agreed with this argument.²²⁴ At trial, the first officer was allowed to talk about finding the gun and how the defendant's hand was near where the gun was actually found.²²⁵ Not only was this testimony given but also the State physically introduced the gun as an exhibit.²²⁶ A second officer testified Parker had been arrested for possessing the weapon, but the trial court sustained an objection to this, and the jury was instructed to ignore it.²²⁷

The Fourth District listed four instances where uncharged acts or crimes evidence would be considered *inextricably intertwined* with the charges against an accused.²²⁸ When the evidence was necessary to “(1) adequately describe the deed; (2) provide an intelligent account of the crime(s) charged; (3) establish the entire context out of which the charged crime(s) arose, or (4) adequately describe the events leading up to the charged crime(s).”²²⁹ Here, it seemed as if the State was relying on either the third or fourth reasons to justify the testimony and the gun's admission.²³⁰ Whatever the State's reason was, the Fourth District of Appeal reversed the conviction.²³¹ The court found that testimony about the gun was totally unnecessary to prove the drug charges.²³² The State could have just produced testimony about finding the drugs in Parker's car during a search car. Additionally, error in admitting the gun-related testimony was compounded by admitting the gun itself as an exhibit.²³³ The gun's admission aggravated matters by “giving the weapon featured billing during the trial.”²³⁴

221. *Parker*, 142 So. 3d at 962.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Parker*, 142 So. 3d at 962.

227. *Id.*

228. *Id.* at 963.

229. *Id.* (quoting *McGee v. State*, 19 So. 3d 1074, 1078 (Fla. 4th Dist. Ct. App. 2009)).

230. *See Parker*, 142 So. 3d at 962.

231. *Id.* at 965.

232. *Id.* at 963–64.

233. *Id.* at 963.

234. *Id.*

Perhaps the most flagrant of the three cases involving reversals for uncharged weapons testimony is *Francois v. State*.²³⁵ There the State charged the accused with armed robbery and conspiracy to commit armed robbery.²³⁶ The robbery victim and other witnesses said a handgun had been used in the crime.²³⁷ This gun was never found.²³⁸ Police officers went to the defendant's residence and found four rifles there, one of which was under a bed and another sticking out from a mattress.²³⁹ The State argued that evidence of the rifles in the home showed Francois could have also once possessed the handgun and hidden it after the robbery.²⁴⁰ Evidently, the *reasoning* went something like this—people who possess firearms in general are likely to possess a particular type of firearm and when that firearm is used in a crime they are likely to hide it. Of course, part of this reasoning rests on using evidence for prohibited propensity purposes. The other part—that someone who commits a crime with a weapon is likely to hide the weapon to avoid detection—could have been made without introduction of any evidence about the rifles at all. The trial court termed this argument “tenuous, at best, and labeled it *far-fetched*.”²⁴¹ Surprisingly after declaring such, the judge admitted the rifles believing “the evidence comprised part of the police investigation and *that Francois would not be prejudiced by the testimony*.”²⁴² In a short opinion, the Third District Court of Appeal reversed finding the evidence totally irrelevant to prove anything about the missing handgun.²⁴³ Additionally, there was no proof that Francois's possession of the rifles was not perfectly legal.²⁴⁴ The court recognized that admitting testimony evidence about the rifles created a very real risk that “the jurors [would] conclude . . . Francois exhibited a propensity to commit crimes.”²⁴⁵

All three cases could be described as good examples of prosecutor attempts at *overkill* causing reversals.²⁴⁶ Unfortunately, there are also examples where trial courts did not give careful scrutiny to arguments and

235. 132 So. 3d 1206, 1209 (Fla. 3d Dist. Ct. App. 2014).

236. *Id.* at 1207.

237. *Id.*

238. *Id.*

239. *Id.*

240. *Francois*, 132 So. 3d at 1207.

241. *Id.*

242. *Id.* (emphasis added).

243. *Id.* at 1209.

244. *Id.*

245. *Francois*, 132 So. 3d at 1209.

246. *See id.* 132 So. 3d at 1209; *Parker*, 142 So. 3d at 964; *Tolbert*, 154 So. 3d at 1143. The third case is *Tolbert v. State*, which involved testimony about a handgun found in the same bag as illegal drugs. *Tolbert v. State*, 154 So. 3d 1141, 1142 (Fla. 2d Dist. Ct. App. 2014). There was no proof connecting Tolbert to the gun, nor proof that he illegally possessed it. *Id.* at 1142–43.

evidence offered for admission.²⁴⁷ The lesson to be learned from all three reversals is simple: Inextricably intertwined is not a magic argument or phrase that will automatically allow in other crimes or acts evidence not essentially connected to the crimes charged. This is especially so when the other acts involve weapons possession.

b. *To Legally Establish an Element of the Charged Offense*

There is another, probably an even more rare, non-*Williams* Rule reason to legitimately present uncharged collateral crimes evidence.²⁴⁸ There may be a *legal* necessity to present other crimes evidence when proof of an earlier act or crime is an essential element of a later charged offense.²⁴⁹ In this situation, the extent of the other crimes evidence should be determined by the elements of the charged offense.

*Spipniewski v. State*²⁵⁰ involved charges of aggravated stalking, aggravated assault with a deadly weapon, and misdemeanor battery.²⁵¹ The victim and defendant were neighbors who had once been on good terms.²⁵² Trouble started when the victim who had been giving the defendant food, rides, and money told him she would no longer do so.²⁵³ The charges concerned events that happened from January to December 16, 2011.²⁵⁴ The State produced evidence that the defendant had punched the victim in November 2011, approached her swinging a bat in December 2011, and pulled her hair and bit her in December 2011.²⁵⁵ The November punching incident was also the subject of a separate misdemeanor charge in county court.²⁵⁶

The Third District found the punching incident testimony relevant to the charge of aggravated stalking.²⁵⁷ As part of this charge, the State had to show the defendant had engaged in a course of conduct designed to repeatedly harass her, and that the defendant threatened the victim with

247. *Id.* at 1142–43; *Parker*, 142 So. 3d at 961, 964; *Francois*, 132 So. 3d at 1208–09.

248. *Spipniewski v. State*, 134 So. 3d 563, 565 (Fla. 3d Dist. Ct. App. 2014).

249. *See id.*

250. 134 So. 3d 563 (Fla. 3d Dist. Ct. App. 2014).

251. *Id.* at 564. Originally, there was a fourth charge—harassing the victim—but the State dropped this before trial. *Id.* The opinion does not explain why. *See id.*

252. *See id.*

253. *Spipniewski*, 134 So. 3d at 564.

254. *Id.*

255. *Id.* at 564–65.

256. *Id.* at 565.

257. *Id.*

intent to make her fearful of death or bodily injury.²⁵⁸ *Course of conduct* as defined in the aggravated stalking statute is “a pattern of conduct composed of a series of acts over a period of time, however short, which evidences a continuity of purpose.”²⁵⁹ Thus, the other acts evidence was directly relevant and legally necessary to prove the aggravated stalking charge.²⁶⁰ Ultimately, the jury convicted the defendant of simple stalking; thus, in any event, admission of the other acts would have been harmless even if done in error.²⁶¹

2. To Prove Traditional *Williams* Rule Issues

As mentioned, section 90.404(2)(a) of the Florida Statutes lists a number of reasons why other crimes or acts evidence is relevant, besides solely showing propensity.²⁶² The list follows the *inclusionary* approach, and is not intended to be exclusive but merely to give examples of the most common, legitimate *Williams* Rule purposes.²⁶³ During this Survey, *Williams* Rule evidence was admitted to prove a number of matters, mentioned²⁶⁴ and unmentioned²⁶⁵ in the section.²⁶⁶ Some decisions show how careless counsel is in urging admission of this evidence and how careless courts are in going along with their arguments. It should never be sufficient for counsel to just *laundry list* the issues given in the Rule as reasons why the evidence should be admitted. Courts should not allow such *laundry listing* to occur, but sometimes this happens.²⁶⁷ Fortunately one opinion during this Survey provides an excellent example of the careful

258. *Spipniewski*, 134 So. 3d at 566; see also FLA. STAT. § 784.048(3) (2014).

259. FLA. STAT. § 784.048(1)(b).

260. *Spipniewski*, 134 So. 3d at 566.

261. *Id.*

262. FLA. STAT. § 90.404(2)(a).

263. See *id.*; *Williams v. State*, 110 So. 2d 654, 659–60 (Fla. 1959).

264. Two cases involved *Williams* Rule evidence offered at trial to prove intent. See *Barnett v. State*, 151 So. 3d 61, 63 (Fla. 4th Dist. Ct. App. 2014); *Jackson v. State*, 140 So. 3d 1067, 1070 (Fla. 1st Dist. Ct. App. 2014). Two cases involved used it to show identity. See *Barnett*, 151 So. 3d at 63–64; *Lewis v. State*, 143 So. 3d 998, 1000, 1002 (Fla. 4th Dist. Ct. App. 2014).

265. See *Peralta-Morales v. State*, 143 So. 3d 483, 485 (Fla. 1st Dist. Ct. App. 2014) (finding the evidence admissible to show *consciousness of guilt*). The author strenuously disagrees with this conclusion and believes the evidence was improperly admitted as proof of propensity.

266. See FLA. STAT. § 90.404(2)(a).

267. See, e.g., *Barnett*, 151 So. 3d at 63 (where this happened at the trial level). On appeal, the Fourth District affirmed the admission of the evidence but after conducting a much more careful analysis and after correctly concluding it was admissible to prove identity and motive. *Id.* at 63–64.

analysis the trial, and appellate courts should engage in before approving use of *Williams* Rule evidence.²⁶⁸

*Jackson v. State*²⁶⁹ involved an appeal from a conviction for burglary of a dwelling and for battery.²⁷⁰ The State claimed that in March 2011, Jackson broke into his ex-girlfriend's apartment and attacked her with a knife.²⁷¹ Over defense objection, the trial court allowed the State to produce evidence of two prior incidents to prove the defendant had the intent needed to commit the March 2011 crimes.²⁷² The first incident occurred in June 2010, when Jackson had pulled the victim from a car and attacked her.²⁷³ The second one occurred in November 2010, when Jackson had come to the victim's apartment at her invitation, but had battered her there.²⁷⁴ In a thoughtful opinion, the First District reversed the convictions.²⁷⁵ The court acknowledged that *Williams* Rule evidence is admissible to prove material facts in a case.²⁷⁶ However, it differed from the trial court as to how materiality should be determined.²⁷⁷ Just because an issue is technically an element of an offense does not make it automatically material for *Williams* Rule purposes.²⁷⁸ Instead, the issue must be a truly contested one at trial.²⁷⁹ Jackson did not raise any issue of intent.²⁸⁰ Rather, he claimed he had never been at the victim's apartment on the particular date in March and thus did not commit any crime there.²⁸¹

"Even if intent [had been] a [true] material issue," the other incidents were not substantially similar enough to demonstrate it.²⁸² The first incident did not take place at the victim's residence, and while the second one did, Jackson had been invited over to the apartment.²⁸³ Thus, while both incidents allegedly involved batteries, neither one of them came close to involving a burglary and so, were not relevant in determining if he

268. *Jackson*, 140 So. 3d at 1071–73.

269. 140 So. 3d 1067 (Fla. 1st Dist. Ct. App. 2014).

270. *Id.* at 1069.

271. *Id.*

272. *Id.* at 1069–70.

273. *Id.* at 1070.

274. *Jackson*, 140 So. 3d at 1070.

275. *Id.* at 1070–73.

276. *Id.* at 1069–70.

277. *Id.* at 1070–71.

278. *Id.* at 1071; *see also Williams*, 110 So. 2d at 659.

279. *Jackson*, 140 So. 3d at 1070–71.

280. *Id.* at 1071.

281. *Id.*

282. *Id.* at 1071–72; *see also McLean v. State*, 934 So. 2d 1248, 1255 (Fla. 2006).

283. *Jackson*, 140 So. 3d at 1070.

committed a burglary.²⁸⁴ As to the battery charge, the First District found the other acts' relevancy was solely based on pure propensity reasoning—he attacked this woman twice in the past, so that makes it more likely he attacked her here—which is what the *Williams* Rule explicitly forbids!²⁸⁵

Overall, *Jackson* is an excellent example of the thorough analysis trial, and appellate courts should engage in when faced with *Williams* Rule questions. As this type of evidence has the potential to be unfairly prejudicial to defendants, it should not be admitted unless its materiality is truly factually an issue and not just an issue in a formal legal sense.

3. To Prove Child Molestation Charges

Both the Code and the Federal Rules of Evidence have added special provisions relating to the admission of *other crimes, wrongs, or acts* evidence in child molestation cases.²⁸⁶ Section 90.404(2)(b)(1) of the Florida Statutes provides that in criminal child molestation cases, “evidence of the defendant’s commission of other crimes, wrongs, or acts of child molestation is admissible and may be considered for its bearing on any matter for which it is relevant.”²⁸⁷ This section’s language indicates the legislature intended to allow what is usually not permitted in criminal case—evidence admitted largely for its propensity purposes. Evidently, the legislature felt that when it comes to certain types of sex crimes, there is a very real risk of repeat offenders, so that evidence that an accused had committed an earlier sexual offense is strong indication he committed a later criminally charged one. In *McLean v. State*,²⁸⁸ the Supreme Court of Florida held that even when this section merely serves “as a conduit for evidence that corroborates the victim’s testimony that the crime occurred rather than to prove the identity of the alleged perpetrator,”²⁸⁹ it does not violate due process.²⁹⁰ *McLean* did not find that evidence of prior acts of molestation was automatically admissible, despite the statutory wording that could be construed that way. Instead, the court focused on the words “and may be considered for its bearing on any

284. *Id.* at 1072.

285. *Id.* at 1070, 1072; *see also Williams v. State*, 110 So. 2d 654, 659, 661, 663 (Fla. 1959).

286. FLA. STAT. § 90.404(2) (2014); FED. R. EVID. 414.

287. FLA. STAT. § 90.404(2)(b)(1). There is a similarly worded provision for evidence of “other crimes, wrongs, or acts” in a *sexual offense* charge case. *See id.* § 90.404(2)(c)(1). The Florida Legislature passed these sections in 2001. Act effective July 1, 2001, ch. 2001-221, § 1, 2001 Fla. Laws 1938, 1938.

288. 934 So. 2d 1248 (Fla. 2006).

289. *Id.* at 1251.

290. *Id.*

matter [for] which it is relevant.”²⁹¹ When it comes to relevancy and other acts, relevancy must be evaluated first by how similar the other sexual acts are to the crime charged.²⁹² The more similarity, the more probative they are.²⁹³ Likewise, the less similar, the less probative, and the more likelihood they will generate unfair prejudicial against an accused and should be excluded by section 90.403 of the Florida Statutes.²⁹⁴ *McLean* set out a four-part test to determine admissibility of other acts of molestation.²⁹⁵ First, how similar are the other acts and the charged ones in terms of when, where, how, and to whom they occurred?²⁹⁶ Second, how close in time are the other acts and the ones charged?²⁹⁷ Third, how frequently did the other acts occur?²⁹⁸ Finally, are there any intervening circumstances between the other acts and the ones charged?²⁹⁹

Four reported opinions discussed this type of evidence in child sexual victim cases during the Survey period.³⁰⁰ Not surprisingly, the appellate courts affirmed admission in three out of the four cases.³⁰¹ *Stewart v. State*³⁰² represents what is probably a typical approach to admission of this type of evidence.³⁰³ The accused was charged with sexually battering a person between twelve and eighteen years of age while he was in a position of familial authority.³⁰⁴ The State introduced proof Stewart had previously sexually battered his step-daughter and also his wife’s daughter, both when the girls were young.³⁰⁵ In affirming his conviction, the First District described this as *Williams* Rule evidence even though it seems to have been introduced solely for its propensity.³⁰⁶ The court described section

291. *Id.* at 1254.

292. *Id.*

293. *McLean*, 934 So. 2d at 1255.

294. FLA. STAT. § 90.403 (2014); *McLean*, 934 So. 2d at 1256.

295. *McLean*, 934 So. 2d at 1262.

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. See *Harrelson v. State*, 146 So. 3d 171, 173 (Fla. 1st Dist. Ct. App. 2014); *Stewart v. State*, 147 So. 3d 119, 121 (Fla. 1st Dist. Ct. App. 2014); *Fincher v. State*, 137 So. 3d 437, 439 (Fla. 4th Dist. Ct. App. 2014); *Peralta-Morales v. State*, 143 So. 3d 483, 485 (Fla. 1st Dist. Ct. App. 2014).

301. *Harrelson*, 146 So. 3d at 175; *Stewart*, 147 So. 3d at 124; *Fincher*, 137 So. 3d at 442; *Peralta-Morales*, 143 So. 3d at 486.

302. 147 So. 3d 119 (Fla. 1st Dist. Ct. App. 2014).

303. See *id.* at 123–24.

304. *Id.* at 120; see also FLA. STAT. § 794.011(8)(b) (2014).

305. *Stewart*, 147 So. 3d at 121.

306. *Id.* at 123–24. The court found it “showed an underlying pattern of molestation where the appellant was in a familial or custodial setting with the victims and the molestation occurred in the home.” *Id.* at 121.

90.404(2)(b) of the Florida Statutes as establishing a *relaxed standard of admissibility*³⁰⁷ even though similarity between the charged offense and the past acts was still important.³⁰⁸ The court emphasized that similarity did not mean the two sets of offenses had to be identical or the same in all respects.³⁰⁹ Here, sufficient similarity to uphold admission existed because the victims were all underage females, the offenses all took place in the family home, the defendant was in a familial or custodial role each time, and the victims were all vulnerable due to being either asleep or under anesthesia.³¹⁰ The fact that some of the acts involved digital penetration, and some involved penile penetration did not outweigh the other similarities.³¹¹

Ironically, the only decision reversing a conviction for improper admission of this type of evidence also came from the First District.³¹² In *Harrelson v. State*,³¹³ the appellate court reversed and remanded, for further proceedings, the defendant's conviction for lewd, lascivious, or indecent assault on a child under sixteen.³¹⁴ The victim was either the defendant's daughter or step-daughter.³¹⁵ Harrelson and her mother were divorced when the acts allegedly occurred.³¹⁶ The defendant was alleged to have grabbed the victim's hand and made her touch his penis during a visit to Harrelson's mother's home.³¹⁷ At least some of the claimed other acts also occurred during other visits to Harrelson's father's home.³¹⁸

The State gave the defense the required notice of intent to use.³¹⁹ However, the trial court and defense undertook an unusual and ultimately legally reversible procedure to determine admissibility. Defense counsel

Some may claim this is not propensity, but the author does not agree. See *id.* at 123. It shows Stewart had a propensity to sexually molest young girls when he got them in the home. See *id.* at 121. Thus, he must have molested the young victim here. See *Stewart*, 147 So. 3d at 123–24.

307. *Id.* at 123 (quoting *Easterly v. State*, 22 So. 3d 807, 814 (Fla. 1st Dist. Ct. App. 2009)); FLA. STAT. § 90.404(2)(b).

308. *Stewart*, 147 So. 3d at 124.

309. *Id.*

310. *Id.*

311. *Id.* The other two opinions, not discussed in this Survey's text, affirming admission of other acts of molestation are *Fincher* and *Peralta-Morales*. *Fincher v. State*, 137 So. 3d 437, 442 (Fla. 4th Dist. Ct. App. 2014); *Peralta-Morales v. State*, 143 So. 3d 483, 486 (Fla. 1st Dist. Ct. App. 2014); see also *supra* note 365 (briefly criticizing *Peralta-Morales*).

312. *Harrelson v. State*, 146 So. 3d 171, 175 (Fla. 1st Dist. Ct. App. 2014). Both opinions were per curiam. Judge Rowe is the only judge named as being on both panels.

313. 146 So. 3d 171 (Fla. 1st Dist. Ct. App. 2014).

314. *Id.* at 172, 175.

315. See *id.* at 174.

316. *Id.* at 174.

317. *Id.* at 173.

318. *Harrelson*, 146 So. 3d at 174.

319. *Id.* at 173.

suggested the trial court should first do the required weighing under section 90.403 of the Florida Statutes of probative value versus unfair prejudice before making a finding that the other acts had been proven by clear and convincing evidence.³²⁰ The trial judge did so and ruled the *substantial similarity* between the alleged offenses outweighed any potential prejudice.³²¹ The trial court then concluded that no finding of *clear and convincing evidence* was needed as the other crimes involved the same victim, the same conduct, and the same approximate timeframe as the charged offense.³²² The defense cross-examined the victim about the other acts and also called Harrelson's mother as a defense witness.³²³ She testified some of the furniture supposedly in the home at the time was gone by then, all in an effort to dispute the acts' existence.³²⁴

In a brief opinion, the First District reversed.³²⁵ The court ruled that findings that other crimes, wrongs, or acts exist by a clear and convincing evidence standard are legally mandated in all cases.³²⁶ The fact that the alleged other crimes involved the same, instead of different, victims did not change this requirement.³²⁷ As the defense had at trial denied their existence with strong proof, the court could not say there was not a strong possibility this evidence did not influence the jury.³²⁸ However, a new trial was not necessarily required.³²⁹ As the trial court had already done the required section 90.403 of the Florida Statutes balancing, only a hearing to see if the State could meet the clear and convincing evidence standard was required.³³⁰ If so, the conviction should have been re-instated.³³¹ If not, a new trial was necessary.³³²

Harrelson is important because it emphasizes to both counsel and trial courts the importance of following the complete procedure discussed in *McLean* for determining the admissibility of other acts of child molestation. Also, as *McLean* has been cited as requiring clear and convincing proof for any *Williams* Rule evidence, this multi-step procedure should be strictly

320. *Id.*; see also FLA. STAT. § 90.403 (2014).

321. *Harrelson*, 146 So. 3d at 173.

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.* at 175.

326. *Harrelson*, 146 So. 3d at 173.

327. *Id.* at 173–74.

328. *Id.* at 174.

329. *Id.*

330. *Id.* at 174–75; see also FLA. STAT. § 90.403 (2014).

331. *Harrelson*, 146 So. 3d at 175.

332. *Id.*

followed for all evidence of other crimes, wrongs, or acts no matter what the offense charged.

IV. WITNESS EXAMINATION ISSUES

Witness examination issues can arise in any number of ways. During this Survey period, one case provided the factual background for the Supreme Court of Florida's discussion of several of them.³³³ The prosecution in *Wilcox v. State*³³⁴ charged the defendant with first-degree murder, armed kidnaping, and armed robbery.³³⁵ Wilcox had called his cousin, Richaundu Curry, and asked if he could stay at her Lauderhill townhome.³³⁶ Curry shared her home with her brother, her sister, and Curry's ex-boyfriend.³³⁷ The four of them lived next to the victim, Nimoy Johnson.³³⁸ The day Wilcox arrived, someone burglarized Johnson's home.³³⁹ Johnson initially blamed it on someone living in Curry's townhome, and the two of them had words about this.³⁴⁰ After Curry had assured Johnson they were good neighbors, he apologized, and everything seemed fine.³⁴¹ About one week later, an intruder came to Johnson's home, and got him to call three female friends of his to come over.³⁴² The intruder had Johnson tie up the three women and then took Johnson from the room they were in.³⁴³ Later that evening, someone stole one of the women's car.³⁴⁴ After they had freed themselves, they found Johnson shot dead in his home.³⁴⁵ Eyewitness testimony placed Wilcox around Johnson's home at the time of the kidnapping and murder.³⁴⁶ Besides this, DNA evidence linked him to a cigarette the intruder had smoked in the home.³⁴⁷ Wilcox had even admitted that morning in a phone call to Curry's brother that he had killed

333. See *Wilcox v. State*, 143 So. 3d 359, 366–71 (Fla. 2014), *cert. denied*, 135 S. Ct. 1406 (2015).

334. 143 So. 3d 359 (Fla. 2014), *cert. denied*, 135 S. Ct. 1406 (2015).

335. See *id.* at 369.

336. *Id.* at 366.

337. *Id.*

338. *Id.*

339. *Wilcox*, 143 So. 3d at 366.

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.* at 367.

344. *Wilcox*, 143 So. 3d at 368.

345. *Id.*

346. See *id.* at 367–68.

347. *Id.* at 369.

Johnson the night before or earlier that same morning.³⁴⁸ Abundant other evidence linked Wilcox to the charged crimes.³⁴⁹

At trial, Wilcox claimed he did not perpetrate these crimes.³⁵⁰ He claimed never to have been to the county where the crimes took place and claimed he was in a neighboring county that weekend.³⁵¹ Wilcox was arrested at an apartment complex where the stolen car was found but claimed Curry's brother gave it to him three days after the crimes.³⁵² At the guilt phase, Wilcox represented himself, with standby counsel appointed for his assistance if Wilcox wished to ask for help.³⁵³ This self-representation decision led to several evidentiary issues discussed below.

A. *Refreshing Recollection*

Sometimes witnesses forget for various reasons and need help in remembering so they can give or continue giving testimony. The process of doing this is called refreshing recollection.³⁵⁴ Although this process is not laid out in statute or rules, it is so common that questions about it seldom arise. To prove its case against Wilcox, the State called his cousin, Richaunda Curry, whose home was next to the victim's home.³⁵⁵ Curry testified that in a second police interview after the crimes, detectives had asked her if she knew someone with gold teeth.³⁵⁶ She had not yet told police about her cousin, Wilcox because she did want to tell them she believed he was involved in the crimes.³⁵⁷ When she learned police were looking for someone with gold teeth, she felt comfortable telling them about Wilcox and his gold teeth.³⁵⁸ On cross-examination by Wilcox, she denied knowing anyone else with gold teeth, including her sister or her sister's

348. *Id.* at 368.

349. *See Wilcox*, 143 So. 3d at 368–71.

350. *See id.* at 369.

351. *Id.* at 369.

352. *Id.* at 368–69.

353. *Id.* at 369, 373.

354. *See Wilcox*, 143 So. 3d at 378. Some jurisdictions may alternatively call this refreshing memory, but the concept is the same. *E.g.*, FLA. STAT. § 90.613. Both the Code and the Federal Rules of Evidence imply this process is available, although neither one directly says so. *See id.*; FED. R. EVID. 612. Certainly, a trial judge's inherent power to control proceedings under section 90.612(1)(a) of the Florida Statutes to “[f]acilitate, through effective interrogation and presentation, the discovery of . . . truth” permits judges to allow this. FLA. STAT. § 90.612(1)(a). Also, the existence of section 90.613 of the Florida Statutes, Refreshing the Memory of a Witness, implies this. *See id.* § 90.613.

355. *See Wilcox*, 143 So. 3d at 375.

356. *Id.* at 377.

357. *Id.*

358. *Id.*

boyfriend.³⁵⁹ Specifically, Curry testified in response to a question from Wilcox that “[you are] the only one that got gold teeth, that I know of.”³⁶⁰ After another question and brief answer, Wilcox asked, “[c]an I refresh your memory, please?”³⁶¹ The State objected to lack of a proper foundation to refresh recollection, and the judge told Wilcox to rephrase his question.³⁶² Wilcox then asked “do you think any document . . . would refresh your memory as to who all had gold that was at your respective apartment?”³⁶³ After Curry said *probably*, the State again objected, but the judge let Wilcox proceed.³⁶⁴

Up to now, one cannot hardly find fault with the proceedings on this point. Technically speaking, there may not have been an absolute need to refresh recollection, but the judge acted wisely in giving a *pro se* defendant, especially one in a capital case, leeway. What happened next provoked error, although the Supreme Court of Florida found all trial errors harmless given the overwhelming proof against Wilcox.³⁶⁵

Wilcox then tried to refresh Curry’s memory by using the statement of another witness, Jean, which was summarized in and attached to the affidavit for his arrest.³⁶⁶ According to the summary, Jean was the victim’s friend and had talked with Johnson about a week before the charged crimes.³⁶⁷ The summary claimed Johnson told Jean about confronting two people, one of whom had gold teeth, regarding Johnson’s home being burglarized.³⁶⁸ The man with gold teeth allegedly told Johnson he was not afraid of Johnson, and Johnson had allegedly threatened to shoot him.³⁶⁹ The

359. *Id.*

360. *Wilcox*, 143 So. 3d at 377.

361. *Id.*

362. *Id.* at 377–78. Technically, it seems that the State’s proper objection was lack of a predicate to refresh recollection. *See id.* Curry never said she could not remember whom else she knew who had gold teeth or that she was not sure if she knew someone else with gold teeth. *Id.* at 377.

Lawyers are not entitled to refresh recollection any time they get an answer they may not like or expect. *See* FLA. STAT. § 90.613 (2014). There must be a need to do so caused by a witness’s complete or partial inability to recall. *See id.*

At common law, a witness had to have complete memory failure about a matter. *See* NLRB v. Fed. Dairy Co., 297 F.2d 487, 488–89 (1st Cir. 1962). This is not required by the Federal Rules of Evidence or the Code. *See* FED. R. EVID. 612; FLA. STAT. § 90.613.

363. *Wilcox*, 143 So. 3d at 377.

364. *Id.* at 377–78.

365. *Id.* at 378–79.

366. *Id.*

367. *Id.*

368. *Wilcox*, 143 So. 3d at 378.

369. *Id.*

prosecutor objected to Curry being refreshed by Jean's statement, and the trial court refused to let Wilcox use the document to do so.³⁷⁰

The Supreme Court of Florida found error in this ruling.³⁷¹ When a witness needs his or her memory refreshed, "a party may show the witness a writing or other object to attempt to refresh . . . recollection."³⁷² If a writing is being used to refresh, it does not have to be one actually written by the witness.³⁷³ Nor does it have to be otherwise admissible into evidence.³⁷⁴ The witness should not be allowed to read parts of the writing aloud, nor should the questioning attorney do so, as that would cause potential hearsay issues.³⁷⁵ If the witness's memory is successfully refreshed, and the witness's testimony is based on remembering an event, not on remembering the contents of whatever is shown to the witness, "that which prompted the witness's memory is immaterial."³⁷⁶ Thus, Wilcox should have been allowed to use the arrest affidavit summary to refresh Curry's memory, if it could.

B. *Impeachment with Prior Convictions*

Section 90.608 of the Florida Statutes recognizes that any party may impeach a witness and that there are multiple ways of doing so.³⁷⁷ One standard method of impeaching a witness's credibility is by showing the witness has committed certain crimes that theoretically cast doubt on the witness's ability to tell the truth.³⁷⁸ Section 90.610(1) of the Florida Statutes limits these crimes to ones "punishable by death or imprisonment in excess of [one] year" in the jurisdiction of conviction³⁷⁹ or ones that involved "dishonesty or a false statement regardless of the punishment."³⁸⁰

370. *Id.* The court also refused to let Wilcox use the summary to impeach Curry. *Id.*

371. *Id.*

372. *Wilcox*, 143 So. 3d at 378.

373. *Garrett v. Morris Kirschman & Co.*, 336 So. 2d 566, 569 (Fla. 1976).

374. *Wilcox*, 143 So. 3d at 379; *see also* FLA. STAT. § 90.613 (2014).

375. *See Garrett*, 336 So. 2d at 569.

376. *Wilcox*, 143 So. 3d at 378. Sometimes the witness's memory of the underlying event or fact is not truly refreshed. *See K.E.A. v. State*, 802 So. 2d 410, 411 (Fla. 3d Dist. Ct. App. 2001). Rather what the witness has used as the basis for his or her subsequent testimony is what has been just shown to the witness. *See id.* When opposing counsel suspects this is the case, section 90.613 of the Florida Statutes requires that the item used to refresh recollection be produced so opposing counsel can use it to demonstrate this continued memory failure. FLA. STAT. § 90.613.

377. *Id.* § 90.608.

378. *Id.* § 90.610.

379. *Id.* § 90.610(1). These are commonly called felonies, as the quoted language is the standard definition for a felony at common law. *See id.* § 90.610; *State v.*

While section 90.610 of the Florida Statutes sets out what general crimes qualify for impeachment, case law has delineated the proper procedure for doing so. The questioning attorney should ask, “have you ever been convicted of a felony or a crime involving dishonesty [or false statement]?”³⁸¹ If the witness admits committing crimes of these types, then the questioner is limited to asking either, *if so, how many?* Or just *how many?*³⁸² If the witness answers both questions accurately, further questions about the witness’ criminal record should not be asked; at least not for purposes of impeaching by a prior conviction.³⁸³

In the *Wilcox* case described above, problems also arose about the proper way of doing this type of impeachment.³⁸⁴ Wilcox testified and denied his involvement in the murder, kidnappings, and robbery.³⁸⁵ On cross-examination the prosecutor asked him: “[H]ave you been previously convicted of a felony or crime involving dishonesty?”³⁸⁶ After a short exchange between the two, Wilcox admitted, “I have been convicted of a crime.”³⁸⁷ When again asked if he had been convicted of a felony or crime involving dishonesty, Wilcox replied saying, “[g]ot to make me understand. As far as dishonesty is concerned, I do [not] see where I lied about anything.”³⁸⁸ The prosecutor told him it was not the state’s job to make him understand and asked for the third time about felonies or crimes of dishonesty.³⁸⁹ Wilcox replied by saying, “I got to say no.”³⁹⁰

The prosecutor responded by inquiring if Wilcox had been convicted of second degree murder, armed robbery, and grand theft motor vehicle.³⁹¹ Wilcox admitted he had, but added it was as an accomplice.³⁹² The

Page, 449 So. 2d 813, 815 (Fla. 1984). However, some jurisdictions recognize aggravated misdemeanors that are punishable by more than one year.

380. FLA. STAT. § 90.610(1).

381. *Wilcox*, 143 So. 3d at 372.

382. *Id.* at 372–74.

383. *Id.* at 374; FLA. STAT. § 90.610. This describes how impeachment by prior convictions should proceed when the person being impeached is an actual witness. See FLA. STAT. § 90.610. For discussion of the proper procedure for impeaching a hearsay declarant, see *infra* Section IV.D.

384. *Wilcox*, 143 So. 3d at 374.

385. *Id.* at 371–72.

386. *Id.* at 371. Note how even this question is not technically in the correct form as it omitted any reference to crimes of false statement. See FLA. STAT. § 90.610. However, this omission had nothing to do with the subsequent erroneous cross-examination. See *Wilcox*, 143 So. 3d at 374.

387. *Id.* at 372.

388. *Id.*

389. *Id.*

390. *Id.*

391. *Wilcox*, 143 So. 3d at 372.

