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## **DAVID'S FIVE SMOOTH STONES:**

### ***CLOUD TECHNOLOGY FOR THE FLORIDA CONSUMER LAWYER***

*Alfred Light*

## DAVID'S FIVE SMOOTH STONES: CLOUD TECHNOLOGY FOR THE FLORIDA CONSUMER LAWYER

Alfred Light\*

*Then Saul dressed David in his own tunic. . . David fastened on his sword over the tunic and tried walking around, because he was not used to them. "I cannot go in these," he said to Saul, "because I am not used to them." So, he took them off. Then he took his staff in his hand, chose five smooth stones from the stream, put them in the pouch of his shepherd's bag and, with his sling in his hand, approached the Philistine.*<sup>1</sup>

When David's father Jesse sent David, only a boy, to the battle site with roasted grain and bread for his soldier brothers, they angrily questioned why he had come, accusing him of only wanting to watch the battle.<sup>2</sup> After David convinced Saul, the king, that he had experience protecting his sheep from predators such as lions and bears, Saul decided to let David confront Goliath and dressed him in his own tunic, coat or armor, bronze helmet, and sword.<sup>3</sup> But David took them off because he was not used to them in favor of his staff, sling, and "five smooth stones from the stream."<sup>4</sup> Everyone knows that David, against all odds, killed Goliath with a stone to his forehead.<sup>5</sup>

In the twenty-first century, the plight of the indigent consumer—pursued by large corporate institutions for debts they are unable to pay—seems little better than David's. Entreated to take out a mortgage beyond his ability to repay (a "subprime" loan), subsequently transferred to numerous investors in a collateralized debt obligation (CDO) owned by numerous anonymous "investors," the consumer finds his house foreclosed on and his domestic peace hounded by creditors night and day because of other debts he is unable to pay.<sup>6</sup> Interest and penalties accrue on the mortgage, which then accelerates.<sup>7</sup> It seems obvious that he will have no money to pay a lawyer as he learns about "default judgment" and that if he resists he will also have to pay the creditor's attorney fees because of a term (undoubtedly unread) in his mortgage contract.<sup>8</sup> It is the rare consumer, even if he has heard about the story of David v. Goliath, who

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<sup>1</sup> 1 *Samuel* 17: 38–40.

<sup>2</sup> *Id.* at 17–28.

<sup>3</sup> *Id.* at 29–38.

<sup>4</sup> *Id.* at 39–40.

<sup>5</sup> *Id.* at 41–50.

<sup>6</sup> See generally Kristopher Gerardi, Lauren Lambic-Hanson, & Paul S. Willen, *Do Borrowers Rights Improve Borrower Outcome? Evidence from the Foreclosure Process*, 73 J. URBAN ECON. 1 (2013); Suleman Baig & Moorad Chouldhry, *The Mechanics of Securitization: A Practical Guide to Structuring and Closing Asset-Backed Security Transactions* (1st ed. 2013); Michael Simkovic, *Secret Liens and the Financial Crisis of 2008*, 83 AM. BANKR. L.J. 253 (2009).

<sup>7</sup> See R. Wilson Freyermuth, *Enforcement of Acceleration Provisions and the Rhetoric of Good Faith*, 1998 BYU L. REV. 1035 (1938).

<sup>8</sup> In Florida, though, lenders may foreclose only through judicial foreclosure. State law permits deficiency judgments subject to the borrower receiving credit for the greater of fair market value of the property or the foreclosure sale price. A deficiency judgment can be pursued against the original makers of a note even if they were not a party to the foreclosure action. However, Florida has an extremely generous homestead exemption such that if the property is an investment property rather than a primary residence, the borrower can partially shield his or her assets from collection on the deficiency. The relevant statutes are FLA. STAT. § 702.

would have David's optimism and temerity to confront corporate America and say, "All those gathered here will know that it is not by sword or spear that the Lord saves, for the battle is the Lord's, and he will give all of you into his hands."<sup>9</sup>

My theme here, though, is that, at least in Florida, sometimes it just might be worth a lawyer's while to represent David, even if that lawyer does not receive a salary paid by the Legal Services Corporation and cannot afford to offer his services *pro bono*. The determined lawyer "without a sword in his hand" sometimes may "triumph over the Philistine."<sup>10</sup> Occasionally there might even be a surge forward "to the entrance of Gath and the gates of Ekron,"<sup>11</sup> that is, to the corridors of U.S. financial power. Here we explore that lawyer shepherd's "New Clio" tunic and five smooth stones of Florida consumer law with which the lawyer may work: contingent fees, fee shifting, statutory damages, reciprocity, and e-discovery.<sup>12</sup> So armed, there is at least there is a possibility of victory if the LORD is truly on his side.<sup>13</sup>

#### THE KING'S ARMOR

Before we look in David's pouch, it is important to understand why David can have the temerity to approach the battlefield in the first place. The principal answer, of course, is the LORD. As "David said to the Philistine, 'You come against me with sword and spear and javelin, but I come against you in the name of the LORD Almighty, the God of the armies of Israel, whom you have defied.'"<sup>14</sup> The contract of adhesion is often considered unfair.<sup>15</sup> In our analogy, the LORD is the justice of David's cause, in which King Saul, the client, also has confidence. In convincing Saul to let him confront Goliath, David references his past successful battles with the lion and the bear, from which the LORD delivered him.<sup>16</sup> David having convinced his client of the justice of his cause and his ability to fight, "Saul said to David, 'Go, and the LORD be with you.'"<sup>17</sup>