392. *Id.*

prosecutor then asked Wilcox about each crime in turn and whether he considered that type crime to be a crime of dishonesty or dishonest, beginning with the theft conviction and ending with the second degree murder conviction.³⁹³

The defendant argued that allowing the State to impeach him by mentioning his specific crimes was improper, because the prosecutor had to exploit his confusion about the questions to do so.³⁹⁴ In turn, the State argued Wilcox was being *cagey*³⁹⁵ and wrongfully tried to resist answering the State's questions.³⁹⁶ Additionally, the State argued this issue had not been preserved for appeal by a contemporaneous objection.³⁹⁷

The Supreme Court of Florida partially agreed with both sides.³⁹⁸ The Court found that Wilcox was genuinely confused by the questioning itself when he said, “[you] [g]ot to make me understand” that he may have been confused about the proper way to object to the cross-examination and that the trial court was aware of this confusion.³⁹⁹ As there was no indication Wilcox did not fail to object to gain a tactical advantage; and also with the leeway pro se defendants should be given, the Court found the claim of error preserved.⁴⁰⁰

As to the merits of Wilcox's claim, the Court found that the trial judge did not abuse his discretion in letting the State initially inquire about Wilcox's criminal record for the three convictions.⁴⁰¹ The convictions were all felonies, thus permissible for impeachment.⁴⁰² Besides this, Wilcox was given several chances to ask for help from standby counsel but did not do so.⁴⁰³ Although he truthfully said one time that he had been convicted of *a crime*, he had also twice explicitly said *no* when asked about this.⁴⁰⁴ Thus, the State was entitled to clear this up at trial.⁴⁰⁵

However, even with this entitlement, the State's follow up questions about whether Wilcox considered certain of the felonies crimes of dishonesty

393. *Id.*

394. *Id.*

395. *Id.*

396. *Wilcox*, 143 So. 3d at 372.

397. *Id.*

398. *Id.* at 373–74.

399. *Id.* at 372–73.

400. *Id.* at 373.

401. *Wilcox*, 143 So. 3d at 373–74.

402. *Id.* at 374.

403. *Id.* at 373.

404. *Id.* at 372–73.

405. *Id.* at 373–74. The Supreme Court may have found that Wilcox likely was, or at least probably was, partially lying at trial. *See Wilcox*, 143 So. 3d at 372. The Court declared that “[a] reasonable person could conclude that Wilcox was being, as the State contends, *cagey* with his responses to the prosecutor's questions.” *Id.* at 373.

was erroneous.⁴⁰⁶ Once the State was able to show he had a past criminal record of certain type felonies, questioning about them should have stopped.⁴⁰⁷ Florida law recognizes that some crimes involve dishonesty or false statement and some do not.⁴⁰⁸ However, this distinction is important for impeachment purposes only when the crimes are misdemeanors, not felonies.⁴⁰⁹ Since any felony can be used to impeach under section 90.610(1) of the Florida Statutes, whether the felony additionally involved dishonesty was irrelevant.⁴¹⁰ What the prosecution tried to do here was to get *double mileage* from the same felony conviction.⁴¹¹ The Supreme Court of Florida concisely summed up its ruling on this point. After a witness's prior convictions are displayed by name and number before a jury, "the prosecution may not then continue to question the witness regarding whether his or her prior felony convictions are also crimes of dishonesty."⁴¹²

The prosecution's impeachment by prior convictions was also incorrect for other points not discussed by the Court. First, robbery and motor vehicle theft are crimes of dishonesty under Florida law. Second, none of the prosecutor's questions about the crimes being ones of dishonesty ever should have been allowed for another reason. The questions asking whether Wilcox considered certain crimes to involve dishonesty asked for Wilcox's opinions about what he had done in the past.⁴¹³ This is irrelevant for prior conviction impeachment purposes. What should count is *not* what Wilcox felt about his crimes being ones of dishonesty, but whether as a matter of Florida law, they were. Both the prosecutor and trial judge seem to have ignored this distinction, and the Supreme Court of Florida's opinion surprisingly fails to comment on it.

Even with these additional errors, the Supreme Court of Florida's finding of harmless error is easily defensible given the apparent overwhelming evidence of Wilcox's guilt and lack of credibility.⁴¹⁴

C. *Inappropriate Witness Dress in Criminal Cases*

The next witness examination issue does not involve actual witness questioning.

406. *Id.* at 374.

407. *Id.*

408. *See State v. Page*, 449 So. 2d 813, 815 (Fla. 1984).

409. *Wilcox*, 143 So. 3d at 374.

410. *Id.* at 374; FLA. STAT. § 90.610(1) (2014).

411. *See Wilcox*, 143 So. 3d at 374.

412. *Id.*

413. *Id.* at 372, 374.

414. *See id.* at 374–75.

Hopefully, it also arises so rarely that seeing a case having to discuss it is surprising indeed. Finally, the fact that the issue could have been easily avoided by the use of good judgment is especially disappointing since it led to reversible error.⁴¹⁵

In *Hayes v. State*,⁴¹⁶ the State claimed the defendant and another man committed armed robbery and assault against a single victim.⁴¹⁷ Hayes was tried alone.⁴¹⁸ The victim identified Hayes at trial, and the jury was not told if the second person had ever been caught.⁴¹⁹ The robbery took place in the front yard of a man named Pharory Greene.⁴²⁰ Greene appeared as a defense witness, claimed that he saw the robbery take place, and that Hayes was not one of the perpetrators.⁴²¹

The problem was not with what Greene said but how he had to say it. Greene, at the time of Hayes's trial, was incarcerated in the jail for an unnamed offense.⁴²² The offense apparently had no connection with the robbery on trial. Greene, over defense objections, had to testify wearing jail clothes.⁴²³ Days before the trial, defense counsel had brought clothes to the jail for Greene to change into before taking the stand.⁴²⁴ When Greene was brought to court in jail garb, defense counsel objected to this.⁴²⁵ He argued that the State would not ordinarily be permitted to cross-examine the witness about his incarceration;⁴²⁶ but that once Greene appeared in jail clothes, his prisoner status would be obvious.⁴²⁷ The trial court overruled this objection stating, "[w]e [do not] dress out witnesses" no matter whom they would testify for.⁴²⁸ Counsel also argued the jury would think Greene was a codefendant, while he in fact was not.⁴²⁹ The defense wanted to bring this out but declined to do so when the trial judge said it would open up Greene

415. *Id.* at 1108–09.

416. 140 So. 3d 1106 (Fla. 1st Dist. Ct. App. 2014).

417. *Id.* at 1107.

418. *See id.*

419. *Id.*

420. *Id.*

421. *Hayes*, 140 So. 3d at 1108.

422. *Id.* at 1107.

423. *Id.* at 1107–08.

424. *Id.*

425. *Id.* at 1107.

426. *Hayes*, 140 So. 3d at 1107. The opinion never mentions the exact offense for which Greene was jailed. *See id.* at 1107–08. However, it was obviously one that was unavailable for impeachment by prior conviction under section 90.610(1) of the Florida Statutes. *See id.* at 1107; FLA. STAT. § 90.610(1) (2014).

427. *Hayes*, 140 So. 3d at 1107.

428. *Id.* (first alteration in original).

429. *Id.*

to inquiry about his criminal history.⁴³⁰ Greene ultimately testified in jail clothes, and the jury never heard he was not a codefendant to the robbery charge.⁴³¹

In a short but well-reasoned opinion, the First District reversed and remanded for a new trial.⁴³² The court first discussed the prohibition against forcing a defendant to testify in jail clothing.⁴³³ To do so would violate several of an accused's fundamental rights.⁴³⁴ First, it would violate his presumption of innocence.⁴³⁵ Secondly, it would also violate his right to equal protection of the law as forcing defendants to testify in jail clothes would usually only affect those who could not make bail before trial.⁴³⁶

As to forcing a defense witness to testify dressed in jail clothes, only the Second District Court of Appeal had previously addressed this issue.⁴³⁷ In *Mullins v. State*,⁴³⁸ the court found such to be error as it could have an indirect effect on the accused's presumption of innocence.⁴³⁹ Witnesses do not have the same presumption of innocence as defendants, but defendants should not be exposed to the dangers of guilt by association or to having their witness's credibility unfairly undermined by matters that would be otherwise unusable for impeachment.⁴⁴⁰

The First District agreed with this reasoning and noted that courts from other states agreed with it as well.⁴⁴¹ *Hayes* also commented that at least one other state court had found that forcing a defense witness to testify in jail clothes generally “further[s] no vital State interest.”⁴⁴² The First District recognized there could be unusual situations when safety concerns or other circumstances justified requiring witnesses to testify in jail clothes or even physical restraints.⁴⁴³ But this was not the case here.⁴⁴⁴ Instead, it

430. *Id.* at 1107–08.

431. *Id.* at 1108.

432. *Hayes*, 140 So. 3d at 1108–09.

433. *Id.* at 1108.

434. *Id.*

435. *Id.*

436. *Id.*

437. *See Hayes*, 140 So. 3d at 1108; *Mullins v. State*, 766 So. 2d 1136, 1136 (Fla. 2d Dist. Ct. App. 2000).

438. 766 So. 2d 1136 (Fla. 2d Dist. Ct. App. 2000).

439. *Id.* at 1137.

440. *See id.*

441. *Hayes*, 140 So. 3d at 1108.

442. *Id.* (quoting *State v. Artwell*, 832 A.2d 295, 303 (N.J. 2003)).

443. *Id.* at 1109.

444. *Id.*

seemed that it was merely “not the common practice”⁴⁴⁵ for this judge to let prisoner witnesses’ change into civilian clothes before testifying.⁴⁴⁶

The appellate court refused to find harmless error.⁴⁴⁷ Greene’s testimony that Hayes was not one of the robbers was critical to Hayes’s defense; thus, anything detracting from Greene’s credibility could hurt this.⁴⁴⁸ The court thus could not say there was “no reasonable possibility that the error contributed to the conviction.”⁴⁴⁹

Three things in general should happen as a result of this decision. First, this practice should be stopped. Indeed, it is almost inconceivable that it happened in the first place. Perhaps, the First District’s opinion should be required reading for newly elected or appointed judges when they attend judge school. Second, defense counsel should be alert, like the one here, to object to this when it might take place. Finally, prosecutors should also try to prevent such errors from taking place. Prosecutors have an ethical obligation to seek justice and not just try to get convictions at all cost.⁴⁵⁰ Additionally, why would any smart prosecutor want this to happen when it might easily lead to reversible error like it did here? In fairness to the State in this case, there is no mention of the State ever objecting to Greene testifying in civilian clothes or objecting to a short continuance while he changed. In the future, prosecutors should join with defense counsel to see that this scenario is never repeated.

D. *Impeaching a Hearsay Declarant*

Occasionally, statements from someone who does not actually testify get admitted as substantive proof.⁴⁵¹ If offered for their truth, the statements are hearsay.⁴⁵² When this happens, section 90.806(1) of the Florida Statutes provides in part that the declarant’s credibility “may be attacked . . . by any evidence that would be admissible for those purposes if the declarant had testified as a witness.”⁴⁵³ Cases construing this provision seldom arise for

445. *Id.*

446. *Hayes*, 140 So. 3d at 1109.

447. *Id.*

448. *See id.* at 1107–09.

449. *Id.* at 1109 (quoting *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986)).

450. *See* MODEL RULES OF PROF’L CONDUCT r. 3.8 cmt. 1 (Am. Bar Ass’n 2013).

451. *See* FLA. STAT. § 90.801(1)(c) (2014).

452. *Id.*

453. *Id.* § 90.806(1). This subsection also provides that if so attacked, the declarant’s credibility “may be supported by any evidence that would be admissible for those purposes if the declarant had testified as a witness.” *Id.*

various reasons.⁴⁵⁴ First, it is more persuasive to rely on testimony from actual witnesses than from someone's statement about what someone else said.⁴⁵⁵ Second, the Sixth Amendment's Confrontation Clause acts as a partial check on admission of some hearsay from unavailable declarants.⁴⁵⁶

One instance where counsel may try to admit hearsay from unavailable declarants involves defendants who want their exculpatory out-of-court statements admitted without their having to testify and be fully cross-examined.⁴⁵⁷ Provisions of section 90.806(1) of the Florida Statutes stand as a partial obstacle for those defendants who wish to *have their cake and eat it too* by doing this.⁴⁵⁸ One 2014 case illustrates both the danger to the criminally accused in trying to do so and also sets parameters on the extent of the State's ability to impeach hearsay declarants.⁴⁵⁹

In *Mathis v. State*,⁴⁶⁰ the State charged James Mathis with possession of cocaine and possession of drug paraphernalia.⁴⁶¹ The drugs were found when the police executed a search warrant at Mathis' residence.⁴⁶² He was home and arrested after the drugs were found.⁴⁶³ On cross-examination, a police officer admitted talking with Mathis the day of the arrest.⁴⁶⁴ The officer conceded Mathis never made any admissions during their conversation.⁴⁶⁵ The trial court, on the State's request, ruled the defense had introduced exculpatory testimony during the cross-examination, thus entitling the State to introduce copies of Mathis' eight felony convictions and one misdemeanor conviction for a crime of dishonesty.⁴⁶⁶ The State did so, and Mathis was convicted.⁴⁶⁷

On appeal, Mathis argued the officer's cross-examination testimony was not exculpatory.⁴⁶⁸ The Second District disagreed as the conversation established Mathis "presumably denied . . . the drugs belonged to him."⁴⁶⁹

454. See FLA. STAT. § 90.806; 1 EHRHARDT, *supra* note 21, at § 801.1.

455. See 1 EHRHARDT, *supra* note 21, at § 801.1.

456. See U.S. CONST. amend. VI; FLA. STAT. § 90.806.

457. See *Freeman v. State*, 74 So. 3d 123, 125 (Fla. 1st Dist. Ct. App. 2011).

458. See FLA. STAT. § 90.806(1).

459. *Mathis v. State*, 135 So. 3d 484, 485 (Fla. 2d Dist. Ct. App. 2014).

460. 135 So. 3d 484 (Fla. 2d Dist. Ct. App. 2014).

461. *Id.* at 485.

462. *Id.*

463. *Id.*

464. *Id.*

465. *Mathis*, 135 So. 3d at 485.

466. *Id.*

467. *Id.*

468. *Id.*

469. *Id.* This ruling seems undoubtedly correct. Why would the defense have asked the question involved if not to elicit exculpatory testimony?

Thus, the State could impeach him by prior convictions.⁴⁷⁰ However, the appellate court agreed the State's actual impeachment of Mathis went too far.⁴⁷¹ While the State was entitled to impeach Mathis with his past criminal record, it was not automatically entitled to introduce copies of the prior convictions themselves.⁴⁷² Had Mathis taken the stand and testified, he could have been impeached by prior conviction under section 90.610 of the Florida Statutes.⁴⁷³ Under this rule, the State could have asked Mathis if he had ever been convicted of a felony or any crimes involving dishonesty or false statements.⁴⁷⁴ If Mathis had said yes, the State would then have been allowed to ask him *how many?* or *how many times?*⁴⁷⁵ If Mathis had given accurate answers to both questions, further interrogation on his prior convictions would have been disallowed.⁴⁷⁶ The State would only have been able to introduce copies of his prior convictions if Mathis had answered untruthfully to one of the two previous answers.⁴⁷⁷

In *Huggins v. State*,⁴⁷⁸ the Supreme Court of Florida permitted introduction of a defendant's prior convictions after he elicited his own statements as favorable hearsay but limited the procedure for doing so.⁴⁷⁹ The trial court told the jury of the number of the accused's convictions and whether they were for felonies or for crimes of dishonesty or false statement.⁴⁸⁰ The trial court also gave a special limiting instruction on the permissible use of the convictions.⁴⁸¹ The names of the convictions were never mentioned.⁴⁸² After *Huggins*, in *Freeman v. State*,⁴⁸³ the district court of appeal suggested an added procedure.⁴⁸⁴ The trial court should wait until the defense rests before deciding on a state's request to impeach a hearsay declarant.⁴⁸⁵ If the declarant testified later at trial, then cross-examination

470. *Id.*

471. *Id.*

472. *Id.* at 485–86.

473. *Id.*; see also FLA. STAT. § 90.610 (2014).

474. *Mathis*, 135 So. 3d at 485–86; see also FLA. STAT. § 90.610.

475. *Mathis*, 135 So. 3d at 487.

476. *Id.* at 486–87.

477. *Id.* at 487.

478. 889 So. 2d 743 (Fla. 2004).

479. *Id.* at 755–56.

480. *Id.* at 754.

481. *Id.*

482. *Id.* at 756–57.

483. 74 So. 3d 123 (Fla. 1st Dist. Ct. App. 2011).

484. See *Huggins*, 889 So. 2d at 755–57; *Freeman*, 74 So. 3d at 125.

485. *Freeman*, 74 So. 3d at 125.

could proceed according to the usual procedure.⁴⁸⁶ If not, the impeachment would follow as *Huggins* discussed.⁴⁸⁷

The trial court in *Mathis* followed neither procedure.⁴⁸⁸ It did not wait to see if Mathis would ultimately testify.⁴⁸⁹ It also did not give a cautionary jury instruction to use Mathis' prior convictions only to evaluate the credibility of his out-of-court statements and not as substantive proof of guilt, which would have been improper propensity use of the convictions.⁴⁹⁰ Finally, it improperly admitted copies of the convictions, thus allowing the jury to see the exact crimes he was convicted for.⁴⁹¹ The Second District declined to find these errors were harmless.⁴⁹² Only one witness said the drugs were Mathis', and her own credibility was in question because of her prior convictions.⁴⁹³

V. ATTORNEY-CLIENT PRIVILEGE

The privilege for attorney-client confidential communications is recognized by all states and by federal case law as well.⁴⁹⁴ Section 90.502(2) of the Florida Statutes provides that "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing the contents of confidential communications when such other person learned of the

486. *Id.*

487. *Id.*; *Huggins*, 889 So. 2d at 755–57.

488. *Mathis v. State*, 135 So. 3d 484, 486 (Fla. 2d Dist. Ct. App. 2014); *see also Huggins*, 889 So. 2d at 755–57; *Freeman*, 74 So. 3d at 125.

489. *Mathis*, 135 So. 3d at 486–87.

490. *Id.* The cautionary instruction in *Freeman* is a good example of what the jurors should have been told. *Id.* at 486; *see also Freeman*, 74 So. 3d at 125. "[E]vidence of prior convictions should be considered only for the purpose of assessing the defendant's credibility of statements he allegedly made that were related by a witness and are not to be considered as proof of guilt for the charged offense." *Freeman*, 74 So. 3d at 125.

491. *Mathis*, 135 So. 3d at 485. The court's opinion does not say whether this happened, but if the copies had been allowed back into the jury room during deliberations, this would have been further error. *See id.* at 485–87.

492. *See id.* at 487.

493. *Id.* at 487.

494. *See, e.g., Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 647 (Tex. 1995). Federal Rule of Evidence 501 recognizes several general types of privileges: Those recognized at common law; those in the U.S. Constitution; those created by federal statute; and those created by the rules of the Supreme Court of the United States. FED. R. EVID. 501. When a common law version of a privilege conflicts with any of the latter three types, the common law version gives way. *Id.*

The attorney-client privilege has long been recognized as existing at common law and thus, continues to exist under federal case law. *See id.* 501, 502. Federal Rule of Evidence 502 specifically discusses waiver limitations and inadvertent disclosure of material otherwise protected by the attorney-client privilege and its closely related common law cousin, work product. *Id.* 502.

communications because they were made in the rendition of legal services to the client.”⁴⁹⁵ Cases on the privilege decided during this Survey period seemed to fall within two main areas.⁴⁹⁶ They involved questions about the privilege’s scope and its waiver, or about the crime-fraud exception to the privilege.⁴⁹⁷ Each of these areas deserves brief discussion.⁴⁹⁸

A. *Scope and Waiver of the Attorney-Client Privilege*

The privilege does not protect all interchange of information between clients and their lawyers, only those communications that are considered *confidential* and made to get or give legal advice.⁴⁹⁹ Florida law places the burden on the party claiming the privilege to show it exists and also to show it has not been waived.⁵⁰⁰ During this Survey period, Florida courts found the following protected by the privilege: fee arrangements between clients and their attorneys,⁵⁰¹ billing records between clients and attorneys,⁵⁰² and original draft responses to interrogatories sent from the client to her attorney.⁵⁰³ However, information that would not be protected in a client’s possession does not become protected by transfer to an attorney.⁵⁰⁴ Thus, trust account wire receipts reflecting payments into a law firm’s trust accounts after judgment was obtained against a judgment debtor are not protected by the privilege.⁵⁰⁵

As with other privileges, the one for attorney-client communications can be waived.⁵⁰⁶ This may be done by answering questions at a

495. FLA. STAT. § 90.502(2) (2014).

496. See *Genovese v. Provident Life & Accident Ins. Co.*, 74 So. 3d 1064, 1065–66 (Fla. 2011), *review denied*, 157 So. 3d 1043 (Fla. 2014); *Merco Grp. of the Palm Beaches, Inc. v. McGregor*, 162 So. 3d 49, 50 (Fla. 4th Dist. Ct. App. 2014); *RC/PB, Inc. v. Ritz-Carlton Hotel Co.*, 132 So. 3d 325, 326 (Fla. 4th Dist. Ct. App. 2014); *infra* Sections V.A–V.B.

497. See *Genovese*, 74 So. 3d at 1065–66; *McGregor*, 162 So. 3d at 50; *RC/PB, Inc.*, 132 So. 3d at 326; *infra* Sections V.A–V.B.

498. See *infra* Sections V.A–V.B.

499. See FLA. STAT. § 90.502(1)(c)(1).

500. *RC/PB, Inc.*, 132 So. 3d at 326.

501. *Tumelaire v. Naples Estates Homeowners Ass’n*, 137 So. 3d 596, 598 (Fla. 2d Dist. Ct. App. 2014).

502. *Id.* at 599.

503. See *Montanez v. Publix Super Mkts., Inc.*, 135 So. 3d 510, 512 (Fla. 5th Dist. Ct. App. 2014).

504. See *Sweetapple Broeker & Varkas, P.L. v. Simmons*, 151 So. 3d 42, 43 (Fla. 3d Dist. Ct. App. 2014).

505. *Id.*

506. See FLA. STAT. § 90.507 (2014) (discussing waiver in general for all privileges); *infra* Part VI (discussing waiver of the psychotherapist-privilege).

deposition⁵⁰⁷ or by using the communications as the basis for arguments or answering questions at a hearing.⁵⁰⁸

One recent case concerning the privilege's scope in bad faith tort actions is worthy of discussion.⁵⁰⁹ Insurance companies owe a duty of good faith to their insureds in defending them in lawsuits.⁵¹⁰ The companies also owe a duty of good faith to the plaintiffs bringing such lawsuit to process the plaintiffs' claims in a reasonable manner.⁵¹¹ When a plaintiff is awarded a judgment against an insured in excess of the insured's policy limits, both first-party and third-party bad faith actions against the company become a possibility.⁵¹²

*Boozer v. Stalley*⁵¹³ involved the following factual background. Benjamin Hintz was severely injured in a motor vehicle accident involving Emily Boozer.⁵¹⁴ Boozer was covered by two Allstate policies totaling \$1.1 million coverage.⁵¹⁵ Douglas Stalley, Hintz's guardian, sued Boozer for negligence and recovered a \$11.1 million verdict.⁵¹⁶ Allstate paid its policy limits exposure, leaving \$10 million unsatisfied.⁵¹⁷ Virgil Wright, an attorney, had been retained to defend Boozer.⁵¹⁸ When Stalley filed a third-party bad faith action against Allstate to collect the unsatisfied balance, Wright continued to appear on Boozer's behalf in the post judgment proceedings.⁵¹⁹ Stalley wished to both depose Wright and to subpoena his files in the underlying negligence action.⁵²⁰ Wright moved for a protective order, asserting attorney-client privilege.⁵²¹ Wright argued that communications between he and Boozer were privilege protected and that she had not assigned any first-party bad faith claim she might have against

507. See *Montanez*, 135 So. 3d at 512. However, here, the court found the actual answers did not constitute a waiver. *Id.* at 512–13.

508. See *Butler v. Harter*, 152 So. 3d 705, 713–14 (Fla. 1st Dist. Ct. App. 2014). Here, the court found that an attorney's affidavit merely listing the number of hours worked on a case and the fees incurred did not disclose privileged information. *Id.* at 714.

509. *Boozer v. Stalley*, 146 So. 3d 139, 140 (Fla. 5th Dist. Ct. App. 2014) (en banc).

510. *Id.* at 143.

511. *Id.* at 143–44, 44 n.1.

512. *Id.* at 142.

513. 146 So. 3d 139 (Fla. 5th Dist. Ct. App. 2014) (en banc).

514. *Id.* at 139.

515. *Id.*

516. *Id.*

517. *Id.*

518. *Boozer*, 146 So. 3d at 141.

519. *Id.*

520. *Id.*

521. *Id.*

Allstate to Stalley.⁵²² Wright appeared at a deposition with his litigation file.⁵²³ He answered general questions about his case management system and also about how his files were organized.⁵²⁴ He refused to answer any questions or produce documents relating to his direct representation of Boozer.⁵²⁵ Both Wright and Boozer petitioned for a writ of certiorari claiming the trial court erred by not granting them a protective order.⁵²⁶ Stalley responded that since he had filed a third party action, he stood in Boozer's shoes and should be able to obtain any communications that would be available to her as a client.⁵²⁷

After deciding that certiorari review was an appropriate means to address the legal issues here, the Fifth District Court of Appeal undertook an extensive review of the law in this area.⁵²⁸ *Boston Old Colony Insurance Co. v. Gutierrez*⁵²⁹ was deemed the first modern decision to consider whether an attorney representing both an insured and an insurer could be deposed and required to produce a litigation file in a third-party bad faith action brought without an assignment of claim from the insured.⁵³⁰ There, the court found the plaintiff was entitled to the insured's attorney's entire file from the lawsuit's start until the date judgment was entered in the underlying action.⁵³¹ This was so because the excess judgment creditor now stood in the position of the insured as far as bringing a bad faith action.⁵³² Following *Gutierrez*, the Fifth District in *Dunn v. National Security Fire & Casualty Co.*,⁵³³ had rejected claims of both work product and attorney-client privilege protection against disclosure of original litigation files in third party bad faith actions.⁵³⁴

In *Boozer*, the Fifth District acknowledged both those decisions supported the trial court's ruling that Stalley should be able to review parts of Wright's litigation file and to depose him about his representation of her.⁵³⁵ However, the Court found two subsequent Supreme Court decisions left the

522. *Id.*

523. *Boozer*, 146 So. 3d at 141.

524. *Id.*

525. *Id.*

526. *Id.*

527. *Id.*

528. *Boozer*, 146 So. 3d at 141–48.

529. 325 So. 2d 416 (Fla. 3d Dist. Ct. App. 1976).

530. *Id.* at 416–17.

531. *Id.* at 417.

532. *Id.*

533. 631 So. 2d 1103 (Fla. 5th Dist. Ct. App. 1993).

534. *Id.* at 1105; see also *Gutierrez*, 325 So. 2d at 417.

535. *Boozer v. Stalley*, 146 So. 3d 139, 139, 140, 142, 147–48 (Fla. 5th Dist. Ct. App. 2014) (en banc).

holdings in *Gutierrez* and *Dunn* in question.⁵³⁶ *Allstate Indemnity Co. v. Ruiz*,⁵³⁷ had held that in statutory first-party bad faith actions,⁵³⁸ work product material was discoverable depending upon whether the requesting party could show both a need for such and substantial hardship unless it is able to do so.⁵³⁹ In so doing, the court refused to draw any distinction for discovery purposes between first-party and third-party bad faith actions.⁵⁴⁰

The Fifth District found *Ruiz*'s possible impact potentially countered by the Supreme Court of Florida's later holding in *Genovese v. Provident Life & Accident Insurance Co.*,⁵⁴¹ a first-party bad faith action case that refused to extend *Ruiz*'s holding to discovery issues involving attorney-client privileged communications.⁵⁴² *Genovese* noted a clear distinction between the purposes behind each privilege.⁵⁴³ The work product privilege exists to protect an attorney's efforts to prepare, bring and defend litigation.⁵⁴⁴ However, it can be overcome in circumstances of need and hardship.⁵⁴⁵ The attorney-client privilege exists to foster open communications in the attorney-client relationship.⁵⁴⁶ Unlike work product, claims of need and hardship are not sufficient to abrogate this privilege.⁵⁴⁷ As there is no statutory exception for disclosure of this privilege's protected communications in first-party bad faith actions, the privilege protected communications between an insurer and its attorney in these cases.⁵⁴⁸

The Fifth District noted that the certified question in *Genovese* was limited to first-party action cases.⁵⁴⁹ However, *Boozer* examined cases from Florida's state⁵⁵⁰ and federal courts⁵⁵¹ that found the same result should be

536. *Genovese v. Provident Life & Accident Ins. Co.*, 74 So. 3d 1064, 1069 (Fla. 2011), *review denied*, 157 So. 3d 1043 (Fla. 2014); *Allstate Indem. Co. v. Ruiz*, 899 So. 2d 1121–22 (Fla. 2005); *see also Gutierrez*, 325 So. 2d at 417; *Dunn*, 631 So. 2d at 1105.

537. 899 So. 2d 1121 (Fla. 2005).

538. FLA. STAT. § 624.155(1)(b)(1) (2002).

539. *Ruiz*, 899 So. 2d at 1122.

540. *Id.* at 1131. *Ruiz* contains a helpful discussion on the evolution of third-party and first-party actions in Florida. *Id.* at 1129.

541. 74 So. 3d 1064 (Fla. 2011), *review denied*, 157 So. 3d 1043 (Fla. 2014).

542. *Id.* at 1069; *see also Ruiz*, 899 So. 2d at 1132.

543. *Genovese*, 74 So. 3d at 1067.

544. *Id.*

545. *Id.* at 1068.

546. *Id.* at 1067.

547. *Id.* at 1068.

548. *See Genovese*, 74 So. 3d at 1068; FLA. STAT. § 90.502(c) (2014).

549. *Genovese*, 74 So. 3d at 1065–66.

550. *Boozer v. Stalley*, 146 So. 3d 139, 144 (Fla. 5th Dist. Ct. App. 2014) (en banc); *see also Progressive Express Ins. Co. v. Scoma*, 975 So. 2d 461, 465 (Fla. 2d Dist. Ct. App. 2007).

551. *See Maharaj v. Geico Cas. Co.*, 289 F.R.D. 666, 670 (S.D. Fla. 2013).

obtained in third-party bad faith actions.⁵⁵² Thus, it found the protective order should have been granted in *Boozer*.⁵⁵³

The court in so doing, recognized the uncertainty in this area and certified the following question as one of great public importance:

“DO THE DECISIONS IN *ALLSTATE INDEMNITY CO. V. RUIZ* . . . AND *GENOVESE V. PROVIDENT LIFE & ACCIDENT INSURANCE CO.* . . . SHIELD ATTORNEY-CLIENT PRIVILEGED COMMUNICATIONS FROM DISCOVERY IN THIRD-PARTY BAD FAITH LITIGATION?”⁵⁵⁴

The Supreme Court of Florida accepted jurisdiction on this question.⁵⁵⁵ However, before any briefs were filed, both parties moved to dismiss, and the court granted the motion.⁵⁵⁶ Justices Pariente and Lewis both filed dissents from the dismissal.⁵⁵⁷ Both justices argued that once the court accepted jurisdiction, it could still decide the issue regardless of the parties’ motions.⁵⁵⁸ Justice Pariente noted that the underlying bad faith claim had been removed to federal court.⁵⁵⁹ Thus, the privilege issue might arise again there, and the Supreme Court of Florida could be asked to decide it on a certified question.⁵⁶⁰ Both justices also recognized the present uncertainty that exists in this area and the need for its resolution.⁵⁶¹

This is an issue that is not likely to go away. When and how the Supreme Court of Florida ultimately resolves it cannot be determined. The author believes that proponents of the privilege protection have the better argument. If Florida is to recognize the privilege, then it should recognize it for all cases unless exceptional reasons exist for doing otherwise. Since the privilege is a creature of statute, any exceptions should be recognized first by the legislature. Yes, application of the privilege may mean that in some individual cases it will be very difficult, if not impossible, for plaintiffs like *Stalley* to successfully bring a claim. But that is the price to be paid whenever privilege protection exists. The legislature has decided so far that this price is one generally worth paying.⁵⁶² The decision whether to change this should be left in its hands.

552. *Boozer*, 146 So. 3d at 144.

553. *See id.* at 141, 148.

554. *Id.* at 148 (citations omitted).

555. *Stalley v. Boozer*, 40 Fla. L. Weekly S221b (Fla. Apr. 17, 2015).

556. *Id.*

557. *Id.*

558. *Id.*

559. *Id.* (Pariente, J., dissenting).

560. *Stalley*, 40 Fla. L. Weekly S221b (Pariente J., dissenting).

561. *Id.* (Pariente and Lewis, JJ., dissenting).

562. FLA. STAT. § 90.502 (2014).

B. *Crime-Fraud Exception*

Statutorily, there are five exceptions where otherwise confidential communications are not protected by the attorney-client privilege.⁵⁶³ The most commonly invoked and discussed exception is the one dealing with claims of crime or fraud.⁵⁶⁴ The whole purpose for the privilege's existence in the first place is to encourage people to seek legal advice without creating situations where either what prospective clients tell attorneys or what attorneys tell clients will come back to haunt the client.⁵⁶⁵ Lawyers need accurate and complete information from clients in order to best advise them, and clients should not be afraid their attorneys' advice will be disclosed to the world unless the client chooses to do so.⁵⁶⁶ However, when a client seeks assistance for legally unworthy purposes, such as for advice on how to commit a crime or on how to hide assets from creditors after the fact, the privilege's purposes are not being furthered.⁵⁶⁷

During this Survey period, one case provided important instruction on how trial courts should proceed when claims of the crime-fraud exception are made.⁵⁶⁸ In *Merco Group of the Palm Beaches, Inc. v. McGregor*,⁵⁶⁹ judgment creditors served subpoenas upon Merco Group's lawyers, seeking documents on the location and treatment of funds that had been put into Merco's lawyers' trust account.⁵⁷⁰ Merco opposed the subpoena, claiming the records were attorney-client privilege protected among other reasons.⁵⁷¹ The trial court rejected all other reasons⁵⁷² except the privilege claim.⁵⁷³ As to that, the judge ordered production of all documents for in camera review and also instructed Merco to file a privilege log identifying each specific document it claimed privileged.⁵⁷⁴ After this and an additional hearing on issues of relevancy, the judge ordered production of the documents, finding prima facie evidence Merco had used the attorney-client relationship to

563. *Id.* § 90.502(4)(a)–(e).

564. *Id.* § 90.502(4)(a). No case during this Survey period discussed any of the four other exceptions.

565. *See Genovese*, 74 So. 3d at 1065–66.

566. *See id.*

567. *See Merco Grp. of the Palm Beaches, Inc. v. McGregor*, 162 So. 3d 49 (Fla. 4th Dist. Ct. App. 2014).

568. *See id.* at 51.

569. 162 So. 3d 49 (Fla. 4th Dist. Ct. App. 2014).

570. *Id.* at 50.

571. *Id.*

572. *Id.* The opinion does not state what these reasons were. *Id.*

573. *McGregor*, 162 So. 3d at 50.

574. *Id.*

conceal assets that should have been discoverable.⁵⁷⁵ From this order Merco petitioned for certiorari.⁵⁷⁶

The Fourth District agreed that the trial court's procedure was improper and that its production order should be at least temporarily quashed.⁵⁷⁷ There was no error in ordering the *in camera* inspection of the documents.⁵⁷⁸ The court also did not address whether the trial judge's conclusion that the creditors had made a *prima facie* of fraud was correct. Where the trial court erred was in not holding a subsequent evidentiary hearing after this finding where Merco could try to provide a "reasonable explanation of its conduct or communications."⁵⁷⁹ Thus, whenever there is a claim the crime-fraud exception requires production of otherwise privileged information, at least two hearing should be required.⁵⁸⁰ The first hearing should be to address whether the exception might lie.⁵⁸¹ This should be followed by *in camera* inspection that would protect the privileged information if the privilege claim is sustained.⁵⁸² If the trial finds a *prima facie* case that the exception applies, an evidentiary hearing must be afforded the party claiming the privilege to further explain why the court's tentative conclusion is incorrect.⁵⁸³ Only after rejecting any explanations from the privilege's proponent should disclosure be ordered.⁵⁸⁴

The hearing at which a party claims the exception applies must be noticed as an evidentiary one if the party plans to introduce proof there.⁵⁸⁵ Otherwise, counsel cannot fairly defend against claims the privilege is inapplicable.⁵⁸⁶ Failure to properly notify an opponent that a scheduled hearing is meant to be evidentiary in nature should mean that both any finding of fraud made there and any *in camera* inspection order should be quashed on certiorari.⁵⁸⁷ This situation occurred in *Trans Health Management, Inc. v. Nunziata*⁵⁸⁸ during this Survey period.⁵⁸⁹

575. *Id.* at 50–51. The opinion also does not state what the judgment against Merco was for and how much it was for. *Id.* at 50.

576. *Id.* at 51.

577. *McGregor*, 162 So. 3d at 51–52.

578. *Id.* at 51.

579. *Id.*

580. *Id.*

581. *Id.*

582. *McGregor*, 162 So. 3d at 51.

583. *See id.* at 50–51.

584. *See id.* at 51.

585. *See id.*

586. *Id.*

587. *McGregor*, 162 So. 3d at 51–52; *see also* *Trans Health Mgmt., Inc. v. Nunziata*, 159 So. 3d 850, 859–60 (Fla. 2d Dist. Ct. App. 2014).

588. 159 So. 3d 850 (Fla. 2d Dist. Ct. App. 2014).

589. *See id.* at 859–60.

VI. PSYCHOTHERAPIST-PATIENT PRIVILEGE

Florida law contains a statutory privilege for confidential communications between a psychotherapist⁵⁹⁰ and patient.⁵⁹¹ Section 90.503(2) of the Florida Statutes provides in part that patients have a general privilege against disclosure of confidential communications to their psychotherapist with several statutory exceptions.⁵⁹² The broad nature and scope of this privilege is obviously to encourage people to seek assistance for their mental or emotional problems without having their discussions about them revealed to the world. During 2014, three reported cases discussed various aspects of this privilege.⁵⁹³

A. *The Privilege in General*

*S.P. ex rel. R.P. v. Vecchio*⁵⁹⁴ demonstrates that the privilege affords protections to some persons who are not formal parties to litigation. Vecchio was accused of multiple sexual offenses against a fourteen-year-old child.⁵⁹⁵ The child told a night security guard at a condominium she had escaped from a man who molested her.⁵⁹⁶ The child received a physical exam from a Child Protection Team doctor which revealed semen in her vaginal area.⁵⁹⁷ Police interviewed Vecchio after the security guard identified him from surveillance footage in one of the condominium's elevators.⁵⁹⁸ Vecchio admitted

590. FLA. STAT. § 90.503(1)(a)(1)–(4) (2014). The definition of psychotherapist under this privilege is extremely broad. *See id.* It includes medical doctors, psychologists, credentialed clinical social workers, mental health counselors, family therapists, and treatment personnel of certain statutorily listed facilities if these persons “are engaged primarily in the diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction.” *Id.*

The definition also includes advanced registered nurse practitioners who are engaged in similar diagnosis or treatment care. *Id.* § 90.503(1)(a)(5).

591. *Id.* § 90.503(1)(b). A patient is someone who consults or is interviewed by a psychotherapist for “diagnosis or treatment of mental or emotional condition[s], including alcoholism and other drug addiction.” FLA. STAT. § 90.503(1)(b).

592. *See id.* § 90.503(2)–(4).

593. *See S.P. ex rel. R.P. v. Vecchio*, 162 So. 3d 75, 77 (Fla. 4th Dist. Ct. App. 2014); *State v. Topps*, 142 So. 3d 978, 979 (Fla. 4th Dist. Ct. App. 2014); *Scully v. Shands Teaching Hosp. Clinics, Inc.*, 128 So. 3d 986, 988 (Fla. 1st Dist. Ct. App. 2014).

594. 162 So. 3d 75 (Fla. 4th Dist. Ct. App. 2014).

595. *Id.* at 77.

596. *Id.*

597. *Id.*

598. *Id.*

performing sexual acts with the victim.⁵⁹⁹ The semen discovered in the exam also was found to be the defendant's.⁶⁰⁰

The victim had been sent out of state for treatment.⁶⁰¹ Unfortunately, she relapsed after ten months of treatment when she heard the case against Vecchio had not been concluded.⁶⁰² The treatment center filed a declaration of her unavailability, and the state said it would proceed without her as a witness.⁶⁰³ Vecchio moved to subpoena her medical, psychiatric, and other records.⁶⁰⁴ The trial court conducted an *in camera* review of the records and made one of them available to the defense.⁶⁰⁵ The others were re-sealed.⁶⁰⁶ After this, the defendant pled open "to lewd or lascivious battery, lewd or lascivious molestation, and battery on a child."⁶⁰⁷ The State's sentencing memorandum mentioned the victim's continuing emotional distress, and her father testified about the same.⁶⁰⁸ Vecchio moved the trial court to unseal the victim's records, so he could raise a discovery violation on appeal.⁶⁰⁹ S.P., the victim's natural guardian opposed unsealing the records, arguing they were private and privileged.⁶¹⁰ The trial court granted Vecchio's motion, and the State petitioned for certiorari review, which was granted.⁶¹¹

The Fourth District quashed the trial court's order for several reasons.⁶¹² Under Florida law, the Florida Constitution's Right to Privacy⁶¹³ protected the victim's medical records from disclosure.⁶¹⁴ Florida statutory law also protects confidential medical records from disclosure.⁶¹⁵ Finally, the psychotherapist-patient privilege protected her confidential communications to her doctors and others, made so she could get treatment.⁶¹⁶ The privilege admittedly created three statutory exceptions where disclosure was allowed: "(1) during involuntary commitment proceedings, (2) when . . . a court order[s] mental examination[s], [and] (3)

599. S.P., 162 So. 3d at 77.

600. *Id.*

601. *Id.*

602. *See id.*

603. *Id.* at 77–78.

604. S.P., 162 So. 3d at 78.

605. *Id.*

606. *Id.*

607. *Id.*

608. *Id.*

609. S.P., 162 So. 3d at 78.

610. *Id.* at 79.

611. *Id.*

612. *Id.* at 81.

613. FLA. CONST. art. I, § 23.

614. *Id.*; S.P., 162 So. 3d at 79.

615. FLA. STAT. § 456.057(7)(a) (2014); S.P., 162 So. 3d at 79.

616. S.P., 162 So. 3d at 79.

when the patient . . . relies on [his] mental condition . . . as [a] claim or defense” in litigation.⁶¹⁷ However, none of these applied.⁶¹⁸ The Fourth District also recognized that the privilege could be breached if *good cause*⁶¹⁹ was shown but declined to find such here.⁶²⁰ The records would only have confirmed the victim’s trauma already shown at the sentencing hearing.⁶²¹ As to any potential *Brady v. Maryland*⁶²² discovery violation, the defendant did not meet his burden of showing this existed.⁶²³ The Fourth District also commended the trial court’s *in camera* review of the victim’s records as ensuring no exculpatory evidence was withheld.⁶²⁴

The Fourth District’s last point, commending the trial court’s *in camera* review of alleged privileged records to see if an exception or good cause existed for their disclosure, stands in partial contrast to what happened in *Scully v. Shands Teaching Hospital & Clinics, Inc.*⁶²⁵ There, the appellant had filed a perceived disability based claim under the Florida Civil Rights Act alleging she had been wrongly constructively discharged.⁶²⁶ The alleged constructive discharge came from Scully’s refusal to give Shands a copy of a monitoring contract with the Professional Resource Network (“PRN”).⁶²⁷ Scully had been “admitted to a psychiatric hospital [due to] an adverse reaction to . . . medication for her psychiatric condition.”⁶²⁸ PRN assured Shands she could safely return to work and was in the process of establishing a monitoring contract with PRN.⁶²⁹

Scully sought to protect her PRN records from discovery.⁶³⁰ The trial court denied her a protective order and ordered their production.⁶³¹ Scully sought certiorari review in the district court.⁶³²

The First District found the records relevant and not protected by the psychotherapist-patient privilege as “Scully placed her medical and psychiatric condition[s]” in issue by both the basis of her “claim and her

617. *Id.* at 79–80; *see also* FLA. STAT. § 90.503(4)(a)–(c).

618. *S.P.*, 162 So. 3d at 80.

619. *Id.* at 79; *see also* FLA. STAT. § 394.4615(2)(c).

620. *S.P.*, 162 So. 3d at 79–80.

621. *Id.* at 80.

622. 373 U.S. 83 (1963).

623. *S.P.*, 162 So. 3d at 79–80.

624. *Id.* at 80.

625. *Id.*; 128 So. 3d 986, 988 (Fla. 1st Dist. Ct. App. 2014).

626. *Scully*, 128 So. 3d at 988.

627. *Id.* at 987.

628. *Id.*

629. *Id.*

630. *Id.* at 988.

631. *Scully*, 128 So. 3d at 988.

632. *Id.*

request for emotional . . . damages.”⁶³³ Thus, a statutory exception contained in the privilege existed⁶³⁴ and some disclosure was appropriate.⁶³⁵

However, the disclosure’s scope was inappropriate.⁶³⁶ PRN had made its determination Scully could safely return to work in November 2011.⁶³⁷ The discovery request asked for any medical records and information about her without setting any time limitations.⁶³⁸ The trial court compounded this problem, but not limiting its order to the time period related to Scully’s claims.⁶³⁹ Furthermore, unlike the trial court in *S.P.*, the trial court here had conducted no *in camera* review to make sure only records relevant to Scully’s claim were ordered disclosed.⁶⁴⁰ Thus, the case was remanded for the trial court to do so.⁶⁴¹

The message collectively sent about the psychotherapist-privilege by these two decisions should be clear. Florida law seeks to protect as privileged, psychotherapist-patient confidential communications unless there is a clear good reason for not doing so.⁶⁴² Even then, the privilege must be protected to all extent possible consistent with the legitimate needs of the parties.⁶⁴³ Thus, even when a statutory exception or other *good cause* for disclosure exists, trial courts should do *in camera* records review to make sure their disclosure orders are not broader than they should be.

2. Confidential Communications and Third Party Presence

Like any other privilege, the psychotherapist-patient privilege can be waived by its holder.⁶⁴⁴ Section 90.503(1)(c) of the Florida Statutes defines a confidential communications as one “not intended to be disclosed to third persons”⁶⁴⁵ except for three instances.⁶⁴⁶ Usually the presence of a third party to an otherwise confidential communication will destroy the

633. *Id.*

634. *See* FLA. STAT. § 90.503(4)(c) (2014) (providing that there is no privilege when any party “relies upon the [mental or emotional condition of the patient] as an element of [the party’s] claim or defense.”).

635. *Scully*, 128 So. 3d at 988.

636. *Id.* at 989.

637. *Id.* at 987.

638. *Id.* at 988.

639. *Id.* at 988–89.

640. *S.P. ex rel. R.P. v. Vecchio*, 162 So. 3d 75, 80 (Fla. 4th Dist. Ct. App. 2014); *Scully*, 128 So. 3d at 989.

641. *Scully*, 128 So. 3d at 989.

642. *See* FLA. STAT. § 90.503 (2014).

643. *S.P.*, 162 So. 3d at 79.

644. *State v. Topps*, 142 So. 3d 978, 981 (Fla. 4th Dist. Ct. App. 2014).

645. FLA. STAT. § 90.503(1)(c).

646. *Id.* § 90.503(1)(c)(1)–(3).

communication's confidentiality and waive the privilege.⁶⁴⁷ The Fourth District in a case of first impression recently discussed a situation where it found that should not be so.⁶⁴⁸

Avery Topps stabbed a dog to death and then tried to be admitted to a hospital.⁶⁴⁹ A deputy sheriff went to the hospital to arrest Topps.⁶⁵⁰ An emergency room doctor acting as a psychotherapist to possibly provide either for the defendant's psychiatric commitment or for his clearance to be jailed examined Topps with the deputy in the room.⁶⁵¹ The deputy was present to provide for the medical staff's safety.⁶⁵² As standard part of Topps' psychiatric evaluation, the doctor asked Topps why he came to the hospital.⁶⁵³ Topps then told the doctor about the stabbing.⁶⁵⁴ The State argued Topps waived any privilege by making the statements in the officer's—a third party—presence.⁶⁵⁵

The trial court agreed with Topps and granted his motion to exclude the statement as privileged.⁶⁵⁶ In so doing, the judge found the officer had been present for multiple reasons: to keep custody of Topps, to ensure medical staff safety, and to make sure Topps got needed medical attention.⁶⁵⁷ Thus, as Topps had sought the treatment himself, "the deputy's presence furthered the interest of the patient by allowing the examination to take place even though he was in custody as an arrestee."⁶⁵⁸

The Fourth District acknowledged the general rule that when a third party hears a communication, that can often destroy confidentiality and make testimony about it admissible.⁶⁵⁹ However, the privilege statutory language recognizes there are times when third parties may be needed to help communication in the therapeutic setting or otherwise aid the patient's interest in getting diagnosis or treatment.⁶⁶⁰ One of those third party groups are "[t]hose persons present to further the interest of the patient in the consultation, examination, or interview."⁶⁶¹ Another group includes

647. *Topps*, 142 So. 3d at 981.

648. *Id.* at 978.

649. *Id.* at 979.

650. *Id.*

651. *Id.*

652. *Topps*, 142 So. 3d at 979.

653. *Id.*

654. *Id.*

655. *Id.*

656. *Id.*

657. *Topps*, 142 So. 3d at 979.

658. *Id.*

659. *Id.* at 979–80.

660. *Id.* at 980; *see also* FLA. STAT. § 90.503(1)(c) (2014).

661. FLA. STAT. § 90.503(1)(c)(1).

“persons necessary for the transmission of the communication.”⁶⁶² The deputy fell into both of these groups.⁶⁶³

The deputy’s presence furthered Topps’s interest in getting care because without it, no attempt to treat him would have occurred.⁶⁶⁴ Topps would not have been left alone with the doctor without law enforcement there.⁶⁶⁵ So the deputy’s presence was essential to Topps getting any help at all.⁶⁶⁶ The deputy was also a person whose presence was needed for the transmission of the communication because again, without the deputy being present, Topps would not have been allowed to be with the doctor.⁶⁶⁷ The doctor needed Topps’s statement as to why Topps came to the hospital for help.⁶⁶⁸ Topps would never have been able to make this statement if he had been immediately removed from the hospital itself.⁶⁶⁹ Additionally, no follow-up on the statement could be done without it being made in the first place.⁶⁷⁰

The Fourth District noted that sometimes a third party’s presence when a statement is made implies a waiver of an otherwise privileged communication.⁶⁷¹ That should not be the case here because the deputy’s presence was not voluntary on Topps’s part.⁶⁷² As long as Topps stayed in the room with the doctor, the deputy would be there whether Topps wished it or not.⁶⁷³ Since waivers usually must be voluntary or at least be implied voluntary from reasonable circumstances, no express or implied waiver was found here.⁶⁷⁴

The *Topps* opinion also gives several cogent policy reasons why waiver should not be found here. The policy behind the privilege is to not only protect certain communications patients do not want widely revealed but also to encourage those who feel in need of mental health care to seek it. Finding waiver here would discourage persons who commit criminal acts from seeking the mental health assistance they need. Finally, as the court

662. *Id.* § 90.503(1)(c)(2). A third group is “persons who are participating in the diagnosis and treatment under the direction of the psychotherapist.” *Id.* § 90.503(1)(c)(3). This third group clearly did not exist in *State v. Topps*. See *id.* § 90.503(1)(c)(3); *Topps*, 142 So. 3d at 978, 980–81.

663. See *Topps*, 142 So. 3d at 979, 981–82.

664. *Id.* at 981.

665. *Id.* at 981–82.

666. See *id.*

667. *Id.*

668. *Topps*, 142 So. 3d at 981.

669. See *id.* at 981–82.

670. See *id.* at 982.

671. *Id.* at 981.

672. *Id.*

673. *Topps*, 142 So. 3d at 979, 981.

674. *Id.* at 981–82.

noted, people should not have to give up their privilege against self-incrimination to seek medical treatment and diagnosis.⁶⁷⁵

Several points apparently not raised by the State are not addressed by the court's opinion. Topps could have arguably whispered his answer to the doctor or have insisted the deputy stand far enough away so the deputy could not hear the answer.⁶⁷⁶ In theory, either of these could have been done. To insist that they be done to preserve the privilege would be ridiculous. First, Topps was already having problems or believed he had serious problems. Why else would he have gone to the hospital? To require under these circumstances that he whisper his answer would be to require extraordinary action from him. People should not have to go to extreme lengths to preserve their privileges. Second, even if Topps had wanted the deputy to stand far enough away so the deputy could not hear, the deputy might not have agreed to do so. Indeed, if concern for medical staff safety was one reason for the deputy's presence, having him stand far away from Topps and the doctor could actually increase the risk of harm to medical staff. Topps supposedly had just engaged in a violent act, what is there to say he might not do so against the doctor?

The court's opinion is a wise accommodation between the need for safety, security, and the need to have certain communications protected, so they will be made to begin with. True, the exclusion of Topps's statement may mean there is not sufficient evidence to convict him. But the loss of potential evidence is always the price that must be paid to recognize and enforce a privilege's protection. The legislature has decided this is not too great a price to pay to promote psychotherapist-patient interchange.⁶⁷⁷ *Topps* goes far in respecting and furthering that decision.

VII. HEARSAY

Unless someone is a hermit and lives alone in a cave or is a castaway stranded alone on a deserted island without any modern means of contact with the outside world, communication with other people is a daily fact of life. Indeed, one can hardly go through an ordinary day without it. As a result, many to most trials involve some testimony about what people say or write to one another.⁶⁷⁸ When these out-of-court statements are offered for their truth at trial, hearsay issues arise.⁶⁷⁹

675. *Id.* at 982; *see also* U.S. CONST. amend. V.

676. *Topps*, 142 So. 3d at 979–81.

677. *See* FLA. STAT. § 90.503(c) (2014).

678. *See id.* § 90.801(1); *Topps*, 142 So. 3d at 978–79; *infra* notes 800–10 and accompanying text.

679. *See* FLA. STAT. § 90.801(1)(c).

Section 90.801 of the Florida Statutes defines *hearsay* as “a statement, other than one made by the declarant while testifying at the trial or [other] hearing offered in evidence to prove the truth of the matter asserted.”⁶⁸⁰ In theory, hearsay is inadmissible at trial.⁶⁸¹ However, any experienced lawyer or judge knows this is a myth. Despite the general prohibition against admitting hearsay statements, most hearsay statements fall within either one of three statutory exemptions⁶⁸² or one of the thirty exceptions to the general prohibition in the rules.⁶⁸³

The key to handling hearsay issues is to first determine if a statement is hearsay to begin, with and, if so, then consider whether it falls within an exemption or exception. If a statement is not being offered for its truth, it is not hearsay.⁶⁸⁴ If hearsay falls within an exemption, it also is not considered hearsay, despite having all the attributes of a classical hearsay statement.⁶⁸⁵ At one time, a number of common misconceptions as to what was or was not hearsay were prevalent. One would think that after almost forty years under the Code these misconceptions would no longer exist. Unfortunately, one recent case meriting brief mention shows that this is not so.⁶⁸⁶ In *Taylor v. State*,⁶⁸⁷ a victim told a police officer about the defendant’s alleged threats against her shortly after they happened.⁶⁸⁸ The defense objected to her testifying about these statements and convinced the trial court her statements

680. *Id.* § 90.801(1)(c).

681. *Id.* § 90.802. This principle is embodied by section 90.802 of the Florida Statutes, which states that “[e]xcept as provided by statute, hearsay evidence is inadmissible.” *Id.*

682. *See* FLA. STAT. § 90.801(2)(a)–(c). Section 90.801 of the Florida Statutes, after defining hearsay, provides three explicit situations where statements, which would otherwise fall within this definition, are declared exempt from the prohibition: (1) prior inconsistent statements under oath; (2) prior consistent statements offered to rebut claims the declarant has a motive to falsify or fabricate; and (3) prior statements of identification. *Id.* § 90.801(1)(c), (2)(a)–(c). All three exemptions require that the declarant’s whose statement is being introduced testify and be subject to cross-examination about the earlier statement. *Id.* § 90.801(2)(a)–(c).

683. Section 90.803 of the Florida Statutes, which does not require declarant unavailability, contains twenty-four exceptions. *See id.* § 90.803. Section 90.804 of the Florida Statutes, which does have a declarant unavailability condition, has an additional six exceptions. *See id.* § 90.804.

684. FLA. STAT. § 90.801(1); *Caballero v. State*, 132 So. 3d 369, 371 (Fla. 4th Dist. Ct. App. 2014) (finding that a victim’s prior inconsistent statement that the defendant had not sexually battered her at a certain time was not hearsay, as it would have been admissible for impeachment purposes and not for its truth).

685. *See* FLA. STAT. § 90.801.

686. *See Taylor v. State*, 146 So. 3d 113, 114–15 (Fla. 5th Dist. Ct. App. 2014).

687. 146 So. 3d 113 (Fla. 5th Dist. Ct. App. 2014).

688. *Id.* at 114.

did not fall within the excited utterance exception.⁶⁸⁹ However, the trial court ruled her statements were *not hearsay at all*⁶⁹⁰ because the victim, the declarant, was available and subject to cross-examination at trial.⁶⁹¹ As the Fifth District declared, “[i]n so ruling, the trial [court] articulated a common misconception about the hearsay rule.”⁶⁹² Only if the victim’s out-of-court statements, which were clearly offered as a truthful account of what just happened to her, fell within one of the three exemptions in the rule could they be considered non-hearsay.⁶⁹³ As they did not, the statements were hearsay despite the declarant’s availability for cross-examination at trial.⁶⁹⁴

As with other areas of evidence law, not every case mentioning the hearsay rule merits. Thus, this Survey does not discuss cases arising during 2014 concerning the following issues of hearsay: hearsay in restitution hearings,⁶⁹⁵ hearsay in probation revocation hearings,⁶⁹⁶ *corpus delicti* rule,⁶⁹⁷ prior consistent statements,⁶⁹⁸ state of mind exception,⁶⁹⁹ and past

689. *Id.* at 115; see also FLA. STAT. § 90.803(2). As the Fifth District said on appeal, this ruling was wrong. See *Taylor*, 146 So. 3d at 115–16.

690. *Id.* at 115.

691. *Id.*

692. *Id.*

693. See FLA. STAT. § 90.801(2); *Taylor*, 146 So. 3d at 115.

694. *Taylor*, 146 So. 3d at 115.

695. See *Phillips v. State*, 141 So. 3d 702, 705, 707 (Fla. 4th Dist. Ct. App. 2014) (finding a trial court erred in allowing a victim to testify as to the value of stole items when the testimony was based on a website the victim had consulted).

696. See *McDoughall v. State*, 133 So. 3d 1097, 1100 (Fla. 4th Dist. Ct. App. 2014) (finding hearsay admissible at probation revocation hearings, but it cannot provide the only basis for revocation).

697. *Burks v. State*, 613 So. 2d 441, 446 (Fla. 1993) (Shaw, J., concurring and dissenting). Before the State can introduce an accused’s statement’s to prove an offense, it must offer evidence to independently prove the *corpus delicti* of the crime charged. *Id.* at 443. The *corpus delicti* has been defined as “the fact that a crime has actually been committed, that someone is criminally responsible” for it. *Id.* (internal quotation omitted); see also *J.B. v. State*, 166 So. 3d 813, 815–17 (Fla. 4th Dist. Ct. App. 2014) (reversing defendant’s petit theft conviction where the only evidence other than her admissions to the theft was inadmissible hearsay testimony from store employees who did not see the crime itself but only testified to an absent declarant’s statements).

The general *corpus delicti* rule is not statutorily codified, but comes from cases construing the Code’s exception for personal admissions. See FLA. STAT. § 90.803(18)(a). In certain types of sexual abuse crimes, the *corpus delicti* rule has statutorily been relaxed. See *id.* § 92.565(2) (provides that in certain prosecutions for sexual crimes, an accused’s statements can be introduced without proof of the *corpus delicti* if the trial court finds that “the state is unable to show the existence of each element of the crime, and . . . finds that the defendant’s confession or admission is trustworthy”). However, this does not preclude the state from introducing a defendant’s confession by satisfying the traditional requirements of *corpus delicti* needed for other, non-sexual offenses. See *Ramirez v. State*, 133 So. 3d 648, 652 (Fla. 1st Dist. Ct. App. 2014) (finding that when the state meets the traditional *corpus*

recollection recorded exception.⁷⁰⁰ Several significant cases on hearsay topics are discussed below.⁷⁰¹

A. *Excited Utterances*

1. In General

One of the traditionally recognized exceptions to the hearsay rule is that of excited utterances.⁷⁰² Section 90.803(2) of the Florida Statutes defines these as “[a] statement or excited utterance relating to a startling event or condition made while the declaring was under the stress of

delicti requirement, the hearing and findings required under section 92.565 of the Florida Statutes do not apply).

698. See FLA. STAT. § 90.801(2)(b); *Howard v. State*, 152 So. 3d 825, 828–29 (Fla. 2d Dist. Ct. App. 2014) (finding that statement did not qualify under the exemption for prior consistent statements, under section 90.801(2)(b) of the Florida Statutes, as a state witness’s prior consistent statements elicited on direct examination were used prematurely to improperly bolster the witness’s testimony before any cross-examination had been done suggesting the witness was being untruthful).

699. See FLA. STAT. § 90.803(3)(a); *Combs v. State*, 133 So. 3d 564, 567 (Fla. 2d Dist. Ct. App. 2014) (finding that statements of a third party that he and another man planned to rob a bank defendant was accused of robbing should have been admitted under the state of mind exception). The statements showed the declarant’s present intent to do a future act, and the actual robbery provided enough of a basis to show the declarant had acted consistent with this intent. FLA. STAT. § 90.803(3)(a); see also *Combs*, 133 So. 3d at 567.

Under this exception, the statements must be offered to prove the declarant’s, not someone else’s state of mind or subsequent acts, and the declarant’s state of mind must be relevant. FLA. STAT. § 90.803(3)(a); see also *Combs*, 133 So. 3d at 567. For a recent case finding error in admitting statements under this exception when the declarant’s state of mind was not relevant, see *Henderson v. State*, 135 So. 3d 472, 476 (Fla. 2d Dist. Ct. App. 2014).

700. See FLA. STAT. § 90.803(5); *Blount v. State*, 152 So. 3d 29, 30–31 (Fla. 1st Dist. Ct. App. 2014) (finding the deposition of a victim who claimed he could not completely remember the event testified to in the deposition qualified as past recollection recorded when the other requirements for the exception were met); *McNeal v. State*, 143 So. 3d 1078, 1079–80 (Fla. 1st Dist. Ct. App. 2014) (finding that before a writing qualifies under this exception, the declarant must verify its accuracy or correctness. Here the victim’s failure to do so for her written out-of-court statement disqualified it under this exception.).

This Survey’s author notes that the defense did not object to the deposition being entered at trial on grounds that it would have violated the accused’s Confrontation Clause rights. See U.S. CONST. amend. VI; *Blount*, 152 So. 3d at 30. Hopefully such an objection would be made if the state tries to make similar use of deposition in the future. See *Blount*, 152 So. 3d at 30. Whether the accused would have had a prior opportunity to cross-examine the victim for confrontation purposes would then have to be addressed. See *Yero v. State*, 138 So. 3d 1179, 1184 (Fla. 3d Dist. Ct. App. 2014). To the author’s knowledge, no reported case in Florida has addressed this issue.

701. See *infra* Sections VII.A–C.

702. See FLA. STAT. § 90.803(2).

excitement caused by the event or condition.”⁷⁰³ This exception and its requirements have been discussed in many reported cases.⁷⁰⁴ Depending upon which case one wishes to cite, the exception has either two or three elements.⁷⁰⁵ *State v. Jano*⁷⁰⁶ appears to have the most complete one. There the Court found three requirements for the exception: (1) there must be an event sufficient to cause nervous excitement, (2) the declarant must in fact have been excited by the event, and (3) the declarant’s statement was made while the excitement from the event was continuing.⁷⁰⁷ Another way of saying this by use of a trilogy is that there must be an excited statement made by an excited person whose excitement was caused by an exciting event. As this exception comes up fairly frequently, especially in criminal cases, the cases mentioning it during this Survey period are worth reviewing.

Nine-one-one telephone calls present a common scenario where a party, usually the State, argues there are excited utterances.⁷⁰⁸ Emergency phone calls seem to so intuitively involve excited utterances that courts and attorneys may make the mistake of assuming this is so.⁷⁰⁹ With any other exception, the proponent of the hearsay has the burden of demonstrating its requirements are met.⁷¹⁰ When an objection is made, the trial court should hold a brief hearing or make explicit findings on the record concerning the exception’s requirements before admitting the statements.⁷¹¹ Failure to do so can often result in reversal.⁷¹²

Unless the declarant or someone who knew and heard the declarant when the call is made testifies, it will be difficult, if not impossible, to satisfy the exception’s requirements. For example, in *Brandon v. State*⁷¹³, a 911 caller identified the defendant as the person who had assaulted the caller and threatened her husband.⁷¹⁴ When the caller could not be at trial to testify

703. *Id.*

704. *See State v. Jano*, 524 So. 2d 660, 661 (Fla. 1988); *Taylor v. State*, 146 So. 3d 113, 115 (Fla. 5th Dist. Ct. App. 2014); *Brandon v. State*, 138 So. 3d 1150, 1152 (Fla. 1st Dist. Ct. App. 2014).

705. *See Jano*, 524 So. 2d at 661; *Taylor*, 146 So. 3d at 115; *Brandon*, 138 So. 3d at 1152.

706. 524 So. 2d 660 (Fla. 1988).

707. *Id.* at 661; *see also Stoll v. State*, 762 So. 2d 870, 873–74 (Fla. 2000) (later discussed these same requirements but merely combined the second and third ones, so as to find two, instead of three requirements. Substantively this makes no difference).

708. *See Morrison v. State*, 161 So. 3d 564, 565 (Fla. 2d Dist. Ct. App. 2014); *Tucker v. State*, 884 So. 2d 168, 171 (Fla. 2d Dist. Ct. App. 2004).

709. *See Morrison*, 161 So. 3d at 565.

710. *See Brandon*, 138 So. 3d at 1152.

711. *See id.* at 1151–52; FLA. STAT. § 90.803(2) (2014).

712. *See, e.g., Brandon*, 138 So. 3d at 1152.

713. 138 So. 3d 1150 (Fla. 1st Dist. Ct. App. 2014).

714. *Id.* at 1151.

about the events, the State offered the call's contents to prove them.⁷¹⁵ After the contents were admitted and the accused convicted, the appellate court reversed.⁷¹⁶ As neither the caller nor someone who knew her testified, the State never proved the caller's identity.⁷¹⁷ Likewise, since the State only could produce testimony from the person who received the call, there was no proof whether the caller was excited at the time, and even more importantly, how long after the alleged assault and threats the call had been made.⁷¹⁸ Without showing the time element, the State could not establish that the declarant had no time to contrive or to reflect on the alleged event.⁷¹⁹ In fairness to the State, it appears the prosecution may have been surprised by the alleged victim's absence.⁷²⁰ However *Brandon* shows that in some instances it is better to just drop charges than try to stretch meager facts to fit an exception. At least the wasted cost of trial and appeal is not incurred then.

Taylor, referred to above, shows the requirement that the declarant be excited cannot be taken to an extreme.⁷²¹ The defendant allegedly threatened and shot at the victim who drove away in her car.⁷²² She went to a restaurant to call 911 but stopped from doing so when she saw a police officer.⁷²³ Instead, the victim promptly told the officer what happened.⁷²⁴ The trial court allowed the officer to testify about what the victim had said on the erroneous ground it was not hearsay, after making the equally erroneous finding the statements were not excited utterances.⁷²⁵ After Taylor's conviction, the Fifth District found the statements should have been admissible as excited utterances, even though they clearly were hearsay.⁷²⁶ The officer testified the victim had calmed down some so she could tell him what happened; however, she was still shaking, crying, and appeared excited.⁷²⁷ Thus "[a]lthough she may have calmed down enough to speak"⁷²⁸ as the officer had said she did, the overall excitement from the shooting and

715. *Id.*

716. *Id.* at 1152.

717. *Id.*

718. *Brandon*, 138 So. 3d at 1152.

719. *Id.*

720. *See id.* at 1151.

721. *See Taylor v. State*, 146 So. 3d 113, 115–16 (Fla. 5th Dist. Ct. App. 2014).

722. *Id.* at 114.

723. *Id.*

724. *Id.*

725. *Id.* at 114–16.

726. *Taylor*, 146 So. 3d at 115–16.

727. *Id.* at 116.

728. *Id.*

threats just minutes previously existed.⁷²⁹ Therefore, the statements fell within the exception.⁷³⁰

2. The *First Complaint* Exception

Under the Code, hearsay statements are only admissible *as provided by statute*.⁷³¹ Thus, theoretically only exceptions explicitly listed in the Code should be recognized. However, some Florida courts continue to recognize a common law exception not explicitly listed, sometimes similar to the one for excited utterances. Twenty years ago, *Pacifico v. State*⁷³² found that if the alleged victim of a sexual assault or battery makes a statement “at [the] first opportunity to complain to anyone other than [the alleged attacker] after the sexual encounter,” the statement would be admissible over a hearsay objection.⁷³³ Subsequent case law found that even if the victim’s first try to complain to another person is unsuccessful, later statements to that same person about the assault may fall under the *first complaint* exception if they are not made after “an unduly long period of time.”⁷³⁴

Pacifico suggests the statements would be admissible even if they do not qualify under any other hearsay exception.⁷³⁵ Another court, soon after the *Pacifico* decision, took a slightly more restrictive approach to the *first complaint* exception.⁷³⁶ In *Burgess v. State*,⁷³⁷ the court took an approach that might be described as an attempt to *split the baby*, even though it is hard to view this decision as having much Solomonic quality. *Burgess* recognized the exception’s existence but limited its contents to “only the fact of the report of the sexual battery but not the details.”⁷³⁸ *Burgess* would require that statements reporting the details satisfy the statutory elements of another hearsay exception—one mentioned in the Code—suggesting this would probably be either one for excited utterances or for present sense impressions.⁷³⁹ This presents the unusual situation that under the *first complaint* exception, a jury might be able to hear the victim say she had reported being attacked but would not be able to hear any details from the

729. *Id.*

730. *Id.*

731. FLA. STAT. § 90.802 (2014).

732. 642 So. 2d 1178 (Fla. 1st Dist. Ct. App. 1994).