An additional strategic reason that David may approach the battlefield is the cloud—his rejection of Saul's armor in favor of clothes most suitable to his style of battle. In our analogy, David must reject the ancient ways of law practice – the yellow legal pad, the landline telephone, filing cabinet, the Hallmark desk calendar, the giant printer/copy machine in the back office, the paralegal with bates stamp in hand in the conference room, the conference room itself, the secretary in a cubicle assigned to David, and the courier for runs to the courthouse. Like Saul's tunic, coat of armor, and bronze helmet, these symbols of the last century's successful lawyers,

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<sup>9</sup> 1 Samuel 17: 47.

<sup>10</sup> *Id.* at 17:50.

<sup>11</sup> *Id.* at 17: 52; see also Tia Ghose, *Goliath Gates: Entrance to Famous Biblical Metropolis Uncovered*, LIVE SCIENCE, <https://www.livescience.com/51737-goliath-city-gates-uncovered-israel.html> (Aug. 4, 2015).

<sup>12</sup> See *infra*, notes 70 - 98 and accompanying text; *Welcome to the New Clio Experience*, CLIO, <https://support.clio.com/hc/en-us/articles/115001166754-Welcome-to-the-New-Clio-Experience> (last visited Aug. 5, 2018).

<sup>13</sup> Cheryce Rampersad, *Prayer for Favor in Court Matters (Legal Battles)*, CHRISTIANSTT <https://christianstt.com/prayer-favour-in-court-matters/> (last visited March 17, 2018).

<sup>14</sup> 1 Samuel 17: 45.

<sup>15</sup> Adhesion Contracts: Definitions, Examples, and Cases, LEGAL DICTIONARY, <https://legaldictionary.net/adhesion-contract/> (last visited Aug. 5, 2018).

<sup>16</sup> 1 Samuel 17: 34-37.

<sup>17</sup> *Id.*

are now largely obsolete, except perhaps for a few remaining Goliath law firms. And in the “real world” of shepherds, a David would not be “used to them” anyway.

If the heart of the Goliath mega-firm of the late twentieth century was a massive IBM 360 computer connecting multiple work stations and storing the firm’s work product and records,<sup>18</sup> the heart of David’s nimble firm of the early twenty-first century is a practice management system in the “cloud.”<sup>19</sup> Integrating time tracking for any lawyer task with an emphasis on compliance with trust obligations;<sup>20</sup> advanced secure document management with Google Drive or Dropbox;<sup>21</sup> Quickbooks Online or Xero for accounting;<sup>22</sup> Calendaring with Google or Outlook;<sup>23</sup> automated credit card payments with LawPay,<sup>24</sup> and Legal Research with Fastcase,<sup>25</sup> David’s “New Clio” probably has created a more level playing field.<sup>26</sup> In Florida, David’s “cloud-based” practice management system is probably Clio or Rocket Matter.<sup>27</sup> In fact, the economics of law practice sometimes actually may favor the smaller firm on the asymmetric battlefield of modern litigation.

The iPad, or for older lawyers the laptop computer, has replaced the yellow legal pad.<sup>28</sup> In the early 1980’s, when I began to practice law, I was expected to write memoranda and briefs on yellow pads, which then were dutifully typed by expert secretaries, whose work product I edited until it reflected my intent.<sup>29</sup> By the time I entered academia in 1989, the mega-firm for which I worked had placed on my desk a personal desktop station, connected to a central computer, so that I was expected to type.<sup>30</sup> Lawyers for whom I worked never learned how to type, and sometimes considered typing somehow “beneath” their station.<sup>31</sup> Today, millennials often cannot write in script at all, or their handwriting is illegible.<sup>32</sup> The examsoft crises

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<sup>18</sup> IBM/ SYSTEM 360, [https://en.wikipedia.org/wiki/IBM\\_System/360](https://en.wikipedia.org/wiki/IBM_System/360) (last visited Aug. 5, 2018).

<sup>19</sup> Law Practice Management Software, [https://en.wikipedia.org/wiki/Law\\_practice\\_management\\_software](https://en.wikipedia.org/wiki/Law_practice_management_software) (last visited Aug. 5, 2018).

<sup>20</sup> Halden Ingwersen, *7 Free Timekeeping Software Options for Lawyers*, CAPTERRA LEGAL SOFTWARE BLOG (Aug. 15, 2017), <https://blog.capterra.com/4-awesome-free-timekeeping-software-options-for-lawyers/>.

<sup>21</sup> GOOGLE DRIVE, <https://www.google.com/drive/> (last visited Aug. 5, 2018); DROPBOX, <https://www.dropbox.com/> (last visited Aug. 5, 2018).

<sup>22</sup> QUICKBOOKS, <https://quickbooks.intuit.com/> (last visited Aug. 5, 2018); XERO, <https://www.xero.com/us/> (last visited Aug. 5, 2018).