733. *Id.* at 1186.

734. Fletcher v. State, 698 So. 2d 579, 581 (Fla. 3d Dist. Ct. App. 1997); *see also* Burgess v. State, 644 So. 2d 589, 591 (Fla. 4th Dist. Ct. App. 1994).

735. *Pacifico*, 642 So. 2d at 1186–87.

736. *Burgess*, 644 So. 2d at 591–92.

737. 644 So. 2d 589 (Fla. 4th Dist. Ct. App. 1994).

738. *Id.* at 591.

739. FLA. STAT. § 90.803(1)–(2) (2014); *Burgess*, 644 So. 2d at 591–92.

victim about the attack unless, of course, the statement describing the details falls within a statutory exception. So then why is *first complaint* exception needed in the first place?

Apparently, the answer is that a relatively prompt first complaint rebuts any claim the victim had consented to the sexual acts involved. Case law before passage of the Code admits such complaints to corroborate the victim's testimony.⁷⁴⁰ If the victim complained about being attacked when she first had a chance,⁷⁴¹ then her actual testimony about the attack in court is more likely to be true.⁷⁴¹ Under this theory a statement giving details of the attack is not necessary for corroboration. The complaint is not being offered for its details but for the fact that it was made relatively promptly thereafter. Under this theory, the statement is not being offered for its truth but for the mere fact it was made; but then, it would not be hearsay in the first place. So why is an exception needed? Probably because courts realize that the mental gymnastics this line of reasoning requires juries to perform is difficult or impossible for them to do. Juries will almost undoubtedly take a complaint to someone that *I have been attacked* as proof the attack happened and not as proof that the victim is not lying when she says at trial it happened.

Thus, the exception itself rests on the theory that juries will perform mental exercises it is almost impossible for a reasonable person to do, regardless of whether a limiting instruction is given them or not. However, if the statement is admissible under an exception, then—in theory—no limiting instruction is required.⁷⁴² So then, why not also allow testimony under the exception about the details?

Besides this problem with the exception, there is another difficulty with it. The exception apparently rests on the now fallaciously proven idea that any female sexually attacked would of course report it at the very first chance. What if the female does not do so? Then, the sexual act must either never have taken place⁷⁴³ or have been consensual to begin with. However, modern studies show that it is not unusual for victims to delay reporting

740. *Ellis v. State*, 6 So. 768, 770 (Fla. 1889) (noting that this is supposedly the first case to recognize this exception). The Court there declared that:

The female outraged should seek the first opportunity to complain, and the fact that she does complain goes to the jury as evidence; but her detailed statement of the circumstances under which she was outraged cannot be given in evidence . . . by the party to whom she made the statement. Such testimony is hearsay, and it is calculated to confuse and mislead the jury, and is not permissible.

Id.

741. *See Custer v. State*, 34 So. 2d 100, 106 (Fla. 1948) (en banc).

742. *See Pacifico v. State*, 642 So. 2d 1178, 1186–87 (Fla. 1st Dist. Ct. App. 1994); *McDonald v. State*, 578 So. 2d 371, 373–74 (Fla. 1st Dist. Ct. App. 1991).

743. *Custer*, 34 So. 2d at 106. Modern medical testimony now can much more effectively rebut this assertion. *See Pacifico*, 642 So. 2d at 1181.

being attacked for various reasons, not including consent.⁷⁴⁴ Thus, the need for the *first complaint* exception is based on outdated, fallacious reasoning, both about sexual attack victims and the mental ability of juries.

More recent case law has questioned the legitimacy of recognizing such an exception and suggested it is beyond the power of courts to judicially do so.⁷⁴⁵ The latest case questioning the exception's very existence was decided during this Survey period.⁷⁴⁶ In *Browne v. State*,⁷⁴⁷ a college student intern at a doctor's office claimed that the doctor had attempted to sexually batter her late one evening after her intern hours.⁷⁴⁸ The victim claimed she fought the defendant off, drove home, and called a friend about being upset because Browne was following her.⁷⁴⁹ The victim went to the friend's home where she met the friend's boyfriend.⁷⁵⁰ The defendant claimed the victim had consented to the encounter, and the State called the victim's friend to testify about what the victim had told her that night.⁷⁵¹ Over defense objection, the friend was allowed to repeat the victim's account based on either the *first complaint* or excited utterance exceptions.⁷⁵²

The Fourth District found error in admission of the friend's testimony and reversed the convictions.⁷⁵³ As to the excited utterance exception, the State failed to establish how much time had passed between the alleged attack and when the statements were made; thus it did not satisfy the requirement that the victim had not had time for reflection.⁷⁵⁴ As to the *first complaint* exception argument, the court's opinion was even more detailed.⁷⁵⁵

The court noted that while some courts still accepted the existence of the *first complaint* exception, others did not.⁷⁵⁶ Section 90.802 of the Florida Statutes explicitly provided that the only exceptions to the hearsay rule were,

744. JON KRAKAUER, *MISSOULA: RAPE AND THE JUSTICE SYSTEM IN A COLLEGE TOWN*, at xiii (2015).

745. See *Browne v. State*, 132 So. 3d 312, 316 (Fla. 4th Dist. Ct. App. 2014). This case did not directly question the legitimacy of the first complaint exception. *Id.* Instead, it questioned in general the legitimacy of any exception not recognized in the Code. *Id.*

746. See *id.*

747. 132 So. 3d 312 (Fla. 4th Dist. Ct. App. 2014).

748. *Id.* at 314.

749. See *id.* at 314–15.

750. *Id.* at 315.

751. *Id.*

752. *Browne*, 132 So. 3d at 315–16; see also FLA. STAT. § 90.803(2) (2014).

753. *Browne*, 132 So. 3d at 317, 319.

754. *Id.* at 317; see also FLA. STAT. § 90.803(2).

755. *Browne*, 132 So. 3d at 316–17.

756. *Id.* at 316.

thus, statutorily recognized in the Code.⁷⁵⁷ Section 90.102 of the Florida Statutes provides that “[t]his chapter—[chapter 90]—shall replace and supersede existing . . . common law in conflict with its provisions.”⁷⁵⁸ Thus, section 90.802 of the Florida Statutes had effectively abolished the common law *first complaint* exception, and the legislature had not codified it.⁷⁵⁹ Therefore, the court found the exception no longer existed in Florida.⁷⁶⁰

Browne’s reasoning seems hard to refute. Although the court did not use this, it clearly was invoking the principle of statutory construction that a specific provision should control over a more general one. Section 90.802 of the Florida Statutes specifically abolished all but statutory exceptions; thus, the *first complaint* exception no longer existed despite section 90.102 of the Florida Statutes’ general language.⁷⁶¹ *Browne* also provides interesting authority that the exception is no longer valid in Florida since the Fourth District had recognized the exception earlier in *Burgess*.⁷⁶² Although *Browne* did not expressly overrule *Burgess*, it certainly does so by implication.

The Supreme Court of Florida has not yet decided this issue.⁷⁶³ Until it does so, some courts may recognize the exception. Better courts and good prosecutors will seek to avoid invoking it and instead try to use a statutory one in its place.

B. *Market Reports and Commercial Publications*

As mentioned above, the Code has three statutory exemptions and thirty statutory exceptions to the ban against using hearsay.⁷⁶⁴ Most attorneys know the common ones. Once in a great while, a decision will discuss what might be called one of the *exotic* exceptions to hearsay, in the sense that this exception is rarely, if ever, encountered in practice.

757. FLA. STAT. §§ 90.802, .803.

758. *Id.* § 90.102.

759. *See id.* §§ 90.102, .802; *Browne*, 132 So. 3d at 316.

760. *Browne*, 132 So. 3d at 316–17; *see also* FLA. STAT. §§ 90.102, .802. The court also found that even if the exception still had existed, the friend’s testimony went beyond just testifying about the complaint and recited the details of the alleged attack—something the exception did not allow. *Browne*, 132 So. 3d at 316–17.

Finally, *Browne* rejected the argument that the victim’s statement was admissible as a prior consistent statement under section 90.801(2)(b) because the court found the victim had a motive to falsify before the statements were made. *Browne*, 132 So. 3d at 317–18; *see also* FLA. STAT. § 90.801(2)(b).

761. FLA. STAT. §§ 90.102, .802; *see also Browne*, 132 So. 3d at 315–16.

762. *See Browne*, 132 So. 3d at 316; *Burgess v. State*, 644 So. 2d 589, 591–92 (Fla. 4th Dist. Ct. App. 1994).

763. *See Browne*, 132 So. 3d at 316–17.

764. *See* FLA. STAT. §§ 90.801, .803–.804.

Section 90.803(17) of the Florida Statutes contains one of the less frequently invoked exceptions to hearsay.⁷⁶⁵ This section provides that “[m]arket quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations if, in the opinion of the court, the sources of information and method of preparation were such as to justify their admission”⁷⁶⁶ are not excluded by the hearsay rule.⁷⁶⁷ This is commonly called the *trade reports exception*.⁷⁶⁸

Until 2014, only one reported Florida case discussed this exception.⁷⁶⁹ In *Health Options, Inc. v. Palmetto Pathology Services, P.A.*,⁷⁷⁰ the court upheld a party’s use of American Medical Association (“AMA”) terms and categories used for computer billings to establish damages for uncompensated services.⁷⁷¹ The opposing party had used the same terms and codes, and these came from a trustworthy source, the AMA’s Current Procedural Terminology Editorial Panel.⁷⁷²

During this Survey period, *Hardy v. State*,⁷⁷³ held that information in the Florida Department of Health’s computer database about prescription drugs did not come within the *trade reports exception* for two reasons.⁷⁷⁴ First, section 90.803(17) of the Florida Statutes, unlike its federal counterpart, Federal Rule of Evidence 803(17),⁷⁷⁵ requires the information to be *published*.⁷⁷⁶ The First District interpreted this to mean it must be available to the public.⁷⁷⁷ As access to the database was limited to certain authorized state employees, it did not qualify.⁷⁷⁸ Second, the court looked at the exception’s general title and found the database was not like a market

765. *See id.*

766. *Id.* § 90.803(17).

767. *Id.*

768. *See id.*; *Hardy v. State*, 140 So. 3d 1016, 1019 (Fla. 1st Dist. Ct. App. 2014).

769. *See Health Options, Inc. v. Palmetto Pathology Servs., P.A.*, 983 So. 2d 608, 616 (Fla. 3d Dist. Ct. App. 2008).

770. 983 So. 2d 608 (Fla. 3d Dist. Ct. App. 2008).

771. *Id.* at 616.

772. *Id.*

773. 140 So. 3d 1016 (Fla. 1st Dist. Ct. App. 2014).

774. *Id.* at 1019–20.

775. FED. R. EVID. 803(17); FLA. STAT. § 90.803(17) (2014). Federal Rule of Evidence 803(17) states that “[m]arket quotations, lists, directories, or other compilations [that are] generally . . . relied [on] by the public or by persons in particular occupations” are not excluded by the hearsay rule. FED. R. EVID. 803.

776. FLA. STAT. § 90.803(17); *Hardy*, 140 So. 3d at 1020; *see also* FED. R. EVID. 803(17).

777. *Hardy*, 140 So. 3d at 1020.

778. *Id.*

report or other compilation commonly used in commerce.⁷⁷⁹ Thus, even if the data had been freely available to the public, it would still not fall within the exception.⁷⁸⁰

Judge Rowe wrote a protracted dissent in which he interpreted the word *published* more broadly than the majority.⁷⁸¹ According to him, “the court’s focus should be the purpose for which the information was disseminated rather than how widespread the information was disseminated.”⁷⁸² The judge acknowledged the database was not *published* in the ordinary sense of the word but was still published to not only authorized Department of Health employees but also some law enforcement officers for limited purposes.⁷⁸³ He also argued that the database should be considered “within the category of *other publications* in the same ilk as a tabulation or list as set forth in the statute”⁷⁸⁴ even if it was not a compilation commonly used in commerce.⁷⁸⁵

Judge Rowe’s dissent, while forcefully argued and well-written, ignores the exception’s express language. The exception does not use the words *other publications*; it says *other published compilations*.⁷⁸⁶ So long as this database is not published within the ordinary sense of that word, under basic principles of statutory construction, the majority’s opinion has the better of this argument.

C. *Business Records in Foreclosure Cases*

Business records are among the commonly used hearsay exceptions, especially in commercial cases.⁷⁸⁷ During this Survey period, a number of reported decisions discussed the business records exception.⁷⁸⁸ All but one

779. *Id.*

780. *See id.*

781. *Id.* at 1022 (Rowe, J., dissenting).

782. *Hardy*, 140 So. 3d at 1022 (Rowe, J., dissenting).

783. *Id.*

784. *Id.*

785. *See id.*

786. FLA. STAT. § 90.803(17) (2014).

787. *Id.* § 90.803(6). This section provides in part that:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such . . . are not excluded by the general prohibition against hearsay.

Id.

788. *See, e.g., Yisrael v. State*, 993 So. 2d 952, 955–58 (Fla. 2008); *Hunter v. Aurora Loan Servs. LLC*, 137 So. 3d 570, 572–73 (Fla. 1st Dist. Ct. App. 2014), *review denied*, 157 So. 3d 1040 (Fla. 2014).

of them involved the introduction of bank records in loan foreclosure actions.⁷⁸⁹ The foreclosing party's failure to either attempt to introduce any business records⁷⁹⁰ or failure to lay a proper foundation for their introduction resulted in a number of reversals.⁷⁹¹

The required elements for the business records exception are not in debate. In *Yisrael v. Florida*,⁷⁹² the Supreme Court of Florida clearly stated that proponents of business records must demonstrate four elements: "(1) the record was made at or near the time of the event; (2) was made by or from information transmitted by a person with knowledge; (3) was kept in the

789. See *Caldwell v. State*, 137 So. 3d 590, 590–91 (Fla. 4th Dist. Ct. App. 2014). *Caldwell* was the one reported decision not involving loan foreclosure. See *id.* There the court reversed the defendant's robbery conviction because of the admission of a booking report. *Id.* at 590, 592. The booking report and statements in it were used to prove the defendant's height and weight at the time of his arrest. *Id.* at 590–91. Although the court found such reports could be business records under the hearsay exception, the State's failure to lay a foundation for when the information in them was received, how the reports were kept, and that it was a regular practice to keep reports like this made this report inadmissible hearsay. *Id.* at 591–92.

790. See *Beauchamp v. Bank of N.Y.*, 150 So. 3d 827, 828 (Fla. 4th Dist. Ct. App. 2014). *Beauchamp* reversed judgment for the bank because a loan service company representative's testimony was admitted based on the records that had never been introduced into evidence and thus were inadmissible hearsay. *Id.* at 827–29. Although the opinion does not mention this, the testimony also violated the best evidence rule as it was about the material contents of a document that had not been admitted or otherwise accounted for. See *id.* at 827–28.

791. See *Kelsey v. Suntrust Mortg., Inc.*, 131 So. 3d 825, 826 (Fla. 3d Dist. Ct. App. 2014). Six reported decisions discussed the foundation for the business records. See *Burdeshaw v. Bank of N.Y. Mellon*, 148 So. 3d 819, 822–26 (Fla. 1st Dist. Ct. App. 2014); *Wolkoff v. Am. Home Mortg. Servicing, Inc.*, 153 So. 3d 280, 282–83 (Fla. 2d Dist. Ct. App. 2014); *Cayea v. Citimortgage, Inc.*, 138 So. 3d 1214, 1216–17 (Fla. 4th Dist. Ct. App. 2014); *Hunter*, 137 So. 3d at 572; *Lindsey v. Cadence Bank, N.A.*, 135 So. 3d 1164, 1167–68 (Fla. 1st Dist. Ct. App. 2014); *Kelsey*, 131 So. 3d at 826. Four of them found reversible error for failure to lay a proper foundation for admission under the business records exception. See *Burdeshaw*, 148 So. 3d at 820; *Wolkoff*, 153 So. 3d at 281–82; *Hunter*, 137 So. 3d at 571; *Kelsey*, 131 So. 3d at 826. Two affirmed judgments foreclosing on loans, finding no error in admission of bank records under the business records exception. See *Cayea*, 138 So. 3d at 1215; *Lindsey*, 135 So. 3d at 1169. From this number of reversals, one might conclude that there are often problems introducing business records under the exception in loan foreclosure actions. See, e.g., *Kelsey*, 131 So. 3d at 826. This conclusion may not be correct as the number of the reported cases does not give any idea of how many cases there were actually tried or decided on summary judgment where there was no issue about a proper foundation. *Contra id.* Perhaps the best that can be said from the reported decisions is that when the issue of business records foundations is raised on appeal in foreclosures, the courts are carefully scrutinizing the trial record to make sure the exception's requirements have been satisfied. See *Burdeshaw*, 148 So. 3d at 821–22; *Wolkoff*, 153 So. 3d at 281–82; *Hunter*, 137 So. 3d at 571–72; *Kelsey*, 131 So. 3d at 826.

792. 993 So. 2d 952 (Fla. 2008).

ordinary course of a regularly conducted business activity; and (4) that it was regular practice of that business to make such a record.”⁷⁹³

Thus, *what* must be shown should be no surprise to business records proponents.⁷⁹⁴ The problem seems to be *how* to do so. Choosing the right person or persons to authenticate the records and lay their foundation under the exception is the critical choice.⁷⁹⁵ Two recent decisions provide good representative examples as to how and how not to go about laying the foundation needed for the business records exception.⁷⁹⁶

To successfully foreclose on a loan, the foreclosing party must show an agreement between the borrower and the plaintiff or a subsequent legal transfer of the loan to the plaintiff, the borrower’s default on payments, an acceleration of the debt to maturity, and the amount remaining due on the loan.⁷⁹⁷ When the original lender transfers the loan to another party, laying the business records foundation to show all this has caused problems.⁷⁹⁸ Usually to do so, the plaintiff attempts to introduce loan payment history records that are computer generated.⁷⁹⁹ Such computer printouts may qualify as business records assuming the proper foundation is laid even though the actual printout was done in connection with a particular lawsuit.⁸⁰⁰ The person called to authenticate the records and lay the foundation must, therefore, be familiar with the business practices of more than one company and with how each company takes, records, and keeps payments on loans.⁸⁰¹ While a witness’s testimony that certain computer programs and certain practices are standardly used in the lending industry is helpful, a witness’s testimony must also be specific with respect to how a particular company services its loans.⁸⁰² When a witness working for one company cannot testify about how another company who had been involved with the loan does this, then foundation problems occur unless additional witnesses are

793. *Id.* at 956.

794. *See, e.g., Cayea*, 138 So. 3d at 1217; *Kelsey*, 131 So. 3d at 826.

795. *See Burdeshaw*, 148 So. 3d at 824; *Cayea*, 138 So. 3d at 1217; *Hunter*, 137 So. 3d at 572–73; *Kelsey*, 131 So. 3d at 826; *Wolkoff*, 153 So. 3d at 282.

796. *Cayea*, 138 So. 3d at 1217; *Kelsey*, 131 So. 3d at 826.

797. *Kelsey*, 131 So. 3d at 826.

798. *Wolkoff*, 153 So. 3d at 281.

799. *See, e.g., Cayea*, 138 So. 3d at 1216.

800. *See id.* at 1217 (stating that “[p]rintouts of data prepared for trial may be admitted . . . even if the printouts themselves are not kept in the ordinary course of business so long as a qualified witness testifies as to the manner of preparation, reliability, and trustworthiness”).

801. *See id.* at 1217–18.

802. *See id.*; *Burdeshaw v. Bank of N.Y. Mellon*, 148 So. 3d 819, 826 (Fla. 1st Dist. Ct. App. 2014); *Hunter v. Aurora Loan Servs. LLC*, 137 So. 3d 570, 573 (Fla. 1st Dist. Ct. App. 2014), *review denied*, 157 So. 3d 1040 (Fla. 2014).

called who can do so.⁸⁰³ This was the case in both *Hunter v. Aurora Loan Services, LLC*⁸⁰⁴ and *Burdeshaw v. Bank of New York Mellon*⁸⁰⁵ where the employee of the subsequent loan assignees could not testify how previous holders of loans kept and recorded their information.⁸⁰⁶ While a witness does not have to be the person who actually makes entries for payments on the loan—the person who actually keeps the loan records or the person who prepared the records for trial—the witness must know how the companies concerned do so.⁸⁰⁷

These two decisions suggest that counsel for foreclosing lenders should be especially careful when more than one holder of a note or mortgage is involved. Counsel should then always ask, “do I need more than one witness”, and “do I have the right witnesses to satisfy the business records foundation?” Counsel must make their own investigation and evaluation to ensure this and not just assume that whomever the foreclosing party wants to send as a witness is sufficient.

Contrary to these two cases, it is what happened in *Cayea v. Citimortgage, Inc.*⁸⁰⁸ There, Citimortgage was the original loan holder, making matters easier than in multiple holder cases.⁸⁰⁹

A company employee in its default research and litigation department testified about Citimortgage’s regular practice of inputting payments, whether made electronically or by mail, into its system by payment processing department employees.⁸¹⁰ He also testified how payment entries were kept and that it was the lender’s regular practice to do so.⁸¹¹ Although he did not work in the payment department himself and had not done any of the actual inputting or record keeping on this loan, his testimony was sufficient to admit computer printouts of the loan history as business records.⁸¹²

Foundations for business records should be no problem if an attorney takes the time to understand how a particular business or company is run and selects the proper witnesses to testify about this. The *Burdeshaw* decision provides a helpful multi-page summary of the cases dealing with this

803. See *Burdeshaw*, 148 So. 3d at 823; *Hunter*, 137 So. 3d at 573.

804. 137 So. 3d 570 (Fla. 1st Dist. Ct. App. 2014), *review denied*, 157 So. 3d 1040 (Fla. 2014).

805. 148 So. 3d 819 (Fla. 1st Dist. Ct. App. 2014).

806. *Burdeshaw*, 148 So. 3d at 826; *Hunter*, 137 So. 3d at 573.

807. *Burdeshaw*, 148 So. 3d at 823; *Hunter*, 137 So. 3d at 573.

808. 138 So. 3d 1214 (Fla. 4th Dist. Ct. App. 2014).

809. See *id.* at 1215.

810. *Id.* at 1215–16.

811. *Id.*

812. *Id.* at 1217.

exception in loan foreclosure cases.⁸¹³ This should be a required reading for counsel in this field.

VIII. BEST EVIDENCE RULE

Section 90.952 of the Florida Statutes provides in part that “an original writing, recording, or photograph is required in order to prove the contents of the writing, recording, or photograph.”⁸¹⁴ This requirement is commonly known as the Best Evidence Rule.⁸¹⁵ The rule does not usually apply unless the contents of the writing, recording, or photograph are considered material to the issues in a case.⁸¹⁶ Additionally, modern versions of the rule do not strictly enforce the requirement of the original.⁸¹⁷ Indeed, copies of a writing are now freely admissible unless there is some reason to believe that the proponent of such has either acted in bad faith or that the offered substitute is not accurate.

The rule usually is so easily satisfied that it does not generate many evidentiary issues. However, during this Survey period, three cases arose that deserve brief discussion.⁸¹⁸

A. Videotape Evidence

Two best evidence rule cases involve admission of videotape surveillance against an accused in a criminal case.⁸¹⁹ Photographs are broadly defined under the rule to include more than just still pictures.⁸²⁰ Videotapes are explicitly included within this definition.⁸²¹ When videotapes that actually capture a crime are introduced to show an accused’s guilt, there is no best evidence rule problem.⁸²² Problems arise when the videos are not produced at trial, and the state still wants to benefit from them.⁸²³ The reason

813. See *Burdshaw v. Bank of N.Y. Mellon*, 148 So. 3d 819, 823–27 (Fla. 1st Dist. Ct. App. 2014).

814. FLA. STAT. § 90.952 (2014).

815. *T.D.W. v. State*, 137 So. 3d 574, 575–76 (Fla. 4th Dist. Ct. App. 2014).

816. See *Yero v. State*, 138 So. 3d 1179, 1184–85 (Fla. 3d Dist. Ct. App. 2014).

817. See FLA. STAT. § 90.953.

818. See *infra* Section VIII.A.

819. *T.D.W.*, 137 So. 3d at 575; *Yero*, 138 So. 3d at 1181.

820. FLA. STAT. § 90.951(2). Section 90.951 of the Florida Statutes defines *photographs* as including “still photographs, X-ray films, videotapes, and motion pictures.” *Id.*

821. *Id.*

822. See *Yero*, 138 So. 3d at 1184–85.

823. See *id.* at 1185.

behind the videos' absence can make all the difference in the world as illustrated by two recent cases.⁸²⁴

In *Yero v. State*,⁸²⁵ the State charged the accused with theft of a woman's wallet.⁸²⁶ The victim and her fiancée were at a bar late at night when they were approached by Yero who stood between them and spoke with them briefly.⁸²⁷ The wallet was sticking out of the victim's purse, which was hung over a chair's back.⁸²⁸ After speaking with them, Yero excused himself, went outside, came back and bought the couple drinks.⁸²⁹ He then paid his own bar bill and left.⁸³⁰ Five minutes later, the victim noticed her wallet missing, and the sheriff's office was called.⁸³¹ A deputy arrived and learned the bar had surveillance cameras.⁸³² The deputy and the two patrons watched the video.⁸³³ It showed Yero, at first, had no bulge in his pockets until after he stood between the couple.⁸³⁴ The bulge's shape matched that of the missing wallet.⁸³⁵ The video further showed Yero leaving the bar, coming back inside, no longer having the same bulge in any pocket.⁸³⁶

All three testified at trial and described what they had seen on the video.⁸³⁷ The video itself was not shown as it had been overwritten by the bar's security system.⁸³⁸ The deputy testified he had tried to get the video that night but was told it was unavailable.⁸³⁹ Nine days later, when the deputy returned to the bar, the tape was already overwritten.⁸⁴⁰ The system automatically recorded over any previous surveillance footage after five days, but no one ever told the deputy this.⁸⁴¹ Thus, the tape was lost for use at trial.⁸⁴² However, the trial court still allowed testimony about its contents

824. See *id.*; *T.D.W.*, 137 So. 3d at 575.

825. 138 So. 3d 1179 (Fla. 3d Dist. Ct. App. 2014).

826. *Id.* at 1181.

827. *Id.*

828. *Id.*

829. *Id.*

830. *Yero*, 138 So. 3d at 1181.

831. *Id.*

832. *Id.*

833. *Id.*

834. *Id.* at 1182.

835. *Yero*, 138 So. 3d at 1182.

836. *Id.*

837. *Id.* at 1181–82.

838. *Id.* at 1182.

839. *Id.*

840. *Yero*, 138 So. 3d at 1182.

841. *Id.*

842. *Id.*

after the State elicited proof about how it was unavailable.⁸⁴³ Yero appealed his conviction claiming the State had lost in bad faith the exculpatory evidence, violating both his Due Process rights and the Best Evidence Rule.⁸⁴⁴ As to his Due Process rights, the Third District found no bad faith on the State's part and further found the tape would have been inculpatory, not exculpatory, in any event.⁸⁴⁵ On the best evidence claim, the district court noted that the rule statutorily provided for instances where originals were not required.⁸⁴⁶ One instance is when "[a]ll originals are lost or destroyed, unless the proponent lost or destroyed them in bad faith."⁸⁴⁷ As the facts showed there was no bad faith, the witnesses' testimony about the tape's contents was permissible even in its absence.⁸⁴⁸

What if a videotape is shown at trial, but the State elicits testimony about the contents of another tape that is not? *T.D.W. v. State*⁸⁴⁹ presented that very scenario and led to a reversal.⁸⁵⁰ The State charged the defendant with being involved in a home burglary.⁸⁵¹ A detective testified he was able to identify T.D.W. as one of the burglars from the angle shown on a surveillance video the detective viewed outside of trial.⁸⁵² Even though other videotapes were shown at trial, the one showing the angle the detective referenced was not.⁸⁵³ This proved to be crucial evidence against the defendant leading to his conviction.⁸⁵⁴

On appeal, the Fourth District reversed.⁸⁵⁵ The detective had testified the missing video clearly showed the accused's face as one of the burglars.⁸⁵⁶ Unlike in *Yero*, the State never offered any explanation for the video view's absence.⁸⁵⁷ Even though the State contended on appeal the tape

843. *Id.*

844. *Id.* at 1182–84.

845. *Yero*, 138 So. 3d at 1183.

846. *Id.* at 1184–1185; *see also* FLA. STAT. § 90.954(1) (2014).

847. FLA. STAT. § 90.954(1).

848. *Yero*, 138 So. 3d at 1185. Section 90.954 of the Florida Statutes lists three other instances when testimony about the contents of a missing writing does not violate the best evidence rule: The original cannot be obtained by judicial process, the opposing party controls the original and is on notice it will be needed at hearing or trial, and the original is not material. FLA. STAT. § 90.954(2)–(4).

849. 137 So. 3d 574 (Fla. 4th Dist. Ct. App. 2014).

850. *Id.* at 575, 578.

851. *Id.* at 575.

852. *Id.*

853. *Id.*

854. *T.D.W.*, 137 So. 3d at 575.

855. *Id.* at 575, 578.

856. *Id.* at 576.

857. *Id.* at 577; *see also* *Yero v. State*, 138 So. 3d 1179, 1182 (Fla. 3d Dist. Ct. App. 2014).

was lost or destroyed, unlike in *Yero*, it never offered any proof at trial to back up this assertion.⁸⁵⁸ The State, as the proponent of the tape, had the burden to demonstrate the reason behind its absence, especially because its contents were clearly material.⁸⁵⁹ Thus, it would be “unfair, under the circumstance, to admit the duplicate in lieu of the original.”⁸⁶⁰ The Fourth District found that “when offered to prove [a] crime without introduction of the video in evidence, a witness’s in-court description of the actions depicted on the video is content-based testimony that violates the best evidence rule.”⁸⁶¹

B. *Promissory Notes*

As mentioned, duplicates are usually admissible to the same extent as originals under the Best Evidence Rule.⁸⁶² One exception to this general rule of free substitution is when there is a negotiable instrument or other special kind of commercial document.⁸⁶³ This includes promissory notes.⁸⁶⁴ *Alavi v. Garcia*⁸⁶⁵ involving promissory notes, summary judgment hearings and the best evidence rule is a recent case of first impression.⁸⁶⁶

The appellants had summary judgment entered against them in an action on a promissory note.⁸⁶⁷ Florida Rule of Civil Procedure 1.510 governs summary judgment proceedings in Florida.⁸⁶⁸ Subsection (c) of Rule 1.510 requires that any motion for summary judgment must be served

858. *T.D.W.*, 137 So. 3d at 577; *see also Yero*, 138 So. 3d at 1182.

859. *T.D.W.*, 137 So. 3d at 577.

860. FLA. STAT. § 90.953(3) (2014). The court did not actually quote this subsection, but the gist of its opinion clearly reflects this language. *See T.D.W.*, 137 So. 3d at 577.

861. *Id.* at 576.

862. *See* FLA. STAT. § 90.953; *T.D.W.*, 137 So. 3d at 576–77.

863. FLA. STAT. § 90.953(1). Admissibility of duplicates, states in part that [a] duplicate is admissible to the same extent as an original, unless: (1) the document or writing is a negotiable instrument, . . . a security, . . . or any other writing that evidences a right to the payment of money, is not itself a security agreement or lease, and is of a type that is transferred by delivery in the ordinary course of business with any necessary endorsement or assignment.

Id. The Federal Rules of Evidence do not have similar language and seem to have no special provisions about commercial documents under the best evidence rule. *See* FED. R. EVID. 1003.

864. *See* FLA. STAT. § 90.953(1).

865. 140 So. 3d 1141 (Fla. 5th Dist. Ct. App. 2014).

866. *Id.* at 1142. Although the court’s opinion does not label itself as one of first impression on the issue it decides, it does say “there appears to be no precedent directly on point.” *Id.*

867. *Id.*

868. FLA. R. CIV. P. 1.510 (2014).

on the opposing party twenty days before the hearing date, and the motion must include copies of any evidence the movant relies upon.⁸⁶⁹ The motion must identify any “materials as would be admissible in evidence ‘summary judgment evidence’ on which the movant relies.”⁸⁷⁰ Subsection (e) further requires any affidavits “shall set forth such facts as would be admissible in evidence.”⁸⁷¹ It also requires that “[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served [therein].”⁸⁷² When Garcia filed for summary judgment, he did not file the original of the promissory note twenty days before the hearing.⁸⁷³ Appellants argued this required reversal as the best evidence rule had been violated by the failure to do so.⁸⁷⁴

The Fifth District declined to find the best evidence rule applicable to summary judgment hearings.⁸⁷⁵ The court found the rule “applies to proceedings wherein evidence is introduced”⁸⁷⁶ but that evidence is not formally introduced in summary judgment hearings.⁸⁷⁷ The hearings are held to see if there are any material issues of fact meriting a trial.⁸⁷⁸ If not, the trial court simply renders judgment as a matter of law.⁸⁷⁹ Under the summary judgment rule’s own language, the movant need only show proof that *would be*⁸⁸⁰ admissible later at trial.⁸⁸¹ For a promissory note, at trial the note would have to be authenticated and the original produced at trial.⁸⁸² However, an affidavit setting forth facts supplying the authentication and attaching a copy of the original is all that is needed for summary judgment.⁸⁸³ The court also declared that “[e]ven assuming that the best evidence rule applies in the summary judgment context, we hold that the presentation of the original note at or before the hearing satisfies [the] rule”,⁸⁸⁴ thus serving it on the opposing party twenty days before the hearing would not be

869. *Id.* 1.510(c).

870. *Id.*

871. *Id.* 1.510(e).

872. *Id.*

873. *Alavi v. Garcia*, 140 So. 3d 1141, 1142 (Fla. 5th Dist. Ct. App. 2014).

874. *Id.* at 1143.

875. *Id.*

876. *Id.*

877. *See id.*

878. *Alavi*, 140 So. 3d at 1143.

879. *See id.*; FLA. R. CIV. P. 1.510 (2014).

880. FLA. R. CIV. P. 1.510; *Alavi*, 140 So. 3d at 1143.

881. FLA. R. CIV. P. 1.510; *Alavi*, 140 So. 3d at 1143.

882. *Alavi*, 140 So. 3d at 1143.