<sup>23</sup> GOOGLE CALENDAR, <https://www.google.com/calendar> (last visited Aug. 5, 2018); MICROSOFT OUTLOOK, <https://outlook.live.com/owa/> (last visited Aug. 5, 2018).

<sup>24</sup> LAWPAY, <https://www.lawpay.com> (last visited Aug. 5, 2018).

<sup>25</sup> FASTCASE, <https://www.fastcase.com/> (last visited Aug. 5, 2018).

<sup>26</sup> The largest vendor of cloud-based practice management software and systems is Clio, based in Canada, which last year revised their platform substantially, which they now call “New Clio,” which sounds a lot like “nuclear.” See *supra*, note 12.

<sup>27</sup> Rocket Matter is probably the second largest vendor, headquartered in Boca Raton. <https://www.rocketmatter.com/> (last visited Aug. 5, 2018).

<sup>28</sup> Retire Your Legal Pad with an iPad, (Jan. 19, 2012), <http://lawyertechreview.com/2012/retire-legal-pad-with-ipad/>.

<sup>29</sup> Madeline Brand, *The History of the Legal Pad*, NATIONAL PUBLIC RADIO (May 31 2005), <https://www.npr.org/templates/story/story.php?storyId=4673512>.

<sup>30</sup> Daniel Knight, *Personal Computer History: 1975-1984*, LOWENDMAC (Apr. 26, 2014) <http://lowendmac.com/2014/personal-computer-history-the-first-25-years/>.

<sup>31</sup> Sometimes you can even find a “baby boomer” among practicing lawyers or law faculty who still cannot type. They may even have a dictaphone.

<sup>32</sup> See Melissa Korn, *I’d Be an ‘A’ Student if I Could Just Read My Notes*, WALL ST. J. (Mar. 12, 2018), <https://www.wsj.com/articles/id-be-an-a-student-if-i-could-just-read-my-notes-1520865531>

(“crashes”) of 2014 and 2017 exposed this loss of elementary school skills, as legions of law students ended up having to write their final exams by hand.<sup>33</sup>

The cellphone has replaced the landline telephone.<sup>34</sup> While most law firms still have a landline, their lawyers rarely use it, and most millennials (and indeed many baby boomers) see little need for the “home phone.” The landline can have advantages (e.g. for emergency use when the power goes out), but there are not many.<sup>35</sup> And many do not make phone calls at all, limiting their communication to texts.<sup>36</sup> If one wishes communication to be more ephemeral, there is always snapchat.<sup>37</sup> For more than one person communication, there is Facebook, Twitter, etc.<sup>38</sup> For specialized and organized communication with one’s clients or prospects, consider Lexicata for what that company calls CRM (client relationship management).<sup>39</sup> This system provide web-based tools for tracking leads and managing communications to assist law firms to make smarter decisions and to convert more potential new clients.

E-mail, and increasingly the client portal, has replaced or is replacing “snail mail.”<sup>40</sup> In the late twentieth century, firms had their own physical servers for e-mail, serviced by information technology professionals.<sup>41</sup> Now even the larger firms have outsourced e-mail services to the cloud through business programs such as Microsoft 365.<sup>42</sup> The bane of most practicing lawyers always has been timekeeping, the need to keep close count how the day is spent by tenths or at least by the quarter of an hour. In the eighties, the time one spent billing time probably “slipped through the cracks” as lawyers quickly filled out time sheets once or twice a day.<sup>43</sup> In more recent times, compulsive lawyers kept timers, probably wasting less time on this administrative task and making their records more accurate.<sup>44</sup> Today, there are programs like Chrometa, that “passively” record every email you write, every phone call you make [including mobile phones], all time preparing documents on a computer, in short every minute

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<sup>33</sup> Nigel Duara, *Bar exam software sets off wave of lawsuits*, THE ASSOCIATED PRESS: MERCURY NEWS (Aug. 12, 2014), <https://www.mercurynews.com/2014/08/12/bar-exam-software-failure-sets-off-wave-of-lawsuits/>; *See also* Staci Zaretsky, *Bar Exam Software Debacle Causes Testing Delays Across the Country*, ABOVE THE LAW (Mar. 1, 2018), <https://abovethelaw.com/2018/03/bar-exam-software-debacle-causes-testing-delays-across-the-country/>. After the crash of 2017, our law school abandoned EXAMSOFT for their principal alternative, EXAM4, for freezing out hard drives on the student laptops upon which the students write their exams. EXTEGRITY, <https://www.exam4.com> (last visited Aug. 5, 2018).

<sup>34</sup> Money Watch, *Milestones for Cellphones vs. Landline Phones*, CBS NEWS (May 4, 2017), <https://www.cbsnews.com/news/milestone-for-cellphones-vs-landline-phones/>.

<sup>35</sup> *Id.*

<sup>36</sup> Larry Alton, *Phone Calls, Texts or Email? Here’s How Millennials Prefer to Communicate*, FORBES (May 11, 2017), <https://www.forbes.com/sites/larryalton/2017/05/11/how-do-millennials-prefer-to-communicate/#4f3f8b9f6d6f>.

<sup>37</sup> SNAPCHAT, <https://www.snapchat.com> (last visited Aug. 5, 2018); *See generally* <https://en.wikipedia.org/wiki/Snapchat> (last visited Aug. 5, 2018).

<sup>38</sup> FACEBOOK, <https://www.facebook.com/> (last visited Aug. 5, 2018); *See generally* <https://en.wikipedia.org/wiki/Twitter> (last visited Aug. 5, 2018).

<sup>39</sup> LEXICATA, <https://lexicata.com> (last visited Aug. 5, 2018).

<sup>40</sup> *See generally* [https://en.wikipedia.org/wiki/Snail\\_mail](https://en.wikipedia.org/wiki/Snail_mail) (last visited Aug. 5, 2018).

<sup>41</sup> *See generally* <https://en.wikipedia.org/wiki/Email> (last visited Aug. 5, 2018).

<sup>42</sup> MICROSOFT 365, <https://www.microsoft.com/en-us/microsoft-365/default.aspx> (last visited Aug. 5, 2018).

<sup>43</sup> *See* Dine Law, P.L., *Ain’t Nobody Got Time for That*, LAW TECHNOLOGY TODAY (July 24, 2013), <http://www.lawtechnologytoday.org/2013/07/aint-nobody-got-time-for-that/>.

<sup>44</sup> Brian Focht, *6 Excellent Timekeeping Apps. For Lawyers* [Updated], LAW TECHNOLOGY TODAY (Mar. 8, 2015), <http://www.lawtechnologytoday.org/2013/07/aint-nobody-got-time-for-that/>.

you work.<sup>45</sup> Client portals permit clients to access their files and obtain status or other reports directly from the law firm without “wasting” any of the lawyer’s time.<sup>46</sup>

The digital file is replacing the filing cabinet, with Google Drive, Dropbox, NetDocuments, Box or similar programs.<sup>47</sup> These are “add-ons” linked to the firm’s cloud-based e-mail communications system.<sup>48</sup> Given the special need for confidentiality of lawyer communications, instead of locking the documents in a safe deposit box lawyers now encrypt documents sent in their e-mail systems such as Gmail, Microsoft Outlook plug-ins through a company like ShareFile, or other similar programs (e.g. PGP Desktop, Zixmail).<sup>49</sup> Users of the Google Chrome web browser typically use the Gmail extension, SendSafely for Chrome, to encrypt confidential documents, which is free and very easy to use.<sup>50</sup>

The automatic calendaring system has replaced the Hallmark desk calendar, through general business programs such as Microsoft 365 or through a feature of the lawyer’s practice management system.<sup>51</sup> The leading textbook on Law Office Management states, “A manual tickler system can still be found in law office as a backup to a computerized system. Compared to an automated system, manual tickler systems are less reliable, more time-consuming, and error prone.”<sup>52</sup>

Electronic files, usually PDFs, have replaced the giant printer/copier and the paralegal with bates stamp in hand in the conference room.<sup>53</sup> In fact, a virtual conferencing system such as Google Hangouts or Webex may have replaced the physical conference room.<sup>54</sup> What does David have instead? The most important items are his laptop computer, a tablet, and a smartphone. He needs a secure, high-speed Internet connection, with a firm website to establish his Internet presence, in large part through social media. No longer tethered to the conference room, he must be comfortable with blogging, tweeting, and posting things on Facebook.<sup>55</sup> He will need, however, a high-speed scanner to convert the occasional paper record into electronic files.<sup>56</sup>

<sup>45</sup>CHROMETA, <https://www.chrometa.com> (last visited Aug. 5, 2018).

<sup>46</sup> *Why attorneys are flocking to client portals*, AM. BAR. ASSOC. (June 2017), <https://www.americanbar.org/publications/youraba/2017/june-2017/client-portals-provide-gateway-to-efficiency--privacy-.html>.

<sup>47</sup> *See supra*, note 21; *See also* NETDOCUMENTS, <https://www.netdocuments.com/en-us/> (last visited Aug. 5, 2018); BOX, <https://www.box.com> (last visited Aug. 5, 2018).

<sup>48</sup> *E.g.*, Clio App Directory, CLIO, <https://www.clio.com/app-directory> (Clio integration with Apps).

<sup>49</sup>*See generally* GMAIL, <http://google.com/gmail> (last visited Aug. 5, 2018); SHAREFILE, <https://www.sharefile.com> (last visited Aug. 5, 2018); SYMANTEC, <https://www.symantec.com/products/encryption> (last visited Aug. 5, 2018); ZIXMAIL, <https://www.zixcorp.com> (last visited Aug. 5, 2018).

<sup>50</sup>SENDSAFELY, <https://www.sendsafely.com> (last visited Aug. 5, 2018).

<sup>51</sup>*See generally* [https://en.wikipedia.org/wiki/Calendaring\\_software](https://en.wikipedia.org/wiki/Calendaring_software) (last visited Aug. 5, 2018).

<sup>52</sup> Pamela Everett Nollkamper, *Fundamentals of Law Office Management: Systems, Procedures, and Ethics* 389 (Delmar CENGAGE Learning, 5th ed. 2014).

<sup>53</sup>*See generally* Bates Numbering, [https://en.wikipedia.org/wiki/Bates\\_numbering](https://en.wikipedia.org/wiki/Bates_numbering) (last visited Aug. 5, 2018); Portable Document Format, [https://en.wikipedia.org/wiki/Portable\\_Document\\_Format](https://en.wikipedia.org/wiki/Portable_Document_Format) (last visited Aug. 5, 2018).