883. *Id.*

884. *Id.* The court noted the Fourth District had also found production of the original at the hearing sufficient to satisfy the rule. *Id.*; *see also Deutsche Bank Nat’l Tr. Co. v. Clarke*, 87 So. 3d 58 (Fla. 4th Dist. Ct. App. 2012).

needed.⁸⁸⁵ The court did note that surrender of the original note was needed before final judgment could be entered unless it was proven the note had been lost or destroyed.⁸⁸⁶

Admittedly this case is as much about summary judgment as it is the best evidence rule. However, it serves as a reminder that some proceedings require the originals of certain commercial documents if they are available. The court's construction of the summary judgment rule's wording as would be admissible also seems a very reasonable one. If the rule had intended a different result, one would expect it to read, *that is admissible at trial or in the same form that would be admissible at trial*. One would also not expect the words summary judgment evidence to have been used. The use of these three words clearly indicates that there is a distinction between it and *trial* evidence. Finally, the case serves as a reminder to counsel moving for summary judgment—bring the originals of documents to hearings in case the trial court decides they are mandatorily required there.⁸⁸⁷ As the saying goes, “better safe, than sorry.”

IX. CONCLUSION

Overall, 2014 was probably a typical year for evidentiary developments.⁸⁸⁸ Few statutory changes were made in the Code.⁸⁸⁹ Likewise, the courts decided few cases of first impression.⁸⁹⁰ This shows that after over thirty years, major issues under the Code have largely been resolved. Now that this is so, attorneys and courts have to be careful in the judgment they use presenting and deciding evidentiary issues. Unfortunately some of the cases discussed in this Survey could fall under the category of *can you believe that* ones. Trial counsel and trial courts are on the front line as *guardians* of the Code, even though the appellate courts and Florida Legislature are its ultimate *guardians*. All of us must take this responsibility seriously.

885. *Alavi*, 140 So. 3d at 1143.

886. *Id.*

887. *See id.* at 1142–44.

888. *See supra* note 2 and accompanying text.

889. *See supra* Parts II–VII.

890. *See supra* Parts II–VII.

JUST SHOOT ME A TEXT: THE FLORIDA BAR’S REGULATIONS ON ATTORNEY ADVERTISEMENTS AND MODERN COMMUNICATIONS

JAZLYN JUDA*

I.	INTRODUCTION.....	153
II.	A NATIONAL LOOK AT ATTORNEY ADVERTISEMENTS: THE AMERICAN BAR ASSOCIATION AND THE SUPREME COURT OF THE UNITED STATES.....	156
	A. <i>Opening the Door to Protection of Attorney Advertisements</i>	156
	B. <i>How Far Can Regulation of Attorney Advertisements Go?</i>	158
	C. <i>The ABA Model Rules of Professional Conduct</i>	162
III.	PROTECTED FORMS OF ATTORNEY ADVERTISEMENTS	166
	A. <i>Direct Solicitation v. Indirect Solicitation</i>	166
	B. <i>Targeted Letters to Potential Clients</i>	170
IV.	FLORIDA’S REGULATIONS ON ATTORNEY ADVERTISEMENTS.....	173
	A. <i>Recognizing Commercial Speech Protection in Florida</i>	173
	B. <i>Distinguishing Standards of the Florida Bar and the American Bar Association</i>	176
V.	EXTENDING FIRST AMENDMENT PROTECTION TO ATTORNEY ADVERTISEMENTS VIA TEXT MESSAGES	178
	A. <i>Classifying Attorney Advertisements Via Text Messages as Protected Commercial Speech</i>	178
	B. <i>Text Messages Applied to the Central Hudson test</i>	180
	C. <i>Keeping up with Modern Modes of Communication</i>	181
VI.	CONCLUSION	182

I. INTRODUCTION

The common thread between all attorney advertisements consists of the delicate balance between the professionalism of the practice of law and

*. Jazlyn Juda will receive her J.D. in May 2017 from Nova Southeastern University, Shepard Broad Law Center. Jazlyn would like to thank the board members and her colleagues of the Nova Law Review for all of their hard work and dedication to improve and refine this Comment. She would also like to thank all of her friends and family—particularly her grandmother, Barbara Trump, and mother, Tamberly Juda—for their infinite love and support. Jazlyn extends a special thank you to her aunt, Kimberly Juda, for helping her to become a better professional woman and teaching her to always “keep her eye on the prize.”

protected commercial speech under the First Amendment of the U.S. Constitution.¹ Traditionally, solicitation and advertising by lawyers has been looked down upon in the practice of law.² In order to maintain the nobleness of the profession, lawyers were expected to build a reputation that would attract their business and clientele.³ The prohibition on advertising began as a rule of legal etiquette and not rules of ethics, as advertising regulations are modernly viewed.⁴ Lawyers treated the legal profession more as a public service rather than as a trade or means of earning a living.⁵ It was believed that commercializing legal services would lower the nobleness and honor of the profession.⁶

Over time, these strong views against attorney advertisements evolved into a standard for rules of ethics.⁷ The Canons of Professional Ethics, drafted in 1908 by the American Bar Association (“ABA”), entirely prohibited attorney advertising and solicitation, claiming advertising and solicitation by lawyers was unprofessional.⁸ Later in 1969, the ABA drafted the Model Code of Professional Responsibility (“ABA Model Code”), which was adopted by every state in the nation and followed the Canons model of prohibiting all forms of attorney advertisements.⁹ After the Supreme Court of the United States decided in *Bates v. State Bar of Arizona*¹⁰ that attorney advertisements were classified as commercial speech and thus protected under the First Amendment, the ABA was left to change the standards of attorney advertisements in order to reflect this landmark decision and to uphold First Amendment protection of attorney advertisements.¹¹ As a result of this decision, the ABA Model Rules of Professional Conduct (“ABA Model Rules”) were drafted and later approved by the ABA in 1983, allowing attorney advertisements, but strongly prohibiting in-person

1. See U.S. CONST. amend. I; *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976); HENRY S. DRINKER, *LEGAL ETHICS* 210–12 (1953).

2. DRINKER, *supra* note 1, at 210–12.

3. Veronica Wooten Brace, *Limits on Marketing of Attorney Services*, 8 U. FLA. J.L. & PUB. POL’Y 109, 110 (1996).

4. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 371 (1977); Brace, *supra* note 3, at 110.

5. DRINKER, *supra* note 1, at 210; Brace, *supra* note 3, at 110.

6. DRINKER, *supra* note 1, at 211–12.

7. See Brace, *supra* note 3, at 110.

8. CANONS OF PROF’L ETHICS Canon 27 (AM. BAR ASS’N 1908); Brace, *supra* note 3, at 110–11.

9. MODEL CODE OF PROF’L RESPONSIBILITY DR 2-101(A)–(B) (AM. BAR ASS’N 1975); Brace, *supra* note 3, at 111.

10. 433 U.S. 350 (1977).

11. *Id.* at 383–84; Brace, *supra* note 3, at 111; see also U.S. CONST. amend. I.

solicitation by lawyers.¹² The ABA Model Rules have since served as the model for professional lawyering codes for sixty-five percent of the states, leaving the majority of the states to permit various forms of attorney advertisements.¹³ Throughout the history of the legal profession, in response to constitutional challenges and decisions of the Supreme Court of the United States, the ABA has amended both ABA Model Code and ABA Model Rules, permitting attorney advertising but still retaining a heavy grip in regulating advertising as much as the Constitution and the Supreme Court of the United States has allowed.¹⁴

The delicate balance between the honor and nobleness of the legal profession and the First Amendment's protection of commercial speech is critical in the case of a Florida law firm that is challenging The Florida Bar's Standing Committee on Advertising for denying the firm's proposed plan to send automated text messages in hopes of obtaining potential clients.¹⁵ The law firm's plan consists of obtaining "a daily list provided by the . . . county clerk of court to [retrieve] phone numbers of [people who had been] arrested the previous day."¹⁶ The law firm would then use these contacts to send automated text messages advertising the firm's legal services to these listed individuals.¹⁷ The text messages would provide an *opt out* option for the recipients to choose to not receive any future communications from the firm.¹⁸ The Committee found that the firm's proposal of automated text messages is considered direct solicitation and is thus prohibited by Rule 4-7.18(a) of The Florida Bar's Rules of Professional Conduct,¹⁹ which involves direct contact with prospective clients.²⁰ The law firm countered the Committee's response by claiming that text messages are not similar to direct telephone communications, and that due to modern habits and modern

12. MODEL RULES OF PROF'L CONDUCT r. 7.1–3 (AM. BAR ASS'N 1983); Brace, *supra* note 3, at 111 n.19.

13. MODEL RULES OF PROF'L CONDUCT r. 7.1–3 (1983); Brace, *supra* note 3, at 111.

14. *Bates*, 433 U.S. at 383; Brace, *supra* note 3, at 111; *see also* MODEL RULES OF PROF'L CONDUCT r. 7.1–3 (1983 & 2013); MODEL CODE OF PROF'L RESPONSIBILITY DR 2-101 (1975).

15. Nathan Hale, *Fla. Bar Rejects Firm's Plan to Send Ads Via Text Messages*, LAW360 (May 22, 2015, 6:32 PM), <http://www.law360.com/articles/659251/fla-bar-rejects-firm-s-plan-to-send-ads-via-text-messages>; *see also* U.S. CONST. amend. I; *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976); DRINKER, *supra* note 1, at 210–12.

16. Hale, *supra* note 15.

17. *Id.*

18. *Id.*

19. *See* FLA. RULES OF PROF'L CONDUCT r. 4-7.18(a) (2014).

20. *Id.* r. 4-7.18 (2014); Hale, *supra* note 15.

modes of communication, text messages serve the same purpose as email or direct mail.²¹

This Comment will focus on commercial speech, the rights of lawyers to advertise legal services, and the regulations that The Florida Bar has placed on attorney advertisements.²² This Comment will also discuss why Florida's regulations on attorney advertisements are neither consistent with the Supreme Court of the United States' decisions, nor take into consideration modern modes of communication utilized in today's society.²³ Part II of this Comment will examine regulations on attorney advertisements on a national level and discuss the Supreme Court of the United States' decisions regarding commercial speech and protection of attorney advertisements and solicitations under the First Amendment, as well as the ABA's rules on attorney solicitation and advertising.²⁴ Part III of this Comment will explain the various modes of attorney advertisements, including direct and indirect solicitation of potential clients and targeted letters to potential clients.²⁵ Part IV of this Comment will introduce the State of Florida's rules regarding attorney advertisements and solicitations and compare Florida's rules to the ABA's rules regarding attorney advertisements.²⁶ This Comment will then analyze attorney advertisements via text messages in Part V and explain how text messages are indirect modes of advertising and why Florida should consider modern modes of communication in regulating attorney advertisements.²⁷ Ultimately, this Comment will conclude that text messages can be considered direct communications, which are protected forms of commercial speech that should not be restricted by The Florida Bar.²⁸

II. A NATIONAL LOOK AT ATTORNEY ADVERTISEMENTS: THE AMERICAN BAR ASSOCIATION AND THE SUPREME COURT OF THE UNITED STATES

A. *Opening the Door to Protection of Attorney Advertisements*

Commercial speech was first recognized as protected speech under the First Amendment in *Virginia State Board of Pharmacy v. Virginia*

21. Hale, *supra* note 15.

22. See *infra* Part II–IV.

23. See *infra* Part IV–V.

24. See *infra* Part II.

25. See *infra* Part III.

26. See *infra* Part IV.

27. See *infra* Part V.

28. See *infra* Part VI.

*Citizens Consumer Council, Inc.*²⁹ In this case, the Supreme Court of the United States held that commercial speech is entitled to protection under the First Amendment, even if the speech is purely economic or the speaker's motive of the speech is to receive pecuniary gain.³⁰ The appellees, consumers of prescription drugs, brought suit against the Virginia State Board of Pharmacy challenging the validity of a Virginia statute under the First Amendment.³¹ The state statute prohibited pharmacists to advertise prices of prescription drugs.³² The Court explained that commercial speech was of general public interest and served as a benefit to society, providing consumers with the knowledge and availability of goods and services.³³ It was further held that a state's interest in protecting and upholding the professionalism of the field might not be sufficient enough to maintain the prohibition of an advertisement.³⁴ Ultimately, the Court extended First Amendment protection to commercial speech and concluded that although a state is free to regulate commercial speech, a state may not place a complete ban on advertisements or commercial speech and keep the knowledge of the availability of goods and services away from consumers.³⁵

The protected First Amendment right to commercial speech was extended to attorney advertisements in the case of *Bates*.³⁶ This was the first case subsequent to *Virginia State Board of Pharmacy* to weigh the rights of attorneys to advertise against the ABA Model Rules and state bar rules in the light of commercial speech and First Amendment protection.³⁷

In this case, the appellants were two licensed attorneys in the State of Arizona who in order to generate business, placed an advertisement in a local newspaper advertising legal services and the prices of the services offered by

29. 425 U.S. 748, 770 (1976); see also U.S. CONST. amend. I.

30. *Va. State Bd. of Pharmacy*, 425 U.S. at 762; see also U.S. CONST. amend. I.

31. *Va. State Bd. of Pharmacy*, 425 U.S. at 749–50, 753–54; see also U.S. CONST. amend. I.

32. *Va. State Bd. of Pharmacy*, 425 U.S. at 749–50.

33. *Id.* at 764–65.

34. *Id.* at 766, 770.

The challenge now made, however, is based on the First Amendment. This casts the [b]oard's justifications in a different light, for on close inspection it is seen that the [s]tate's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance. The advertising ban does not directly affect professional standards one way or the other.

Id. at 769.

35. *Id.* at 770; see also U.S. CONST. amend. I.

36. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977); see also U.S. CONST. amend. I.

37. *Bates*, 433 U.S. at 357, 363, 384; see also U.S. CONST. amend. I; *Va. State Bd. of Pharmacy*, 425 U.S. at 773; MODEL CODE OF PROF'L RESPONSIBILITY DR 2-101(B) (AM. BAR ASS'N 1970).

the firm.³⁸ The Arizona State Bar claimed that the firm's use of a newspaper advertisement to generate business violated Disciplinary Rule 2-101(B) incorporated by the Supreme Court of Arizona that read:

A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.³⁹

A hearing was held before the Special Local Administrative Committee, which decided that the appellants should be suspended from practicing law for a period of six months.⁴⁰ The appellants challenged the Committee's decision as a violation of their First Amendment rights.⁴¹ Focusing on their previous decision and precedent set by *Virginia Board of Pharmacy*, the Supreme Court of the United States determined that the same First Amendment protection of commercial speech was applicable to attorney advertisements of legal services and fees.⁴² The Court explained that even if a speaker's intent in making the speech is purely economic, such speech is protected in certain contexts.⁴³ Stressing the societal interests served by commercial speech, the Court discussed how commercial speech informs the public of the availability, prices, nature of products and services, and assures "informed and reliable decision-making."⁴⁴ Since the decision of the Court in *Bates*, attorney advertisements are not subject to complete prohibition or suppression; however, states retain a right to regulate attorney advertisements.⁴⁵

B. *How Far Can Regulation of Attorney Advertisements Go?*

Both landmark decisions of *Virginia State Board of Pharmacy* and *Bates* determined that commercial speech was protected under the First Amendment; however, both cases held that states retained the right to

38. *Bates*, 433 U.S. at 353–54.

39. *Id.* at 355; see also MODEL CODE OF PROF'L RESPONSIBILITY DR 2-101(B) (1970).

40. *Bates*, 433 U.S. at 356.

41. *Id.*; see also U.S. CONST. amend. I.

42. *Bates*, 433 U.S. at 357; see also U.S. CONST. amend. I; *Va. State Bd. of Pharmacy*, 425 U.S. at 773.

43. *Bates*, 433 U.S. at 364.

44. *Id.*

45. *Id.* at 383–84.

regulate commercial speech under certain contexts.⁴⁶ These two Supreme Court of the United States' decisions determine that commercial speech is protected under the First Amendment but retains lesser protection than other constitutionally protected forms of speech.⁴⁷ Despite the lessened protection that commercial speech is granted under the First Amendment, commercial speech is still protected from unwarranted governmental regulation.⁴⁸ Both cases are influential decisions in regard to protection of commercial speech under the First Amendment; however, neither of these decisions discussed to what extent commercial speech could be regulated by the government or by the states.⁴⁹

Following *Virginia State Board of Pharmacy*, the Supreme Court of the United States set a standard consisting of a four-prong analysis for what constitutes commercial speech and the extent of how far the government or states may regulate commercial speech.⁵⁰ In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,⁵¹ the Supreme Court was presented with the question of whether a regulation from the Public Service Commission of New York completely banning promotional advertising of an electrical utility company violated the First Amendment.⁵² The Court defined commercial speech as "expression related solely to the economic interests of the speaker and its audience."⁵³ For commercial speech to be protected under the First Amendment, the speech must concern lawful activity and may not be misleading.⁵⁴ If the speech is concerning lawful activity and is not misleading, the speech falls within First Amendment protection.⁵⁵ The Court determined that in order to restrict commercial speech, the asserted governmental interest to be served by the restriction on commercial speech must be substantial.⁵⁶ If the asserted governmental interest to be served is substantial, it must be "determine[d] whether the

46. See U.S. CONST. amend. I; *Bates*, 433 U.S. at 357, 363, 384; *Va. State Bd. of Pharmacy*, 425 U.S. at 770–72.

47. U.S. CONST. amend. I; *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562–63 (1980); *Bates*, 433 U.S. at 357, 363; *Va. State Bd. of Pharmacy*, 425 U.S. at 761, 770.

48. *Bates*, 433 U.S. at 363; see also U.S. CONST. amend. I.

49. *Bates*, 433 U.S. at 384; *Va. State Bd. of Pharmacy*, 425 U.S. at 770; see also U.S. CONST. amend. I.

50. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566; *Va. State Bd. of Pharmacy*, 425 U.S. at 748.

51. 447 U.S. 557 (1980).

52. *Id.* at 558; see also U.S. CONST. amend. I.

53. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 561.

54. *Id.* at 564; see also U.S. CONST. amend. I.

55. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 564; see also U.S. CONST. amend. I.

56. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566.

regulation directly advances the governmental interest asserted, and whether [the regulation] is not more extensive than is necessary to serve that interest.”⁵⁷ Taken together, this analysis is known as the *Central Hudson* test.⁵⁸ Based on the *Central Hudson* test, in determining whether commercial speech is guaranteed First Amendment protection and whether the government or state has the ability to restrict the commercial speech, the protection of the speech looks at the nature of the expression and nature of the governmental interest served by the regulation imposed.⁵⁹ Regulations of commercial speech are measured under an intermediate scrutiny analysis.⁶⁰ A state’s restrictions on commercial speech “must be substantially related to the achievement of an important [state] objective.”⁶¹

The Court in *Central Hudson* held that in order to determine whether the restriction on commercial speech is in proportion to the government or state interest, the restriction must directly advance the government or state interest involved, and if the government or state interest could be served by a more limited restriction on commercial speech, the excessive restriction will not meet First Amendment muster.⁶² In other words, the restriction imposed may only extend as far as the interest that it serves.⁶³ Similar to *Virginia State Board of Pharmacy* and *Bates*, the Court in *Central Hudson* held that a ban on advertising could not survive if the ban is imposed to protect ethical or professional standards of a profession.⁶⁴ The Court concluded, as stated in *Virginia State Board of Pharmacy*, “[t]he advertising ban does not directly affect [the] professional standards [of a profession] one way or the other.”⁶⁵

57. *Id.*

58. *Id.*

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id.

59. *Id.* at 563; see also U.S. CONST. amend. I.

60. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995).

61. *Intermediate Scrutiny*, BLACK’S LAW DICTIONARY (10th ed. 2014).

62. See U.S. CONST. amend. I; *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at

564.

63. See *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 564.

64. *Id.*; *Bates v. State Bar of Ariz.*, 433 U.S. 350, 378, 383 (1977); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

65. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 564 (quoting *Va. State Bd. of Pharmacy*, 425 U.S. at 769) (alteration in original).

The Court found that the state's interest in upholding professionalism is not a substantial interest in regulating commercial speech.⁶⁶

In 1982, the Court took the *Central Hudson* test and analyzed it from the perspective of attorney advertisements in the case of *In re R.M.J.*⁶⁷ Comparing this Supreme Court decision to *Bates*, *In re R.M.J.* was the first case subsequent to *Central Hudson* to apply the four-prong analysis of what constitutes commercial speech and the extent of regulation permitted on attorney advertisements.⁶⁸ The Court in *In re R.M.J.* emphasized the holding of *Bates*, where the Court held that commercial speech protection under the First Amendment extended to attorney advertisements and “advertising by attorneys may not be subjected to blanket suppression.”⁶⁹ The Court found in *Bates* that the advertising of prices for legal services offered was neither advertising unlawful activity nor a misleading advertisement, preventing the speech from being prohibited on that basis.⁷⁰ The Court in *Bates* also rejected suppression of an attorney advertisement based on the state interest that attorney advertisements had negative effects on the profession.⁷¹

The Court in *In re R.M.J.* found that although *Bates* was a critical case in analyzing the extent of protection of attorney advertisements under the First Amendment, the decision in *Bates* was a narrow decision in holding that attorney advertisements could still be regulated by states.⁷² The Court found that “[f]alse, deceptive, or misleading advertising remains subject to restraint, and . . . advertising by the professions poses special risks of deception, ‘because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising.’”⁷³ In regards to attorney advertisements, the Court in *Bates* did not set any standards or regulations “on potentially or demonstrably misleading advertis[ements].”⁷⁴ However, in circumstances subsequent to *Bates*, the Court reasoned that regulation and prohibition of advertisements are permissible where the advertisements are likely to be misleading.⁷⁵ The

66. See *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 571–72.

67. 455 U.S. 191, 203, 206 (1982).

68. *Id.*; *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566; *Bates*, 433 U.S. at 383; see also U.S. CONST. amend. I.

69. *In re R.M.J.*, 455 U.S. at 199 (quoting *Bates*, 433 U.S. at 383); see also U.S. CONST. amend. I.

70. *Bates*, 433 U.S. at 382–83.

71. *Id.* at 368–69, 371.

72. *In re R.M.J.*, 455 U.S. at 200; see also U.S. CONST. amend. I; *Bates*, 433 U.S. at 383.

73. *In re R.M.J.*, 455 U.S. at 200 (quoting *Bates*, 433 U.S. at 383).

74. *Id.* at 202.

75. *Id.*

Court in *In re R.M.J.* set the official standard for the commercial speech doctrine in the context of advertising for professional services as follows:

Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the [s]tate[] may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the [s]tates may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive.⁷⁶

Even though a state holds the ability to regulate non-misleading commercial speech, “the [s]tate must [still] assert a substantial interest, and the interference with the speech must be in proportion to the interest served.”⁷⁷ Regulations on commercial speech and professional advertising “must be narrowly drawn, and the [s]tate lawfully may regulate only to the extent regulation furthers the [s]tate’s substantial interest.”⁷⁸

While *Central Hudson* established a four-pronged analysis as to what constitutes commercial speech and the extent that the government may regulate commercial speech, the *Central Hudson* test focused on commercial speech in a general context.⁷⁹ The Court in *In re R.M.J.* took the four-pronged analysis of *Central Hudson* and applied it to professional advertising.⁸⁰ The four-pronged analysis of *Central Hudson* is used by the Supreme Court of the United States in determining whether certain contexts of commercial speech are protected under the First Amendment, and the extent to which such speech may be regulated by the states.⁸¹

C. *The ABA Model Rules of Professional Conduct*

The ABA is a professional organization of lawyers and law students from all over the nation.⁸² The ABA was founded in 1878 and has since expanded to four hundred thousand members, committed to: “[S]erving . . .

76. *Id.* at 203.

77. *Id.*

78. *In re R.M.J.*, 455 U.S. at 203.

79. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 564–66 (1980).

80. *In re R.M.J.*, 455 U.S. at 203–04; *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566.

81. *See Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566.

82. *See About the American Bar Association*, A.B.A., http://www.americanbar.org/about_the_aba.html (last visited Dec. 18, 2015).

members, improving the legal profession, eliminating bias . . . and advancing the rule of law throughout the United States and around the world.”⁸³ The ABA aims to uphold the legal profession and provide practical tools and resources for lawyers.⁸⁴

One of the roles of the ABA is to establish model ethical codes, which the majority of states in the nation have adopted as a part of their own ethical standards.⁸⁵ The current ethical rules established by the ABA are the ABA Model Rules.⁸⁶ The ABA Model Rules “were adopted by the ABA House of Delegates in 1983 [and] [s]erve as models for the ethical rules of most states.”⁸⁷ California is the only state that does not model their ethical and professional rules for lawyers after the ABA Model Rules.⁸⁸ The current ABA Model Rules set ethical and professional standards for lawyers across the nation in regard to the client-lawyer relationship, acting as a counselor, acting as an advocate, transactions with persons other than clients, law firms and associations, public service, information about legal services, and maintaining the integrity of the profession.⁸⁹

The ABA standards regarding attorney advertising and solicitation are found in Rule 7.2 and Rule 7.3 of the ABA Model Rules.⁹⁰ The general rule of attorney advertising is found in Rule 7.2 of the ABA Model Rules and reads “[s]ubject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.”⁹¹ The ABA and ABA Model Rules follow the precedent by *Bates*, recognizing that attorney advertisements serve a fundamental benefit to the consumers in need of legal services.⁹² The ABA states:

To assist the public in learning and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer

83. *Id.*

84. *Id.*

85. *Id.*; *About the Model Rules*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (last visited Dec. 18, 2015).

86. *See About the Model Rules*, *supra* note 85.

87. *Id.*; *see also* MODEL RULES OF PROF’L CONDUCT (AM. BAR ASS’N 2013).

88. *About the Model Rules*, *supra* note 85; *see also* CAL. RULES OF PROF’L CONDUCT (2015).

89. MODEL RULES OF PROF’L CONDUCT (2013).

90. *Id.* r. 7.2–.3.

91. *Id.* r. 7.2.

92. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 376 (1977).

should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.⁹³

The modern ABA Model Rules completely overturned the ABA's 1969 ABA Model Code and the 1908 Canons of Professional Ethics—both of which defined the traditional view of attorney advertising as unprofessional and placed complete bans on attorney advertisements.⁹⁴ After the ABA Model Rules were adopted in 1983, attorney advertisements were recognized as protected commercial speech under the First Amendment, and ethical attorney advertisements came as a result of the Supreme Court of the United States decisions in *Virginia State Board of Pharmacy*, *Bates*, and *In re R.M.J.*⁹⁵

The ABA Model Rules discuss the rules of attorney solicitation in Rule 7.3:

A lawyer shall not by in-person, live telephone, or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted: (1) is a lawyer; or (2) has a family, close personal, or prior professional relationship with the lawyer. A lawyer shall not solicit professional employment by written, recorded, or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if: (1) the target of the solicitation has [been] made known to the lawyer a desire not to be solicited by the lawyer; or (2) the solicitation involves coercion, duress, or harassment.⁹⁶

The distinction that the ABA Model Rules make between the rules regarding attorney advertising and attorney solicitation involves the use of real-time or live communications to a specific audience.⁹⁷ The ABA defines

93. MODEL RULES OF PROF'L CONDUCT r. 7.2 cmt. (2013).

94. *About the Model Rules*, *supra* note 85; *see also* MODEL CODE OF PROF'L RESPONSIBILITY Canon 2 (AM. BAR ASS'N 1975); CANONS OF PROF'L ETHICS Canon 27 (Am. Bar Ass'n 1908).

95. *In re R.M.J.*, 455 U.S. 191, 199–200 (1982); *Bates*, 433 U.S. at 383–84; *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770, 773 (1976); *see also* U.S. CONST. amend. I.

96. MODEL RULES OF PROF'L CONDUCT r. 7.3 (2013).

97. *See id.* r. 7.2 (ABA professional rules of attorney advertisements); MODEL RULES OF PROF'L CONDUCT r. 7.3 (2013) (ABA professional rules of attorney solicitations).

solicitation as “a targeted communication initiated by the lawyer that is directed to a specific person and . . . offers to provide, or can reasonably be understood as offering to provide, legal services.”⁹⁸ A communication to the general public is not considered solicitation by the ABA.⁹⁹ The ABA Model Rules express concern for potential abuse through solicitation of direct in-person or live communication by a lawyer to a potential client.¹⁰⁰ According to the ABA Model Rules, “[the] potential for abuse inherent in direct in-person, live telephone, or real-time electronic solicitation justifies its prohibition, particularly since lawyers have alternative means of conveying necessary information to those who may be in need of legal services.”¹⁰¹ The ABA Model Rules explain that communications with potential clients can be sent through other electronic modes of communication that are not considered to be real-time or live communications, such as e-mail or other electronic modes of communication.¹⁰² The ABA’s goal in prohibiting direct solicitation by attorneys of potential clients is to prevent a potential client from hiring an attorney based on undue influence, intimidation, or pressure under the circumstances.¹⁰³

The ABA has a substantial interest in prohibiting direct, in-person solicitation to protect the consumer of legal services; however, targeted or direct solicitation may benefit the consumer or potential client, as well as the attorney.¹⁰⁴ In an article published by the ABA Journal in 2013, Stephanie Francis Ward discussed how consistently targeting advertisements to a specific audience may benefit a legal practice.¹⁰⁵ Ward countered the traditional belief that lawyers should attract their business clientele through good work and not through advertisements,¹⁰⁶ by stating, “[s]ome lawyers believe that if you do good work, people will automatically come to you. They are wrong. People need reminders.”¹⁰⁷ Ward stressed the ABA’s promotion of direct advertisements by referring to the fact that personal injury lawyers often send targeted advertisements and letters to accident

98. MODEL RULES OF PROF’L CONDUCT r. 7.3 cmt. (2013).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 462 (1978); MODEL RULES OF PROF’L CONDUCT r. 7.3. cmt (2013).

104. *Ohralik*, 436 U.S. at 464; *see also* MODEL RULES OF PROF’L CONDUCT r. 7.3 cmt (2013).

105. Stephanie Francis Ward, *50 Simple Ways You Can Market Your Practice*, A.B.A. J. (July 1, 2013, 10:19 AM), http://www.abajournal.com/magazine/article/50_simple_ways_you_can_market_your_practice.

106. *Id.*

107. *Id.*

victims, and criminal defense lawyers often refer to arrest reports in hopes of targeting and obtaining potential clients.¹⁰⁸ This practice of targeted advertisements benefits both the consumers who are in need of legal services and who may not know how to go about obtaining legal representation and the attorneys who are in need of business and clientele.¹⁰⁹

III. PROTECTED FORMS OF ATTORNEY ADVERTISEMENTS

Looking at the ABA Model Rules and at the ethical and professional rules of the states that are modeled after the ABA Model Rules, there are many permissible forms of attorney advertisements and solicitation through written or electronic communications.¹¹⁰ Two forms of attorney advertisements that result in a gap between the standards for attorney advertisements of the ABA and state ethical and professional rules are indirect and direct solicitation, specifically targeted letters to potential clients.¹¹¹

A. *Direct Solicitation v. Indirect Solicitation*

In *Ohralik v. Ohio State Bar Ass'n*,¹¹² the Supreme Court of the United States held that “the [s]tate—or the Bar acting with state authorization—constitutionally may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the [s]tate has a right to prevent.”¹¹³ In this case, the appellant, a practicing lawyer, learned of a young girl who was a driver in a recent car accident.¹¹⁴ The appellant visited the young accident victim in the hospital, where he told the accident victim that he would represent her, and subsequently, the accident victim signed an agreement retaining the appellant’s legal representation and agreed that the appellant would receive one-third of the victim’s recovery.¹¹⁵

After obtaining the signed retainer agreement with the accident victim, the appellant contacted the passenger of the vehicle that the victim was driving and informed the passenger that she had a chance of recovery

108. *Id.*

109. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 376–77 (1977).

110. *See* MODEL RULES OF PROF’L CONDUCT r. 7.2(a), 7.3(a)–(b) (AM. BAR ASS’N 2013); *About the Model Rules*, *supra* note 85.

111. *See* *Shapero v. Ky. Bar Ass’n*, 486 U.S. 466, 479 (1988); MODEL RULES OF PROF’L CONDUCT r. 7.3(a)–(b) (2013).

112. 436 U.S. 447 (1978).

113. *Id.* at 449.

114. *Id.*

115. *Id.* at 450.

against the driver and persuaded her to sign a contingent fee agreement.¹¹⁶ When the passenger of the vehicle decided she did not want to sue the driver and attempted to revoke her agreement with the appellant, the appellant claimed that the agreement was binding and could not be revoked.¹¹⁷ The driver of the vehicle also attempted to revoke her agreement with the appellant.¹¹⁸ Both the driver and passenger of the vehicle brought complaints against the appellant with the Grievance Committee of the Geauga County Bar Association.¹¹⁹ These complaints were later referred to the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, who determined that the appellant violated the Ohio Code of Professional Responsibility, and appellant argued that it was his First Amendment right to solicit his legal services to potential clients.¹²⁰

In *Ohralik*, the Court stated that “[t]he solicitation of business by a lawyer through direct, in-person communication with [a] prospective client has long been viewed as inconsistent with the profession’s ideal of the attorney-client relationship and as posing a significant potential for harm to the prospective client.”¹²¹ The Court determined that a state has a stronger interest in heavily regulating direct in-person solicitation than in regulating indirect attorney advertisements made towards the public.¹²² In-person direct solicitation by attorneys of potential clients is still considered to be commercial speech and thus protected under the First Amendment; however, in-person direct solicitation receives a lower level of judicial scrutiny.¹²³ The Court distinguished the in-person solicitation used by the appellant in *Ohralik* from the indirect advertising at issue in *Bates*, in that in-person solicitation may discourage potential clients in need of legal representation and “may disservice the individual and societal interest, identified in *Bates*, in facilitating ‘informed and reliable decision-making.’”¹²⁴ The Court also recognized a significant difference between in-person direct solicitation and indirect advertisements in that “[u]nlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or

116. *Id.* at 449, 451.

117. *Ohralik*, 436 U.S. at 452.

118. *Id.*

119. *Id.*

120. *Id.* at 452–53; *see also* U.S. CONST. amend. I.

121. *Ohralik*, 436 U.S. at 454.

122. *Id.* at 457–58.

123. *Id.* at 457; *see also* U.S. CONST. amend. 1.

124. *Ohralik*, 436 U.S. at 457–58; *see also* *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1974).

reflection.”¹²⁵ In-person solicitation—because of the intimidation and undue influence that it has the potential to cause—does not stand up to the precedent set forth by the Court in *Virginia Board of Pharmacy* and *Bates*, in holding that commercial speech, specifically attorney advertisements, serve the fundamental function of informing the public of the availability and nature of goods and services and promote rational decision-making.¹²⁶

The Court in *Ohralik*, held that a state has a substantial interest in regulating in-person direct solicitation by attorneys to potential clients, because “the potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person.”¹²⁷ It was decided by the Court that a state has reason to believe that in-person solicitation may be harmful to the person who is solicited, and thus, the state has an interest in protecting its people from this harm.¹²⁸ The Court held that being officers of the courts, attorneys serve the role of administering justice and a state has an interest in regulating attorneys and the standards of the legal profession, including setting forth standards regarding attorney advertisements.¹²⁹

The Supreme Court of the United States set fundamental precedent regarding direct and indirect solicitation and attorney advertisements in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*.¹³⁰ In this case the appellant was a practicing attorney who in hopes of expanding his practice, ran advertisements for his law firm in a local newspaper.¹³¹ The appellant targeted defendants of drunk driving cases.¹³² When the Ohio Office of Disciplinary Counsel saw the appellant’s newspaper advertisement, the appellant was informed that his advertisement violated the Ohio Code of Professional Responsibility, which prohibited offering representation to criminal defendants on a contingent-fee basis.¹³³ Appellant then withdrew the advertisement.¹³⁴ One year later, the appellant ran another newspaper advertisement targeting women who had suffered injuries from the use of a particular contraceptive device.¹³⁵ As with the

125. *Ohralik*, 436 U.S. at 457.