<sup>54</sup> Web conferencing, [https://en.wikipedia.org/wiki/Web\\_conferencing](https://en.wikipedia.org/wiki/Web_conferencing) (last visited Aug. 5, 2018); Google Hangouts, <https://hangouts.google.com/> (last visited Aug. 5, 2018); Cisco Webex, <https://www.webex.com/> (last visited Aug. 5, 2018).

<sup>55</sup> Lynne Adair Kramer & Ann L. Nowak, *The Experiential Guide to Law Office Management* 69 (1st d. 2016). <sup>56</sup>Probably the most popular scanner among lawyers is Scansnap by Fujitsu, *see generally* <http://www.fujitsu.com/us/products/computing/peripheral/scanners/scansnap/> (last visited Aug. 5, 2018).

Electronic services such as Casemail's Virtual Postal Mail (VPM) are replacing the physical courier.<sup>57</sup> CaseMail's VPM interfaces directly into The United States Postal Service and FedEx print and delivery networks.<sup>58</sup> This enables users to quickly upload and physically mail their clients' documents directly from their computer. Here is how Casemail describes how its system works:

Documents can be sent via Certified Mail, First Class, or Overnight Priority Express.<sup>59</sup> There are no documents to print, no envelopes to stuff, and no stamps to lick. Mail is routed to the nearest sender or recipient location then physically delivered by USPS or FedEx. The USPS and FedEx Certificates of Service, Certificates of Mailing, and Electronic Return Receipts are returned digitally and recorded in the users' CaseMail accounts. The system CaseMail enables users to manage multiple e-signature providers. Users can use their own accounts like Adobe Sign and eSignLive directly in CaseMail.<sup>60</sup> Certificates of Mailing, Certificates of Service, and Electronic Consent forms provide proof when documents were sent, opened, and signed. CaseMail provides a single dashboard to track and manage all postal and electronically mailed communications between attorneys, clients, and third-party recipients.<sup>61</sup>

The cumulative effect of these changes is reduction of the law firm staff and the overhead costs that gave Goliath firms an advantage in the last century. Now even in the large firms a lawyer rarely has the luxury of his or her own paralegal or secretary.<sup>62</sup> Smaller firms tend to use an office sharing arrangement with a shared receptionist in lieu of an answering service.<sup>63</sup> Even here, though, in the age of Alexa, Cortana and SIRI, AI can make mechanical calendaring of appointments and other routine administrative tasks seem almost human.<sup>64</sup> Remote live answering services (e.g. Ruby Receptionist) seem superior to voice mail and more affordable than a traditional receptionist.<sup>65</sup> Small firms and solo practitioners may even decide to work from a home office, or have a virtual office.<sup>66</sup> In short, the shepherd's tunic can be more practical than a coat of armor and bronze helmet.

## THE SWORD

When Saul outfitted David in his battle armor, David tried it on and "fastened on his sword" over the king's tunic. In our analogy, the sword is the traditional legal instrument, such

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<sup>57</sup> See generally CASEMAIL, <http://casemail.us/> (last visited Aug. 5, 2018).

<sup>58</sup> See generally <http://casemail.us/how-it-works> (last visited Aug. 5, 2018).

<sup>59</sup> *Id.*

<sup>60</sup> See generally ADOBE SIGN, <https://acrobat.adobe.com/us/en/sign.html?promoid=FD1KZP65&mv=other> (last visited Aug. 5, 2018); ESIGNLIVE, <https://www.esignlive.com/> (last visited Aug. 5, 2018).

<sup>61</sup> See *supra*, note 58.

<sup>62</sup> E.S. Martin, *What is the Ratio of Support Staff in Large Law Firms?* USA TODAY: AZ CENTRAL, <https://yourbusiness.azcentral.com/ratio-support-staff-large-law-firms-24967.html> (last visited Aug. 5, 2018).

<sup>63</sup> Adair Kramer *supra* note 55 at 57-71.

<sup>64</sup> See generally AMAZON'S ALEXA, <https://developer.amazon.com/alexa> (last visited Aug. 5, 2018); CORTANA, <https://www.microsoft.com/en-us/windows/cortana> (last visited Aug. 5, 2018); SIRI, <https://en.wikipedia.org/wiki/Siri> (last visited Aug. 5, 2018).

<sup>65</sup> See generally RUBY RECEPTIONIST, <https://www.callruby.com> (last visited Aug. 5, 2018).

<sup>66</sup> Adair Kramer *supra* note 55, at 69-71; REGUS, <https://www.regus.com/virtual-office> (virtual office offerings).

as the contract. To the extent that David must use such instruments, they must use the Goliath's own instrument. Recall that after slaying Goliath, David "took hold of the Philistine's sword and drew it from the scabbard. After he killed him, he cut off his head with Goliath's sword."<sup>67</sup> Between large corporations and the consumer, the draftsman is almost exclusively the corporation without input of the consumer. David must accept the terms of service of Microsoft, or the Note and Mortgage of Wells Fargo. In the event of a dispute, the contract negates consumer-friendly forums such as class actions and the jury trial.<sup>68</sup> And almost inevitably, the contract will shift attorney's fees, with a typical term reading: "If the Note Holder has required me to pay immediately in full as described above the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees."<sup>69</sup>

### FIVE SMOOTH STONES

In light of the overweening bargaining power of creditors, David would seem to have little reason for optimism, even if he is wearing the right clothes. In Florida, though, the odds really are more even because of what we shall call the five smooth stones of the consumer lawyer: Contingent Fees, Fee Shifting, Statutory and Punitive Damages, Reciprocity, and Discovery.