126. *See id.* at 457, 466–67; *see also Bates*, 433 U.S. at 364; *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 764–65 (1976).

127. *Ohralik*, 436 U.S. at 464–65.

128. *Id.* at 466.

129. *Id.* at 460.

130. 471 U.S. 626, 641–42, 645–47 (1985).

131. *Id.* at 629–30.

132. *Id.*

133. *Id.* at 630; *see also OHIO CODE OF PROF’L RESPONSIBILITY DR 2-106(C)* (1970).

134. *Zauderer*, 471 U.S. at 630.

135. *Id.* at 630–31.

targeted drunk driving advertisements previously posted by the appellant, this advertisement attracted the attention of the Ohio Office of Disciplinary Counsel.¹³⁶ The appellant was charged with violating several disciplinary rules of the Ohio Code of Professional Responsibility, including that the targeted drunk driving advertisement was “false, fraudulent, . . . and deceptive to the public” because it offered representation on a contingent-fee basis in a criminal case” and the advertisement targeted toward injured women was not *dignified* and violated the state rule that “[a] lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice.”¹³⁷ In its opinion, the Court stressed that because the appellant was proposing a commercial transaction, the appellant’s speech was commercial and fell within the boundaries of First Amendment protection.¹³⁸ The question for the Court then was the extent that the use of direct advertisements may be regulated.¹³⁹ Throughout its holding, the Court kept in mind that complete prohibition or “blanket bans on price advertising by attorneys and rules preventing attorneys from using non-deceptive terminology to describe their fields of practice are impermissible.”¹⁴⁰ The Court also kept in mind throughout its holding, that in regards to rules prohibiting in-person solicitation, there are some circumstances where rules prohibiting in-person solicitation of potential clients by attorneys may be permissible.¹⁴¹ Differentiating the use of in-person solicitation by the appellant in *Ohralik*, with the use of newspaper advertisements by the appellant in *Zauderer*, the Court determined that the use of newspaper advertisements, though directed toward a specific audience, did not invade the privacy of those individuals who read the newspaper and saw the advertisement for legal services.¹⁴² The Court further discussed that print advertisements do not have the same high risk of overreaching or undue influence that in-person solicitation has.¹⁴³ The Court stated:

Print advertising may convey information and ideas more or less effectively, but in most cases, it will lack the coercive force of the

136. *Id.* at 631.

137. *Id.* at 631–33 (footnote omitted); *see also* OHIO CODE OF PROF’L RESPONSIBILITY DR 2-101(A)(1), 104(A), 106(C) (1970).

138. U.S. CONST. amend. I; *Zauderer*, 471 U.S. at 637–38; *see also* *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455–56 (1978) (holding that commercial speech includes any speech that proposes a commercial transaction).

139. *Zauderer*, 471 U.S. at 629.

140. *Id.* at 638.

141. *Id.*; *see also* *Ohralik*, 436 U.S. at 457–58.

142. *Zauderer*, 471 U.S. at 642; *see also* *Ohralik*, 436 U.S. at 457.

143. *Zauderer*, 471 U.S. at 642.

personal presence of a trained advocate. In addition, a printed advertisement, unlike a personal encounter initiated by an attorney, is not likely to involve pressure on the potential client for an immediate yes-or-no answer to the offer of representation.¹⁴⁴

An indirect advertisement, although aimed toward a specific audience, allows a potential client to reflect on the need and ability of hiring a particular lawyer and to freely make the choice of hiring a particular attorney, without undue influence or added pressure of in-person solicitation.¹⁴⁵ In the case of *Ohralik*, the state had a substantial interest in regulating in-person solicitation of potential clients by attorneys in order to protect its citizens from undue influence or intimidation.¹⁴⁶ The Court determined that this substantial state interest could not stand to regulate the use of indirect solicitation of potential clients by attorneys, because indirect advertisements do not carry the same risk of undue influence that in-person solicitations carry.¹⁴⁷

B. *Targeted Letters to Potential Clients*

In *Shapero v. Kentucky Bar Ass'n*,¹⁴⁸ the Supreme Court of the United States was faced with the issue of “whether a [s]tate may . . . prohibit lawyers from soliciting [and advertising] legal business for pecuniary gain by sending truthful and non-deceptive letters to potential clients known to face particular legal problems.”¹⁴⁹ The petitioner was a practicing attorney who filed for approval by the Kentucky Attorneys Advertising Commission of a letter that he had hopes of sending “to potential clients who . . . had a foreclosure suit filed against them.”¹⁵⁰ “The Commission did not find the letter [to be] false or misleading,” however, the Commission did find that the letter violated a “Kentucky Supreme Court Rule [that] prohibited the mailing or delivery of written advertisements ‘precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public.’”¹⁵¹ The Commission then urged the Supreme Court of Kentucky to amend its rules after finding that the rule “ban[ning] . . .

144. *Id.*

145. *Id.*

146. *Ohralik*, 436 U.S. at 449, 462, 466 (holding that a state has reason to assume that in-person solicitation of potential clients by an attorney will be injurious to the person who is solicited).

147. *Zauderer*, 471 U.S. at 642.

148. 486 U.S. 466 (1988).

149. *Id.* at 468.

150. *Id.* at 469.

151. *Id.* at 469–70.

targeted, direct mail advertise[ments] violated the First Amendment.”¹⁵² The petitioner then petitioned the Kentucky Bar Association’s Committee on Legal Ethics for an advisory opinion on the validity of the rule, which resulted in the Committee on Legal Ethics’ adoption of the ABA’s Rule 7.3 on attorney solicitation.¹⁵³

In analyzing targeted direct solicitation by attorneys to potential clients, the Court reiterated its fundamental holding in *Zauderer* that “[t]he ‘unique features of in-person solicitation by lawyers [that] justified a prophylactic rule prohibiting lawyers from engaging in such solicitation for pecuniary gain,’ . . . are *not present* in the context of written advertisements.”¹⁵⁴ The Court pointed out that previous precedent set by the Court in regards to attorney advertisements never distinguished between the constitutionality and protection of various modes of written advertisements to the general public.¹⁵⁵ The Court made the analysis based upon the four prong analysis of *Central Hudson Gas & Electric Corp.*¹⁵⁶ The Court here distinguishes between advertisements that target specific individuals and read “[i]t has come to my attention that your home is being foreclosed on” and advertisements that more broadly read “[i]s your home being foreclosed on?”¹⁵⁷ The Court determined that the advertisement not targeting specific individuals is commercial speech that can be regulated or prohibited.¹⁵⁸ Whereas, the more broad advertisement could not be prohibited without violating the First Amendment as long as the advertisement was not false, misleading, or advertising unlawful activity.¹⁵⁹

The Supreme Court of Kentucky, the preceding court below the Supreme Court of the United States, had relied on the holding of *Ohralik* and found that the state’s complete prohibition on all targeted, direct mail solicitation was permissible under the First Amendment, because of the “serious potential for abuse inherent in direct solicitation by lawyers of potential clients known to need specific legal services.”¹⁶⁰ The Supreme Court of the United States in its holding did not agree that the precedent set

152. *Id.* at 470; *see also* U.S. CONST. amend. I.

153. *Shapero*, 486 U.S. at 470; *see also* MODEL RULES OF PROF’L CONDUCT r. 7.3 (AM. BAR ASS’N 1983).

154. *Shapero*, 486 U.S. at 472 (alteration in original) (quoting *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 641 (1985)).

155. *Id.* at 473.

156. *See Shapero*, 486 U.S. at 472; *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

157. *Shapero*, 486 U.S. at 473.

158. *Id.* at 472–73.

159. *See* U.S. CONST. amend. I; *Shapero*, 486 U.S. at 473, 479.

160. *Shapero*, 486 U.S. at 474; *see also* U.S. CONST. amend. I; *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 468 (1978).

by *Ohralik*—that direct in-person solicitation by attorneys of potential clients—was present in the case of *Shapero* regarding targeted, direct mail solicitation.¹⁶¹ The Court made a fundamental distinction between direct and indirect solicitation.¹⁶² The Court stated:

Of course, a particular potential client will feel equally *overwhelmed* by his legal troubles and will have the same *impaired capacity for good judgment* regardless of whether a lawyer mails him an untargeted letter or exposes him to a newspaper advertisement—concededly constitutionally protected activities—or instead mails a targeted letter. The relevant inquiry is not whether there exist potential clients whose *condition* makes them susceptible to undue influence, but whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility.¹⁶³

The Court found that it is not to whom the targeted solicitation is sent that makes the solicitation prone to regulation, but the mode of communication in which the solicitation is sent that makes the solicitation prone to regulation.¹⁶⁴ The mode of communication is a fundamental factor in determining whether direct solicitation is overreaching or cause for undue influence.¹⁶⁵

Compared to print advertising, targeted direct mail solicitation “‘poses much less risk of overreaching or undue influence’ than does in-person solicitation.”¹⁶⁶ The Court held that written communications, either targeted or made toward the general public do not “‘involve[] ‘the coercive force of the personal presence of a trained advocate’ or the ‘pressure on the potential client for an immediate yes-or-no answer to the offer of representation.’”¹⁶⁷ People receiving a written communication has the ability to draw their attention either towards or away from the solicitation.¹⁶⁸ A targeted letter also does not have the ability to invade the privacy of a recipient any more than an attorney solicitation directed to the public at large can invade on a recipient’s privacy.¹⁶⁹ The Court ultimately held that “a truthful and non-deceptive letter, no matter how big its type and how much it

161. *Shapero*, 486 U.S. at 475–76; see also *Ohralik*, 436 U.S. at 449, 467–68.

162. See *Shapero*, 486 U.S. at 474–75.

163. *Id.* at 474.

164. See *id.* at 475.

165. *Id.*

166. *Id.* (quoting *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 642 (1985)).

167. *Shapero*, 486 U.S. at 475 (quoting *Zauderer*, 471 U.S. at 642).

168. *Id.* at 475–76.

169. *Id.* at 476.

speculates, can never *shout at the recipient or grasp him by the lapels*, . . . as can a lawyer engaging in face-to-face solicitation.”¹⁷⁰ Because attorney advertisements are commercial speech and thus, protected under the First Amendment, a state may not raise a substantial interest in restricting truthful and non-deceptive lawyer solicitations, including targeted direct mail solicitations.¹⁷¹

IV. FLORIDA’S REGULATIONS ON ATTORNEY ADVERTISEMENTS

A. *Recognizing Commercial Speech Protection in Florida*

The State of Florida has long been known for its strict standards in regulating attorney advertisements.¹⁷² Florida first recognized attorney advertisements as commercial speech and protected under the First Amendment in the year 1989.¹⁷³ Following the precedents set by the Supreme Court of the United States in *Virginia State Board of Pharmacy*, the Florida Bar took the initiative of conducting a survey of the public opinion on attorney advertising, and “[a]fter conducting hearings, . . . surveys, and reviewing extensive public commentary, the [Florida] Bar determined that several changes to its advertising rules were in order.”¹⁷⁴ As a result of these findings, “[i]n late 1990 the [Supreme Court of Florida] adopted the [Florida] Bar’s proposed amendments with some modifications.”¹⁷⁵ The Supreme Court of Florida took the initiative to pass the amended rules to attorney advertisements because of the precedents set by the Supreme Court of the United States in *Virginia State Board of Pharmacy* and *Bates*.¹⁷⁶ The Supreme Court of Florida cited *Bates* stating that the Supreme Court upheld “reasonable restrictions on the time, place, and manner of advertising.”¹⁷⁷ The Supreme Court of Florida explained “[s]ince lawyers render professional

170. *Id.* at 479 (citation omitted).

171. *Id.*; see also U.S. CONST. amend. I.

172. Lyrissa Barnett Lidsky & Tera Jckowski Peterson, *Medium-Specific Regulation of Attorney Advertising: A Critique*, 18 U. FLA. J.L. & PUB. POL’Y 259, 260 (2007).

173. Fla. Bar v. Went For It, Inc., 515 U.S. 618, 620 (1995); Fla. Bar: Petition to Amend the Rules Regulating the Fla. Bar—Advert. Issues, 571 So. 2d 451, 455 (Fla. 1990); see also U.S. CONST. amend. I.

174. *Went For It, Inc.*, 515 U.S. at 620; see also Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).

175. *Went For It, Inc.*, 515 U.S. at 620; see also Fla. Bar: Petition to Amend the Rules Regulating the Fla. Bar—Advert. Issues, 571 So. 2d at 452.

176. Fla. Bar: Petition to Amend the Rules Regulating the Fla. Bar—Advert. Issues, 571 So. 2d at 456–57; see also *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977); *Va. State Bd. of Pharmacy*, 425 U.S. at 770.

177. Fla. Bar: Petition to Amend the Rules Regulating the Fla. Bar—Advert. Issues, 571 So. 2d at 458 (quoting *Bates*, 433 U.S. at 384).

services [that] vary from attorney to attorney, case to case, and client to client, the potential for deception . . . in advertising is great.”¹⁷⁸ The amended rules to attorney advertisements in Florida supported “reasonable restrictions on the time, place, and manner of advertising” and reduced deception of potential clients caused by advertisements.¹⁷⁹ These amended Florida Bar Rules were the first amendments to the Florida Bar Rules subsequent to the Supreme Court decisions of *Virginia State Board of Pharmacy* and *Bates*, upholding commercial speech as protected under the First Amendment and extending this protection to attorney advertisements.¹⁸⁰ Maintaining its strict regulations on attorney advertisements, Florida has proceeded to “push[] the First Amendment envelope that safeguards the right of attorneys to inform potential clients about the [legal] services they offer.”¹⁸¹

The Florida Bar, even after the Supreme Court of Florida passed the amended rules allowing Florida to be a more permissive state towards attorney advertisement, continued to reveal its beliefs about the negative effects that attorney advertisements place on the legal profession.¹⁸² In 1994, after the attorney advertising rules were recently amended to allow attorney advertisements, former Florida Bar President, Patricia A. Seitz, expressed to the ABA that “[a]ggressive ads have caused the public to see the legal system as a lottery of fictitious claims in which lawyers make out like bandits in fees.”¹⁸³ Patricia A. Seitz also expressed that attorney advertisements were to blame for “increas[ing] the public’s cynicism about the legal system, which undermines the system that lawyers take an oath to uphold.”¹⁸⁴ In the year 2000, as advertisements became more popular and used amongst attorneys, the Florida Bar decided that it was time to take a stronger stance against attorneys who violated any Florida rules regarding attorney advertisements.¹⁸⁵ The Florida Bar subsequently passed a motion to

178. *Id.*

179. *Id.* (quoting *Bates*, 433 U.S. at 384).

180. *Fla. Bar: Petition to Amend the Rules Regulating the Fla. Bar—Advert. Issues*, 571 So. 2d at 457–58; see also *Bates*, 433 U.S. at 384; *Va. State Bd. of Pharmacy*, 425 U.S. at 770.

181. Lidsky & Peterson, *supra* note 172, at 261.

182. See *Fla. Bar: Petition to Amend the Rules Regulating the Fla. Bar—Advert. Issues*, 571 So. 2d at 452, 455; Lidsky & Peterson, *supra* note 172, at 260 n.1.

183. James Podgers, *Image Problem: Burned by a Fall in Public Favor, the Organized Bar Turns Up the Heat on Lawyer Advertising*, A.B.A. J., Feb. 1994, at 66, 68; see also *Fla. Bar: Petition to Amend the Rules Regulating the Fla. Bar—Advert. Issues*, 571 So. 2d at 452, 455.

184. Podgers, *supra* note 183, at 68.

185. Gary Blankenship, *Bar to Take a Harder Line Toward Lawyer Ad Violations*, FLA. B. NEWS, July 1, 2000, at 13.

initiate grievances against any Florida Bar attorney who violated the Bar rules in regard to attorney advertisements.¹⁸⁶ The Bar's motive for initiating grievances against violators of the Florida Bar rules of attorney advertisements was due to appeals.¹⁸⁷ The Bar was frustrated that since advertisement appeals take several months, attorneys may still run their advertisements, and by the time the appeal has been decided, the advertisement could have already been exposed through various media and communications.¹⁸⁸

The Florida Bar maintained its strong grip on regulating attorney advertisements in 2004, when it was announced that the Florida Bar was forming an Advertising Task Force.¹⁸⁹ The purpose of creating the Advertising Task Force was to review Florida's attorney advertisement regulations and determine when changes or amendments to the rules would be necessary.¹⁹⁰ The Florida Bar President at the time, Kelly Overstreet Johnson, expressed that "many lawyers still dislike or oppose lawyer advertising, believing [it is] the [strongest] cause of public discontent with the profession."¹⁹¹ Johnson also explained that because Supreme Court of the United States precedent prohibits complete bans on attorney advertisements, it is important to make sure that the Florida Bar's rules remain "as consistent . . . as possible and enforced."¹⁹²

In 2013, the Florida Bar petitioned to the Supreme Court of Florida to consider proposed amendments to Subchapter 4-7 of the Rules Regulating the Florida Bar.¹⁹³ The Florida Bar proposed to the Supreme Court of Florida that they strike all current rules regarding attorney advertisements and adopt entirely new rules, which ultimately the Supreme Court of Florida adopted.¹⁹⁴ The adoption of entirely new rules regarding attorney advertisements was due to a "contemporary study of lawyer advertising, which . . . include[d] public evaluation and comments about lawyer advertising."¹⁹⁵ After analyzing the findings, the Florida Bar came to the

186. *Id.*

187. *See id.*

188. *Id.*

189. *See New Bar Panel to Review Attorney Advertising Rules*, FLA. B. NEWS, Dec. 15, 2003, at 1.

190. *Id.*

191. *Id.*

192. *Id.*

193. *In re Amendments to the Rules Regulating the Fla. Bar—Subchapter 4-7, Lawyer Advert. Rules*, 108 So. 3d 609, 609 (Fla. 2013); *see also* FLA. RULES OF PROF'L CONDUCT r. 4-7.11 (2014).

194. *In re Amendments to the Rules Regulating the Fla. Bar—Subchapter 4-7*, 108 So. 3d at 609, 611.

195. *Id.* at 609–10.

conclusion that entirely new rules, which prevent the “dissemination of misleading and unduly manipulative information,” should be adopted.¹⁹⁶ The new advertising rules were “designed to make the advertising rules more cohesive, easier for lawyers who advertise to understand, and less cumbersome for the [Florida] Bar to apply and enforce.”¹⁹⁷

B. *Distinguishing Standards of the Florida Bar and the American Bar Association*

Florida is a state that has modeled its ethical and professional rules of conduct after the ABA Model Rules.¹⁹⁸ Florida’s Rules of Professional Conduct regarding attorney advertisements and solicitations are found in Rule 4-7.18, which reads:

Except as provided in subdivision (b) of this rule, a lawyer may not: (1) solicit, or permit employees or agents of the lawyer to solicit on the lawyer’s behalf, professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, in person or otherwise, when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain. The term *solicit* includes contact in person, by telephone, telegraph, or facsimile, or by other communication directed to a specific recipient and includes any written form of communication, including any electronic mail communication, directed to a specific recipient and not meeting the requirements of subdivision (b) of this rule and rules 4-7.11 through 4-7.17 of these rules; [and] (2) enter into an agreement for, charge, or collect a fee for professional employment obtained in violation of this rule.¹⁹⁹

The Florida Bar Standing Committee on Advertising’s Handbook on Lawyer Advertising and Solicitation also contains regulations that lawyers in the State of Florida must comply with, in addition to the Florida Rules of Professional Conduct.²⁰⁰ The Handbook on Lawyer Advertising and Solicitation cites Rule 4-7.11(a) of the Florida Rules of Professional Conduct: “Florida’s lawyer advertising rules apply to all forms of communication seeking legal employment in any print or electronic forum, including but not limited to newspapers, magazines, brochures, flyers, television, radio, direct mail, electronic mail, and Internet, including banners,

196. *Id.* at 610.

197. *Id.*

198. *See About the Model Rules, supra* note 85.

199. FLA. RULES OF PROF’L CONDUCT r. 4-7.18(a) (2014).

200. *See* FLA. BAR STANDING COMM. ON ADVERTISING, HANDBOOK ON LAWYER ADVERTISING AND SOLICITATION 1 (10th ed. 2013, rev. 2014).

pop-ups, websites, social networking, and video sharing media.”²⁰¹ In regard to Rule 4-7.18 of the Florida Rules of Professional Conduct and prohibited forms of attorney solicitation, the Handbook on Lawyer Advertising and Solicitation states:

A lawyer may not contact a prospective client in person, by telephone, telegraph, or facsimile, or through other means of direct contact, unless the prospective client is a family member, current client, or former client. This prohibition does not extend to unsolicited direct mail or email communications made in compliance with Rule 4-7.18(b).²⁰²

Attorneys who advertise through direct mail and email communications must not use “coercion, duress, fraud, overreaching, harassment, intimidation, or undue influence” in order to obtain clientele.²⁰³ According to the Florida Rules of Professional Conduct, a lawyer is not permitted to send potential clients advertisements through direct mail or email communications if the lawyer has been informed that the potential client does not wish to receive the communications from the lawyer.²⁰⁴

On a national perspective, Rule 7.2 and Rule 7.3 of the ABA Model Rules set the standards for attorney advertisements and solicitations.²⁰⁵ In contrast to the Florida Rules of Professional Conduct that specifically list the modes of communications in which a lawyer may not advertise to a potential client, Rule 7.2 of the ABA Model Rules states that “a lawyer may advertise services through written, recorded or electronic communication, including public media.”²⁰⁶ Some of the communications in which Florida prohibits lawyers from advertising through are permitted by the ABA Model Rules.²⁰⁷ For example, it can be argued that telephone communications classify as electronic communications and are thus permissible under the ABA Model Rules, but not permissible under the Florida Rules of Professional

201. *Id.* at 2.

202. *Id.* at 4.

203. HANDBOOK ON LAWYER ADVERTISING AND SOLICITATION, *supra* note 200, at 19; *see also* FLA. RULES OF PROF’L CONDUCT r. 4-7.18(b) (2014).

204. HANDBOOK ON LAWYER ADVERTISING AND SOLICITATION, *supra* note 200, at 19; *see also* FLA. RULES OF PROF’L CONDUCT r. 4-7.18(b) (2014).

205. MODEL RULES OF PROF’L CONDUCT r. 7.2, 7.3 (AM. BAR ASS’N 2013); *see also supra* Section II.C.

206. *See* FLA. RULES OF PROF’L CONDUCT r. 4-7.11(a)–(b) (2014); MODEL RULES OF PROF’L CONDUCT r. 7.2(a) (2013).

207. *See* FLA. RULES OF PROF’L CONDUCT r. 4-7.11 (2014); MODEL RULES OF PROF’L CONDUCT r. 7.2 (2013).

Conduct.²⁰⁸ Rule 7.3 of the ABA Model Rules specifically discusses solicitation of clients by attorneys and distinguishes that a lawyer may not solicit through any live or real-time communications; whereas the Florida Rules of Professional Conduct define *solicit* as in-person communications.²⁰⁹

V. EXTENDING FIRST AMENDMENT PROTECTION TO ATTORNEY ADVERTISEMENTS VIA TEXT MESSAGES

A. *Classifying Attorney Advertisements Via Text Messages as Protected Commercial Speech*

A Florida law firm has recently challenged the Florida Bar for denying the law firm's proposal of sending automated text messages to potential clients advertising the firm's legal services.²¹⁰ The Florida Bar classified automated text messages to potential clients as direct solicitation by telephone prohibited by the Florida Advertising Rules and Florida Rules of Professional Conduct.²¹¹ The law firm has argued that text messages may be classified as direct mail or email, which are permitted by the Florida Advertising Rules and the Florida Rules of Professional Conduct.²¹² Based on the decisions of the Supreme Court of the United States in regards to direct and indirect attorney advertisements, text messages more closely resemble the indirect communications in *Shapero* than the direct solicitation analyzed in *Ohralik*.²¹³

When analyzing attorney advertisements through the use of text messages, direct text messages to potential clients by attorneys reflect the same communications that the Supreme Court of the United States analyzed in *Shapero*.²¹⁴ Similar to the issue in the case of the Florida law firm sending direct text messages to potential clients, the Supreme Court of the United States was left with the question of whether a state may prohibit direct letters to targeted potential clients in *Shapero*.²¹⁵ As the Court pointed out in

208. See FLA. RULES OF PROF'L CONDUCT r. 4-7.11(a) (2014); MODEL RULES OF PROF'L CONDUCT r. 7.2(a) (2013).

209. See FLA. RULES OF PROF'L CONDUCT r. 4-7.18(a)(1) (2014); MODEL RULES OF PROF'L CONDUCT r. 7.3(a) (2013).

210. Hale, *supra* note 15.

211. FLA. RULES OF PROF'L CONDUCT r. 4-7.18(a)(1) (2014); HANDBOOK ON LAWYER ADVERTISING AND SOLICITATION, *supra* note 200, at 4; Hale, *supra* note 15.

212. Hale, *supra* note 15; see also FLA. RULES OF PROF'L CONDUCT r. 4-7.18 (2014).

213. See *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 479 (1988); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 468 (1978).

214. See *Shapero*, 486 U.S. at 479.

215. *Id.* at 468; Hale, *supra* note 15.

Shapero, a recipient of written communications has the ability to read the communication or avert their attention away from the communication.²¹⁶ Text messages, like letters, have the ability to be read, ignored and looked at later, or if the recipient chooses, not even seen at all.²¹⁷ In this respect, text messages are similar to written communications, such as emails or letters.²¹⁸

In the context of direct solicitation, text messages do not reflect the same in-person solicitation that the Court analyzed in *Ohralik*.²¹⁹ In-person solicitation, or live communications such as soliciting through the telephone, are distinguished from text messages in that text messages do not have the same high risk of intimidation or undue influence that live or in-person solicitation may have.²²⁰ Recipients of text messages are not pressured to accept legal representation immediately and are not pressured by the presence of an attorney.²²¹ Advertisements sent via text message also allow the recipient to reflect on the message, compare the nature and availability of goods and services, and allow for rational decision-making.²²² Unlike direct in-person solicitations, text messages are not immediate communications that urge an immediate response.²²³ Attorney advertisements via text message are classified as commercial speech and are thus deserving of First Amendment protection because they are direct communications that propose a transaction and serve the public interest of informing the public of the availability, nature, and prices of services.²²⁴

216. *Shapero*, 486 U.S. at 475–76 (“A letter, like a printed advertisement—but unlike a lawyer—can readily be put in a drawer to be considered later, ignored, or discarded.”).

217. *See id.*

218. *See id.*; *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 642 (1985).

219. *Shapero*, 486 U.S. at 475; *see also Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 457 (1978).

220. *Zauderer*, 471 U.S. at 642; *Ohralik*, 436 U.S. at 457.

221. *Zauderer*, 471 U.S. at 642 (“Print advertising may convey information and ideas more or less effectively, but in most cases, it will lack the coercive force of the personal presence of a trained advocate.”); *Ohralik*, 436 U.S. at 465 (“[T]he potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person.”).

222. *Ohralik*, 436 U.S. at 457; *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977) (holding that “commercial speech . . . inform[s] the public of the availability, nature, and prices of products and services, and . . . serves individual and societal interests in assuring informed and reliable decision-making.”).

223. *Zauderer*, 471 U.S. at 642 (“In addition, a printed advertisement, unlike a personal encounter initiated by an attorney, is not likely to involve pressure on the potential client for an immediate yes-or-no answer to the offer of representation.”); *Ohralik*, 436 U.S. at 457 (“The aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decision-making.”).

224. *Bates*, 433 U.S. at 364; *see also U.S. CONST. amend. I.*

B. *Text Messages Applied to the Central Hudson test*

If attorney advertisements via text messages are classified as commercial speech, in order to determine whether such commercial speech may be restricted or prohibited by a state, the *Central Hudson* test must be applied.²²⁵ The first prong of the four-part analysis asks whether the speech is protected under the First Amendment.²²⁶ *Bates* extended commercial speech protection to attorney advertisements, allowing attorney advertisements to be considered protected First Amendment speech.²²⁷ Attorney advertisements via text messages propose a transaction and inform the public of the availability of goods and services, qualifying as commercial speech.²²⁸ Attorney advertisements via text messages, which do not advertise unlawful activity and are not misleading or deceptive, meet the conditions for First Amendment protection.²²⁹

The second part of the *Central Hudson* test requires that the asserted governmental interest be substantial.²³⁰ In regard to the Florida Bar denying a Florida law firm's proposal to send automated text messages to potential clients, the Florida Bar can argue that its asserted interest in restricting the automated text messages would be to protect Florida citizens in need of legal services.²³¹ As the Court found in the case of *Ohralik*, a state has reason to assume that in-person solicitation of potential clients by an attorney may be harmful to the person who is solicited.²³² However, text messages, like other written communications, do not have the ability to intimidate or cause undue influence like other forms of in-person solicitation.²³³ Attorney advertisements also serve the important function of informing consumers of goods, which is fundamental to the freedom of speech of both attorneys and consumers.²³⁴ This asserted state interest of protecting consumers in Florida would fail in the case of attorney advertisements via text messages.²³⁵ The

225. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

226. *Id.*; see also U.S. CONST. amend. I.

227. *Bates*, 433 U.S. at 384; see also U.S. CONST. amend. I.

228. See *Zauderer*, 471 U.S. at 638; *Ohralik*, 436 U.S. at 455–56.

229. *Bates*, 433 U.S. at 383; see also U.S. CONST. amend. I.

230. See *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566, 568–69.

231. See *Hale*, *supra* note 15.

232. *Ohralik*, 436 U.S. at 466.

233. See *Zauderer*, 471 U.S. at 642 (holding that print advertisements generally pose a much less risk of overreaching or undue influence than in-person solicitation).

234. See U.S. CONST. amend. I; *Zauderer*, 471 U.S. at 642; *Bates*, 433 U.S. at 364.

235. See *Ohralik*, 436 U.S. at 466 (holding the State has reason to assume in-person solicitation of potential clients by an attorney will be injurious to the person who is solicited).

Florida Bar may also argue that direct solicitation should be prohibited in order to maintain the nobleness of the legal profession.²³⁶ As the Court held in *Virginia State Board of Pharmacy*, a state interest in upholding professionalism of a field may not be a sufficient interest in restricting commercial speech.²³⁷ The asserted state interest in upholding the dignity of the legal profession would also fail under the *Central Hudson* test in analyzing attorney advertisements via text messages to potential clients.²³⁸

If the asserted state interests were determined to be substantial, it must then be determined whether the restrictions directly advance the asserted state interest.²³⁹ If the Florida Bar were to assert the interests of protecting consumers or upholding the legal profession, then restricting text messages by attorneys to potential clients would have to carry out these interests.²⁴⁰ The restrictions also may not be more extensive than is necessary to serve that interest.²⁴¹ If the Florida Bar were able to carry out its asserted interests without restricting or prohibiting attorney advertisements via text messages, then the restriction or prohibition of the commercial speech would violate the First Amendment.²⁴²

C. *Keeping up with Modern Modes of Communication*

In the year 2000, the Florida Bar noted that a “member of the Florida Bar might feel lost without a cell phone.”²⁴³ Fifteen years later, that opinion should not have changed considering that technology has only grown more popular and become more useful.²⁴⁴ The opinion of the Florida Bar in 2000 was that technology must be “utilize[d] . . . to become more efficient and [to] provide the public with a better justice system.”²⁴⁵ At the time, technology was seen as “giving the decision-maker more information to make . . .

236. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 766 (1976).

237. See *id.* at 766, 770.

238. *Id.* at 766 (holding an asserted state interest in upholding professionalism of a field may not be sufficient); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

239. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566.

240. See *id.*

241. See *id.*

242. See *id.* (holding that a state’s asserted interest in restricting commercial speech must be narrowly drawn and may not be more extensive than is necessary to serve that interest).

243. Gary Blankenship, *The Florida Bar: Changing Through Technology*, FLA. B. J., Apr. 2000, at 37, 37.

244. See Hale, *supra* note 15.

245. Blankenship, *supra* note 243, at 39–40.

decision[s].”²⁴⁶ Relating to commercial speech, attorneys who choose to advertise must ensure that their advertisements are able to keep up with evolving technology in order to provide consumers with the knowledge of the nature and availability of goods and services.²⁴⁷ If in the year 2000, the Florida Bar was noting how extensive the use of cell phones were, this number has only expanded, and attorneys today must also utilize these communications.²⁴⁸

In 2000, evolving technology was already a major concern for the practice of law, as stated, “[t]echnology—and how lawyers use it—will be an important factor in determining what the practice of law looks like in the next [ten] years, let alone the next [fifty].”²⁴⁹ It is important for lawyers to recognize where the profession is headed and be able to keep up with the profession.²⁵⁰ Society and technology is something that is constantly and rapidly changing that lawyers, along with state bar associations, must be able to recognize.²⁵¹ Rules regarding commercial speech and attorney advertisements should also be flexible and able to keep up with society and technology.²⁵² It will be “[t]he lawyers who are able to stay on top of changing times [that will be] the ones who are going to be successful.”²⁵³ There will be even more expansive growth and changes in technology, and it is essential that the legal profession, including commercial speech and attorney advertisements, be able to keep up with these changes.²⁵⁴

VI. CONCLUSION

Throughout the history of the legal profession, advertising by attorneys has consistently been looked down upon and considered unprofessional.²⁵⁵ These consistent negative views of attorney advertisements have influenced the ethical and professional standards of the

246. *Id.* at 40.

247. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977) (“And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system.”).

248. *See* Blankenship, *supra* note 243, at 40; Hale, *supra* note 15.

249. Blankenship, *supra* note 243, at 40.

250. *Id.*

251. *See id.*

252. *Id.*; DRINKER, *supra* note 1, at 212.