The first stone in David's pouch is the contingency fee.<sup>70</sup> At common law, "maintenance," the maintaining or assistance to a party in a lawsuit in which that person had no interest, with money or otherwise, to prosecute or defend the suit, was prohibited because, as Blackstone put it, it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression.<sup>71</sup> Champerty, a species of maintenance, is a bargain made by one, called the champertor, with a plaintiff or a defendant for a portion of the matter involved in a suit in case of a successful termination of the action.<sup>72</sup> An attorney may not maintain a lawsuit at his or her own expense without expectation of reimbursement.<sup>73</sup>

It is now common throughout the United States, however, including Florida, that an attorney and client can enter into an arrangement where the attorney receives a percentage of any judgment or settlement, so long as the client absorbs the costs and expenses of the suit. A contingent fee contract is contingent because under the fee agreement the attorney will not be

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<sup>67</sup> 1 *Samuel* 17: 51.

<sup>68</sup> "The Borrower hereby waives any right to a trial by jury in any action, proceeding, claim, or counterclaim, whether in contract or tort, at law or in equity, arising out of or in any way related to this Security Instrument or the Note," Paragraph 24, FLORIDA-Single Family-Fannie Mae/Freddie Mac UNIFORM INSTRUMENT WITH MERS, Form 3010 1/01.

<sup>69</sup> Florida Fixed Rate Note- Single Family – Fannie Mae/Freddie Mac UNIFORM INSTRUMENT, Form 3210 1/01 (Wolters Kluwer Financial Services, 2010).

<sup>70</sup> *When You Need a Lawyer*, AM. BAR ASSOC.

[https://www.americanbar.org/groups/public\\_education/resources/law\\_issues\\_for\\_consumers/lawyerfees\\_contingent.html](https://www.americanbar.org/groups/public_education/resources/law_issues_for_consumers/lawyerfees_contingent.html) (last visited Aug. 5, 2018).

<sup>71</sup> 4 Chase's Blackstone, Commentaries \*905.

<sup>72</sup> *E.g.*, *Marshall v. Bickel*, 445 A.2d 606 (D.C. 1982).

<sup>73</sup> *Id.*; *Johnson v. Van Wyck*, 4 App. D.C. 294, 41 L.R.A. 520 (App. D.C. 1894) (explaining that a fee agreement champertous where attorney agreed to prosecute suit entirely at his own expense in consideration of one-half of recovery).

paid unless the client is successful.<sup>74</sup> Today, the Rules of Professional Conduct of the American Bar Association specifically provide for the use of contingent fee agreements.<sup>75</sup> Such agreements are seen as much for the benefit of the client as of the attorney, especially in cases where the client has a meritorious cause of action but no means to pay for legal services unless he can make a contract for a contingent fee.<sup>76</sup> The Florida Bar approves but regulates contingent fee agreements closely. Rule 4-1.5(f) provides for presumptive caps on fees depending on when a matter settles, e.g. before an answer, after an answer but before entry of judgment, where defendants admit liability and only try damages, and where there are post-trial proceedings or appeals.<sup>77</sup> Where a contract for a contingent fee is freely entered by a knowledgeable and competent client who has had ample opportunity to form a conclusion with reference to the fairness of the contract, a court will be reluctant to declare it invalid.<sup>78</sup>

The second stone in David's pouch is fee-shifting.<sup>79</sup> The presumptive rule in the United States is that a litigant pays his own attorneys' fees.<sup>80</sup> But there are four major exceptions to the no-fee rule: (1) common fund; (2) substantial benefits conferred or the common-benefit doctrine; (3) statutory authorization, and (4) sanctionable behavior. Even without statutory authorization, most courts have accepted a percentage recovery approach under a traditional monetary common-fund doctrine (e.g. where a suit creates a common fund out of which attorneys fees may be paid) or a non-pecuniary substantial-benefit variant, where the defendant must pay the plaintiff's attorney acting on behalf of plaintiffs obtaining injunctive or other equitable relief.<sup>81</sup> For the consumer lawyer, though, the main action is statutory, with the prevailing or substantial prevailing party obtaining attorney's fees from the other side under the terms of a substantive statute. Fee-shifting under federal law is frequently a mechanism to encourage private enforcement of public policy objectives, such as the enforcement of civil rights, environmental, or consumer law.<sup>82</sup> Florida law frequently is broader than federal law, for example the scope of liability under fair debt collections practices legislation.<sup>83</sup> One particularly interesting area of Florida law is foreclosure law, where fee-shifting in favor of the foreclosure defendant often occurs at the pleadings or dismissal stage.<sup>84</sup> This is possible outside this context as well.<sup>85</sup>

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<sup>74</sup> *E.g.*, *Fogarty v. State*, 270 Ga. 609, 513 S.E.2d 493 (1999).

<sup>75</sup> MODEL RULES OF PROF'L CONDUCT r.1.5(c) ("A fee may be contingent on the outcome of the matter for which the service is rendered. . .").

<sup>76</sup> *Lipscomb v. Adams*, 193 Mo. 530, 91 S.W. 1046 (1906).

<sup>77</sup> MODEL RULES OF PROF'L CONDUCT r. 4-1.4(f)(4)(B)(i).

<sup>78</sup> *E.g.*, *Stabinski and Funt, P.A. v. Baucom*, 444 So. 2d 1067 (Fla. 3d DCA 1984).

<sup>79</sup> *See generally* [https://en.wikipedia.org/wiki/Attorney%27s\\_fee](https://en.wikipedia.org/wiki/Attorney%27s_fee) (*extensively* discusses fee shifting).

<sup>80</sup> *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975).

<sup>81</sup> *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970).

<sup>82</sup> *E.g.*, 42 U.S.C. § 1988.

<sup>83</sup> FLA. STAT. § 559.55.

<sup>84</sup> *Black Diamond Prop., Inc. v. Haines*, 36 So. 3d 819 (Fla. 5th DCA 2010); *Alhambra Homeowners Assoc., Inc. v. Asad*, 943 So. 316 (Fla. 4th DCA 2006); *Stuart Plaza, Ltd. v. Atl. Coast Dev. Corp. of Martin Cty*, 492 So. 2d 1136 (Fla. 4th DCA 1986); *Hatch v. Dance*, 464 So. 2d 919 (Fla. 4th DCA 1985); *McKelvey v. Kismet, Inc.*, 430 So. 2d 919 (Fla. 3d DCA 1983); *Jackson v. Hatch*, 288 So. 2d 563 (Fla. 2d DCA 1974).

<sup>85</sup> *Claiborne v. Wisdom*, 414 F.3d 715 (7th Cir. 2005) (holding that a defendant is "prevailing party" under fee-shifting statute where plaintiff voluntarily dismissed its case).

The third smooth stone is statutory and punitive damages.<sup>86</sup> Ordinarily, attorney's fees are not recoverable as an item of damages either in a contract or tort action.<sup>87</sup> However, many jurisdictions have either held or recognized that the expenses of litigation may be considered in making an award of punitive damages, either in determining whether an award of punitive damages is appropriate or in setting the amount to be awarded.<sup>88</sup> As a practical matter, even more important to the consumer lawyer are statutes providing for specific awards without the plaintiff having to prove any actual damages at all. For example, under the Telephone Consumer Protection Act of 1991, where a business calls a home via "robo call" without the homeowner's advance express permission, there are statutory damages of \$100 per call.<sup>89</sup> Because the damages can really mount up in light of the unscrupulous businesses making multiple calls, lawyers will take cases on a contingency basis even though there is no attorney fee-shifting provision under the relevant statute. The lawyer simply takes a percentage of the judgment or settlement of the action.

The fourth smooth stone is that Florida is among the seven states that have explicitly evened the odds where a creditor requires the debtor to pay the creditor's legal expenses, including attorney's fees, as a contractual stipulation.<sup>90</sup> This is Florida Statute, Section 57.105(7), which reads, "If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract."<sup>91</sup> Six other states and the District of Columbia have adopted reciprocity in areas specific to consumer contracts, installment contracts, and residential leases.<sup>92</sup> Related to this statutory reciprocity idea are "offers of judgment"

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<sup>86</sup> See generally [https://en.wikipedia.org/wiki/Statutory\\_damages](https://en.wikipedia.org/wiki/Statutory_damages) (last visited Aug. 5, 2018); [https://en.wikipedia.org/wiki/Punitive\\_damages](https://en.wikipedia.org/wiki/Punitive_damages) (last visited Aug. 5, 2018).

<sup>87</sup> E.g. *Tullock v. Mulvane*, 184 U.S. 497 (1902)

<sup>88</sup> *Afro-American Pub. Co. v. Jaffe*, 366 F.2d 649 (D.C. Cir. 1966); *Sankin v. 5410 Conn. Ave. Corp.*, 281 F. Supp. 524 (D.D.C. 1968), judgment aff'd, 410 F.2d 1060 (D.C. Cir. 1969).

<sup>89</sup> 42 U.S.C. § 277.

<sup>90</sup> CAL. CIV. CODE § 1719; FLA. STAT. § 57.105(7); HAW. REV. STAT. § 607-14; MONT. CODE ANN. § 28-3-704; OR. REV. STAT. ANN. § 78B-5-826; WASH. REV. CODE ANN. § 4.84.330.