253. Blankenship, *supra* note 243, at 40.

254. *See id.*

255. *See* DRINKER, *supra* note 1, at 212; Brace, *supra* note 3, at 110–11; *supra*

ABA, as well as a majority of state bar ethical and professional standards.²⁵⁶ It was not until 1977 in the case of *Bates*, where the Supreme Court of the United States determined attorney advertisements to be commercial speech and thus protected under the First Amendment, that the ABA standards and state bar ethical and professional rules began to permit attorneys to freely advertise their legal services and fees.²⁵⁷ Even after the Court extended First Amendment protections to attorney advertisements, ethical and professional rules have still maintained strict standards and regulations on attorney advertisements.²⁵⁸ These strict regulations consist of the delicate balance between maintaining the honor and dignity of the legal profession and upholding the First Amendment rights of attorneys to freely advertise their legal services and fees.²⁵⁹ Florida is a state that has consistently placed some of the strictest regulations on attorney advertisements.²⁶⁰

Attorney advertisements that directly solicit potential clients are a great concern for the ABA, as well as state bar associations, including the Florida Bar.²⁶¹ One of the modes of communication that is currently at issue in the State of Florida, is targeted automated text messages to potential clients.²⁶² The Florida Bar has struck down a firm's proposed plan of sending automated text messages to potential clients, as direct solicitation via telephone in violation of the Florida Rules of Professional Conduct.²⁶³ Upon a closer analysis of the use of text messages by attorneys to potential clients, these communications more closely resemble the direct solicitation that was held to be constitutionally protected commercial speech in *Zauderer* and *Shapero*.²⁶⁴ Text messages sustain the fundamental public interest of informing consumers of the nature, availability, and prices of available services and promote rational decision-making by the consumer.²⁶⁵

In conclusion, the Florida Bar should allow attorney advertisements via text messages because these communications are considered protected

256. See DRINKER, *supra* note 1, at 212; Brace, *supra* note 3, at 110–11; *supra* Section I.C.

257. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 379 (1977); Brace, *supra* note 3, at 111, 113; Lidsky & Peterson, *supra* note 172, at 263–64, 272–73.

258. *Bates*, 433 U.S. at 379; see also U.S. CONST. amend. I; MODEL RULES OF PROF'L CONDUCT r. 7.1–.3 (2013).

259. See *supra* Part I.

260. Lidsky & Peterson, *supra* note 172, at 260–61; see also *supra* Part IV.

261. See *supra* Section III.B.

262. See *supra* Parts I, V.

263. See *supra* Part I.

264. See *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 475–76, 478 (1988); *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 641–42 (1985); Hale, *supra* note 15; *supra* Section V.A.

265. See *supra* Part V.

forms of commercial speech under the First Amendment.²⁶⁶ Text messages do not invade the privacy of the recipient, nor demand an immediate response, proving to not violate the ABA Model Rules or Florida Rules of Professional Conduct.²⁶⁷ Florida must also consider allowing attorneys to advertise legal services through targeted text messages in order to keep up with evolving modern communications.²⁶⁸

266. U.S. CONST. amend. I; *see also supra* Part V.

267. MODEL RULES OF PROF'L CONDUCT r. 7.3, 7.3 cmt. (AM. BAR ASS'N 2013); FLA. RULES OF PROF'L CONDUCT r. 4-7.18 (2014); *see also Zauderer*, 471 U.S. at 642; *supra* Part V.

268. *See supra* Section V.C.

THE REAL EMERGENCY: WILL FLORIDA FOLLOW GEORGIA IN MEDICAL MALPRACTICE REFORM?

MICHELLE DIAZ*.

I.	INTRODUCTION.....	186
II.	BRIEF HISTORY OF MODERN TORT REFORM	187
	A. <i>What Is Tort Reform?</i>	187
	B. <i>Modern Tort Reform in the 1970s</i>	188
	C. <i>The 1980s and the Reagan Administration</i>	189
III.	MODERN ATTEMPTS TO ENCOURAGE TORT REFORM IN MEDICAL MALPRACTICE.....	190
	A. <i>National Movement for Medical Tort Reform</i>	191
IV.	INCREASING THE BURDEN OF PROOF RATIONALE	192
	A. <i>Introduction to the Emergency Room Malpractice</i>	192
	B. <i>Georgia and Its Reform to Heightened Burden of Proof</i> ..	193
	1. <i>Georgia's Conflict with Clear and Convincing</i> ...	195
V.	IN FLORIDA'S CASE.....	196
	A. <i>Florida's Tort Reform Direction</i>	196
	1. Introduction.....	196
	a. <i>1986 Florida Reform</i>	196
	b. <i>Republicans Make the Change</i>	197
	c. <i>House Bill 775</i>	198
	2. <i>Medical Malpractice Reform Gains Momentum</i> .	199
	B. <i>Access to the Courts</i>	201
	1. <i>Kluger v. White</i>	202
	2. <i>Mitchell v. Moore</i> and Defining an Overpowering Public Necessity	202
	C. <i>Estate of McCall Changes Florida's Justification for Tort Reform</i>	203
	1. <i>Why Estate of McCall Matters</i>	204
	2. <i>No Alternative Method</i>	207
	3. <i>North Broward Hospital District v. Kalitan</i>	208

* Michelle Diaz earned her bachelor's degree from Florida State and is a J.D. Candidate for May 2017 at Nova Southeastern University, Shepard Broad College of Law. Michelle would like to thank her family, friends, and Frank Gomez for the unconditional support and encouragement through law school. Specifically, Michelle would like to thank her parents, Miguel and Jacqueline Diaz for always working hard to ensure her education and for teaching her the values of persistence and dedication. Michelle would also like to thank Professor Michael Flynn for providing the necessary guidance to further develop this topic. Lastly, Michelle would like to thank the *Nova Law Review*, Volume 40 for their devotedness in perfecting and editing this Article.

4.	Florida Cannot Continue in Its Tort Reform.....	209
VI.	CONCLUSION.....	211

I. INTRODUCTION

With the high increased costs of insurance premiums and advances in medicine, tort reform has become a rising area of conflict in the law.¹ States are found in conflict with the high costs of insurance while at the same time protecting an individual's rights to seek just compensation in the law.² Many legislators have adopted distinct standards in order to respond effectively to the needs of their state.³ States, such as Georgia, Arizona, North Carolina, and others, are revolutionizing medical malpractice reform by increasing the burden of proof required in emergency physicians' medical malpractice cases from the standard torts preponderance of the evidence to a clear and convincing standard.⁴

Increasing the standard of proof to a clear and convincing standard makes it close to impossible for a plaintiff to raise a successful claim against a doctor who committed malpractice.⁵ Nevertheless, tort reform is rapidly occurring across the United States; many lobbyists of these reforms promise that the restrictions on a plaintiff will bring lower insurance costs for everyone.⁶ Statistical evidence contradicts that promise, with a showing of four hundred thousand dollars as the average amount that a jury awards in medical malpractice cases.⁷

Following the wave of tort reform, Florida has passed caps on the amount of damages that can be awarded to a plaintiff and has made the distinction between cases of emergency physicians and general practitioners.⁸ With recent cases, such as *Estate of McCall v. United States*,⁹ the constitutionality of tort reform has been called into question when caps

1. See F. Patrick Hubbard, *The Nature and Impact of the "Tort Reform" Movement*, 35 HOFSTRA L. REV. 437, 457, 517 (2006); Steve Cohen, *On Tort Reform, It's Time to Declare Victory and Withdraw*, FORBES (Mar. 02, 2015, 9:59 AM), <http://www.forbes.com/sites/stevecohen/2015/03/02/on-tort-reform-its-time-to-declare-victory-and-withdraw>.

2. See Hubbard, *supra* note 1, at 438, 441, 446; Cohen, *supra* note 1.

3. *Sample Legislation*, AM. C. EMERGENCY PHYSICIANS, <http://www.acep.org/Content.aspx?id=33178> (last visited Dec. 18, 2015).

4. *Id.*

5. See Cohen, *supra* note 1.

6. Cohen, *supra* note 1; *Sample Legislation*, *supra* note 3.

7. Cohen, *supra* note 1.

8. FLA. STAT. § 766.118(2), (4) (2014).

9. 134 So. 3d 894 (Fla. 2014).

are applied in wrongful deaths cases but not personal injury.¹⁰ If Florida chooses to continue tort reform and creates a distinction between medical practices, like its sister state Georgia, it would encounter many hurdles in establishing a rational basis for the distinct treatment.¹¹ The biggest hurdle for tort reformers to overcome is the Florida Constitution because it is unique from other states, as it provides equal protection and guarantees its citizens access to the courts.¹²

Setting aside the issue of whether caps on damages in malpractice cases are constitutional under equal protection, this Comment will discuss the following question: Will Florida be able to follow Georgia in its tort reform and increase the burden of proof in emergency care cases?¹³ Part II will introduce a brief history of modern tort reform that leads to the issue today of targeting tort reforms towards medical malpractice.¹⁴ Part III will analyze the national modern attempts to encourage tort reform in medical malpractice.¹⁵ Part IV will discuss Georgia's reasoning behind an increased burden of proof.¹⁶ Part V will discuss the individuality of Florida law and the change after *Estate of McCall*.¹⁷ Finally, Part VI will conclude with how Florida is unable to follow Georgia in its path towards reform.¹⁸

II. BRIEF HISTORY OF MODERN TORT REFORM

A. *What Is Tort Reform?*

The area of tort law in civil litigation was created to provide justice and to compensate those who have been injured due to negligence or with purposeful intent.¹⁹ The purpose of tort law is to place the victim, who suffered a loss, in the same position before the breach of duty.²⁰ Tort law, majorly based on common law, imposes legal liability on an individual who deviates from the norm and compensates the victim with monetary awards.²¹

10. *Id.* at 899.

11. *See id.* at 914; Greg Roslund, *The Medical Malpractice Rundown: A State-by-State Report Card*, EMERGENCY PHYSICIANS MONTHLY (July 21, 2014), <http://www.epmonthly.com/departments/subspecialties/medico-legal/the-medical-malpractice-rundown-a-state-by-state-report-card>.

12. *See* FLA. CONST. art. I, §§ 2, 21; *Estate of McCall*, 134 So. 3d at 933.

13. *See infra* Part V.

14. *See infra* Part II.

15. *See infra* Part III.

16. *See infra* Part IV.

17. *See infra* Part V.

18. *See infra* Part VI.

19. *See* DAN B. DOBBS, *THE LAW OF TORTS* 1 (2000).

20. Hubbard, *supra* note 1, at 440.

21. DOBBS, *supra* note 19, at 2.

Tort law's quick adaptation to legislative enactments due to various interests from insurance companies, corporations, and legal practitioners makes it a dynamic area of law open to criticism.²² Tort reform is often defined as a movement that limits the ability and award that a plaintiff can attain when pursuing a civil tort lawsuit in order to address a series of *crises*.²³ Tort reform often involves distinct actors, such as the American Medical Association or State Farm Insurance, with multiple interests but who share a common goal for efficiency.²⁴ Other times tort reform is part of a political movement, which is subject to economic needs.²⁵

Critics often debate whether some of these reforms violate constitutional principles, such as those of due process, and whether this constant adaption to social policies opens the floodgates for courthouses over the country with frivolous lawsuits.²⁶ Supporters of tort reform propose changes to the judicial system to decrease costs in the economy, as insurance premiums rise and medical innovation expands.²⁷ It is frequently deemed as a controversial area of law because tort reform often aims at limiting the amount of recovery a victim can receive for his or her injury.²⁸ The reasoning behind such limitations is the increase in high insurances, but often the effect goes beyond limiting the compensation system and is done at the cost of guaranteed constitutional rights.²⁹

B. *Modern Tort Reform in the 1970s*

In order to understand whether states, such as Florida, can adopt other states' standards in medical malpractice cases, it is essential to give a brief historical introduction to important tort reforms that have lead to the common practice today.³⁰ While tort law is considered common law and was introduced in the United States as early as the 1800s, the true identity of reform began in the 1970s when the insurance market quickly rose.³¹ As a result, physicians petitioned legislators to make changes in personal injury cases.³² In 1975, California enacted its famous medical malpractice statute

22. See Hubbard, *supra* note 1, at 438–39, 471.

23. *Id.* at 438, 472.

24. *Id.* at 472.

25. See *id.* at 475–76.

26. *Id.* at 474, 523.

27. See Scott DeVito & Andrew W. Jurs, “Doubling-Down” for Defendants: *The Pernicious Effects of Tort Reform*, 118 PA. ST. L. REV. 543, 549 (2014).

28. See *id.* at 544.

29. See *id.* at 543–44, 596.

30. See *id.* at 543, 546, 549.

31. *Id.* at 551; see also Hubbard, *supra* note 1, at 439.

32. DeVito & Jurs, *supra* note 27, at 551.

that placed a cap on non-monetary awards on pain and suffering, therefore, slowing the price increase of medical malpractice premiums.³³

The movement of tort reform in the 1970s focused on placing an economical focus on civil litigation and limited the amount of damages that could be awarded.³⁴ A decrease in the number of carriers and increase in the number of claims caused premiums to rise and created an air of distrust towards the court system.³⁵ Subsequently, the medical community blamed the judicial system and lobbied the legislature to place limitations on recoveries for plaintiffs.³⁶ Nevertheless, many insurers were slow to increase and adjust their rates because of the uncertainty of the constitutionality of these limits.³⁷

C. *The 1980s and the Reagan Administration*

In the 1980s, the increased tort reform in the United States boosted the demand for insurance coverage, and many critics claim that this is a cause of the tort reform itself.³⁸ The Reagan Administration blamed the insurance crisis of the 1980s on tort reform.³⁹ Groups were formed, such as the Tort Policy Working Group, who believed that a doubling in the 1970s of lawsuits and an increase in award damages in medical malpractice suits would cause individuals to experience a high increase in insurance premiums.⁴⁰ The group recommended for the first time placing caps on damage awards and increasing the burden of proof.⁴¹

The Reagan Administration's Republican platform consisted of preventing insurance from rising and blamed the civil suits for the high costs of insurance and lack of healthcare available.⁴² The movement to limit civil trials in the courtroom and to decrease costs began to increase momentum when many states in the 1980s began a reform to adopt legislation to limit recovery on claims.⁴³ As well, many states focused on the abolition or

33. CAL. CIV. CODE § 333.2(a)–(b) (West 2015); FRANK A. SLOAN & LINDSEY M. CHEPKE, *MEDICAL MALPRACTICE* 117 (2008).

34. See G. EDWARD WHITE, *TORT LAW IN AMERICA* 216 (expanded ed. 2003).

35. DeVito & Jurs, *supra* note 27, at 549–50.

36. *Id.* at 550.

37. SLOAN & CHEPKE, *supra* note 33, at 97.

38. See DeVito & Jurs, *supra* note 27, at 551; Hubbard, *supra* note 1, at 438.

39. DeVito & Jurs, *supra* note 27, at 551.

40. *Id.*

41. *Id.*

42. REPUBLICAN NAT'L COMM., *THE REPUBLICAN PARTY PLATFORM OF 1988: AN AMERICAN VISION: FOR OUR CHILDREN AND OUR FUTURE* (1988), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=25846>.

43. See DeVito & Jurs, *supra* note 27, at 551–53.

limitation of joint and several liability.⁴⁴ In joint and several liability, each tortfeasor is held liable for damages, and each defendant must then prove that they were not the sole proximate cause of the injury.⁴⁵ The plaintiff may elect from the group of defendants which one to seek payment from, but joint and several liability is often critiqued in that it entices plaintiffs to seek judgment from the wealthiest defendant.⁴⁶

Between 1986 and 1987, thirty-five states quickly adapted to tort reforms, within them abolishing the common law theory of joint and several liability.⁴⁷ However, some states, such as Arizona, adopted a slower approach by merely limiting joint and several liability.⁴⁸ Other states, such as Florida, moved towards completely abolishing it and received popular opposition in its tort reform movements.⁴⁹ The Supreme Court of Florida held that the complete abolition of joint and several liability did not violate the U.S. Constitution nor the Florida Constitution under equal protection, due process, and access to the courts.⁵⁰ However, the court ruled that caps on non-economic damages violated the Florida Constitution because they deny the plaintiff's access to the courts.⁵¹

III. MODERN ATTEMPTS TO ENCOURAGE TORT REFORM IN MEDICAL MALPRACTICE

Tort reform is often looked at as an answer for the insurance crisis.⁵² Therefore, because of the connection between insurance companies and medical malpractice, this then becomes an area of law often targeted by legislators and companies.⁵³ A second Republican attempt to limit tort reform occurred in 2000 with the Bush Administration after a repeated insurance crisis.⁵⁴ The Bush Administration proposed further tort reform by imposing a \$250,000 cap on non-economic damages in medical malpractice

44. See Mike Steenson, *Recent Legislative Responses to the Rule of Joint and Several Liability*, 23 TORT & INS. L.J. 482, 485 (1987).

45. See James J. Scheske, Comment, *The Reform of Joint and Several Liability Theory: A Survey of State Approaches*, 54 J. AIR L. & COM. 627, 635 (1988).

46. *Id.*

47. *Id.* at 642.

48. *Id.*

49. See *id.* at 642–43.

50. U.S. CONST. amend. XIV, § 1; FLA. CONST. art. I, § 9, 21; *Smith v. Dep't. of Ins.*, 507 So. 2d 1080, 1091 (Fla. 1987); Scheske, *supra* note 45, at 643.

51. FLA. CONST. art. I, § 21; *Smith*, 507 So. 2d at 1095.

52. See Alan G. Williams, *The Cure for What Ails: A Realistic Remedy for the Medical Malpractice "Crisis"*, 23 STAN. L. & POL'Y REV. 477, 478 (2012).

53. *Id.* at 480–81.

54. *Id.* at 482–83.

suits, in response to premium increases in insurance rates.⁵⁵ However, the rise in insurance premiums was due to the rise in medical costs, recovery attempts for lost profits, and insurer's lack of ability to reserve profits for down periods.⁵⁶ None of the factors that caused the higher premiums were due to an increase in medical malpractice cases.⁵⁷ Often politicians have mistakenly looked towards tort reform as a solution to resolve the crisis in making insurance available to the public; however, repeatedly, this method has not worked.⁵⁸

A. *National Movement for Medical Tort Reform*

Distinct states are each slowly continuing their independent tort reform in limiting the ability for plaintiffs to pursue litigation in exchange for lower insurance premiums.⁵⁹ In 2003, Texas enacted an emergency care provision requiring a showing of willful and wanton negligence for an emergency care provider to be held liable for malpractice.⁶⁰ In the same year, Florida created a strict cap on non-economic damages, making the distinction between a cap of \$150,000 for emergency care providers versus \$500,000 for general practitioners.⁶¹ Subsequently, Georgia followed the distinction in the standard of evidence for malpractice claims between emergency physicians and general practitioners.⁶² Georgia changed the required standard of proof from preponderance of the evidence to a higher clear and convincing standard but only when a practitioner has shown a standard of gross negligence.⁶³ Utah, Arizona, and North Carolina subsequently followed but with only a heightened clear and convincing standard of proof.⁶⁴

Increasing the burden of proof and placing caps on the claim amount questions whether these methods are constitutional and whether lower premiums are paid at the expense of patients who suffer injuries that can be

55. *Id.*

56. Alec Shelby Bayer, Comment, *Looking Beyond the Easy Fix and Delving into the Roots of the Real Medical Malpractice Crisis*, 5 HOUS. J. HEALTH L. & POL'Y 111, 118 (2005).

57. *Id.*

58. *Id.* at 115–16.

59. See *Sample Legislation*, *supra* note 3.

60. TEX. CIV. PRAC. & REM. CODE ANN. § 74.153 (West 2003).

61. *Sample Legislation*, *supra* note 3.

62. See *id.*

63. *Id.*

64. *Id.*

avoided.⁶⁵ Protection to insurers and health care providers is justified by the fear that practitioners will leave the state due to malpractice suits and a common objective to reduce defensive medicine.⁶⁶ However, with the relatively small number of malpractice claims that make it to court, the effectiveness of these restrictions becomes questionable.⁶⁷ Are patients being limited their rights in order to achieve affordable care?⁶⁸ Will other states, such as Florida, with their unique state constitutions be able to follow political tort reform to increase efficiency and diminish costs by restricting fundamental rights?⁶⁹

IV. INCREASING THE BURDEN OF PROOF RATIONALE

A. *Introduction to the Emergency Room Malpractice*

Generally, in civil actions, including medical malpractice, the plaintiff has the duty to prove every element of the case by a preponderance of evidence.⁷⁰ Preponderance of evidence means that the plaintiff, in a more than probable standard, can establish a persuasive chain of causation between the injury and the defendant.⁷¹ The evidence must show that it is more probable that the practitioner caused the plaintiff's injury; however, causation can often be difficult to prove.⁷² Defendants in medical claims have the ability to blame the injury on many external factors and on the plaintiff's previous medical history.⁷³ In medical cases, the breach is determined in accordance to what the physician should have done differently; however, it is not conclusive.⁷⁴ Emergency claims are made even more difficult for a plaintiff when emergency practitioners are not required to follow the same standard as the general profession and are allowed to use their best judgment.⁷⁵

65. Alex Stein, *Toward a Theory of Medical Malpractice*, 97 IOWA L. REV. 1201, 1253–54 (2012); Jason R. Graves, Note, *State of Emergency: Why Georgia's Standard of Care in Emergency Rooms is Harmful to Your Health*, 45 GA. L. REV. 275, 293 (2010); see also Bayer, *supra* note 56, at 131.

66. Graves, *supra* note 65, at 280.

67. See *id.* at 291.

68. See *id.* at 280.

69. See FLA. CONST. art. I, § 21; Graves, *supra* note 65, at 281.

70. Stein, *supra* note 65, at 1217.

71. *Id.*

72. *Id.*

73. *Id.*

74. See *id.* at 1215–17.

75. See Stein, *supra* note 65, at 1212.

Emergency care, unlike general care, focuses on the immediate care provided to a patient in times of emergency.⁷⁶ Unlike general practitioners, emergency doctors do not have extensive knowledge of the patient's medical history or any prior relationship to the patient, and they must rely on split-second decisions.⁷⁷ An emergency physician is responsible for providing diagnosis and care to episodic illness.⁷⁸ Emergency physicians are often liable for a broad area of medical expertise unlike other practitioners who are able to specialize in a specific area.⁷⁹ Some states have even allowed other medical specialists to serve as expert witnesses against an emergency physician.⁸⁰

Part of the reasoning behind why many states have taken the approach to make a distinction with emergency room practitioners involves the fast pace they encounter daily and the distinct regulation from general practitioners.⁸¹ A greater portion of the population is relying significantly more on emergency room services than a clinic with a general practitioner, even in situations where an emergency is not warranted.⁸² As a result, a conflict arises in determining what is a true emergency and to what standard an emergency practitioner will be held liable.⁸³ Emergency practitioners often treat conditions that are not critical but that patients seek because of lack of health care based on their financial situation.⁸⁴

B. *Georgia and Its Reform to Heightened Burden of Proof*

In 2005, the Georgia General Assembly, in Senate Bill 3, reasoned that liability insurance caused the state at the time to suffer a crisis that affected the quality of health.⁸⁵ Therefore, the assembly believed that the regulation of civil action in the healthcare would resolve the crisis and result in stability and predictability in the economy.⁸⁶ As a result of healthcare problems and the individuality of emergency physician malpractice, the State of Georgia enacted section 51-1-29.5 of the Georgia Code, establishing that no emergency physicians shall be held liable for negligence unless it is

2011). 76. RICHARD M. PATTERSON, HARNEY'S MEDICAL MALPRACTICE 569 (5th ed.

77. *See Graves, supra* note 65, at 279.

78. PATTERSON, *supra* note 76, at 569.

79. *Id.*

80. *Id.*

81. *See Stein, supra* note 65, at 1212.

82. Graves, *supra* note 65, at 298.

83. PATTERSON, *supra* note 76, at 569–70.

84. *See Graves, supra* note 65, at 298.

85. *Id.* at 284; S. 3, 148th Gen. Assemb., Reg. Sess. § 1 (Ga. 2005).

86. *See Graves, supra* note 65, at 284; Ga. S. 3 § 1.

proven with a higher clear and convincing standard and with a showing of gross negligence.⁸⁷

Georgia's healthcare is unique because most physicians are covered by one insurer, MAG Mutual Insurance Company, and therefore, the high premium insurance crisis is more evident when there is not much diversity in the insurance market for physicians.⁸⁸ Besides lacking competition in insurance, another cause of the health care crisis was affirmative duty statutes that required public hospitals to treat all patients who seek care in emergency rooms.⁸⁹ Georgia's affirmative duty to treat all patients often led to hospitals being over-occupied with higher traffic, forcing emergency physicians to work at a faster pace.⁹⁰ While Georgia blamed medical malpractice cases for the lack of affordability in insurance, distinct factors accelerated the insurance crisis in Georgia.⁹¹ For example, competition with one of the greatest health insurance companies, St. Paul Insurance Company, ultimately caused competition to rise to the point where premium rates dropped rapidly until insurance companies were no longer capable of providing coverage at such low rates.⁹²

The Georgia General Assembly introduced Senate Bill 3 with the purpose to lower healthcare costs and make healthcare more accessible.⁹³ However, Senate Bill 3 raised much opposition from individuals, such as Senator David Adelman, who commented that by raising the burden of proof, it would, as a result, become difficult for those patients who suffer from injury or even death to seek justice in the law.⁹⁴ When the legislators raised the standard of proof to *clear and convincing*, they made it nearly impossible—or at least almost to the criminal standard of a *beyond a reasonable doubt*—for a plaintiff to bring a successful claim against an emergency physician.⁹⁵ Not only has the legislature raised the standard, but it has also changed the negligence norm to a gross negligence standard, which is almost a “mission impossible for plaintiffs.”⁹⁶

87. GA. CODE ANN. § 51-1-29.5(c) (2015).

88. Graves, *supra* note 65, at 284, 301.

89. See *Williams v. Hosp. Auth. of Hall Cty.*, 168 S.E.2d 336, 337 (Ga. Ct. App. 1969); Graves, *supra* note 65, at 301.

90. See *Williams*, 168 S.E.2d at 337; Jade Hindmon, *E.R. Overcrowding*, WTVM, <http://www.wtvm.com/story/4710750/er-overcrowding> (last visited Dec. 18, 2015).

91. See Graves, *supra* note 65, at 299–300.

92. *Id.* at 301.

93. *Id.* at 284; see also S. 3, 148th Gen. Assemb., Reg. Sess. §§ 1(a), 8(c) (Ga. 2005).

94. See Ga. S. 3 § 8(c); Graves, *supra* note 65, at 287.

95. See Graves, *supra* note 65, at 287, 289.

96. Graves, *supra* note 65, at 287.

1. Georgia's Conflict with *Clear and Convincing*

The Supreme Court of Georgia's ruling in *Gliemmo v. Cousineau*,⁹⁷ faced public backlash after the passing of Senate Bill 3, when a medical malpractice action was filed questioning the constitutionality of Georgia's heightened burden of proof and the raised standard of gross negligence.⁹⁸ Plaintiffs in this case alleged that the distinction between emergency room and general medical malpractice cases violated Georgia's Constitution because it provided a *special laws clause*, which made any law that is not applied uniformly, unconstitutional.⁹⁹ Due to the uniqueness in the Georgia Constitution, the court held that a gross negligence and heightened burden of proof was constitutional because it was not a special law, and it did not deny equal protection and due process.¹⁰⁰

The plaintiffs in *Gliemmo* alleged that because section 51-1-29.5(c) only applies to some emergency physicians, it is considered a special law that discriminates against practitioners outside the emergency room and thus, is in violation of the Georgia Constitution.¹⁰¹ The court reasoned that the statute is not a special law because it is applied uniformly to all claims in emergency care and without a specific time frame.¹⁰² The General Assembly's legislative intent behind the distinct treatment showed that both emergency and general practitioners are having great difficulty affording insurance, and because emergency care is distinct from general care, it is sufficient to heighten the burden of proof to reach those goals.¹⁰³ However, the court and the legislature do not discuss doctors who are not emergency physicians but who undergo similar emergency situations, and patients with severe injuries and yet do not qualify for a heightened burden of proof.¹⁰⁴ This argument will be discussed further in depth later in this Comment.¹⁰⁵ Subsequently, the court then cites to *State Farm Mutual Auto Insurance Co.*

97. 694 S.E.2d 75 (Ga. 2010).

98. *Id.* at 77; *see also* GA. CODE ANN. § 51-1-29.5(c) (2015); S. 3, 148th Gen. Assemb., Reg. Sess. (Ga. 2005).

99. *Gliemmo*, 694 S.E.2d at 77 (emphasis added).

100. *Id.* at 79–80; *see also* GA. CONST. art. III, § VI, para. IV(c).

101. *Gliemmo*, 694 S.E.2d at 77; *see also* GA. CONST. art. III, § VI, para. IV; GA. CODE ANN. § 51-1-29.5(c).

102. *Gliemmo*, 694 S.E.2d at 78–79; *see also* GA. CONST. art. III, § VI, para. IV(c); GA. CODE ANN. § 51-1-29.5(c).

103. *Gliemmo*, 694 S.E. 2d at 79.

104. *See id.*

105. *See infra* Section V.A.2.

v. *Five Transportation Co.*,¹⁰⁶ which held that treatment that is not uniformly identically applied does not necessarily offend the Georgia Constitution.¹⁰⁷

V. IN FLORIDA'S CASE

A. *Florida's Tort Reform Direction*

1. Introduction

Tort reform is becoming a popular new movement, which all states are taking part in but that many face conflict with because of the individuality of each state's constitution.¹⁰⁸ In order to understand whether Florida can continue its tort reform path, it is essential to understand the case law and special constitutional provisions that do not allow Florida to continue tort reform like its sister state, Georgia.¹⁰⁹ In Georgia, the legislature has successfully enacted statutes that increase the standard of the proof that makes it close to impossible for a victim to successfully bring a case to court.¹¹⁰ Contrastingly, the effectiveness of tort reform in states such as Florida becomes questionable when Florida still has some of the highest insurance premiums in the country even when it has different cap amounts in place and expert witness reform.¹¹¹

a. *1986 Florida Reform*

The Medical Malpractice Reform Act, one of Florida's earliest reforms in 1975, was enacted in order to diminish the cost of medical insurance to patients at a time when the state began to suffer through a health care crisis, and the cost of insurance was excessively gross.¹¹² In Florida, the tort reform movement did not become recognized until a move from the contributory negligence standard to the comparative negligence norm occurred in *Hoffman v. Jones*,¹¹³ to adopt a more equitable system of

106. 271 S.E.2d 844 (Ga. 1980).

107. *Gliemmo*, 694 S.E.2d at 79; *State Farm Mut. Auto. Ins. Co.*, 271 S.E.2d at 848; see also GA. CONST. art. III, § VI, para. IV.

108. See Roslund, *supra* note 11.

109. See *supra* Section IV.B; *infra* Sections V.A.1.a–c, V.A.2.

110. See Roslund, *supra* note 11.

111. See *id.*; *Estate of McCall v. United States*, 134 So. 3d 894, 934 (Fla. 2014).

112. Medical Malpractice Reform Act of 1975, ch. 75–79, 1975 Fla. Laws 13; see also Thomas Horenkamp, Comment, *The New Florida Medical Malpractice Legislation and Its Likely Constitutional Challenges*, 58 U. MIAMI L. REV. 1285, 1287 (2004).

113. 280 So. 2d 431 (Fla. 1973).

relief.¹¹⁴ Notably, the Tort Reform and Insurance Act of 1986 demonstrated that Florida's aim to move towards comparative fault in negligence cases.¹¹⁵ This would be the first attempt to slowly abolish the doctrine of joint and several liability in Florida.¹¹⁶ Subsequent reforms followed the passage of section 768.81, such as allocating fault to the plaintiff and removing joint and several liability to a defendant who has a less percentage of fault, which changed medical malpractice law.¹¹⁷ The 1986 reform was based on the legislature's attempt to decrease insurance premiums and as a result, implemented insurance profit laws and insurance rate rollbacks.¹¹⁸

b. *Republicans Make the Change*

In 1996, Florida gained a Republican majority controlling the Florida House and Senate, which caused the legislators to aim their focus on improving business relations in Florida.¹¹⁹ The changes in office began a movement to change the civil court system in order to increase prosperity for insurance companies.¹²⁰ The legislators gained wide support for the limitation of litigation; they claimed that the floodgate of civil cases in the courthouses was causing insurance companies and the market to fail in Florida.¹²¹ Despite the fact that in 1996 Florida's economy was strong as the gross state product rose by 19.5%, the unemployment rate fell by 4.9%, and Florida ranked third in greatest number of new businesses, legislators still blamed the small percentage of civil cases in Florida for a non-existent decline.¹²² Further statistics in the 1990s show that medical claims were not the culprit because when the 1986 reform was passed negligence cases only consisted of 8.9% of civil cases, and they have been in decline since 1990.¹²³

114. *Id.* at 438.

115. Michael S. Hooker & Guy P. McConnell, *Joint and Several Liability in Florida: Are Reports of Its Demise Greatly Exaggerated?*, FLA. B. J., Dec. 2006, at 10, 12; see also FLA. STAT. § 768.81 (2014).

116. Hooker & McConnell, *supra* note 115, at 12; see also FLA. STAT. § 768.81.

117. Hooker & McConnell, *supra* note 115, at 12; see also FLA. STAT. § 768.81.

118. Kenneth D. Kranz, *Tort Reform 1997–98: Profits v. People?*, 25 FLA. ST. U. L. REV. 161, 163–64 (1998).

119. *Id.* at 165.

120. *See id.*

121. *See id.*

122. *See id.*; Robert S. Peck et al., *Tort Reform 1999: A Building Without a Foundation*, 27 FLA. ST. U. L. REV. 397, 433 (2000).

123. Kranz, *supra* note 118, at 176–77.

The only increase that has occurred in civil cases is due to the standard population increase of Floridians.¹²⁴

c. *House Bill 775*

In 1999, Florida once again made changes to tort law with the passage of House Bill 775 that reformed joint and several liability, punitive damages, statute of repose, and vicarious liability in motor vehicle cases.¹²⁵ The doctrine of joint and several liability was further limited in the 1999 reform when a plaintiff's economic losses were limited to a total of a one million dollar cap, but it only applied when the defendant was more than fifty percent at fault.¹²⁶ Significantly, under the new reform, multiple defendants could not be held to be joint and severally liable for more than one million dollars.¹²⁷

A common method used by tort reformists in order to gain public support for the limitation of the civil litigation system was the reference to a fictitious *tort tax* to the public.¹²⁸ Reference to the tort law system as a tax on civilians was used to quickly gain negative opposition against individuals who brought claims to court.¹²⁹ Vice President Dan Quayle made a statement to a group of business leaders that the tort litigation system costs Americans three hundred billion dollars, a figure that has no statistical support but that quickly gained momentum.¹³⁰ Fictitious information, negative terminology, such as *tort tax*, and company lobbyists have falsely led the tort reform in Florida when no accurate information demonstrates that civil litigation burdens Florida's economy in any manner.¹³¹ Other costs, such as natural disasters—specifically hurricanes—have caused a decline in Florida's economy, but are not accounted for when the legislature looks for a culprit in the downfall of the economy.¹³²

124. *Id.* at 177.

125. H.B. 775, 1999 Leg., Reg. Sess. (Fla. 1999) (Act effective Oct. 1, 1999, ch. 99-225, 1999 Fla. Laws 1400); Peck et al., *supra* note 122, at 406.