<sup>91</sup> One of the particularly effective foreclosure defenses under Florida law has been "lack of standing," where the creditor, when challenged, is unable to show at the time of its filing of a complaint that it owns the note and the mortgage upon which it is foreclosing. In a particularly clever sophistry, creditors have argued that there is no contract between the debtor and creditor upon which fees can shift where the debtor proves lack of standing. See generally Bradley T. Borden, David J. Reiss, and W. KeAupuni Akini, *Show Me the Note*, BROOKLYN LAW SCHOOL LEGAL STUDIES RESEARCH PAPERS, ACCEPTED PAPERS SERIES, Research Paper No. 343 (June 2013), available at <http://ssrn.com/abstract-2274966>; Gregory Light, *Failed to Prove in a Mortgage Foreclosure Claim, Now What?* BROWARD COUNTY BAR ASSOCIATION BARRISTER (May 2017), at 11, <https://www.browardbar.org/wp-content/uploads/barrister/2017/may/Barrister-May-2017.pdf>; *But see* Bank of New York Mellon Trust Co., N.A. f/k/a The Bank of New York Trust Co., N.A. as trustee for Chaseflex Trust Series 2007-2, No. 3D16-981, Lower Tribunal No. 09-44683 (Fla. 3d DCA, Mar. 1, 2017) (stating that a defendant who proves that plaintiff does not own note on which he sued may not recover under attorney's fees provision because no contract between plaintiff and defendant). Of course, after they have corrected their errors, the creditors again argue that they have a note and mortgage upon which they may foreclose. It is surprising that the Florida courts have not read through this stratagem under 57.105(7) and required the creditors to pay for the debtor's attorney's time that their incompetence required the court and the debtor to waste.

<sup>92</sup> ALA. CODE § 34-9A-163(a)(3); ARK. CODE ANN. § 4-56-101; D.C. CODE § 28-3806; KAN. STAT. ANN. § 58-2547(a)(3); KY. REV. STAT. ANN. § 411.195; ME. REV. STAT. ANN. tit. 14, § 6030(2)(B); OHIO REV. CODE ANN. §

statutes that shift attorney's fees when a party rejects a settlement offer and the subsequent judgment is less than the offer.<sup>93</sup>

The final smooth stone is discovery.<sup>94</sup> Armed with the tools of cloud-based evidentiary software, the consumer can more effectively and efficiently use the tools of discovery to reach a just result. Consider the classic legal drama from 1991, *Class Action*, a moderate box office success starring Gene Hackman.<sup>95</sup> Hackman's client sues a car manufacturer, and a key document upon which success turns are notes of an engineer retrieved from Iron Mountain showing the manufacturer's research into the car's design. The manufacturer's lawyers disclose the document in discovery but seek to "bury" it in truckloads of information turned over in response to Hackman's obviously overbroad discovery request. Hackman uses a twentieth-century "short cut" to uncover the document, and for many years in the 1990's I used clips from the movie in my first-year Civil Procedure class in explaining principles and realities embodied in the Federal Rules. The movie may continue to have some value in that regard even today. But the technology of e-discovery, especially the implicit standard or developing norm that documents be produced in searchable PDF form, largely renders the subplot moot in a twenty-first century case.<sup>96</sup> Two clicks of the mouse exhumes the document from the truckloads produced. That defense lawyers can overwhelm their plaintiff counterparts to "hide" a key document is no longer plausible. Technology, as one solo practitioner put it in a 2012 Florida Bar seminar, can "level the playing field for me with the big boys and girls I would be going up against in court."<sup>97</sup> The tricks of the defense lawyer's trade of the 1980s have met their match in the current generation of e-discovery software such as Logikull.<sup>98</sup>

#### CONCLUSION

Readers of First Samuel know that the Goliath battle was just an early story in the saga of a stormy relationship between David and Saul, in which David refused to usurp the throne by forceful means but left his accession to office in the LORD's hands.<sup>99</sup> Eventually Saul was wounded in a subsequent battle with the Philistines and, fearing capture, took his own life.<sup>100</sup> This set the stage for Second Samuel, in which David is anointed King over Judah and then all of Israel.<sup>101</sup> David is no longer a boy, and Israel is transformed, but the Philistines do not go away. In our analogy, the odds still may favor Goliath, but David, clothed in cloud technology and carrying five smooth stones, sometimes may prevail for the Florida consumer.

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1319.02; see also Jeffrey C. Bright, *Unilateral Attorney's Fees Clauses: A Proposal to Shift to the Golden Rule*, 61 *DRAKE L. REV.* 85 (2012).

<sup>93</sup> E.g., FED. R. CIV. P. 68; FLA. STAT. § 768.79.

<sup>94</sup> See generally [https://en.wikipedia.org/wiki/Discovery\\_\(law\)](https://en.wikipedia.org/wiki/Discovery_(law)) (last visited Aug. 5, 2018).

<sup>95</sup> See generally [https://en.wikipedia.org/wiki/Class\\_Action\\_\(film\)](https://en.wikipedia.org/wiki/Class_Action_(film)) (last visited Aug. 5, 2018).

<sup>96</sup> See generally [https://en.wikipedia.org/wiki/Electronic\\_discovery](https://en.wikipedia.org/wiki/Electronic_discovery) (last visited Aug. 5, 2018).

<sup>97</sup> See generally <https://pri.floridabar.org/video/working-in-the-cloud/> (last visited Aug. 5, 2018).

<sup>98</sup> See generally <https://logikcull.com/> (last visited Aug. 5, 2018).

<sup>99</sup> 1 *Samuel* 6–31.

<sup>100</sup> 1 *Samuel* 31.

<sup>101</sup> 2 *Samuel* 2; 2 *Samuel* 5.