126. Peck et al., *supra* note 122, at 409.

127. *Id.*

128. *Id.* at 421.

129. *Id.*

130. *Id.* at 421–22.

131. *See* Peck et al., *supra* note 122, at 422.

132. *Id.* at 426.

2. Medical Malpractice Reform Gains Momentum

In 2003, the legislature focused its attempts on medical malpractice cases by placing statutory caps on non-economic damages.¹³³ The medical malpractice reform also enacted provisionary steps to protect consumers from medical negligence, such as allowing insurance companies to avoid suit by tendering the limit of the defendant's policy in two hundred ten days.¹³⁴ The 2003 legislature also expressed that the new cap on non-economic damages would be on an aggregate basis, and in cases where there were several plaintiffs, the cap would be even lower.¹³⁵ As a result, section 766.118 of the Florida Statutes was enacted to limit the amount of non-economic damages a plaintiff could receive to five hundred dollars per claimant.¹³⁶ The statute aimed at limiting frivolous lawsuits and enforcing mediation before trial in order to protect insurance companies from excessive claims.¹³⁷ In order to pass the Statute, Senate Bill 2-D provided several legislative findings, many are no longer presently applicable.¹³⁸

Overall, the 2003 Florida Legislature for Senate Bill 2-D found that Florida was in the middle of a medical malpractice crisis and that it caused decreased availability of healthcare for Floridians.¹³⁹ The legislature claimed that Florida is one of the states with the highest medical malpractice insurance and therefore reasoned that this was why medical practitioners were leaving Florida.¹⁴⁰ The legislature reasoned that it could not provide its citizens with access to proper healthcare when doctors were leaving the state to practice somewhere else with lower insurance premiums.¹⁴¹ As a result, the legislature publicized a correlation between the numbers of doctors leaving the state; nonetheless it was only *anecdotal* data that was merely implied.¹⁴²

Organizations, such as the American Medical Association, have blamed the American jury system for the increase in insurance premium

133. Tracy S. Carlin, *Medical Malpractice Caps Move from the Legislature to the Courts: Will They Survive?*, FLA. B. J., May 2004, at 10, 10.

134. See Horenkamp, *supra* note 112, at 1290–91.

135. See S.B. 2-D, 2003 Leg., Spec. Sess. (Fla. 2003); Horenkamp, *supra* note 112, at 1289.

136. FLA. STAT. § 766.118(2)(a) (2014); Horenkamp, *supra* note 112, at 1290.

137. See FLA. STAT. § 766.118; Horenkamp, *supra* note 112, at 1289, 1291.

138. See *Estate of McCall v. United States*, 134 So. 3d 894, 913 (Fla. 2014) (discussing that in Florida there no longer exists a healthcare crisis to provide a rational basis for caps); Fla. S.B. 2-D; *infra* Part V.C.

139. See Fla. S.B. 2-D; Horenkamp, *supra* note 112, at 1299–1300.

140. Fla. S.B. 2-D; Horenkamp, *supra* note 112, at 1298.

141. See Fla. S.B. 2-D; Horenkamp, *supra* note 112, at 1298–99.

142. Horenkamp, *supra* note 112, at 1302.

costs and the limitation of accessibility to healthcare.¹⁴³ Tactics to support the allegation of excessive jury awards include placing emphasis on individual high jury awards and claiming that the award system is the true culprit.¹⁴⁴ Insurance companies repeatedly claim that litigation and excessive awards are responsible for the national crisis and high costs of healthcare, however, significant data shows otherwise.¹⁴⁵ In 2001, a total of 1303 claims were made against doctors in Florida that totaled to \$361.1 million.¹⁴⁶ If insurance companies claim that medical malpractice suits are driving doctors out of Florida and are excessive, the numbers of the amount of cases that actually make it to court do not match the allegations.¹⁴⁷

Other arguments made by tort reformers are that jurors are often sympathetic to plaintiffs because they only see the injuries caused and that often the medical standard is too complex for them to understand, even with expert testimony.¹⁴⁸ Tort reformers argue that medical malpractice is too complex for jurors because it involves multiple parties, difficult medical issues, and a complex method to award appropriate damages.¹⁴⁹ However, all these legislative findings on the need for tort reform in the medical malpractice area do not discuss how insurance premium costs have increased due to the losses in the reserve amount of negligent doctors and the lack of proper management of healthcare companies in the industry.¹⁵⁰

In 2004, further reforms continued as Florida passed the *Three Strikes Rule*, also referred to as *Amendment 8*, which became section 456.50 of the Florida Statute.¹⁵¹ The Act focused on preventing physicians who have repeatedly committed malpractice from maintaining or obtaining a physician's license.¹⁵² While the Act may at first seem to benefit the plaintiff, the Act also heightens the standard of proof required to deny a license to a physician to a *clear and convincing* standard if the act or acts are not part of the *Amendment 8* list.¹⁵³ This standard is the same standard of proof required in Georgia against emergency physicians, with the exception

143. *Id.* at 1305.

144. *Id.* at 1306–07.

145. *See id.* at 1305–07.

146. Horenkamp, *supra* note 112, at 1307.

147. *See id.* at 1306–07.

148. Edward L. Holloran, III, Comment, *Medical Malpractice Litigation in Florida: Discussion of Problems and Recommendations*, 26 NOVA L. REV. 331, 335–36 (2001).

149. *Id.*

150. Horenkamp, *supra* note 112, at 1312.

151. FLA. STAT. § 456.50 (2014); Dinah Stein, *Florida's "Three Strikes" Legislation: A Defense Perspective*, 29 TRIAL ADVOC. Q., Spring 2010, at 22, 22.

152. FLA. STAT. § 456.50(2); Stein, *supra* note 151, at 22–23.

153. *See* FLA. STAT. § 456.50; Stein, *supra* note 151, at 22–23.

that in Florida, physicians must have committed three malpractice acts or their license will be removed.¹⁵⁴ This heightened standard makes imposing strikes almost impossible and a finding of ordinary negligence would not be sufficient to impose a strike on a practitioner under section 456.50.¹⁵⁵ A greater standard of evidence required to remove a physician's license is argued because the right to practice medicine is seen as valuable property, and removal of a license limits a basic right, which would deprive doctors of due process.¹⁵⁶ The right to practice medicine is recognized as a federal constitutional property right that the Florida Legislature cannot limit under the Supremacy Clause.¹⁵⁷ However, a plaintiff's right to access the courts and be able to seek redress for their injury is an equally protected right under the Florida Constitution.¹⁵⁸

B. *Access to the Courts*

In accordance with the Florida Constitution, "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."¹⁵⁹ Although the U.S. Constitution does not expressly provide access to the courts, it is implied through the Due Process Clause and the Fourteenth Amendment.¹⁶⁰ Often Florida's access to courts is one of the main criticisms of tort reform, but it raises the main question of who should bear the responsibility to compensate: the aggrieved individual, the tortfeasor or the taxpayers?¹⁶¹ Further, conflict arises when society is forced to pay for the wrongdoers' actions.¹⁶² Therefore, because of the access to courts provision, Florida is more susceptible to challenge any new tort reform that may deny citizens their right to redress.¹⁶³

154. Compare FLA. STAT. § 456.50(1)(h), with GA. CODE ANN. § 51-1-29.5(c) (2015).

155. See FLA. STAT. § 456.50; Stein, *supra* note 151, at 23.

156. Stein, *supra* note 151, at 23, 26.

157. U.S. CONST. art. VI, cl. 2; Stein, *supra* note 151, at 26.

158. See FLA. CONST. art. I § 21.

159. *Id.*

160. See U.S. CONST. amend. XIV, § 1.

161. See Horenkamp, *supra* note 112, at 1292.

162. *Id.*

163. See *id.*

1. *Kluger v. White*

As established by *Kluger v. White*,¹⁶⁴ access to the courts is given to Floridians as a fundamental right in their constitution and can only be removed in two circumstances: (1) when there is a reasonable alternative to protect the right to redress for injuries or (2) “an *overpowering public necessity* for the abolishment of [the] right, and [that] no alternative method of meeting [the] public necessity can be shown.”¹⁶⁵ However, protection under access to the courts is only extended to rights that existed at common law, such as personal injury claims.¹⁶⁶ The holding of *Kluger* was essential to bring awareness into Florida on whether the tort reform was violating an individual’s access to the courts by increasing the difficulty for a plaintiff to seek relief.¹⁶⁷ The Supreme Court of Florida addressed that the legislation cannot abolish the right to access the courts without providing an alternative to guarantee an individual a way to redress.¹⁶⁸

2. *Mitchell v. Moore* and Defining an Overpowering Public Necessity

Denial of an individual’s access to the courts includes burdening or restricting an individual’s access right to redress.¹⁶⁹ In *Mitchell v. Moore*,¹⁷⁰ a prisoner sought his petition to be reviewed by the appellate court; however, his petition was denied unless he filed various copies of the pleadings.¹⁷¹ The petitioner stated that this was a violation of his access to courts guaranteed by the Florida Constitution because it was unduly burdensome in his condition as a prisoner to provide additional copies.¹⁷² The Supreme Court of Florida agreed that the statute requiring him to provide extensive copies only provided difficulty and delay with no possible alternative to access the courts for the prisoners.¹⁷³ Therefore, if a fundamental interest is being taken, then the statute must meet the rational basis test and strict scrutiny test.¹⁷⁴ The court in *Mitchell* held that the *compelling government interest* is equivalent to the *overpowering public necessity* and, therefore, the statute was to be held under a strict scrutiny analysis instead of a lower

164. 281 So. 2d 1 (Fla. 1973).

165. *Id.* at 4 (emphasis added); *see also* FLA CONST. art. I § 21.

166. *See* Fla. Const. art. I § 21; *Kluger*, 281 So. 2d at 4.

167. *See Kluger*, 281 So. 2d at 10; Horenkamp, *supra* note 112, at 1292–93.

168. *Kluger*, 281 So. 2d at 4.

169. *Mitchell v. Moore*, 786 So. 2d 521, 527 (Fla. 2001).

170. 786 So. 2d 521 (Fla. 2001).

171. *Id.* at 523–24.

172. *See id.* at 524; FLA CONST. art. I § 21.

173. *Mitchell*, 786 So. 2d at 525.

174. *Id.* at 527.

rational basis standard.¹⁷⁵ However, this all applies if the legislature's finding to limit access to the courts is current, and in cases where legislative findings do not parallel the present findings, the court has the ability to correct them.¹⁷⁶

C. Estate of McCall *Changes Florida's Justification for Tort Reform*

One of the most recent Supreme Court of Florida cases, *Estate of McCall*, directly addresses the alleged medical malpractice crisis in Florida.¹⁷⁷ In *Estate of McCall*, a woman named "Michelle McCall received prenatal medical care [from] a United States Air Force clinic" when she was diagnosed with severe preeclampsia.¹⁷⁸ The patient was treated by the family practice department instead of the required obstetrics-gynecology.¹⁷⁹ Since the Air Force hospital was unavailable, the patient was transferred to the Fort Walton Beach Medical Center where she delivered the baby.¹⁸⁰ Dr. Archibald, the obstetrician in charge of the procedures, left after the delivery, but he was called after the family practitioner could not remove the placenta, and the patient had already lost a great amount of blood.¹⁸¹ The practitioners informed Dr. Archibald of the blood loss; however, forty minutes thereafter, a nurse attempted to draw blood from Ms. McCall.¹⁸² As a result, Ms. McCall underwent cardiac arrest and never regained consciousness.¹⁸³ The district court awarded a total of \$2,000,000—\$500,000 for her son and \$750,000 for each of her parents.¹⁸⁴ However, with the application of section 766.118(2), the cap on wrongful death cases, the case was limited to \$1,000,000.¹⁸⁵ The petitioners then appealed the case on the basis that the cap violated the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, was an unlawful taking under the Fifth Amendment, and was a violation of Florida's right of access to the courts, the right to jury trial, and equal protection under the Florida Constitution.¹⁸⁶

175. *Id.* at 528, 531.

176. *See* Horenkamp, *supra* note 112, at 1294.

177. *Estate of McCall v. United States*, 134 So. 3d 894, 897 (Fla. 2014).

178. *Id.*

179. *Id.* at 898.

180. *Id.*

181. *Id.* at 898–99.

182. *Estate of McCall*, 134 So. 3d at 898–99.

183. *Id.* at 899.

184. *Id.*

185. *Id.*; FLA. STAT. § 766.118 (2014); *Estate of McCall*, 134 So. 3d at 899.

186. U.S. CONST. amend. XIV, § 1; U.S. CONST. amend. V; FLA. CONST. art. I, §§ 2, 21–22; *Estate of McCall*, 134 So. 3d at 899.

1. Why *Estate of McCall* Matters

Although *Estate of McCall* is a wrongful death case that discusses the constitutionality of caps on medical malpractice claims, for the purposes of this Comment we will only discuss the effect *Estate of McCall* has on medical malpractice claims in Florida, and the continuation of further tort reform.¹⁸⁷ The court in *Estate of McCall* ruled that the statutory cap on wrongful death cases violates the Equal Protection Clause under the Florida Constitution because there is no longer a rational basis reasoning for a legitimate state objective behind it.¹⁸⁸ Where the importance of the recent case is the court's explanation and reasoning behind why the caps are unconstitutional; the court analyzes the present day situation in Florida with the alleged medical malpractice case.¹⁸⁹

In *Estate of McCall*, the court addressed the responsibility given under *Warren v. State Farm Mutual Automobile Insurance Co.*¹⁹⁰ to assure that the statute that was passed serves a legitimate government purpose and therefore, obligates itself to analyze the alleged insurance crisis.¹⁹¹ The court discussed the reasoning that the Florida Legislature has utilized in order to enact statutes limiting malpractice liability; the Florida Legislature Task Force has alleged that Florida has such a high cost of insurance premiums that it has forced medical practitioners to leave the state.¹⁹² The court dismissed this finding and asserts that in 2003, "the United States General Accounting Office ["GAO"] found that from 1991 to 2001, [the amount of physicians] grew from 214 to 237 in metropolitan areas."¹⁹³ This is contrary to the Task Force's findings that malpractice litigation was driving practitioners out and limiting the availability of health care to practitioners.¹⁹⁴ As well, the alleged increase of jury verdicts statement by the Task Force has been exaggerated—a study revealed that only 7.5% of malpractice cases actually involve a jury trial verdict, and most of the cases were resolved in settlements.¹⁹⁵ Therefore, as the court stated, the Task

187. U.S. CONST. amend. V; U.S. CONST. amend. XIV § 1; FLA. CONST. art. I, §§ 2, 21–22; *Estate of McCall*, 134 So. 3d at 899.

188. *See Estate of McCall*, 134 So. 3d at 905, 914–15.

189. *Id.*

190. 899 So. 2d 1090 (Fla. 2005).

191. *See Estate of McCall*, 134 So. 3d at 905–06; *Warren*, 899 So. 2d at 1095.

192. *Estate of McCall*, 134 So. 3d at 906; JOHN C. HITT ET AL., GOVERNOR'S SELECT TASK FORCE ON HEALTHCARE LIABILITY INSURANCE XVII (2003).

193. *Estate of McCall*, 134 So. 3d at 906.

194. *See id.*; Hitt et al., *supra* note 192, at XVII.

195. *Estate of McCall*, 134 So. 3d at 906; Hitt et al., *supra* note 192, at 64.

Force's findings that jury awards in medical malpractice cases were the culprits for the increased costs of insurance are deemed *most questionable*.¹⁹⁶

The court quotes the opinion of Joanne Doroshow, Executive Director of the Center for Justice and Democracy, who claims that:

[T]his so-called *crisis* is nothing more than the underwriting cycle of the insurance industry, and driven by the same factors that caused the *crises* in the 1970s and 1980s [W]ith each crisis, there has been a severe drop in the investment income for insurers, which has been compounded by sever[e] under-pricing of insurance premiums [D]uring years of high interest rates or excellent insur[ance] profits that are invested for maximum return, the insurance companies engage in fierce competition [W]hen investment income drops . . . the insurance industry responds by sharply increasing premiums and reducing coverage. [T]ort reform changes in the 1980s . . . was caused instead by [the] modulations in the insurance cycle throughout the country.¹⁹⁷

The court acknowledged that the reason for the insurance crisis in Florida was due to the increases in the amount of money that insurance companies place for reserve.¹⁹⁸ The allegation that insurance is driving practitioners out of Florida is not supported because the practitioners are leaving to other states, such as North Carolina, that have the same crisis with high malpractice insurance rates.¹⁹⁹ The alleged statement that the number of frivolous lawsuits has allegedly increased in Florida is contradicted by the deputy director of Florida Office of Insurance Regulations who confirmed that there is no evidence of an increase in the number of frivolous lawsuits or excessive jury verdicts.²⁰⁰

In accordance with the GAO, some providers have even purported that because of the medical malpractice suits, physicians are forced to cut back on services that are seen as high risk.²⁰¹ However, the GAO debunked that allegation as unrepresentative of the physician population as the surveys only had a twenty percent response rate.²⁰² The American Medical Association claimed that twenty-four percent of physicians stopped performing these procedures but failed to mention that responses for the

196. *Estate of McCall*, 134 So. 3d at 906; HITT ET AL., *supra* note 192, at 64.

197. *Estate of McCall*, 134 So. 3d at 907–08 (alteration in original) (emphasis added); see also HITT ET AL., *supra* note 192, at 64.

198. *Estate of McCall*, 134 So. 3d at 908.

199. *Id.* at 909.

200. *Id.* at 908.

201. U.S. GEN. ACCOUNTING OFFICE, GAO-03-836, MEDICAL MALPRACTICE: IMPLICATIONS OF RISING PREMIUMS ON ACCESS TO HEALTH CARE 20 (2003).

202. *Id.*

survey were only ten percent.²⁰³ States with caps on non-economic damages claim that they have lower premium rates because of this; however, they exclude many factors such as hospitals and nursing homes.²⁰⁴ Other factors, such as the manner in which plaintiffs are permitted to collect damages, alter the award amount depending on whether the plaintiff files claims for multiple defendants together or individually.²⁰⁵

Today, even if Florida was in the same medical crisis as it was in the 1980s, a crisis is not a permanent condition.²⁰⁶ The court emphasizes that, “even if section 766.118 may have been rational when it was enacted . . . it will no longer be rational where the factual premise upon which the statute was based has changed.”²⁰⁷ Florida courts have a duty to evaluate both data before a statute is passed and its constitutionality after.²⁰⁸ Further data contradicts any allegations of lack of access to healthcare when there are more active physicians in Florida than in the past, while, at the same time, the Office of State Courts Administrator reports that medical malpractice cases in Florida have decreased from 5829 to only 2491 in 2012.²⁰⁹ In 2003, the 5829 medical malpractice cases only constituted 3% of civil actions, and later the actions filed for medical malpractice decreased by more than 60% in 2012.²¹⁰

As a result of the court’s findings, the Supreme Court of Florida established that there is no current medical malpractice crisis in Florida and that if there was in the past, it was no longer practical.²¹¹ The lack of a present medical malpractice crisis denies any rational basis reasoning to impose caps by section 766.118 and any legitimate state purpose to limit litigation, equal protection, and access to the courts.²¹² Nonetheless, the court decided not to answer any of the remaining questions regarding access to the courts because *Estate of McCall* was a wrongful death case, which is not considered common law or a statute protected by the Florida Constitution.²¹³

203. *Id.*

204. *Id.* at 30.

205. *Id.* at 37.

206. *Estate of McCall v. United States*, 134 So. 3d 894, 907, 913 (Fla. 2014); see also HITT ET AL., *supra* note 192, at 64.

207. *Estate of McCall*, 134 So. 3d at 913.

208. *See id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Estate of McCall*, 134 So. 3d at 914; see also FLA. CONST. art. I, §§ 9, 21; FLA. STAT. § 766.118 (2014).

213. *Estate of McCall*, 134 So. 3d at 915.

2. No Alternative Method

With *Estate of McCall* proving that there no longer exists a rational basis for medical malpractice reform, it is even more prevalent that any new reform in Florida would violate the Florida Constitution's right of access to the courts and equal protection.²¹⁴ In *University of Miami v. Echarte*,²¹⁵ the court held that mandatory arbitration and monetary caps on non-economic damages in medical malpractice claims are not unconstitutional because they "are necessary to meet the medical malpractice crisis" even when they limit an individual's access to the courts.²¹⁶ In *Echarte*, the court states that monetary caps on non-economic damages, known as the Medical Malpractice Reform Act, satisfies both the *overpowering necessity* and *no alternative method* of the *Kluger* test when a party is forced to request arbitration first.²¹⁷ Nonetheless, *Echarte* denies a plaintiff the right to access when they force a plaintiff to receive a lower amount of damages if they deny arbitration.²¹⁸

The arbitration option enforced in *Echarte* is no longer constitutional because under the new findings, it does not pass the *Kluger* test.²¹⁹ The legislature can no longer show an overpowering public necessity for abolishment of a right and no reasonable alternative without limiting access to the courts.²²⁰ In this situation, the plaintiff is undercompensated both when they choose arbitration and decide to go to trial, even though it is at the benefit of the defendant.²²¹ Not only is the plaintiff limited from being able to bring their claim to court as guaranteed under the Florida Constitution, but they are also denied full compensation with no legitimate rational reasoning behind it.²²² Florida's Malpractice Act allows jurors to use the caps of non-economic damages and leave a plaintiff undercompensated when they

214. See FLA. CONST. art. I, §§ 9, 21; *Estate of McCall*, 134 So. 3d at 913.

215. 618 So. 2d 189 (Fla. 1993).

216. *Id.* at 197–98.

217. *Id.* at 194–97; *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973); see also FLA. STAT. § 766.207(7)(b).

218. *Echarte*, 618 So. 2d at 197; see also FLA. CONST. art. I, § 21; FLA. STAT. § 766.207; Jessica Fonseca-Nader, Comment, *Florida's Comprehensive Medical Malpractice Reform Act: Is It Time for a Change?*, 8 ST. THOMAS L. REV. 551, 565–66 (1996).

219. See *Estate of McCall*, 134 So. 3d at 914; *Echarte*, 618 So. 2d at 197; *Kluger*, 281 So. 2d at 4; Fonseca-Nader, *supra* note 218, at 565–66.

220. Fonseca-Nader, *supra* note 218, at 563; see also *Estate of McCall*, 134 So. 3d at 914; *Echarte*, 618 So. 2d at 197.

221. Fonseca-Nader, *supra* note 218, at 558.

222. *Id.* at 561–62; see also FLA. CONST. art. I, § 21; *Echarte*, 618 So. 2d at 194.

suffered an incredible loss.²²³ The arbitration option and other medical malpractice reforms punish the plaintiff when they do not seek arbitration because they wish to take their case to court.²²⁴ Further medical tort reform, such as increasing the burden of proof to a clear and convincing standard when treated by emergency physicians, would further punish and delay the plaintiff's right to redress.²²⁵

3. *North Broward Hospital District v. Kalitan*

Estate of McCall opens the door to future litigation when it questions the constitutionality of non-economic caps and when it completely exposes a no longer present need for limitations on plaintiffs based on their injuries.²²⁶ In the recent Fourth District Court of Appeal case *North Broward Hospital District v. Kalitan*,²²⁷ a patient brought an action against a hospital for medical malpractice when she suffered a catastrophic injury.²²⁸ The plaintiff's injuries consisted of an induced coma for several weeks, upper body pain, mental disorders, and loss of independence.²²⁹ The jury found in favor of the plaintiff and determined that the plaintiff had suffered a catastrophic injury and awarded a total of \$4,718,011 in total damages as well as a total of \$4,000,000 in non-economic damages.²³⁰ The trial court then moved to limit the amount of non-economic damages to \$2,000,000 under section 766.118(2) of the Florida Statutes and was further capped under sovereign entity to \$1,300,000.²³¹

The Fourth District Court of Appeal then moved to reference *Estate of McCall* to analyze whether section 766.118 of the Florida Statutes applies to both personal injury and wrongful death cases.²³² The court determined that, as established under *Estate of McCall*, if there is no longer an objective for the statute, then there is no longer a legitimate state objective to which the caps can *rationally relate*.²³³ Although *Estate of McCall* specifically refers to wrongful death cases, when the statute's objective as a whole is

223. Fonseca-Nader, *supra* note 218, at 564; *see also* FLA. STAT. § 766.207(7) (2014).

224. Fonseca-Nader, *supra* note 218, at 565.

225. *See* Stein, *supra* note 151, at 22–23.

226. *See Estate of McCall*, 134 So. 3d at 913.

227. 174 So. 3d 403 (Fla. 4th Dist. Ct. App. 2015).

228. *Id.* at 405.

229. *Id.*

230. *Id.* at 406.

231. *Id.* at 407; *see also* FLA. STAT. § 766.118(2) (2014).

232. *Kalitan*, 174 So. 3d at 411; *see also* FLA. STAT. § 766.118(2)(a); *Estate of McCall v. United States*, 134 So. 3d 894, 915 (Fla. 2014).

233. *Estate of McCall*, 134 So. 3d at 901; *Kalitan*, 174 So. 3d at 411.

discredited then reference to personal injury cases applies as well.²³⁴ It is a violation of equal protection when non-economic caps discriminate and allow claimants with little non-economic damages to claim all the damages, while claimants with serious injuries are capped.²³⁵ In *Kalitan*, the court demonstrates the intention to limit tort reform after *Estate of McCall* brought to light the lack of rational basis for distinction among medical malpractice plaintiffs.²³⁶ The *Kalitan* court decided not to address the statute's violation to access to courts or jury trials because *Estate of McCall* rationale applies to medical malpractice actions in general.²³⁷

4. Florida Cannot Continue in Its Tort Reform

What makes *Estate of McCall* so essential to today's tort reform in Florida is the assertion that Florida is no longer in a medical malpractice insurance crisis; therefore, the court's findings question the constitutionality of past reforms and any future attempts.²³⁸ *Estate of McCall* sets a distinct precedent for future cases and legislative actions; it limits any possibility of Florida continuing tort reform.²³⁹ Unlike the state of Georgia that overcame the equal protection hurdle in order to enact a heightened burden of proof when the legislature increased the standard, a similar reform would not pass Florida's scrutiny.²⁴⁰ Florida's case law, such as *Kluger*, *Estate of McCall*, and now *Kalitan*, note that there is no longer an overpowering public necessity and rational basis to place any more limitations on a plaintiff.²⁴¹ There no longer exists a compelling reason for unequal treatment towards plaintiffs with different injuries—whether wrongful death or personal injury.²⁴² Florida no longer has legislative findings to prove that it is still in a medical crisis.²⁴³

Nevertheless, because Florida under *Kluger* requires a test of *overpowering necessity*, it will be unsuccessful in enacting and justifying any further tort reform.²⁴⁴ The legislature is now unable to provide rational

234. *Estate of McCall*, 134 So. 3d at 897; *Kalitan*, 174 So. 3d at 411.

235. *Kalitan*, 174 So. 3d at 411.

236. See *id.* at 409, 10; *Estate of McCall*, 134 So. 3d at 901.

237. FLA. CONST. art. I, §§ 21–22; *Estate of McCall*, 134 So. 3d at 901; *Kalitan*, 174 So. 3d at 411.

238. See *Estate of McCall*, 134 So. 3d at 913.

239. See *id.* at 931.

240. *Id.* at 916; *Gliemmo v. Cousineau*, 694 S.E.2d 75, 80 (Ga. 2010).

241. See *Kluger v. White*, 281 So. 2d 1, 4–5 (Fla. 1973); *Estate of McCall*, 134 So. 3d at 901, 936; *Kalitan*, 174 So. 3d at 411.

242. See *Estate of McCall*, 134 So. 3d at 901, 916.

243. *Id.* at 906.

244. See *Kluger*, 281 So. 2d at 4 (emphasis added).

reasons for the different treatment for those individuals who suffer serious near death injuries caused by negligence, but who are forced to cap their damages.²⁴⁵ In contrast, plaintiffs in wrongful death cases have unlimited damages.²⁴⁶ The legislature also cannot pass the first part of *Kluger* with a reasonable alternative when the alternative is to go to arbitration.²⁴⁷ Even if arbitration is no longer mandatory, rather voluntary, it becomes mandatory when the plaintiff's non-economic damages are capped even further.²⁴⁸ The alternative arbitration creates a greater burden on the plaintiff, and it discourages the parties from settling.²⁴⁹

Florida already places caps on emergency practitioners and limits the award of non-economic damages available to plaintiffs who underwent medical care by an emergency physician to \$150,000.²⁵⁰ Increasing the burden of proof to a clear and convincing standard and gross negligence, like Georgia, would potentially deny an individual the right to access the courts, equal protection, and a full recovery.²⁵¹ If Florida attempts to continue tort reform by increasing the standard of proof, the plaintiff in an emergency practitioner claim would have to undergo arbitration, show negligence by a clear and convincing standard, and then be forced to limit the amount of damages.²⁵² The plaintiff will also have to prove by a *clear and convincing* standard to a lay jury who may have trouble with medical terminology comprehension.²⁵³

A plaintiff can no longer be labeled in accordance to the injury he or she suffered.²⁵⁴ A *clear and convincing* standard proposal in Florida will be subject to strict scrutiny because a justification for limitations would no longer exist, as malpractice claims are not the cause of high cost of insurance.²⁵⁵ As established by the court in *Estate of McCall*, "[h]ealth care policy that relies upon discrimination against Florida families is not rational

245. Fonseca-Nader, *supra* note 218, at 563–64.

246. *Estate of McCall*, 134 So. 3d at 915.

247. See FLA. CONST. art. I, § 21; *Kluger*, 281 So. 2d at 4; Fonseca-Nader, *supra* note 218, at 560–61, 565.

248. See Fonseca-Nader, *supra* note 218, at 560–61, 564–65.

249. See *id.* at 560–62.

250. FLA. STAT. § 766.118(4)(a) (2014).

251. See U.S. CONST. amend. XIV; FLA. CONST. art. I, § 21; GA. CODE ANN. § 51-1-29.5(c) (2015); *Mitchell v. Moore*, 786 So. 2d 521, 527 (Fla. 2001) (denying or burdening an individual's access to the courts violates the Florida Constitution).

252. See FLA. STAT. §§ 766.118(4)(a), .207(2); GA. CODE ANN. § 51-1-29.5(c) (2015).

253. Holloran, III, *supra* note 148, at 343–44.

254. See *Estate of McCall v. United States*, 134 So. 3d 894, 914–15 (Fla. 2014).

255. *Id.* at 914; see also GA. CODE ANN. § 51-1-29.5(c); *Mitchell*, 786 So. 2d at 527; *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973).

or reasonable when it attempts . . . to create unreasonable classifications.”²⁵⁶ Making a distinction between patients who were treated in an emergency room, in contrast from those who were treated in a clinic, makes the same unreasonable classification.²⁵⁷ Forcing a plaintiff to demonstrate a showing of the *clear and convincing* standard of gross negligence based on which hospital door they entered would substantially burden and restrict a plaintiff’s right to redress.²⁵⁸

VI. CONCLUSION

In summary, Florida can no longer justify any new tort reforms, especially in the area of medical malpractice.²⁵⁹ There no longer exists legislative reasoning to limit the right of access to the courts and equal protection; the legislature can no longer enact statutes that limit the plaintiff’s right to sue malpractice doctors.²⁶⁰ A statute like Georgia’s statute that increases the burden of proof would violate Florida’s unique right of access to the courts clause because it would almost make it impossible for a plaintiff to bring a claim to court against an emergency physician when there is no source of rational reasoning or need for such limitation.²⁶¹ Historically, Florida has always been a state leading in tort reform; nonetheless, the new findings force the courts to reevaluate the constitutionality of statutes that reflect the needs of the state at the time they were enacted.²⁶² Doctors are not leaving the State of Florida anymore and so ensuring access to medical care is not reasoning behind further reform.²⁶³ Moreover, the arbitration option as an alternative to limit access to the courts works towards the detriment of the plaintiff by capping them at an even lower rate when they already have caps in place at court.²⁶⁴ Arbitration is not a good alternative; it penalizes a plaintiff for seeking justice in the law and it does not penalize a party who does not want to settle.²⁶⁵

Florida healthcare is at a high rate, and many individuals seek care from emergency rooms because of their financial situation.²⁶⁶ However, the

256. *Estate of McCall*, 134 So. 3d at 915.

257. *See id.*; Graves, *supra* note 65, at 293.

258. *See Mitchell*, 786 So. 2d at 527; Graves, *supra* note 65, at 293.

259. *See Estate of McCall*, 134 So. 3d at 914.

260. *See id.*; *Mitchell*, 786 So. 2d at 527.

261. *See* FLA. CONST. art. I, § 21; GA. CODE ANN. § 51-1-29.5(c) (2015); *Estate of McCall*, 134 So. 3d at 914.

262. *See Horenkamp*, *supra* note 112, at 1287, 1292.

263. *See id.* at 1302.

264. *See Fonseca-Nader*, *supra* note 218, at 568.

265. *Id.*

266. *See Graves*, *supra* note 65, at 298.

number of medical claims is not the cause of the healthcare problem.²⁶⁷ Florida needs to note that it is not in the same medical crisis as it was in the 1980s, and it must address all the limitations it has placed on plaintiffs who are denied their access to the courts and equal protection when they suffer an injury from medical practitioners.²⁶⁸ The Equal Protection Clause is violated when patients with different injuries are treated differently with no rational basis for discrimination.²⁶⁹ In the case of emergency practitioners, it is noted that they undergo distinct exposure from those practitioners in the normal practice, and it may seem logical that other malpractice suits may arise from this.²⁷⁰ However, the type of environment that emergency practitioners are involved and trained in does not give rational reasoning to limit basic Florida constitutional rights.²⁷¹ The right of access to the courts in article I, section 21 of the Florida Constitution cannot be expressed any more clearly; it is not a right dependent on the practice or the environment that a tortfeasor may encounter.²⁷² The right to access the courts is unique and absolute, and any form of further reform in the area of medical malpractice will not survive Florida scrutiny.²⁷³ As expressed in *Mitchell*, “[t]he right to access is specifically mentioned in Florida’s Constitution. Therefore, it deserves more protection than those rights found only by implication.”²⁷⁴

267. See *Estate of McCall v. United States*, 134 So. 3d 894, 914 (Fla. 2014).

268. See *id.*; Horenkamp, *supra* note 112, at 1287.

269. See U.S. CONST. amend. XIV, §1; *N. Broward Hosp. Dist. v. Kalitan*, 174 So. 3d 403, 409 (Fla. 4th Dist. Ct. App. 2015).

270. See *Graves*, *supra* note 65, at 279.

271. See FLA. CONST. art. I, § 21; *Graves*, *supra* note 65, at 279.

272. See FLA. CONST. art. I, § 21.

273. See *id.*; *Estate of McCall v. United States*, 134 So. 3d 894, 913 (Fla. 2014).

274. *Mitchell v. Moore*, 786 So. 2d 521, 527 (Fla. 2001); see also FLA. CONST. art. I, § 21.



NOVA LAW REVIEW
Vol. 40 No. 1
Southeastern University
Pages 1-212